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NATIONAL TREATMENT AND EXTRATERRITORALITY: DEFINING THE DOMAINS OF TRADE AND ANTITRUST POLICY

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I. Introduction

In an increasingly integrated global economy, we see dramatic increases in the international movement of goods, services, and capital. From 1950 to 1999 the average annual growth rate of world real GDP was 3.8%; the average annual growth rate in the trade of goods over this period was 6.2%; from 1980 to 1999 the average annual growth rate in the trade of services was 7.0%; from 1982 to 1999 the average annual growth rate in the stock of FDI was 13%.[1]

A multiplicity of national competition policies in this world of significant and growing economic integration is costly. First, there are enforcement costs. These include the additional costs that antitrust authorities incur when investigating conduct in other jurisdictions, as well as the additional costs from attempting to enforce their orders extraterritorially. Enforcement costs also include the higher transaction costs that accrue to parties from complying with the laws of several jurisdictions. Pre-notification of mergers, for example, can become a substantial burden when many different laws require different information. These costs are becoming increasingly significant as more countries adopt merger clearance regimes.[2]

A second source of costs results from the effect on substantive laws from the interaction of trade and competition policies. Countries may distort antitrust policies in order to capture a larger share of the surplus in a supranational market even at the expense of reducing the overall surplus. An obvious example is the exemption for export

[1] See Michael Trebilcock, "The Law and Economics of Immigration Policy", American Law and Economics Review (forthcoming).
[2] James S. Venit & William J. Kolasky, "Substantive Convergence and Procedural Dissonance in Merger Review" in Simon J. Evenett et al., ed., Antitrust Goes Global: What Future for Transatlantic Cooperation? (Washington, D.C.: Brookings Institution Press, 2000) 79 at 97. See William E. Kovacic, "Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies" (1998) 66 University of Cincinnati Law Review 1075 (discussing the proliferation of competition laws in transition economies).

cartels that exists in several laws, including those of Canada and the United States. Export cartels earn supracompetitive profits at the expense of foreign consumers, increasing domestic but harming global welfare.

Without denying the significance of the first source of costs, in this essay we focus primarily on the second source of costs. In particular, we focus on the role of extraterritoriality in addressing the costs from self-interested competition policies. We suggest that the extraterritorial application of domestic antitrust law can be desirable from a global perspective, but that it requires some organizing principles.[3] Section II develops the first principle that we defend in this essay; namely, that domestic laws should adhere to the National Treatment principle enshrined in Article III of the GATT. Consistency with National Treatment avoids many of the blatant beggar-thy-neighbour applications of domestic competition policy, but not all. Our second principle, developed in Section III, is that when there is a genuine conflict between laws, as opposed to a conflict resulting from a violation of National Treatment, resolution of this conflict should build on the principles that animate competition and trade policies. The former requires an examination of where consumers are alleged to suffer harm; the latter looks to harm to producers. Section IV discusses the residual problems that remain even if the first two principles prevail. Section V concludes.

[3] The United States has applied its antitrust laws extraterritorially since *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416(2d Cir. 1945).

II. Justifying National Treatment

In order to understand the attraction of National Treatment as a principle to govern domestic competition policies, it is helpful first to understand the costs and benefits of maintaining distinctive local competition policies. That is, why do policies diverge in the first place?

The best place to start the analysis may be to ask what competition policies countries would adopt in an autarkic (closed economy) world, and then ask how a liberal international trade and investment regime may influence countries to change competition policies that they deemed optimal in autarky. [4]

In autarky, it seems reasonable to assume that well-intentioned or public interested governments would adopt competition policies that are designed to maximize domestic social welfare. Social welfare here obviously means the welfare of local residents given that the costs and benefits of domestic policies are fully internalized. There is a range of reasons for supposing there would be significant policy differences across countries, assuming public interested governments. First, as Iacobucci points out, there may be differences as to the objectives of competition policy, ranging from an efficiency (total welfare) objective to a consumer welfare objective to a populist (decentralization of power) objective, to preserving small businesses to integrating regional markets or even to promoting the "public interest" broadly defined.[5] Moreover, as is evident in the history of various countries' domestic competition laws, these objectives may vary through time. Second, even if there is convergence in objectives, material conditions may vary from one country to another requiring a different mix of

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[4] See Edward Iacobucci, "The Interdependence of Trade and Competition Policies" (1997) 21:2 World Competition Law and Economics Review 5 at 16-17.
[5] Iacobucci, *supra* note 4 at 17.

policy instruments.[6] For example, very small economies with thin markets may have to live with much higher concentration levels than would be acceptable to countries with much larger markets. It is not surprising, for example, that Canada has an explicit efficiencies defence to mergers, while the U.S. does not; high concentration levels may be necessary to obtain scale economies. For similar reasons, small economies may assign a larger role to economic regulation or even state ownership.[7] Third, countries may simply have different understandings of relevant and contested bodies of economic theory that inform their policy choices, for example on the efficiency properties of various kinds of vertical restraints, or different cultural traditions that are more hospitable to certain practices or arrangements than other traditions, for example vertical and horizontal keiretsu in Japan. Fourth, if one drops the assumption of well-intentioned or public interested governments, one might imagine that differences in competition policies are likely to emerge because of different configurations of political interests in different countries that, according to Public Choice theory, might shape competition policies in different ways. For example, in some countries concentrated producer interests may dominate diffuse consumer interests in the political process and succeed in having enacted competition laws that are extremely lax with respect to abuse of market power, while in other countries a politically engaged citizenry may be more effective in resisting this distortion. In countries with authoritarian or despotic governments it is difficult to

[6] Kovacic expresses concern with the transition economies' attempts to apply regulatory frameworks based on Western models in environments that lack the institutional preconditions that are essential to the effectiveness of such frameworks in the West. Kovacic, *supra* note 3 at 1078. See also Michal S. Gal, "Size Does Matter: The Effects of Market Size on Optimal Competition Policy" (2001) 74 S. Cal. L. Rev. 1437 (discussing the distinct needs of small economies with respect to antitrust policy).
[7] Gal, *supra* note 6 at 1472-1474.

predict what policy objectives are likely to motivate the government in formulating competition laws.

Now assume a world where there are substantial trade and investment flows between and among countries. We can then ask whether in such a world the differences in competition policies that one might observe in an autarkic world are likely to diminish or increase, and in what ways and for what reasons? There are some reasons why countries might choose to reduce differences in their competition laws from those of other countries. For example, in order to attract investment from other countries or to encourage imports from other countries, there may be incentives to avoid imposing burdens on foreigners that they do not face in their home countries. Alternatively, countries may wish to facilitate the investigation or review of international cartels or mergers.

On the other hand, in an open international trade and investment environment, there may also be incentives for countries to adopt protectionist or beggar-thy-neighbour competition policies (amongst other policies) that produce benefits for their residents but externalize costs to foreigners. These inter-jurisdictional externalities may increase domestic welfare but reduce foreign welfare and perhaps global welfare.[8] It is also conceivable that some countries may adopt lax competition laws in general, or sectoral

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[8] "A central purpose of competition policy is to maximize the sum of producer and consumer surplus in the economy. (…) Where there is autarky, both the consumer surplus and the producer surplus are realized in the same nation. To maximize welfare, the domestic authorities would use a competition policy designed to promote activity that maximizes the sum of consumer and producer surplus in that nation. In the two-country autarky model, global welfare is maximized by each country independently maximizing its domestic welfare. The maximum of a sum is the sum of the maxima of the sum's constituents. In this model, there is no beggar-thy-neighbour reason for divergence in competition policies or their application. (…)
Where there is trade, locally optimal competition policy may fail to maximize global welfare. Country A permits anticompetitive practices in order to extract consumer surplus from Country B. This, as with any anticompetitive practice that raises price, serves to reduce quantity and results in a deadweight loss to global welfare. The gains to Country A from 'beggaring' its neighbours are smaller than the loss to the neighbour; it is a negative sum game." Iacobucci, *supra* note 4 at 20-21.

exemptions from them, to promote the growth of "national champions" or to provide local businesses with an opportunity to grow to minimum efficient scale prior to exposing them to foreign competition (a version of the infant industry argument often invoked by developing countries to support import substitution policies). Finally, various models suggest that a country with a strong competition policy may reap gains from international trade; therefore, countries may face incentives to pursue stricter competition policies than their trading partners, resulting in divergence of competition policies.[9]

Self-interest is most obviously manifest in laws that explicitly discriminate against foreign interests, which we consider in this section.[10] The widespread exemption for export cartels in general or in particular sectors provides an excellent example: domestic producers benefit at the expense of foreign consumers. Canadian merger law provides another example. Section 96 of the Canadian *Competition Act*[11] provides an efficiency defence to mergers. In applying the defence, authorities are to consider whether efficiency gains will result in, "(a) a significant increase in the real value of exports; or (b) a significant substitution of domestic products for imported products."[12] Obviously, self-interested competition policy would also include the discriminatory

[9] According to Iacobucci, under certain circumstances (in particular, where competition involves strategic substitutes, such as in the case of Cournot (quantity) oligopoly competition) countries will maximize their welfare by having several local firms, rather than one, participate in international markets. Having more than one domestic firm compete reduces the total amount of profit in an international market, but, in the case of strategic substitutes, increases the domestic country's share of those rents, thus potentially increasing total domestic producer welfare. In addition, competition will be beneficial to domestic consumers. The combination of these factors could result in countries racing to the top with their competition policies in an attempt to shift rents to the home country. Unlike beggar-thy-neighbor reasons for the divergence of competition policy, the race to the top may be global welfare-enhancing. Iacobucci, *supra* note 4 at 24-26. We further discuss these issues, which could be described as the implications for international approaches to competition policy of strategic trade theory, in Section IV(c).

[10] We return below to the question of dealing with non-discriminatory laws whose substantive content is nevertheless distorted by international trade.

[11] *Competition Act*, R.S.C. 1985, c. C-34.

[12] *Competition Act*, *supra* note 11 s. 96(2).

application of domestic laws. Allowing an anticompetitive merger of domestic producers who typically export to other countries would fall in this category.

As a matter of policy, there are several different ways of addressing the costs of self-interested, divergent competition policies.[13] It is common to propose the comprehensive harmonization of competition policies. Guzman is one of the most ardent contemporary advocates of harmonization. According to him, "international business activity requires the adoption of substantive international standards to govern antitrust."[14] Assuming that countries act to maximize their own welfare, international antitrust faces the problem that national policies will not be, in general, the best policies from a global perspective.[15] Furthermore, in Guzman's view, "once one recognizes the impact that trade has on antitrust policy, the need for an international antitrust regime becomes clear."[16] However, few concrete steps have been taken towards substantial harmonization of competition law. [17]The Draft International Antitrust Code (the Munich Code), [18] produced by the International Antitrust Working Group (primarily a group of German competition scholars) in 1993, is one of the few initiatives in this area. The Munich Code proposes a complete mandatory World Competition Code, setting out minimum standards to be incorporated into the GATT, and enforceable in domestic jurisdictions by an International Antitrust Authority operating under the auspices of the WTO.

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[13] By "divergent policies," we mean policies that would treat the same matter differently even where there is full agreement on the facts. Even if two countries have exemptions for export cartels, there is divergent policy since the importing country may object to conduct that the exporting country permits.
[14] Andrew T. Guzman, "Antitrust and International Regulatory Federalism" (2001) 76 New York University Law Review 1142 at 1142 [hereinafter "Antitrust and International Regulatory Federalism"]; Guzman, "Global Governance and the WTO", Working Paper, 2003.
[15] "Antitrust and International Regulatory Federalism," *supra* note 14 at 1147.
[16] "Antitrust and International Regulatory Federalism," *supra* note 14 at 1155.
[17] For a
[18] See Special Supplement, 64 BNA Antitrust and Trade Reg. Rep., 19 August 1993 (Special Supplement, No. 1628). For a review of the code, see W. F. Kentscher, "Competition Rules for Private Agents in the GATT/WTO System" (1994) 49 Aussenwirtschaft 281 (code annexed).

We do not find comprehensive harmonization proposals attractive even if they were feasible.[19] They are unattractive because there are significant benefits to maintaining independent policies, including divergent objectives across countries and divergent means of achieving those objectives.

We would instead rely in part on the National Treatment principle.[20] This principle as elucidated in trade law requires countries in framing and applying their laws not to discriminate between local and foreign producers of like or directly competitive products by treating the latter less favourably than the former. We suggest that adherence to this principle in the competition context could play a valuable role in permitting the diversity of competition policies and its attendant benefits to flourish, while limiting harmful forms of local self-interest. Prohibiting the discriminatory application of laws would be the most difficult aspect of the National Treatment principle to enforce, but this is also true with respect to the interactions of many aspects of domestic law or regulation and international trade law, where very difficult questions of adverse effects or *de facto*

[19] Both authors have written at greater length on this question elsewhere. See Iacobucci, *supra* note 4. Michael Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) ch. 10; Neil Campbell & Michael J. Trebilcock, "International Merger Review: Problems of Multi-Jurisdictional Conflict" in *Competition Policy in an Interdependent World Economy* (Baden-Baden: Nomos Verlagsgesellschaft, 1993) 129. Also against harmonization: Eleanor M. Fox, "Antitrust and Regulatory Federalism: Races Up, Down, and Sideways" (2000) 75 New York University Law Review 1781 at 1801 [hereinafter "Antitrust and Regulatory Federalism"]; Karl M. Meessen, "Competition of Competition Laws" (1989) 10 Northwestern Journal of International Law and Business 17 at 21; Douglas H. Ginsburg & Scott H. Ansgstreich, "Multinational Merger Review: Lessons From Our Federalism" (2000) 68 Antitrust Law Journal 219 at 237.

[20] Although the National Treatment principle is not a central piece in Guzman's model to deal with international competition problems, in Guzman's view, an international antitrust agreement should contain a national treatment principle. According to Guzman, although this principle "would not address the strategic choice of domestic law by trading nations, it would prevent the most explicit attempts to favor locals over foreigners such as exemptions for export cartels." "Antitrust and International Regulatory Federalism," *supra* note 14 at 1162.

discrimination are raised in the National Treatment context.[21] Problems of enforceability, while real, are not insuperable.

The National Treatment principle would prohibit countries from framing or enforcing domestic competition laws, such as laws on abuse of dominance, predatory pricing or vertical restraints, so as to favour domestic producers over foreign producers of like or competitive products. However, probably reflecting its mercantilist history, international trade law emphasizes market access rather than consumer welfare.[22] As Tarullo notes, "trade policy is usually concerned with promoting the interests of specific competitors, whereas competition policy is usually concerned with promoting competitive markets …trade negotiators tend to stress the result of "effective" access (i.e. sales), rather than the relative competitiveness of the market in an economic or antitrust sense."[23] Thus, the National Treatment principle does not, as traditionally formulated in trade law, prohibit discrimination between domestic and foreign consumers of like or competitive products. To address potential problems that this presents, we would favour a limited form of extraterritorially (an "effects" doctrine) that would permit countries in respect of inbound commerce to sanction conduct originating abroad that adversely impacts either consumers or total welfare in the importing country, provided that such action meets the National Treatment Principle. We develop this principle in the next section.

[21] See Michael Trebilcock and Shiva Giri, "The National Treatment Principle in International Trade Law", University of Toronto, Law and Economics Workshop paper, February 26, 2003.
[22] See Daniel Tarullo, "Norms and Institutions in Global Competition Policy", (2000) 94 American Journal of International Law 478 at 479.
[23] Ibid at 483.

III. Resolving Conflicts: Defining the Jurisdiction of Trade and Competition Laws

The National Treatment principle, as traditionally formulated, compels state actors not to discriminate between domestic and foreign producers of like or directly competitive products. This eliminates some of the most egregious forms of self-interested, globally harmful policies. But it leaves open some potentially difficult questions of conflict resolution, particularly over the scope for extraterritorial application of local laws. The advantages of a relatively weak supranational principle in preserving local choice over antitrust policy also present disadvantages in leaving open the possibility of conflict. This section reviews principles of conflict resolution that allocate authority over particular problems to trade or competition laws. It is helpful to begin by reviewing two scenarios, based loosely on actual antitrust experience.

Example 1: Export Cartels

Let us suppose that Japan has no competition laws at all or at least no laws dealing with cartels, and members of a Japanese cartel export their output to the United States at inflated prices that reduce the welfare of US consumers. Let us suppose further that domestic US anti-trust law would prohibit such cartels if they involved domestic parties. This is similar to the case of *Hartford Fire Insurance Co. v. California*,[24] decided by the US Supreme Court. Applying Japanese laws to the conduct in question would entail a form of extra-territorial application of these laws to the market most impacted by the conduct, *i.e*. the US market. Applying US laws to the conduct of the

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[24] *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). For discussions of this case, see Kenneth Dam, "Extraterritoriality in an Age of Globalization: The Hartford Case" (1993) Supreme Court Review 289; Alan Swan, "The Hartford Insurance Company Case: Antitrust in the Global Economy – Welfare Effects and Sovereignty" in Jagdeep S. Bhandari & Alan O. Sykes, eds., *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge: Cambridge University Press, 1997).

Japanese firms would entail the extra-territorial application of US laws to parties and conduct located elsewhere. Given our assumption of no local competition laws in Japan and a U.S. ban on cartelization, neither a Japanese decision not to prosecute the cartel nor an American decision to prosecute would violate National Treatment. There is therefore a divergent approach to the same fact pattern and a conflict that needs resolving.

Example 2: Vertical Restraints

Let us assume now that under Japanese competition law, there is no prohibition on exclusive dealing arrangements, or at any rate the law is much more permissive than US law in this respect, and US firms seeking to export into the Japanese market face difficulties in securing distribution outlets because of exclusivity arrangements between local distributors and suppliers. This broadly parallels the claim before the WTO by the United States in *Japan – Measures Affecting Consumer Photographic Film and Paper*.[25] Suppose *arguendo* that U.S. law would not permit these exclusive arrangements. The US may wish to argue that while Japanese law may permit such conduct, the extraterritorial application of US vertical foreclosure or exclusivity laws would enhance access by US exporters to the Japanese market. Again, the divergent approaches of US and Japanese law do not violate the National Treatment principle; we assume that each jurisdiction would apply its own laws without discriminating between foreign and domestic producers.

These examples are structurally very similar, yet for the reasons discussed below we conclude that the extraterritorial application of US antitrust law is legitimate in the first case (in-bound commerce) but not in the second (out-bound commerce). Carefully

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[25] *Japan – Measures Affecting Consumer Photographic Film and Paper (Complaint by the United States)* (1998), WTO Doc. WT/DS44/R (Panel Report).

considering the appropriate domains of trade and competition law can help resolve these kinds of conflicts.

Competition policies around the world universally take maximizing consumer welfare in any particular market as at least a central objective, if not the exclusive objective. A total welfare or total surplus standard would weigh both consumer and producer surplus. However, only a producer welfare standard would ignore consumer welfare and no competition law, by definition, espouses such a standard, as a general norm, because it would be maximized by eschewing competition law altogether. The U.S. explicitly seeks to maximize consumer welfare, as demonstrated, for example, by its price standard in the efficiencies defence context in merger review. Canada too places significant emphasis on consumer welfare, both in the Competition Act's purpose clause and in particular legal contexts. Its statutory efficiencies defence in merger review, for example, while arguably supporting a total welfare test that would not discriminate between producers and consumers, has been held by the Federal Court of Appeal to require consideration of a transfer from producers to consumers as potentially harmful.[26] The EU also takes harm to consumers seriously, for example providing that high prices by a monopolist can in themselves constitute an abuse of dominance. Producers may benefit in their capacity as purchasers of inputs from effective competition laws and may in some instances also incidentally benefit from particular antitrust rules, like those against predation, but the rules generally stem from a concern about consumer welfare.

This is not to say that in all jurisdictions consumer welfare is the exclusive focus. The EU, for example, seems sometimes to consider harms to rival producers when two

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[26] *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, [2001] F.C.J. No. 455, online: QL (FCJ) [hereinafter *Superior Propane*].

firms propose to merge. But it is accurate to describe most competition policies in the developed world as for the most part adopting the dictum from *Brown Shoe Co. v. United States* [27] that antitrust law is at base not about protecting competitors but rather about protecting competition. The EU Commissioner of Competition has recently stated that EU competition laws are principally concerned with protecting consumer welfare.[28] Nowhere, for example, will the complaint that low prices are driving a firm out of business get far without more; rather, the complainant would need to show that the prices are unreasonably low and predatory, which in turn requires a careful examination of the facts, including price-cost comparisons. While all could agree on the facts that low prices are indeed harming a competitor, protecting competitors from low prices is not *per se* ordinarily an aim of antitrust law.

Antitrust law is thus generally about promoting either consumer welfare or total welfare. Trade law, on the other hand, recognizes that domestic governments may pursue objectives other than domestic consumer or total welfare. Free trade maximizes domestic welfare on net, but this does not prevent those harmed by it lobbying against it. Public Choice theory predicts that concentrated interest groups may be influential in distorting domestic law to hinder trade. As a consequence, countries enter into agreements with other countries entailing reciprocal commitments to allow foreign producers access to their markets. [29] These involve commitments to abolish tariffs and quotas, as well as commitments not to adopt laws that either explicitly or in their operation discriminate against foreign producers. The locus of concern in the trade law context is found in producers who are excluded from foreign markets. There will be incidental (and often

[27] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962).
[28] Mario Monti, "Europe's Merger Monitor" *The Economist* (9 November 2002) at 71.
[29] See Tarullo, *supra* note 21.

substantial) benefits for domestic consumers from the focus on producers, but the law in its operation seeks to constrain reciprocally domestic governments from adopting laws that deny foreign producers access to a market. To substantiate a complaint, the producer must show harm and discriminatory conduct; the effect on domestic consumers from trade-reducing laws is largely beside the point as a matter of trade law.

The different principles that animate trade and competition law lead in many different contexts to a coherent method of determining the appropriate scope for the extraterritorial application of competition law (on the assumption that no country has violated the National Treatment principle). In particular, extraterritorial application of competition law is appropriate to remedy the harm that domestic antitrust laws seek to address: harm to domestic consumer or total welfare. This implies that extraterritorial application is appropriate in the first example. A Japanese export cartel aims to raise prices and harm U.S. consumers. Since the conduct would be illegal under U.S. law (that is, the U.S. authorities do not violate National Treatment by applying their law to such a cartel) *and* since the alleged conduct would harm U.S. consumers, it is appropriate that U.S. antitrust law applies extraterritorially. Recent evidence suggests that international cartels impose severe costs on importing countries, including many developing countries.[30] But our limited principle of extraterritoriality permits importing countries to act unilaterally in all such cases and does not suggest a need for international competition laws beyond voluntary cooperation between states in investigating and prosecuting such practices.

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[30] See Robert Anderson and Peter Holmes, Competition Policy and the Future of the Unilateral Trading System", (2002) 5 Journal of International Economic Law 53 at 541-544; Report of the WTO Working Group on the Interaction Between Trade and Competition Policy to the WTO General Council, December 9, 2002, at 17, 18.

This contrasts with the vertical restraints example. In that example, the only harm to the U.S. comes in the form of harm to its producers. Given the conflict between Japanese and U.S. law without either country violating National Treatment, we suggest that it is appropriate to look to first principles in ruling out extraterritorial application of U.S. vertical restraints law. U.S. antitrust law is explicitly not about protecting producers, but rather about protecting competition. The harm to U.S. producers in the example is not a harm that its domestic antitrust law cares about in itself; rather, vertical restraints law exists to promote competition and consumer or total welfare. Applying U.S. antitrust law to protect U.S. producers in foreign markets would therefore be inappropriate and would entail a global race to the most stringent competition laws which are unlikely to be globally welfare maxamizing. We oppose, therefore, the United States assertion of jurisdiction in such cases and in particular the amendment in 1992 and 1995 to the U.S. Antitrust Enforcement Guidelines for International Operations, repealing footnote 159 and asserting jurisdiction over conduct that harms U.S. exporters in outbound commerce even if U.S. consumers are not harmed.[31]

On the other hand, harm to producers as the result of exclusionary practices is indeed the domain of trade law as is the more general issue of market access by foreign producers. If Japanese permissiveness toward vertical restraints is in essence a form of protectionism, U.S. producers may have a complaint under trade law (as claimed unsuccessfully in *Japan – Measures Affecting Consumer Photographic Film and*

[31] See Paul Crampton "The 1995 U.S. Antitrust Enforcement Guidelines for International Operations: A Foreign Perspective", (1996) 1 International Business Law 99; for similar reasons, we oppose the assertion of jurisdiction by the U.S. in *United States v. Pilkington,* 59 FR 30604 (1994), alleging that Pilkington established a web of restrictive distribution arrangements impeding effective market access by U.S. competitors to the U.K. and other glassware markets around the world.

Paper)[32], at least if the law is being applied in a discriminatory fashion. Where this is not the case but Japanese policy on exclusionary policies reduces consumer welfare in Japan, this cost is internalized to Japan and it is its prerogative to decide whether to amend or apply its competition laws to address this harm.

Although there is some symmetry between the export cartel and vertical restraints examples in that neither involves the violation of National Treatment with respect to competition policy, and in both cases local Japanese laws and conduct harm U.S. interests, there is a crucial asymmetry in the distribution of the effects. The vertical restraints case results in harm to foreign producers in export markets (out-bound commerce) and thus is appropriately left to trade law; the cartel case results in harm to foreign consumers in import markets (in-bound commerce) and is therefore an appropriate context for the extraterritorial application of U.S. antitrust law.

Example 3: Monopoly

Let us assume a monopoly has developed in the EU that exports all of its output to the US, and exports monopoly overcharges along with the output to US consumers.[33] Under US antitrust law monopolization does not include supra competitive pricing *per se,* but requires proof of some exclusionary, disciplinary, or market foreclosure practice, while under European Community law monopoly pricing *per se* may constitute an abuse of dominant position. In this case, US consumers are harmed but not in a way that would attract liability for a US producer under US domestic antitrust law. EU consumers are

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[32] *Japan – Measures Affecting Consumer Photographic Film and Paper (Complaint by the United States)* (1998), WTO Doc. WT/DS44/R (Panel Report).

[33] See Frank Easterbrook, "Antitrust and the Economics of Federalism", (1982) 26 Journal of Law and Economics 23, for a similar example.

not harmed, but this conduct would potentially violate EU laws if it took place within the EU.

We can resolve the potential conflict here by again relying on first principles. The US would not challenge high prices *simpliciter* charged by a local monopolist; therefore it would be a violation of the National Treatment principle to challenge the European monopolist on this basis. On the other hand, it would not be a violation of National Treatment for the EU to address the monopolist's prices, since it would do the same in the case of a local monopolist selling into the EU market (although as a matter of European law the European Commission or courts may lack jurisdiction if E.U. citizens are not harmed). This would create a conflict with U.S. law in this context, which should be resolved by reference to our extra-territoriality principles that assign jurisdiction in cases of conflict to the jurisdiction where consumer welfare is prejudiced. If the monopolist sells some of its output in both U.S. and EU markets, then obviously the EU would have jurisdiction over the monopoly overcharges.

Example 4: Dumping

This jurisdictional approach to extraterritoriality helps resolve other potential conflicts, including a vexing problem for trade law: the domain of anti-dumping and predation laws. Suppose that Japanese steel producers sell steel into the U.S. U.S. steel producers object that the steel is being sold at low prices that cause them material injury. What law should resolve the dispute?

Current trade law would permit U.S. producers to seek trade remedies under anti-dumping provisions in the GATT (Article VI), depending on the prices charged by Japanese producers in the U.S. relative to their home markets. Our approach suggests

that this is inappropriate. Trade law (as opposed to trade theory) is about harm to producers excluded from foreign markets; competition law is about harm to local consumers. In the steel example, U.S. producers are obviously not being excluded from Japanese markets and it is inappropriate to rely on trade law to remedy any potential problem. If, on the other hand, Japanese producers are preying on U.S. steel firms, there may be a claim that U.S. consumers will be harmed in the long run and this would be an appropriate case for the extraterritorial application of U.S. predation laws. That meeting standards for predation, which are constructed out of concern for consumers not producers, is much more difficult than meeting anti-dumping standards would not come as a surprise to local firms that pursue trade remedies, not competition remedies. However, but for the special dispensation for anti-dumping laws in the GATT (Article VI), such laws would clearly violate the National Treatment principle by applying pricing constraints to foreign producers that do not apply to domestic producers of like or competitive products. Hence, there is a strong case for abolishing this flagrant exception to the National Treatment principle and relying instead on non-discriminatory domestic antitrust predation or abuse of dominance laws, albeit applied extraterritorially.[34]

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Aside from questions of internal consistency, the key advantage of the National Treatment principle and the jurisdictional limitations on extraterritoriality (applicable to inbound but not outbound commerce) that we suggest is that they preserve the benefits of localized competition policy. The principles allow local governments to devise competition laws to suit local conditions and to engage in policy experimentation.

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[34] See Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd ed.,Routledge, London, 1999) chap.7.

Allowing violations of National Treatment would allow countries to adopt globally undesirable self-interested laws, and an overly permissive approach to extraterritoriality would interfere with local governments' ability to adopt distinctive competition laws. For example, extraterritoriality in the vertical restraints example would hinder Japan's ability to adopt its own distinctive vertical restraints regime. Looking to the country whose consumers are affected by conduct helps resolve the jurisdictional division between trade and competition policies.

Another instrumental advantage of the conflicts regime we propose is one of institutional competence. It is the role of antitrust authorities wherever situated to determine the effect of conduct on consumer or total welfare, while trade authorities typically only seek to determine whether foreign producers have been excluded from a market by discriminatory restraints on trade.[35] Allocating matters engaging consumer or total welfare to antitrust authorities and matters engaging producer welfare to trade authorities exploits the comparative advantage of the different agencies.

In summary, trade law adopts as its purpose the promotion of international trade by ensuring that producers have non-discriminatory access to foreign markets; competition law generally adopts as its purpose the promotion of either consumer or total welfare. The extraterritorial application of competition law is only coherent if predicated on the protection of the interests of domestic consumers. Protecting the interests of producers in export markets is the domain of trade law.

IV. Residual Issues

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[35] See Tarullo, *supra* note 21.

Adherence to National Treatment and the restriction of extraterritorial application of local law to cases involving local consumers resolves many, but far from all problems that arise through the interaction of trade and competition policies. The following example serves as a useful context for discussing remaining issues.

Example 5: A Supra-national Merger

Here we assume a merger between two firms selling their output into supra-national or global markets (for example, large commercial aircraft manufacturers). Suppose one country – perhaps where the two merging parties are located – approves the merger on the grounds of efficiencies (cost savings) likely to be generated by the merger, but another country disapproves the merger on account of a likely increase in the price of the product in question as a result of the reduction in competition. The latter country does not realize in any direct way the efficiencies associated with the merger. This broadly reflects the *DeHavilland* case, where the Canadian[36] competition authorities approved a merger and the European Community[37] authorities disapproved it. The European Commission prohibited the acquisition of de Havilland, a Canadian-based commuter aircraft producer (owned by the American firm, Boeing) by a European joint venture, ATR (owned by French and Italian interests), on the grounds that the merger would give the merged entity excessive market power in the European market. The example is also similar in some respects to the inter-jurisdictional conflicts between the US and the EU in the *McDonnell Douglas-Boeing* merger[38] and the *GE/Honeywell*

[36] The Canadian Competition Bureau approved the merger without providing written reasons.
[37] *Aerospatiale-Alenia/ de Havilland*, [1991] O. J. Eur. Comm. L334/42.
[38] See In Re The Proposed Acquisition of McDonnell Douglas Corp. by the Boeing Co., FTC File No. 971-005 (July 1, 1997). For a comment on the case see: Thomas L. Boeder, "The Boeing-McDonnell Douglas

merger. In our view, this example is conceptually similar to Example 1 (export cartels), and does not differ in important analytical respects from a major international cartel (like the vitamin cartel)[39] impacting many domestic markets.

Several issues arise with this example. We consider them in order of the most to the least troubling.

(a) Multiplicity of Jurisdictions/ Race to the Strictest

By assumption, the merging parties sell in a supranational market. That is, there will be a multiplicity of jurisdictions that can both comply with National Treatment principles and legitimately (under our analysis) apply their laws extraterritorially given the potential to harm to local consumers. This creates the potential problem of inconsistent decisions about the same merger. The nature of relief in merger cases is typically injunctive, either permitting the merger to proceed in its entirety, permitting a modified merger to proceed after divestitures, or forbidding any form of the merger. If several jurisdictions review a merger and each relies on injunctive remedies, the rule that prevails will be the strictest. This undermines the autonomy of antitrust regimes, just as US extraterritorial application of vertical restraints law in Example 2 would undermine Japanese efforts to employ a permissive approach to vertical restraints. Furthermore, Guzman argues that as harmed countries impose their laws to transactions that cause harm to them, they will block not only globally inefficient anticompetitive activities, but also many efficient activities (i.e., all activities that cause a net loss to a particular country, but that yield global benefits far outweighing that loss). Guzman rightly

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Merger" in Simon J. Evenett et al., ed., Antitrust Goes Global: What Future for Transatlantic Cooperation? (Washington, D.C.: Brookings Institution Press, 2000) 139.

[39] See In re Vitamins Antitrust Litig., 2000-1 Trade Cas. (CCH) P 72,914 (D.D.C. 2000).

concludes that in this scenario, domestic law may be more stringent than the optimal global policy.[40]

There are a number of responses to the problem of jurisdictional multiplicity/race to the strictest. First, the choice of a merger in the example was deliberate because of the difficulty in generating strictly local remedies. Allowing firms to merge in all jurisdictions but one is often not feasible in cases involving global or supranational markets. However, in many other antitrust contexts, idiosyncratic local remedies are entirely feasible. Consider Example 3 involving a European monopolist charging high prices in the EU and US. There is no reason that the EU could not penalize the monopolist for high prices in the EU, while US authorities decline to intervene with respect to sales in the US. Likewise exclusivity provisions may be unenforceable in some local markets, but permissible in other jurisdictions. Even mergers that involve many local markets can sometimes appropriately be addressed by local divestitures. The problem of the race to the strictest should not be exaggerated; as an empirical matter, there will be some difficult supranational cases, but many problems can be addressed differently by different jurisdictions.

A second, more radical response to the problem of jurisdictional multiplicity/race to the strictest is to rethink the injunctive nature of antitrust remedies. Instead, a damages remedy could accommodate jurisdictional multiplicity without requiring any jurisdiction to cede sovereignty over the substantive content of its antitrust regime. In the merger context, for example, rather than responding yes, no, or yes with conditions to a merger, antitrust authorities considering a merger involving several jurisdictions could instead

[40] "Is International Antitrust Possible?", (1998) 73 New York University Law Review 1501 at 1524; "Antitrust and International Regulatory Federalism", *supra* note 14 at 1159-1160.

calculate the local damages to consumers stemming from the merger and require the merging parties to pay this amount (perhaps by way of a reduction in prices in that jurisdiction). If there are gains elsewhere that offset local damages, the merger will proceed. If not, it will not. This approach has benefits analogous to the efficient breach benefits of awarding damages rather than specific performance for breach of contract. The requirement of National Treatment would be important in this context, as there will be a temptation for individual jurisdictions to make spurious findings in order to extract extortionate damages from foreign merging firms. But if the principle of National Treatment is adhered to, the strictest regime would set the highest price for the merger (at least relative to the size of local sales), but this is entirely appropriate given local views of the harms from the merger. The strictest regime would not, however, have a veto over the merger which would violate at least the spirit of the National Treatment principle by ignoring the impact of its decision on foreign producer and consumer welfare.

A third response to the problem of jurisdictional multiplicity is to consider a lead jurisdiction approach. Just as nations with legal jurisdiction over a matter may cede authority to other nations under principles of comity, it may be appropriate for local jurisdictions to cede authority to a lead jurisdiction in antitrust matters. Campbell and Trebilcock have argued for a lead jurisdiction model that comes in different variants.[41] The least intrusive is a coordinating agency model, where the lead jurisdiction would coordinate a review of the merger for all affected countries, reach a dispositive decision with respect to its own jurisdiction, and merely make findings and recommendations to other affected countries. While this model would not prevent divergent outcomes, it would reduce transaction costs with regard to activities affecting supranational

[41] Campbell & Trebilcock, *supra* note 19 at 149-155.

geographic markets.[42] A more intrusive model would be a lead jurisdiction with dispositive powers not only with respect to its own jurisdiction, but other affected jurisdictions. A third variant of a lead agency model would entail some kind of supra-national appeal mechanism, not on the merits of the merger but on the conflict of laws issue and in particular who the appropriate lead agency is for evaluating the merger. In each model, the choice of lead jurisdiction should build on the concern for consumers that animates competition policy. That is, the country that represents the largest share of consumption should presumably be the lead jurisdiction.[43] The presence of producers in a jurisdiction should have no impact on the choice.

(b) Conflicts of Principle

While really a subset of the problem of jurisdictional multiplicity, it is worth pointing out a further problem arising from jurisdictional conflicts. While generally competition laws are designed to promote consumer welfare, in some cases they explicitly account also for producer welfare. For example, as mentioned, Canada has an explicit efficiencies defence in merger review which balances anti-competitive effects with efficiency gains.[44] This implies that in some cases Canada may approve a merger in part out of a regard for producer welfare. Assuming there is multijurisdictional conflict over a particular merger, resolving the conflict by reference to the location of consumers is at least complicated by the Canadian emphasis on producer welfare (as an element in a total welfare test). *De Havilland* provides a relevant context, since while production of commuter airlines was in part located in Canada, customers were for the most part located in Europe. Resolving the conflict by deferring to Europe because of customer

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[42] Campbell & Trebilcock, *supra* note 19 at 150.
[43] Trebilcock et al., *supra* note 19 at 684; Campbell & Trebilcock, *supra* note 19 at 153.
[44] *Competition Act*, *supra* note 11 s. 96(2).

location ignores the producer (or total welfare) emphasis of the efficiencies defence in Canada.

Two of the responses to the problem of jurisdictional multiplicity apply to this context. First, this problem only arises where idiosyncratic local remedies are infeasible, which as an empirical matter is not true in the vast majority of antitrust cases. Second, an international agreement to impose damages rather than injunctions can better accommodate conflicting decisions. An additional response is that while each antitrust law may recognize qualifications to an emphasis on consumer welfare, the basic approach is to protect consumers from anti competitive distortions. Canadian antitrust law generally protects consumers, so it is not unreasonable to ask it to cede jurisdiction to Europe on the basis of consumer welfare.[45]

(c) General Distortions from Trade

The example of an international merger raises another possible problem with the interaction of trade and competition policies that the National Treatment principle (applicable to outbound commerce) and a limited extraterritoriality principle (applicable to inbound commerce) may not address. Guzman[46] and Iacobucci[47] consider whether countries' *general* approach to antitrust will be distorted by trade flows. Even if all countries adhere to National Treatment, trade patterns may distort local competition laws. Net exporters in imperfectly competitive markets may often favour a lax policy; net importers in such markets a strict policy.[48] In addition, Guzman suggests that since in a world with unlimited extraterritoriality the strictest approach across jurisdictions will

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[45] See *Superior Propane, supra* note 26 (requiring consideration of a transfer from producers to consumers as potentially harmful).
[46] "Antitrust and International Regulatory Federalism", *supra* note 14 at 1154.
[47] Iacobucci, *supra* note 4 at 21.
[48] "Antitrust and International Regulatory Federalism", *supra* note 14 at 1154-1155.

prevail in any given case, trade will lead to overly strict antitrust rules(from a global welfare perspective) imposed by net importers in imperfectly competitive markets.[49]

Aside from our earlier responses to the race to the strictest concern, including consideration of local remedies, we do not view the general distortions from trade as a significant problem for our approach. First, the trade surplus in any given country in the long run must be balanced. Guzman argues that while trade overall may be in balance over time, trade in *imperfectly* competitive markets may not balance over time.[50] The problem with his analysis is that the presence of imperfectly competitive markets is at least in part dependent on local competition and trade policies. Oil, for example, is a commodity that almost certainly would sell in a competitive market if not for OPEC. The endogeneity of the competitiveness of markets makes the predictive value of Guzman's analysis problematic. Predicting which countries are net exporters or importers in imperfectly competitive markets in order to predict the strictness of their policies depends on the policies themselves. It may therefore be difficult for a local-welfare maximizing government to disentangle market and legal effects in order to decide whether, over time, it will be a net importer or exporter in imperfectly competitive markets and thus how to distort its policies.

Second, Guzman argues that the combination of trade-distorted policies and the veto power of the strictest policy would lead to excessively strict global policies.[51] It is not clear that net importers in imperfectly competitive markets will always adopt overly strict rules. The strategic trade literature shows that countries may intervene in imperfectly competitive markets in an attempt to shift rents from foreign firms to

[49] "Is International Antitrust Possible?", *supra* note 37 at 1524.
[50] "Antitrust and International Regulatory Federalism", *supra* note 37 at 1155.
[51] "Is International Antitrust Possible?", *supra* note 37 at 1524.

domestic firms.[52] Applying similar analysis to international antitrust can provide valuable insights.[53] The following example shows that the strategic self-interest of an importing country may lead to *lax* competition policy. Suppose that two US firms and two European firms each serve the European market. The market is imperfectly competitive and Europe is a net importer. The EU firms propose to merge. Guzman would argue that the EU should object. But a domestic welfare maximizing EU antitrust authority may come to the opposite conclusion. The EU will have to balance two effects. On the one hand, the merger will decrease competition and harm local consumers. On the other hand, the merger will benefit local producers. If all effects are internal to the EU, the net effect may be negative and the EU should object to the merger – this is the economic basis for antitrust policy. But not all effects are internal. Rather, the merger could result in a larger or smaller share of overall profits for EU producers, depending on the model of oligopoly that prevails. This complicates the self-interested calculus for the EU. It is possible that by allowing the merger, total producer rents in the market increase and that the EU realizes a larger share of these rents. The gains in profit for the merged EU firm could offset losses to EU consumers. Rent-shifting could cause net importing countries to impose a lax policy in some cases. Again, the predictive value of Guzman's analysis is questionable.[54]

Finally, as an empirical matter, the net trade surplus in imperfectly competitive markets is unlikely to have significant distortionary effects on policies. The value of

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[52] Iacobucci, *supra* note 4 at 13.
[53] Iacobucci, *supra* note 4 at 20.
[54] As discussed in footnote 9, *supra*, Iacobucci, *supra* note 4 emphasizes the strategic domestic incentives to adopt vigorous competition policy, but acknowledges that rent-shifting concerns could result in lax policies.

exports less imports was only 5.1% of GDP in Canada in 2001,[55] which is a small, open economy with a relatively large trade surplus. Assuming that imperfectly markets are not disproportionately important in export as opposed to import markets, the effect of trade is even smaller if one considers only the surplus that arises in imperfectly competitive markets. If countries can discriminate in the application of their policies between foreigners and locals, it is reasonable to suppose that their standards will vary depending on the position of local firms and customers in any given case. But if countries adhere to a policy of non-discrimination, we are skeptical that the trade surplus or deficit in imperfectly competitive markets will have a significant effect on the general choice of competition policy.

V. Recent Developments in International Antitrust

Recent events in international antitrust demonstrate the likely futility and undesirability of a substantive harmonization agenda. Even apparently modest proposals for harmonization have engendered strong disagreements, indicating that harmonization is impractical. Moreover, the reasons for disagreement, like differing views on what precisely constitutes a "hard core" cartel, may sometimes relate to self-interest, but often seem motivated by good faith differences in opinion over optimal law.

Proposals for sweeping international harmonization competition laws, such as espoused by the Munich Group or by Guzman, do not reflect current mainstream

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[55] Derived by dividing gross receipts in international trade of goods and services less gross payments in 2001 (which difference was C$55.6 billion in 2001. See "Canada's Balance of International Payments," online: Statistics Canada < http://www.statcan.ca/english/Pgdb/econ01a.htm > (date accessed: 12 November 2002)) by Canadian GDP in 2001 (which was C$1.1 trillion. See "Gross Domestic Product: Expenditure-based," online: Statistics Canada < http://www.statcan.ca/english/Pgdb/econ04.htm > (date accessed: 12 November 2002).

preoccupations with the costs, in terms of global welfare, of divergent national competition policies. The Doha Ministerial Declaration of November 14, 2001, launching the multilateral round of trade negotiations, identified (in paragraph 25) an apparently much more modest trade and competition policy agenda:

> In the period until the Fifth Session, further work in the WTO Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least developed country participants and appropriate flexibility provided to address them.

While this is a much more modest agenda than comprehensive international harmonization of competition laws (with a much reduced focus on market access issues), a recent report released by the WTO Working Group on the Interaction between Trade and Competition Policy to the WTO General Council[56] (December 9, 2002,) reports a striking diversity of views amongst member states on all of these issues.

With respect to transparency, the report states that in principle transparency should permeate all aspects of a country's competition regime, including legislation, policies, institutional structures, decision-making processes, enforcement priorities, policy and procedural guidelines, case selection criteria, exemption criteria, appeal processes, and details of all relevant outcomes and decisions made. However, recognizing that 50 or more members of the WTO have no competition laws at all and that many countries' competition laws exist on paper only,[57] such a set of requirements is likely to be extremely burdensome, especially if it includes all case-specific decisions

[56] December 9, 2002.
[57] See William Kovacic, "Creating New Competition Policy Institutions in Transition Economies", (1997) 23 Brooklyn Journal of International Law 403.

made by enforcement authorities, such as advisory opinions and settlements. Moreover, the question of the protection of confidential information, including commercial and business secrets, is likely to be viewed very differently in different legal cultures.

With respect to the principle of non-discrimination, a diversity of views were reported on whether it should apply only to *de jure* discrimination or also to instances of *de facto* discrimination, and how easy or difficult it would be to distinguish the latter from reasonable exercises of prosecutorial discretion. Moreover, a number of countries have general exemptions for export cartels, and most countries have various sectoral exemptions from competition laws. Developing countries argued more generally for special and differential status so that they would not be obliged to apply competition laws to expose domestic industries to foreign competition or acquisitions, and to be permitted to maintain export cartels in commodity markets, on an infant industry rationale. Thus, many developing countries argued for the addition of special and differential status to the core principles, while some developed countries argued for the addition of the principle of comprehensiveness to the list of core principles (obviously strongly antithetical principles).

With respect to the principle of procedural fairness, one view was that four broad concepts could be identified that were likely to promote fairness, namely 1. the right of access to and right to petition a competition authority; 2. the right of a firm subject to investigation to know the basis for an antitrust authority's objection before the authority took action, and the right of that firm to respond; 3. the right to appeal an agency's decision; and 4. timeliness. Each of these concepts is contestable and ambiguous, and the report notes that there was no broad consensus on the meaning of procedural fairness in

the context of competition law enforcement, partly because notions of fundamental fairness differed between legal systems and were influenced by the political and legal cultures in which relevant agencies operated.

With respect to hard core cartels, the report notes a lack of any consensus on the definition of a hard care cartel as opposed to other kinds of horizontal arrangements,[58] and whether, even if they could be defined, they should be subject to *per se* illegality or rule of reason review; whether even if these two issues could be resolved, there should be some common position on penalties or sanctions for participation in such cartels; and moreover, even if all these issues could be resolved, whether certain exemptions should be permitted from the prohibition against hard core cartels.

As this review demonstrates, significant harmonization on substantive areas of law seems very unlikely given the variety of views expressed about apparently much more modest proposals. Moreover, the reasons for disagreement, such as different conceptions of hard core cartels, or different conceptions of procedural fairness, often seem rooted in fundamental differences in approach, not parochial self-interest. Harmonization would create costs as countries would be forced away from their (non-strategic) conceptions of optimal law.

VI. Conclusion

In the end, we are inclined to view efforts at international harmonization of competition laws, whether ambitious or apparently more modest in scale, as largely a solution in search of a problem. To the extent that diversity of national competition laws

[58] On the difficulties of drawing this distinction, see Presley Warner and Michael Trebilcock, "Rethinking Price-Fixing Law", (1993) 38 McGill Law Journal 679.

poses problems in a context of dramatically increased international trade, we believe that the two core principles that we have identified - the National Treatment Principle and limited (in-bound) extraterritoriality - adequately address the most serious problems. Voluntary cooperation between national competition authorities in the investigation and enforcement of competition laws can be promoted by bilateral treaties or agreements of the kind that already exist between a number of national enforcement authorities. To the extent that pointless incompatibilities between international competition laws exist with respect, for example, to information requirements and decision time-lines in merger reviews, a convergence on common requirements is best promoted through forums such as the International Competition Forum, which represents most significant national antitrust enforcement authorities. Similar spontaneous regulatory convergence on best practices in various other areas of anti-trust law enforcement can also effectively be promoted through such a forum.[59]

We are opposed to proposals (like Guzman's) to vest in the WTO a mandate to negotiate a single, comprehensive harmonized international antitrust regime (like the TRIPS Agreement)[60] by employing cross-issue trade-offs or side-payments to induce countries to adopt domestic antitrust regimes. Threats of trade sanctions, for example, in the absence of agreement to a harmonization agenda may be effective in achieving such harmonization, but it would compel countries to opt for laws that they (non-strategically) do not consider optimal in terms of their own domestic welfare.[61] The only distinctive

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[59] See Konrad Von Finckenstein, Chair, International Competition Network Steering Group, 29th Annual Conference on International Antitrust Law and Policy Fordham Corporate Law Institute, New York, October 31, 2002; see also Tarullo *supra* note 21 at 495, 496.

[60] See Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd edition, London: Routledge, 1999), Chapter 12.

[61] Guzman, "Antitrust and International Regulatory Federalism", *supra* note 14 at 1142-1143; 1155-1158. The Canadian Competition Bureau outlined the possible elements of a multilateral agreement on Trade-

institutional feature of vesting a competition policy mandate in the WTO would seem to be the mandatory dispute settlement process. However, it is not clear what purpose this process would serve in practice with respect to inevitably platitudinous and largely non-justiciable encomia to transparency and procedural fairness, or why countries in their own self-interest will not be induced to take appropriate action against hardcore or other cartels, supplemented where appropriate through voluntary cooperation arrangements with other enforcement authorities.[62] Only with respect to the principle of non-discrimination, or as we would prefer more narrowly to define it, the principle of National Treatment, would the WTO seem to have a legitimate mandate in the trade and competition policy area, but this mandate already exists, and while no doubt difficult to discharge in the case of complaints of *de facto* discrimination, especially involving allegations of discriminatory non-enforcement of laws (state inaction rather than state action)[63], it is not obviously a less tractable mandate than in many other areas of domestic law and regulation where the WTO already has frequently had to address issues of *de facto* discrimination.[64]

Related Aspects of Anti-competitive Measures (TRAMS) in "Options for the Internationalization of Competition Policy: Defining Canadian Interests," online: Competition Bureau <http://strategis.ic.gc.ca/SSG/ct01519e.html#Sec6 > (date accessed: 25 November 2002). Against the idea of negotiating a comprehensive multilateral competition policy agreement in the WTO, see: Merit E. Janow, "Transatlantic Cooperation on Competition Policy" in Simon J. Evenett et al., eds., *Antitrust Goes Global: What Future for Transatlantic Cooperation?* (Washington, D.C.: Brookings Institution Press, 2000) 29 at 54 [hereinafter "Transatlantic Cooperation"]; Merit E. Janow & Cynthia R. Lewis, "International Antitrust and the Global Economy: Perspectives on The Final Report and Recommendations of the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust" (2001) 24:1 Journal of World Competition 3 at 14, Eleanor Fox, "Competition Law and the Millennium Round", (1999) 2 Journal of International Economic Law 665 at 677-678 (Fox argues for a limited role for the WTO. According to her, only market-access competition issues belong in the WTO).

[62] See Tarullo, *supra* note 21 at 500, 501.

[63] See Tarullo, *supra* note 21, at 491.

[64] See Trebilcock and Giri, supra note 20.

In our view, it would be the ultimate incongruity that the desire to harmonize all or some aspects of national competition laws may come at the price of eliminating competitive politics and policy-making. Competition in the latter domain is important for social welfare, just as is competition in the economic domain.[65]

[65] Michael Trebilcock and Robert Howse, "Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics", (1998) 6 European Journal of Law and Economics 5.