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## Courts, Tribunals, and Legal Unification— The Agency Problem

Paul B. Stephan\*

Any project to unify some part of the law across jurisdictions requires an adjudicatory body to apply the unified law to transactions and transactors. The available choices include domestic courts (which in the United States entails a further choice between federal and state courts), private arbitration, ad hoc arbitration under the auspices of an international organization (such as that conducted by the International Center for the Settlement of Investment Disputes), and a permanent international tribunal (such as the European Court of Justice, the Dispute Settlement Body of the World Trade Organization, the International Court of Justice, or the new International Criminal Court). Most efforts to unify law take it on faith that the application phase will not present any significant problems, assuming that adjudicatory bodies will honor the commands of the legislator and, where discretion exists, will implement the underlying purpose of the unified legislation in a coherent and transparent fashion. I argue, to the contrary, that the application phase presents severe difficulties that will frustrate a wide range of unification projects. In particular, any legal unification project that has substantial redistributive dimensions will face significant obstacles, whatever the adjudicatory body chosen.<sup>1</sup>

First I discuss the roles of adjudicatory bodies in promoting the unification of law. Then I clarify the redistributive dimensions of unification projects. Working

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1. My argument, which focuses on the deficiencies of unification, complements the claim that in many contexts, regulatory competition among diverse legal systems promotes welfare. For elaboration on the welfare claim, see Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, in George A. Bermann, Matthias Herdegen, and Peter L. Lindseth, eds, *Transatlantic Regulatory Co-Operation: Legal Problems and Political Prospects* 167 (Oxford 2000). Further arguments can be found in Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 *Theoretical Inq L* 387 (2001); Uriel Procaccia and Uzi Segal, *Thou Shalt Not Sow Thy Vineyard With Divers Seeds? The Case Against the Harmonization of Private Law*, available online at <[http://www.econ-pol.unisi.it/scdbanc/CONFERENZA/FILE\\_PDF/12-Procaccia.pdf](http://www.econ-pol.unisi.it/scdbanc/CONFERENZA/FILE_PDF/12-Procaccia.pdf)> (visited Sept 13, 2002).

within the familiar framework of game theory as applied to international relations, I distinguish between the coordination and defection problems that underlie most international interactions. I argue that adjudicatory bodies have the ability to generate solutions to some coordination problems, but face major obstacles when seeking to implement stable solutions to others, and to many defection problems. The difficulties vary depending on the types of adjudicatory bodies involved, but each type has its own drawbacks. I offer examples from a range of current unification projects—carriage of goods, antitrust, and environmental law—to illustrate how application problems can frustrate unification.

## I. COURTS, TRIBUNALS, AND UNIFICATION

Translating law-on-the-books into law-in-practice requires a mechanism to implement the prescribed rules. Certainly some rule internalization takes place without any need for enforcement, but doubts over the rules' meanings and the occurrence of operative facts usually arise and demand attention. No international legal unification project has avoided the need to rely on some kind of adjudication, whether it employs a system especially designed for the project or commandeers a preexisting system such as national courts.

The responsibilities, and therefore the scope of the authority, of adjudicatory bodies vary. At a minimum, some body must resolve disputes over the application of accepted rules to contested facts. Certain kinds of international commercial arbitration do only this. The typical arbitration tribunal provides a definitive resolution of the dispute before it, but does not make its decision available to the general public. At a maximum, the dispute resolving body may have the responsibility not only to apply the rules, but to create them. Admiralty and antitrust law in the United States are cases in point. The federal courts have regarded themselves as possessing a mandate to develop a common law governing these subjects, a license they have exercised vigorously. Adjudicatory bodies normally operate in a range between these two extremes, generating different amounts of additional information about the law they apply as well as determining the outcomes of specific disputes.

When seeking to achieve some coherence in the laws of multiple jurisdictions, the reformer must consider whether the project's ambition includes unified application, as opposed to unified expression. Many of the twentieth century's state-based commercial law unification projects—the Hague Rules on bills of lading in sea transport, the Warsaw Convention on contracts of carriage by air, the New York Convention on Commercial Arbitration, the New York Convention on International Sale of Goods, as well as the various proposed model laws of the United Nation's Commission on International Trade Law ("UNCITRAL")—leave it to national

courts to apply the laws.<sup>2</sup> Similarly, most international efforts to harmonize regulation of commerce involve informal coordination among administrative agencies without any judicial participation. Thus the European Community (“EC”) and the US Justice Department have a written agreement to coordinate their antitrust enforcement efforts, but nothing in this accord binds their courts. National securities market regulators cooperate less formally through their participation in the International Organization of Securities Commissions (“IOSCO”), but again their actions do not involve their courts.

What seems to be the dominant model of national judicial sovereignty—what I will call the dispersion approach—comes at a cost to unification, especially in those instances where the unified law leaves significant discretion to the court. Accordingly, other strategies have emerged in fields where transactors or lawmakers desire greater degrees of legal predictability across national borders. Commercial arbitration under the auspices of an established facility, such as the International Chamber of Commerce, has become the default process for resolving a wide range of banking, sales, and shipping disputes. Another strategy involves transactors precommitting to dispute resolution by a particular jurisdiction’s courts, thereby converting one nation’s law into a *de facto* unified international standard. Because both arbitration and jurisdiction-by-choice depend on the disputants’ contractual relationship, however, neither option helps to unify the law governing nonconsensual transactions, whether the imposition of regulatory restrictions by a government or the rules dealing with third-party effects.

If dispersion of adjudicatory authority is a problem, the logical solution would seem to be submission of disputes to a single decisionmaking system, what I will call the centralized approach. We do encounter instances where, in the regulation of nonconsensual transactions, states have placed national decisionmakers under binding international oversight. For example, the European Court of Justice, a treaty-based international body, determines whether member states have complied with the community’s directives, a form of legal unification that requires national legislation to implement community-determined law. More recently, the Dispute Settlement Body of the World Trade Organization (“WTO”), another treaty-based body, has begun to supervise the compliance of member states with substantive legal unification commitments, particularly those embodied in the Trade-Related Aspects of Intellectual Property (“TRIPS”) Agreement. A proposal in the current round of multilateral trade negotiations would extend this oversight to antitrust law.

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2. In the case of the United States, adoption of the commercial law conventions does advance a more limited form of unification, namely nationwide uniformity in the form of federal law. These conventions in some instances supplant state law, over which the Supreme Court has no supervisory power.

The centralized approach has a basic institutional structure that remains the same across substantive goals. In the case of both the EC and WTO, a standing international tribunal, at the behest of a range of public actors (in the case of the EC, Community organs and the member states; in the case of the WTO, the member states), ascertains whether a country has complied with its obligation to unify its substantive law.<sup>3</sup> Each tribunal has sanctioning authority to coerce compliance with its rulings, although neither has as great an array of coercive tools as a typical national court.

The centralized approach to unification should reduce the dispersion of outcomes and interpretations and thus promote unification. But, using the vocabulary of the law and economics literature, international adjudicatory bodies entail substantial agency costs.<sup>4</sup> The members of the adjudicatory bodies (the putative agent) normally do not have strong incentives to divine and honor the wishes of the states that gave them lawmaking authority (the putative principals). The principals, aware of the endemic risk of disloyalty, will under-invest in such an agent. The creation of incentives for the international agent to act as the national principals would wish—typically through monitoring and bonding mechanisms—also entails costs. These costs may be especially high given the structure of international decisionmaking.

Conceptually, nations creating an international adjudicatory body can choose three strategies, each of which has drawbacks. Through bonding, nations can adopt precise rules that significantly limit the adjudicator's discretion. Alternatively, they can endow the adjudicatory body with the authority to decide the specific content of the unified law. Giving this power to the adjudicatory body in turn requires a choice between tolerating agent disloyalty—the adoption of laws that the nations would not wish to see enacted—or costly monitoring. Mixing these strategies—bonding, tolerating disloyalty, and monitoring—may reduce one category of costs, but always increases others.

The bonding route means adopting a unified law that sacrifices flexibility and adaptability for the sake of clarity. In international unification projects, giving up flexibility presents particular disadvantages. For the project to have continuing vitality, it must adapt to its constantly changing environment. But the nature of international lawmaking makes it hard to do this. Sovereign states enact unified laws in one of two ways. They may allow each nation to choose whether to adopt the law, thus giving every state a veto over the project, or at least to choose the extent of the law.

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3. In the case of the EC, private persons also can invoke Community legislation, including directives, in civil lawsuits to challenge national law. Private parties do not have direct access to WTO dispute settlement proceedings, but can participate indirectly by obtaining the support of one of the participating member states.

4. The seminal discussion is Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J Fin Econ* 305 (1976).

Alternatively, as in the EC, states may choose, one-by-one, *ex ante* to delegate lawmaking authority to an international body. In either case, deciding on the precise terms of the law, or the delegation to make law, is difficult. Negotiating amendments presents even greater challenges. Absent a means of exit from the unified legal regime, whether formal or informal, states will regard the unified law as a status quo with network benefits. Piecemeal changes on a state-by-state basis mean sacrificing these benefits. Coordinated amendments involving all members will be difficult to enact due to holdout states, at least some of which might view any departure from the status quo as risky or otherwise welfare-reducing.

Restructuring a delegation of authority to an international body poses even greater difficulties. The terms of the delegation might preclude piecemeal changes by individual states, and the international agent might resist any alteration that reduces its discretionary authority. It is instructive that organizations such as the WTO and the EC have tended over time to acquire broader and less specific delegated authority from their members. Instances of members making downstream constitutional commitments to rein in an international organization are exceedingly rare.

The alternative to bonding, which is precise and therefore constrains delegations, is to authorize the international adjudicator to implement broad principles in a manner that it sees fit. So recast, the adjudicatory function subsumes a delegation of lawmaking authority. In the international context, such delegations raise special concerns. States resist blanket derogations of their authority because of the serious risk to national authority that disloyal institutions present. Instead, they build monitoring constraints into the institutions that receive adjudicatory power. A typical arrangement involves limiting the tenure in the adjudicatory bodies to short terms, with individual states determining who occupies particular slots. For example, the justices of the European Court of Justice hold office for only six years, with a right of renomination, and each member state selects one justice. The members of the WTO's Appellate Body have a similar arrangement, serving for only four years.<sup>5</sup>

Such short leashes make it difficult for these bodies to develop coherent approaches to the development of new law. Knowing that they can be replaced, the members of the tribunal have an incentive not to do anything that will upset the countries with nominating authority. In those cases where the members nonetheless veer off in an unanticipated direction, the nominating state can institute a course correction within a relatively short period of time by choosing "sunder" candidates for the tribunal. Thus one should not expect ambitious, systematic, and comprehensive law coming from an institution endowed with the authority to develop unified law on an international level. More likely are decisions that do not commit the

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5. Similarly, the judges on the European Court of Human Rights have six-year terms. Judges on the International Criminal Court have nine-year terms and, with one narrow exception, have no right of renomination.

tribunal to particular directions, perhaps punctuated by bold moves that generate reversals more often than not.

These agency costs do not mean that international agencies as such cannot achieve important goals, or that they cannot advance significant unification of the law. Neither do I reject the possibility of some successful coordination that depends exclusively on national courts for application and enforcement. In the next section I consider the conditions for the success of both dispersive and centralized unification. I argue that the conditions exist less frequently than is often assumed, and in particular appear not to exist with respect to some projects already in existence or under current consideration.

## II. COORDINATION AND DEFECTION

The use of game theory to model international relations, including the development of international law, has become commonplace.<sup>6</sup> I will not repeat here the discussion of the various games, their characteristics and their relevance to particular issues. Rather I want to focus on two broad categories of games, those involving coordination and those posing defection problems.<sup>7</sup>

In the international relations literature, all games begin as interactions between two players, each with two choices.<sup>8</sup> Chart 1 illustrates the conception. Players X and Y choose between moves A and B, with each player receiving a payoff P that depends on both choices. Both matches (both players choose A or B) and mismatches (one

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6. A representative list of articles by international law professors includes Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 U Chi L Rev 1113 (1999); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 Va L Rev 1 (1997); David W. Leeborn, *A Game Theoretic Approach to the Regulation of Foreign Direct Investment and the Multinational Corporation*, 60 Cin L Rev 305 (1991); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 Yale J Intl L 335 (1989).
  7. Economists often limit the term "coordination game" to those "pure" games where the players have identical preferences and prefer any match to any mismatch. In the international relations literature, however, the term is used more generally to apply to those games where defection from a cooperative outcome is not the dominant strategy for a single iteration. See, for example, Duncan Snidal, *Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 Am Polit Sci Rev 923, 931-32 (1985). I will follow the political scientists' usage, hoping that any economist reading this will make allowances for the conventional if imprecise usage. Similarly, some political scientists characterize games where defection represents the dominant strategy in single-shot games as presenting cooperation problems. Id. Economists, in contrast, tend to confine the term "cooperation" to direct contacts between players outside the iteration of the game. To avoid confusion, I will refer to these games as defection problems.
  8. Game theory as such deals with more general n-player, n-choice interactions. For a defense of the 2 x 2 method, see id at 925. For a discussion of extending 2 x 2 models to n x n games, see Goldsmith and Posner, 66 U Chi L Rev at 1129-31 (cited in note 6).

chooses A, the other B, and vice versa) are possible. Characterization of the game turns on the values assigned to particular Ps.

Chart 1

		Player Y	
		A	B
Player X	A	$P_{X(A,A)}, P_{Y(A,A)}$	$P_{X(A,B)}, P_{Y(A,B)}$
	B	$P_{X(B,A)}, P_{Y(B,A)}$	$P_{X(B,B)}, P_{Y(B,B)}$

Coordination problems are those in which at least one matching outcome is at least as highly rewarded as all nonmatching outcomes.<sup>9</sup> Defection problems entail games where one nonmatching outcome is, for each player, superior to either

9. Both the “battle of the sexes” and the “stag hunt” games are examples of coordination games. Imagine players X and Y and choices A and B. In the battle of the sexes, each player prefers all matches with its opponent to any nonmatching outcome, but each prefers a different match. X prefers (A,A) to (B,B) [in each pair the first choice is X’s, the second Y’s], but prefers either of those two to (A,B) or (B,A). Y symmetrically prefers (B,B) to (A,A), but also prefers (A,A) to (A,B) or (B,A). In the stag hunt, for each player the wrong nonmatch is the worst possible outcome, but the right nonmatch is worse than the best match. X prefers (A,A) to all outcomes, may be indifferent between (B,A) and (B,B) or prefers (B,A) to (B,B), and least desires (A,B), while Y prefers (A,A), but is indifferent between (A,B) and (B,B) or prefers (A,B) to (B,B) and least prefers (B,A). An uninteresting variation on the coordination game is coincidence of interest, where both X and Y prefer one matching outcome ((A,A) or (B,B)) to all other outcomes and prefer the other matching outcome least. Coordination is unnecessary, as naked self-interest produces the optimal collective outcome; in one sense this is not a game at all. For an analysis of this model in the context of international law, see Goldsmith and Posner, 66 U Chi L Rev at 1122–23 (cited in note 6). A coordination game that presents less complexity than either the battle of the sexes or a stag hunt, but more than a coincidence-of-interest problem, gives equally high payoffs to each matching outcome and equally low payoffs to each nonmatch. The players do not care about the choice, other than whether it matches that of the other player. This is the pure coordination game as economists use the term. *Id* at 1127–29.



matching outcome.<sup>10</sup> If we think of the games' two choices as either adherence to some standard, or defection, defection problems are those in which successful opportunism (defection while the other player adheres) reaps the most rewards.<sup>11</sup>

It is conventional in international relations to begin a game theory analysis by making two strong assumptions: that each player knows the other's payoffs and that only one play occurs. A second step involves relaxing the single shot assumption and analyzing indefinite repetitions of the single game. Multiple games allow players to observe past behavior and to condition their choices on their opponent's prior actions. If players believe that the current iteration is not the last, they may base their choice not only on the immediate payoff, but also on the expected effect of their choice on the other player's later moves. The choice about how to react to past moves constitutes a strategy. Some strategies may perform better than others. The famous instance concerns the tit-for-tat strategy in the context of certain defection games, in particular the Prisoners' Dilemma. Given sufficiently high discount factors (relative indifference between present and future outcomes), the tit-for-tat strategy leads to outcomes that mimic what would happen if parties could bargain explicitly.<sup>12</sup>

More recently, evolutionary game theory has refined the analysis of multiple-iteration games.<sup>13</sup> Borrowing on insights from theoretical biology, this methodology looks at the adaptive success of various strategies under conditions of mutability (some predictable number of players change their strategies between iterations) and discounting of future results (due to uncertainty about whether future iterations occur, uncertainty about the value of future payoffs, and the reduced time value of future payoffs). The principal insight of this literature is to put boundaries on the claim that iteration increases the likelihood of success for strategies that promote

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10. The Prisoners' Dilemma is the most famous defection problem, at least in the international relations literature, but another, the Chicken Game (also called Dove-Hawk) also has received some treatment. In the Prisoners' Dilemma, X prefers (B,A) to all other outcomes and regards (A,B) as the worst result, and Y prefers (A,B) and regards (B,A) as the worst outcome. Both regard (A,A) as their second most preferred outcome. In the Chicken Game, both regard (B,B) as the worst outcome and (A,A) as their second most preferred outcome.
  11. Coordination games do not eliminate all opportunity costs. In the battle of the sexes, for example, players prefer different matching outcomes, so the choice of either match ((A,A) or (B,B)) imposes opportunity costs on one player. But both players are better off under either match than they would be under either non-matching outcome. In the stag hunt one match presents opportunity costs for both players compared to the optimal match, and each player may prefer defection to the lower-valued match.
  12. For treatment of multiple-iteration games, see Robert Axelrod, *The Evolution of Cooperation* (Basic Books 1984). For the application of Axelrod's treatment to international relations theory, see Snidal, 79 *Am Polit Sci Rev* 923 (cited in note 7); Duncan Snidal, *The Game Theory of International Politics*, in Kenneth A. Oye, ed, *Cooperation Under Anarchy* 25 (Princeton 1986).
  13. On evolutionary game theory as it applies to custom and law, see Paul G. Mahoney and Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 *U Pa L Rev* 2027 (2001).

beneficial cooperation. Under certain realistic conditions, iteration will lead to strategies that stabilize around suboptimal outcomes. The likelihood of suboptimal survivability increases with mismatch cost (the difference in the payout to each player between  $P_{B,A}$  and  $P_{A,B}$ ) and the discount rate, and decreases with efficiency gain (the payout difference for each player between  $P_{A,A}$  and  $P_{B,B}$ ).<sup>14</sup>

A numerical example illustrates the insight of evolutionary game theory. Working with the familiar Prisoners' Dilemma, assume that Player X has a gain of 5 if both X and Y choose strategy A, -10 if X chooses A and Y chooses B, 10 if X chooses B and Y chooses A, and 0 if both choose B. Assume that Y's payoffs mirror X's (where X gets -10, Y gets 10, and vice versa). The optimal outcome occurs when both choose A; all other outcomes, summing together each player's return, produce a net payoff of 0. If the game involves an indefinite number of iterations and X reliably knows that Y invariably will pursue a tit-for-tat strategy, X must choose between B (a payoff of 10 followed by an indefinite string of 0 payoffs) and A (an indefinite string of 5 payoffs). X will prefer the choice of A as long as X's discount factor is greater than 0.5.

Assume to the contrary that Y has the capacity to switch strategies at any stage of the game, making prediction of Y's responses to X's choices impossible. X will choose A only if the discount factor is 0.75 or higher, which implies a discount rate of 33 percent or less. The combination of some pessimism about the future, the high cost of choosing a different outcome from one's opponent, and the relatively low reward, compared to the mismatch cost, from matching the opponent at the more efficient outcome, makes the fittest strategy, in evolutionary terms, one that produces inefficient outcomes.

It is impossible to state categorically that defection games will have higher mismatch costs, relative to efficiency gains, than will coordination games. The so-called chicken game, in which the players prefer a successful mismatch to the best match and least prefer the wrong match, may produce great efficiency gains. A conventional example is the Cold War's nuclear balance of terror, or Mutually Assured Destruction. While either side might have preferred defeat of its enemy to the status quo of the Cold War, stalemate clearly produced welfare gains as compared to mutual nuclear annihilation. Conversely, some coordination gains may have high mismatch risk relative to welfare gains. The so-called stag hunt, where a player may be indifferent between the right mismatch and the low match and least prefers the wrong

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14. Id at 2057 (giving formula). Simplifying the formula, we can state that inefficient outcomes will be fit in the evolutionary sense whenever  $MR-EG > w$ , where MR = mismatch risk, EG = efficiency gains, and  $w$  is the discount factor, expressing the degree of confidence in the future (or more precisely, 1 divided by 1 plus the discount rate  $r$ ).

mismatch, can meet these conditions even though, *ex definitio*, the players prefer the right match to any mismatch.<sup>15</sup>

Nonetheless some generalizations are possible. The particular coordination game known as the Prisoners' Dilemma by definition has high mismatch costs relative to efficiency gains. In this game, the right mismatch is the most desired outcome, and the wrong mismatch the least. The difference between mismatch outcomes thus must always exceed the difference between the good and bad match. The point is not that, under evolutionary conditions, games that conform to the Prisoners' Dilemma model will lead to suboptimal outcomes. The possibility of efficient outcomes achieving evolutionary fitness depends critically on the discount rate. But, relative to other coordination and defection games, the Prisoners' Dilemma is more likely to lead to inefficient outcomes even at lower discount rates.

These refinements have significant implications for international relations generally, and law unification projects in particular. First, an assumption of a somewhat high discount rate seems plausible. Many factors impede the ability of states to maintain stable interactions with others. States may have indefinite lives and therefore significant continuity, but governments and regimes do not. The population of policy élites turns over, even where the structures of élite decisionmaking endure. The needs and impulses of electorates, to which at least some élite decisionmakers are accountable, also change over time. The complexity of the environment in which they can operate, where there is a wide range of policy choices, rather than the bimodal choice modeled in classical game theory, adds to uncertainty about outcomes.

In law unification projects, the assumption of a higher discount rate seems especially plausible. Legal unification typically occurs in the context of a particular industry or economic sector, where the legal regime both depends on and to some degree determines the underlying transactional structure. These environments can change significantly in light of shifting supply capacities, consumer demand and technological innovation. Alteration in the underlying economic conditions in turn can create new groups of winners and losers, with corresponding shifts in what they want from the law. In the next section I identify several law unification projects that operate under exactly these conditions.

Application of the remaining insights of evolutionary game theory to law unification projects cannot be straightforward. Some unification efforts occur in fields that have the characteristics of a pure coordination game, where each player is indifferent between mismatches and prefers only some match. Where transactors can expect to be on either side, such as sales between merchants, we might anticipate mutual willingness to embrace rules that reduce uncertainty and that have no apparent distributional effect (for example, the detailed definition of "free on board"

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15. For a demonstration of this point, see *id* at 2044–47.

found in the International Chamber of Commerce's Incoterms).<sup>16</sup> Once a norm emerges under these conditions, we would expect a broad consensus in its support, encompassing adjudicators as well as transactors.

In other areas, however, law unification seeks to restrict the rights of a well defined group of transactors in pursuit of general welfare. Regulatory programs of this type qualify as redistributive in the precise sense that certain transactors lose rights and powers that they value. The program may generate welfare gains, and the group suffering losses might receive some compensation, but the concrete losses remain an opportunity cost for the persons affected.

In these cases the Prisoners' Dilemma becomes the appropriate model. An example is the severely constraining rules applicable to French winegrowers operating under the Appellation d'origine Contrôlée ("AOC") rules, which restrict individual flexibility to promote brand quality. Driving the quality of the brand upwards involves substantial sacrifices by the individual grower, who must adopt more costly production methods and forego production increases. Mismatch gains and losses can be great: Producing costly wine while others are adulterating generates relative losses, while adulterating a brand that everyone else maintains leads to considerable gains. We would not expect a high-quality unified standard to evolve without centralized enforcement.<sup>17</sup>

These insights extend to adjudicators, not just to predictions as to the content of unified law. First, under conditions where we would anticipate difficulty creating optimal unified rules, we also would expect national courts not to reach a consensus as to the optimal interpretation and application of these rules. The dispersion approach, in other words, would not achieve desirable unification. Second, under the same conditions, we would expect a centralized dispute resolution system also to have difficulty maintaining consistent adherence to optimal interpretation and application of these rules. The centralized adjudicatory body might achieve coherence over the short run, but over time it would tend to cycle its outcomes and otherwise respond to shifting preferences on the part of powerful states. In the next section, I offer some examples of international unification projects that illustrate these pitfalls.

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16. For discussion of transactor reversibility as a condition of successful law unification, see Robert E. Scott, *The Rise and Fall of Article 2*, 63 *La L Rev* (forthcoming 2002). See also Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 *J Legal Stud* 43 (1987) (documenting evolutionary fitness of "thou shalt not steal" as a norm and of the lack of fitness of any particular norm governing good-faith purchasers of misappropriated goods).

17. Staying with the example of AOC wines, it is instructive to compare the meaning of terms such as "Champagne," "Chablis," or "Burgundy" as applied to controlled French production, with the uses of these labels in the United States.

### III. REDISTRIBUTIVE UNIFICATION: SOME EXAMPLES

Modern experience with international legal unification began over a century ago. The initial projects involved international shipment of goods, and commercial transactions remain at the heart of these efforts. More recent efforts, involving proposals rather than realized achievements, seek to harmonize regulation of business activities. Most of these efforts have contained significant redistributive goals. As the following section indicates, those projects that have come to pass have not achieved anything like full legal unification. The regulatory proposals hold out even less promise of success.

#### A. CARRIAGE OF GOODS

International unification of the law governing the transport of goods illustrates the shortcoming of the dispersion approach. The story begins at the end of the nineteenth century, when a handful of sea carriers had organized a cartel covering Atlantic routes. The cartel generated profits through monopolistic pricing and used standardized bills of lading, supported by the English law of contract, to immunize carriers from a wide array of risks affecting cargo. In response, individual states began to regulate the terms of shipping contracts, including those governing liability for accidents. The industry responded with the project that culminated in the 1924 Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, popularly known as the Hague Rules.<sup>18</sup>

Close on the heels of the Hague Rules came efforts by the nascent air transport industry to achieve a similar unified contractual structure. With the Hague Rules serving as a model, the industry began negotiations in 1922 that led to the Warsaw Convention in 1929. The United States, which after World War I had become the preeminent international economic power, joined the unified air transport club in 1934, two years before it adopted the Hague Rules.<sup>19</sup>

These regimes for international sea and air transport have functional as well as formal similarities. First, both are redistributive. Second, both have seen significant defections from the unification goals. Third, both rely on national courts for

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18. For more of the background and content of the Hague Rules, see Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 Va J Intl L 743, 762–68 (1999).

19. *Id.* at 768–72. For those interested in lawmaking processes, and in particular the rather esoteric debate about the legitimacy under the US Constitution of so-called congressional-executive agreements, it is worth noting that the United States adopted the Warsaw Convention through the Article II treaty process, and two years later, with no change in Congress or the Administration, enacted the virtually identical Hague Rules as a statute, the Carriage of Goods at Sea Act. See Joel Richard Paul, *Is Global Governance Safe for Democracy?*, 1 Chi J Intl L 263, 268–70 (2000) (reviewing debate).

interpretation and enforcement, a choice that has led to greater discrepancies among states with regard to the “unified” law.

The redistributive nature of the Hague Rules and the Warsaw Convention seems clear, although the direction of the redistribution is debatable. The issue is choosing the right baseline. Both laws set limits on the ability of shippers to exonerate carriers for certain kinds of liability for damage to cargo. Both authorize other kinds of limitations on liability, in particular caps on damages, which in a standardized-form contracting environment comes close to stipulating these limits. The English common law of the late nineteenth century permitted and enforced full exoneration, so from this perspective the unified laws took away valuable rights from carriers. On the other hand, important states, particularly the United States, had already enacted restrictions on carriers’ freedom of contract. From this perspective, the unified laws arguably held off other, more draconian restrictions on carrier rights. Both regimes also preclude “budget” carriers from competing on the basis of lower levels of service, a strategy that often is associated with industry cartelization.<sup>20</sup> What seems non-debatable, however, is that both laws mediate between two classes of discrete transactors with substantial opposing interests—sellers of shipping services and their customers.

These regimes also illustrate the use of the dispersion strategy with respect to enforcement. The parties to the two conventions enacted the same words as governing law, but no centralized body currently ensures consistent application and interpretation. Nations may modify the unified law to meet the particular interests of groups within their jurisdiction, and nothing stops their courts from doing the same. Thus, for example, Australia and South Africa enacted a version of the Hague Rules that arguably favors consumers at the expense of service providers, compared to the baseline of the Convention.<sup>21</sup> In addition, competing regimes—the Visby and Hamburg Rules in sea carriage, and the Hague and Montreal Protocols in air carriage—have proliferated, ending even the formal unity of the nations that initially embraced the Hague and Warsaw projects.<sup>22</sup>

National courts have made a significant contribution to the conflicting meaning of these laws. They disagree on questions such as the liability of servants and contractors of the carrier, the compensability of intangible injuries, and the extent of the obligation of carriers to inform customers of liability limitations.<sup>23</sup> The separation

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20. Stephan, 39 Va J Intl L at 764–66, 771–72 (cited in note 18).

21. Sea-Carriage of Goods Act 1924, § 9(2) (Australia); Carriage of Goods by Sea Act, No. 1 of 1986, § 3 (South Africa) (forbidding choice-of-forum clauses in carriage contracts). One suspects that in both countries, consumers of sea shipping services play an important part in the economy but that ownership of major carriers is located elsewhere.

22. Stephan, 39 Va J Intl L at 765–66, 770–71 & nn 37, 40 (cited in note 18).

23. For discussion and close analysis of cases reaching conflicting interpretations of the Hague Rules, see Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 Va J Intl L 729 (1987). For US cases disregarding or marginalizing

of outcomes led the preeminent US commentator on the Hague Rules to call for the creation of an international court of appeals to impose uniformity.<sup>24</sup>

Has the breakdown in the uniformity of these laws caused significant welfare losses? The behavior of transactors suggests that the status quo provided by dispersed adjudicators does not meet their needs. At least for sea carriage, transactors have invested in the design and enforcement of contracts that work around the divergent approaches of adjudicatory bodies. Carriers often insert choice-of-forum clauses, including arbitration clauses, in their form contracts, which courts in turn honor.<sup>25</sup> Transactors, in other words, have obtained the benefits of uniformity through contract, not by legislative fiat.

## B. ANTITRUST

In theory, international competition policy should be seamless. The harmful effects of monopolization and cartelization on consumer welfare are well understood and generally recognized, even if particular industrial structures remain controversial because of offsetting benefits due to specialization, economies of scale, and related factors. Governments often sacrifice consumer welfare for other ends (protection of locally favored producers, industrial policy and the like), but one would think that competition law would be the one arrow in states' regulatory quivers that governments would employ unambiguously to make consumers better off through the promotion of more efficient markets. If welfare goals explained competition policy, we would expect variation in the degree of commitment, but not in the policy's content.

What we find, however, is strikingly different economic, social, and political norms embedded in national competition policies. In the EU, competition law focuses upon attacking large concentrations of economic power (especially, it must be noted, when those concentrations are not located in Europe). In the United States, the administrative authorities (although not necessarily the courts) show greater sympathy for the offsetting economic benefits of large structures, but seem uniquely willing to regulate the level of competition in foreign markets (where US producers allegedly face export barriers). At the risk of oversimplification, two generalizations seem true: EU competition policy, compared to that of the United States, focuses more on the political risks to the state from concentrated economic power; and both

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foreign interpretations of the Warsaw Convention, see, for example, *Zicherman v Korean Air Lines*, 516 US 217 (1996); *Eastern Airlines v Floyd*, 499 US 530 (1991); *Chan v Korean Air Lines*, 490 US 122 (1989).

24. Charles L. Black, Jr., *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 Vand J Transnatl L 365 (1973).

25. *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer*, 515 US 528 (1995) (arbitration); *The Bremen v Zapata Off-Shore Co*, 407 US 1 (1972) (London Court of Justice).

regimes invoke competition rules to achieve objectives that seem largely rooted in trade policy and unrelated, or even adverse, to consumer welfare.

The blurring of competition and trade policy is especially troubling for anyone who would wish to see general norms of competition law at work internationally. Common national practice has called off restraint of trade rules in instances where monopoly rents to local producers could be derived from foreign consumers.<sup>26</sup> Strategic trade theory offers a rationale for such practices. It argues that under the right conditions, the benefits from cartelization will include positive externalities for other sectors in the national economy at a level that exceeds the welfare loss to local consumers due to reduced competition.

These different approaches to competition law necessarily have different distributive effects. A theoretically pure competition regime (that is, one seeking simply to maximize consumer welfare) would entail wealth redistribution. By definition, this would end producers' monopoly rents to the benefit of consumers. Mixed regimes, especially as seen in Europe and Japan, facilitate the collection of monopoly rents by some producers at the expense of others, and of consumers. And the use of competition law to achieve trade goals normally involves the promotion of the interests of domestic producers, at the cost of both domestic consumers and foreign producers.

The sharpest contrast between US and other nations' competition law involves the role of the courts. In Europe and Japan, civil suits brought by victims of anti-competitive conduct play almost no role in shaping the content of the law. In Europe, enforcement rests largely in the European Commission, with some national competition authorities policing local markets. Japan takes a similar approach, except that its administrative authorities do less than their European counterparts. In both systems the courts find their role limited to reviewing the propriety of actions brought by the government, a review that generally reflects the judges' deference toward the administrators.

In the United States, by contrast, civil litigation plays a significant role in shaping the content as well as the enforcement of antitrust law. The capacious statutory language invites judicial freelancing, an invitation that the courts have accepted with gusto. But judicial discretion has not produced a stable, ever more precisely refined system of rules. Rather, the courts have oscillated between *per se* rules and rules of reason to determine the acceptability of particular practices, such as vertical restraints, tie-ins, and boycotts. Populist interpretation has given way to economically driven welfare considerations, with no stable consensus across time. The administrative

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26. In the United States, examples include the Webb-Pomerene Act of 1918, codified at 15 USC §§ 61–65 (exempting registered exporters' marketing cartels from antitrust regulation); National Cooperative Research Act of 1984, codified at 15 USC §§ 4301 *et seq* (exempting cooperative research projects).



agencies have done what they can to follow in the courts' wake, but their role in defining the law can go no further than what the courts will permit.

Add to this interpretative freedom the characteristics that generally attach to US civil litigation—class actions, contingency fees, and generous pretrial discovery—and private lawsuits take on an even greater economic significance. In an international context, what matters is the asymmetry between these court-dominated aspects of the US system and the administrative-agency regimes that prevail elsewhere, especially in Europe. The mismatch makes any collaborative efforts that bind only administrative agencies, such as the current accord between the EU and the US Department of Justice, seriously incomplete.

Perhaps because of the inherent limitations of prior efforts to coordinate competition law, the principal economic powers worked to have the latest round of WTO negotiations consider a proposal to submit national competition policy to WTO review.<sup>27</sup> The language of the Doha Declaration is deliberately vague. It does not refer to any particular mechanism for implementing this review, much less defining its objectives.<sup>28</sup> Nonetheless, the inclusion of the topic of competition policy, however innocuous the phrasing, suggests a certain inevitability about the process. It does not seem excessively speculative to envision a future where the WTO will have the authority to police national compliance with certain uniform standards, much as it does now with respect to intellectual property law.<sup>29</sup>

A review of past WTO practice in reviewing national legal practice relating to competition policy illustrates the deficiencies of the centralized approach, at least using the present institutional architecture. In one instance, *Japan—Measures Affecting Consumer Photographic Film and Paper*, the WTO showed itself unable to process a claim by the United States that nonenforcement of Japanese competition law reflected a government strategy of protecting local producers from foreign, i.e. US, competition.<sup>30</sup> The Japanese laws themselves mandated no discrimination against imports, and the WTO refused to look behind the laws' formal requirements to

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27. World Trade Organization, *Ministerial Conference – Fourth Session – Doha, 9–14 November 2001 – Ministerial Declaration – Adopted on 14 November 2001*, WTO Doc No WT/MIN(01)/DEC/1 (Nov 20, 2001) (hereinafter Doha Declaration).

28. The key language, found in paragraph 25 of the Doha Declaration, refers to “core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.” Id.

29. For an optimistic vision of how the WTO might do this, see Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 NYU L Rev 1142 (2001). For my skepticism about this, see Paul B. Stephan, *The Political Economy of Choice of Law*, 90 Georgetown L J 957, 961–64 (2002).

30. See World Trade Organization, Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WTO Doc No WT/DS44/R (Mar 31, 1998). For a more extensive discussion of this dispute, see Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 Chi J Intl L 49, 56–61 (2000).

discern a concerted policy in administrative and judicial decisionmaking. In another, *United States—Antidumping Act of 1916*, the WTO ruled that an old US statute violated trade law because it provided for the theoretical possibility of private enforcement of antidumping rules.<sup>31</sup> The WTO regarded as irrelevant that the US judiciary had interpreted the statute so narrowly as to preclude its application to any set of facts that would not constitute a criminal breach of the Sherman Act. These disputes illustrate the WTO's inability to account for the capacity of domestic courts to alter the effect of generally applicable laws, either to imbue them with a bias against foreign producers (as in the Japanese case) or to interpret them to remove such a bias (as in the Antidumping Act of 1916).

Nor does it seem likely that the WTO, or any other body, will find it possible to consider the effect of judicial policy on the meaning and application of regulatory regimes. Part of the problem is the difficulty of coping simultaneously with judicial policy expressed through cryptic decisions that depend on authoritative but unofficial interpreters (as in civil law countries) and the verbose, sometimes incoherent offerings of common law courts. Both strategies shape the law in ways that the naked language of statutes may not suggest, but developing a full and faithful appreciation of each presents extraordinary difficulties.

In theory, the WTO might address this problem by engaging in case-by-case review of judicial outcomes in the manner of the European Court of Justice in the European Union or the Supreme Court in the United States. Hypothetically, domestic policies expressed through inaction (as in the Japanese film case) might then be subjected to some oversight. But the thought of replicating these judicial bodies at the international level raises grave concerns about accountability, consistency, and predictability. No one has proposed offering anything like Article III life tenure to the participants in the WTO's dispute resolution procedure, and the arguments against such a step are manifest. Yet it seems unlikely that arbiters who serve largely at the pleasure of significant national actors will be able to develop a coherent jurisprudence that significantly constrains the capacity of domestic courts to shape the content of competition policy.

### C. ENVIRONMENTAL REGULATION

Like competition law, environmental law addresses conflicts between the preferences of producers and those of society as a whole. Unlike competition law, environmental law sets against producer interests a wide array of social concerns and desires, not merely the conceptually simple, if sometimes empirically elusive, criterion

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31. World Trade Organization, Report of the Appellate Body, *United States—Antidumping Act of 1916*, WTO Doc Nos WT/DS136/AB/R, WT/DS162/AB/R (Aug 28, 2000).

of consumer welfare. It has, in short, all of the redistributive effects of competition law, multiplied by a greater range of justifications for regulating producer behavior.

I know of no efforts at present to impose a unified law of environmental protection. Given what we know about preferences for environmental protection, this absence hardly seems surprising. Considerable empirical work indicates that a strong positive correlation exists between prosperity and a desire for a safer and more attractive environment; the correlation applies both to individuals and to states. One would be surprised not to find radical differences among states in terms of what they would forego for a cleaner environment, as a wide disparity exists among states with regard to their well-being, whether measured narrowly in terms of GDP or broadly to include social capital. These differences make national enforcement of uniform standards implausible.

Some experiments with centralized harmonization exist, although none currently in existence has tested how adjudication might work. But we do observe centralized unification in the symmetrical area of WTO-based trade law, which may constrain the kinds of environmental rules nations can adopt. What is intriguing about the interaction of trade and environmental law at the WTO is the complicating role of national judicial behavior.

The most important WTO case involves US restrictions on shrimp imports designed to protect endangered sea turtles from accidental harvesting.<sup>32</sup> After mandating in 1987 the use of turtle exclusion devices (“TEDs”) for shrimp nets employed in US waters, Congress in 1990 banned the importation of all shrimp not harvested with TEDs. Over the next decade, environmentalists, the US government, the US courts, and the WTO disputed the meaning and extent of this statute.

The WTO Appellate Body determined that the United States had the right under the WTO regime to regulate the conditions of shrimp harvesting in foreign waters, but ruled that the regulations adopted by the Department of Commerce constituted an impermissibly arbitrary and discriminatory exercise of that regulatory power. The tribunal regarded as irrelevant that the regulations only technically represented the position of the executive branch. The government had adopted them only in response to a court order based on an interpretation of the statute with which it disagreed. In reaction to the WTO ruling, the US government in effect reinstated its prior interpretation of the law, one that removed the aspects that the WTO found offensive. The Court of International Trade ruled that the new regulations violated the congressional mandate, but on appeal the Federal Circuit reversed.<sup>33</sup>

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32. World Trade Organization, Report of the Appellate Body, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, WTO Doc No WT/DS58/AB/R (Oct 12, 1998).

33. See *Turtle Island Restoration Network v Evans*, 284 F3d 1282 (Fed Cir 2002). The precise issues were (1) whether the ban affected shrimp from all nations, or only those from fisheries near the United States, and (2) whether the statute banned all shrimp originating from countries that did not

For our purposes, the interesting question is not which actor correctly divined the intent of Congress, but rather which interpretation constituted the “law” of the United States for purposes of assessing its compliance with its international obligations. In one sense, the WTO took a consistent position—it regarded the US position as whatever its administrative regulations provided. In doing so, it regarded as irrelevant whether those regulations reflected judicial demands with which the government disagreed (as they did between 1995 and 1999) or whether the regulations conflicted with what the judiciary had divined to be the intent of Congress (as they did between 1999 and 2002). For purposes of centralized supervision of international unification, the domestic system of checks and balances disappears, to be replaced with an artificial depiction of a monolithic national position.

A legal fiction of national legal homogeneity serves the purposes of simplifying the task of international supervision and increasing the accountability of the institution in direct contact with the supervising entity, namely the executive branch of government. This fiction, however, not only sacrifices realism—although some nations may not have genuine separation of powers, others have a highly meaningful system of divided government—but it privileges the executive branch at the expense of the others. This highlights an additional cost of centralized unification, namely the incremental loss of political accountability through legislative oversight in favor of greater concentration of administrative power. Moreover, because executive branches, compared to legislatures and the judiciary, generally face lower barriers to sudden shifts in policy, the fiction increases the likelihood of instability in national commitments to nominal unification of regulatory principles.

#### IV. CONCLUSION

In a world where the solution to defection problems involves sacrifices by nations and interest groups, with only an uncertain prospect of compensation, many forces will undercut the effort to impose a cooperative solution. Political scientists and international lawyers have assumed the existence of foot-dragging and resistance by nation states. They have not fully considered the resistance by sub-national interest groups, and have not considered resistance expressed through adjudicatory bodies at all. Yet both theory and casual empiricism indicate that this resistance can be a serious problem.

Evolutionary game theory provides one means of formalizing insights about this resistance. The theory not only predicts the fitness of formally noncooperative outcomes, but also explains why states might tolerate a world in which nations

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mandate the use of TEDs, or only shrimp harvested by ships that did not use TEDs. The Appellate Body maintained that the United States could require the use of TEDs, but had to apply this requirement on a ship-by-ship, rather than country-by-country, basis.

consent to formal legal unification while permitting either national courts (in the case of the dispersion approach to unification) or international bodies (in the case of the centralized approach) to undermine the nominal cooperative outcome. The theory both confirms the lack of significant legal unification in a wide array of areas affected by global economic forces and suggests that hopes of achieving significant gains in these areas are illusory.