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STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM
FOR SUSTAINABLE DEVELOPMENT



**Antitrust Without Borders:
From Roots to Codes to Networks**

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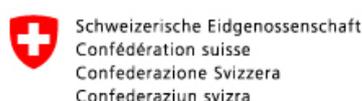
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ABSTRACT

Antitrust law has moved from a national enterprise to an international enterprise. Markets transcend national boundaries, and many problems appear to require supranational or cooperative solutions. The 1990s triggered visions of a multilateral framework under the aegis of the World Trade Organization (WTO). As the new millennium proceeds, multilateral agreement seems more remote, and networking solutions seem more practical and attractive. International antitrust today is less "world antitrust" and more "antitrust without borders." This essay describes the intellectual journey from hierarchy to networking. Using the subsidiarity principle (what can be done as well or better at a lower level should be done at a lower level), it identifies the problems that can be tackled horizontally, and how and in what forum; it identifies the problems that still need a solution from the top, and suggests how to move forward.

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A PERSPECTIVE: WHERE WE HAVE COME FROM

Half a century ago, only a handful of nations had adopted antitrust law. Many preferred dirigisme or cooperation to competition. The biggest challenge to the American competition system was acceptance of cartels, not competition, as the rule of trade. When the United States (US) sought to protect itself from off-shore cartels, its trading partners invoked international law and comity, arguing that if cartels were legal where formed, they were insulated wherever their cinders landed.

Famously, in *Alcoa*,¹ the US adopted the effects doctrine. Just as famously, in late 1989, there came a dramatic change. Most of the rest of the world embraced markets and antitrust, and many antitrust jurisdictions adopted some form of the effects test, validating jurisdiction over off-shore actors and their acts that produced a significant effect in the regulating nation.² The nations adopted an effects test to protect themselves. If there were no effects jurisdiction, the world would surely need, and would already have, an international antitrust regime.

From the time of the fall of the Berlin wall in late 1989, the US antitrust agencies, the European competition authorities, and others, extolled the importance of antitrust law in free-market economies. Today, approximately 130 nations have antitrust (or “competition”) laws. This is, by some measure, success.

There are some costs of success; small in the scheme of things, but palpable. In a globalising world with national-level law, there would be differences in procedure and substance, overlaps and gaps of jurisdiction, lack of coherence, and conflicts. Some of the differences would be a matter of principle, related to capacities of antitrust authorities, stages of economic development, and values or preferences of peoples. Some differences in outcomes would be related to different impacts of the same transaction or conduct in different markets; thus, different facts. Some differences would derive simply from lack of knowledge or perspective of less-experienced agencies, or would stem from divergences on unimportant details, such as the earliest allowable date of premerger notification. Differences are a fact of life in a world in which scores of nations are reinventing and refining the antitrust wheel.

Antitrust agencies of the world have risen admirably to the challenges. Authorities, particularly of the US and Europe, collaborate intensely when vetting the same mergers and pursuing the same cartels. Collaborations provide transparency and cross-fertilisation. The US and the European

Union (EU) authorities have particularly close relations, backed up by a working group on mergers and documents detailing best practices.

Merger collaborations have had many successes. One well-known example is the cooperation between the US Department of Justice and the European Commission in the case of the merger of WorldCom and MCI. Enabled by confidentiality waivers, the agencies coordinated requests for information, jointly met with the parties, and concluded settlements that met the concerns on both sides.³

In this new era of cooperation, the Organisation for Economic Co-Operation and Development (OECD) (especially for the developed countries), the United Nations Conference on Trade and Development (UNCTAD) (especially for developing countries), and the International Competition Network (ICN) play important roles. For many years, the OECD in particular has advanced the state of knowledge and cooperation. The ICN is a different construct; it is much younger and much less formal. Founded in 2001 as a network of the world’s competition agencies to explore avenues for convergence and assistance,⁴ the ICN is a ground-up network of all antitrust authorities of the world intended, at its inception, to discuss and solve practical problems; to pursue tasks capable of achievement. Initial efforts were devoted to harmonising details of practice and process where divergent rules and practices imposed significant, unnecessary costs; for example, agreement on the earliest date on which pre-merger notification filings can be submitted and on the required nexus between merging parties and jurisdictions seeking to regulate the merger. Later projects approach more controversial issues, such as standards for identifying abuse of dominance.⁵

In terms of cooperation and the formation of shared norms, there is more to be done. I shall return to this subject. First, I reflect on substantive convergence and then comity; I comment on extraterritoriality and the bounds of jurisdiction; and I comment on notions for world antitrust. Finally, I ask: what problems remain? What is the lowest level at which they can be solved; and what is left for international antitrust?

1 | United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

2 | See, for the European Union, *Ahlström Osakeyhtiö v. Commission* (Wood Pulp), [1988] ECR 5193.

3 | Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (ICPAC Report) (2000), p. 66.

4 | An international competition network (then named The Global Competition Initiative) was one of the principal recommendations of the ICPAC Report (2000). See ICPAC Report, Chapter 6, Preparing for the Future, pp. 281-287, 300-301.

5 | See generally Fox, Eleanor. “Linked-In: Antitrust and the Virtues of a Virtual Network,” 43 *International Lawyer* 151 (2009).

SUBSTANTIVE CONVERGENCE

Substantive convergence of law is often extolled as a worthy and pressing goal in this world of national law and multitudinous jurisdictions. The value of convergence as a goal may be exaggerated. Convergence is good when it happens through the enlightened choices of the jurisdictions, for convergent law can produce more business certainty, save transactions costs, and increase trade. But, nations in the antitrust family are at different stages of economic development and have different capabilities, perceptions, and priorities. Moreover, diversity has benefits, and openness of the channels for experimentation and adjustment has its own dynamic, pro-competitive rewards. Even within the US, antitrust diversity thrives. The case law of the Third Circuit and the District of Columbia (DC) Circuit courts of appeals are not entirely congruent. The Clinton Administration's view of efficient and appropriate relief in the Microsoft monopoly case and the Bush II Administration's view of efficient and appropriate relief in the same case differed widely. The Bush II Administration's perspective on the importance of dominant firms' freedom to act and the Clinton and later Obama Administrations' appreciation of the importance of freedom from the clutches of abusive power put two different world views in relief. Acknowledgment of diversity is a concession to reality.

For transactions that are cross border and especially global, there is a case to be made for a single rule of law or framework for the law, adopted multilaterally, all other things being equal. There is a credible argument that one substantive standard should govern global mergers. The US has strongly opposed this idea when proposed in the context of multilateral agreement. Its officials have argued that nations have different standards; there is not one standard fit for or accepted by all.⁶ If there is not an appropriate single standard achievable through a multilateral regime, then can there be an appropriate single standard to be achieved through cajoled convergence?

Sunlight and engaged discussion are invaluable. They tend to produce convergence in some respects, but not in others. They are likely to lead to better understanding of differences and more respect for them.

COMITY

Comity is a concept of discretionary reciprocal deference. It holds that one nation should defer to the law and rules (or dispute disposition) of another because, and where, the other has a greater interest; a greater claim of right. Comity is a concept founded on process and relationship, not outcome. The outcome in the nation that is accorded the deference may not be the preferred outcome of the nation that defers.

Comity is an amorphous concept. Invoking the word does not reveal its practical meaning. Whether one nation has a greater claim of right than another is usually not obvious in the cases in which duties of deference are likely to be asserted.⁷

Comity is a horizontal, nation-to-nation concept, seeking — by reciprocal deference — to maximise the joint interests of the affected nations by splitting their differences or otherwise dissipating conflict in view of repeated interactions expected to occur. It could play into the hands of nationalistic detente and the nurturing of national champions. A case in point is the *Hartford Fire*⁸ case, in which Lloyds of London underwriters agreed not to supply reinsurance and retrocessionaire coverage to US primary insurers for sudden pollution claims and long tail policies.⁹ The United Kingdom (UK) parliament had legislated the Lloyds' members' right of self-regulation,¹⁰ and the Lloyds' members pled that what

6 See Klein, Joel I. "No Monopoly on Antitrust," *Financial Times*, Feb. 13, 1998, p. 20; Klein, Joel I. *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, in 1997 *Fordham Corp. Law Institute* 9 (Barry Hawk ed., 1999).

7 See *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (rejecting the claim that the US courts should refuse to take jurisdiction over Laker's bankruptcy trustee's antitrust conspiracy suit against British and Belgian airlines). Thus, invocation of "comity" does not answer the following questions: Should the US have deferred to the European Community when it examined conduct by IBM-Europe that (the Europeans thought) was anticompetitive and harmed Europeans? Or, should the European Commission have deferred to the US when it withdrew its similar complaint against IBM-US at an advanced stage in the litigation? In *Microsoft*, should Europe and Korea have deferred to the US even though they determined that conduct subsequent to the subject of the US *Microsoft* case was anticompetitive and harmful to their citizens? Or should the US defer to the decisions by other jurisdictions when they were the first to examine certain conduct?

8 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

9 Long tail policies allow recovery whenever the harm occurs if the covered act occurs within the period of the policy.

10 The UK law affirmatively recognised the autonomy of the re-insurers by handing over the reins of (self) regulation to the industry. See Eleanor Fox, "National Law, Global Markets, and Hartford: Eyes Wide Shut," 68 *Antitrust L.J.* 73 (2000).

they had done was lawful where they did it and that the UK legislation filled the field. They and their government asked the US court to refrain from exercising jurisdiction on grounds of comity. The court declined. Dismissal would have meant: go ahead and boycott our firms, and we will expect similar treatment from you when our ox is going.¹¹

“Comity” sounds good and does little work. Through all the years, from the famous *Timberlane* case¹² to the present,¹³ not one US court has ever found that the interest of another nation outweighed the interest of the US in cases in which the US had an antitrust interest at stake.¹⁴

In view of the enormous naturally occurring convergence of the law and policy of nations toward common competition norms, the important question is not: when should one country defer to the (inconsistent) interests of other nations? The important question is: how can the antitrust jurisdictions of the world work together to maximise a shared interest in competitive markets, to the benefit of consumers and robust business?¹⁵

In the absence of law that is as broad as the affected market, a wise regime would stretch its law, conceptually, to embrace the whole affected market; thus, approximating world welfare.¹⁶ Methodologies would allow authorities and courts to take account of antitrust harms beyond the nation's borders. Authorities would be empowered to share sufficient data so that less well-situated nations could effectively protect themselves from antitrust harms. The national law governing jurisdiction and remedies would be broadened so that, for example, national authorities in a jurisdiction with the largest consumer market would provide a forum in which smaller affected nations could be heard and their legitimate concerns satisfied, as proposed below.¹⁷

In sum, the comity concept is horizontal — nation-to-nation. The more fitting paradigm for the new century is overarching, global, and spiral. National antitrust would operate in the shadow of the true market.

EXTRATERRITORIALITY AND THE BOUNDS OF JURISDICTION

Consistent with international law, nations have broad jurisdiction to prescribe regulatory rules. In essence, according to the US Restatement (Third) of the Foreign Relations Law

of the United States, nations may write rules that catch transactions and actors beyond their borders as long as the regulating nation's goal is to protect its own non-parochial interests, such as domestic consumer interests, and does so in a proportional way. Jurisdiction is then limited in two respects, according to the Restatement: (1) where a command of the actor's nation directly conflicts with the requirements of the regulating nation; and (2) where assertion of jurisdiction is unreasonable, in view of all the interests, contacts, and regulations. In the realm of antitrust, these limits put very little constraint on a nation's permissible jurisdiction to prescribe, and properly so. The same transaction or conduct frequently has effects in many nations of a sort that antitrust law typically condemns. Indeed, in contrast to the 1940s at the time of the *Alcoa* case,¹⁸ it is now well recognised among antitrust authorities worldwide that no nation “owns” a merger, and that it is fair game for any jurisdiction whose consumers are likely to be significantly adversely affected to examine an off-shore merger and to enjoin or condition it.¹⁹ *A fortiori*, antitrust authorities of the world recognise the legitimacy and even the imperative of pursuing off-shore and world cartels that hurt their citizens.

11 There was a quite different articulation of the story by the defendants, but the case was decided on the face of the complaint.

12 *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). *Timberlane* was the parent of the US antitrust comity “doctrine.” In *Timberlane*, as it turned out after years of litigation on jurisdiction and comity, plaintiffs were at most deprived of a trickle of exports to the US and the conspiracy in Honduras could not have harmed US competition. 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F. 2d 1378 (9th Cir. 1984), cert. denied, 472 U.S. 1032 (1985). This is one of the very few cases dismissed for lack of jurisdiction.

13 *Hartford Fire*, *supra* note 8, hinted at the unhelpfulness if not irrelevance of comity where offshore action is intended to affect and significantly affects the regulating nation. *But see Empagran S.A. v. F. Hoffmann-LaRoche, Ltd. (Empagran)*, 542 U.S. 155 (2004), using principles of comity in the interpretation of a statute.

14 See Eleanor Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is Reasonableness the Answer?*, 19 NYU J. Int'l L. & Pol. 565 (1987). The antitrust agencies are better placed than courts to take account of (non-nationalistic) interests of other nations, as well as to take account of other agencies' or courts' analyses of the same issues, and they try to do so. See Fox, Eleanor. “The European Court's Judgment in *GE/Honeywell* – Not a Poster Child for Comity or Convergence,” *ANTITRUST*, Spring 2006.

15 This effort includes protecting against over regulatory outcomes, while giving room to competing perspectives. Over regulation also harms efficiency and consumers.

16 See Fox, Eleanor and Janusz Ordovery, “The Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action,” 19 *World Competition L. & Econ. Rev.* 5 (December 1995).

17 See note 36 *infra*.

18 *Supra* note 1.

19 See *Gencor Ltd. v. Commission Case IV/M 619*, Commission Decision of 24 April 1996, O.J. L 11/30 (1997) and *Institut Mérieux S.A.*, Docket No. C-3301, 1990 FTC LEXIS 291 (FTC consent order, Aug. 23, 1990).

Of course, nations need not exercise their prescriptive powers to the full. In the famous *Empagran* case (vitamins cartel),²⁰ the US Supreme Court determined that Congress meant to exclude from the Sherman Act private damage suits by victims who bought the price-fixed good abroad from a world cartel unless plaintiffs were harmed by the cartel's anticompetitive effect in the US.²¹ If nations choose, they can require their nationals not to harm foreigners abroad by conduct that is illegal at home. They generally do not choose to do so.²²

For the major nations,²³ legal limits on jurisdiction to prescribe are not a hindrance to an effective antitrust world order. National legislators, however, predictably limit their countries' laws to what they see as good for them (in the short term).²⁴ Thus, national antitrust laws normally exclude export cartels from their laws' reach.

A WORLD REGIME?

Thus far, we have spoken of contemporary times. Few fora are devoted to "world antitrust" in contemporary times. But, not long ago, the subject held centre stage in conversation on the future of antitrust.

The 1990s was the decade of reflection and debate about a world competition regime. The idea was generated principally by the EU, whose officials understand, probably more than others, the cosmopolitan virtues of "community," including the juncture of free movement and free competition. In 1995, a European committee of Wise Men proposed an international competition system, with a home in the WTO.²⁵ The system would have started with building blocks of transparency, non-discrimination, and due process; cooperation; and assistance to developing economies. It would eventually have included a framework for substantive rules – against cartels, abuse of dominance, and the other commonly condemned restraints, as applied to cross-borders effects. It would have offered dispute resolution. The committee's concept was adopted in substantial part by the EU. After criticism especially from the US, the EU watered down its recommendations and proposed a modest form of international competition law that would have encompassed the first-stage building blocks of non-discrimination, due process, cooperation, and assistance. It would have incorporated only one substantive rule — a rule against hard-core cartels. It would have eliminated dispute resolution except for failure to fulfil clear obligations; e.g., failure to adopt a law against cartels. This more modest proposal was provisionally placed on the agenda of the WTO Doha Development trade round. The antitrust programme was, however, jettisoned from the trade agenda after failure of initial trade negotiations (on agricultural subsidies) at the Cancun meeting in 2003.²⁶ Developing countries were not

convinced that international competition rules would be good for them; WTO antitrust might be another Trojan horse, as many regarded the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).²⁷ The US was not convinced that international competition rules would hold any benefit that it could not achieve on its own, and feared that antitrust at the bargaining table would produce a watering down of good law and create an unaccountable bureaucracy.²⁸

Meanwhile, international cooperation was steadily improving, in part through the new, grass-roots-up ICN; and the threat of serious case-specific conflicts was alleviated by the organically occurring soft convergence. If there was a movement for a comprehensive higher-up law of competition in the 1990s and early 2000s, it seemed to have receded in the face of the networking wave of the "new world order"²⁹ informed as it has been by the spirit of the rule of subsidiarity: What can be done just as well or better at a lower level should be done at the lower level.³⁰

20 Note 13 *supra*. See Fox, Eleanor. "Extraterritoriality in the Age of Globalization; Conflict and Comity in the Age of *Empagran* ("*Empagran*")," *Antitrust Report* 3, Issue 4, 2005.

21 This is a tortured reading of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). See Fox, Eleanor. "Extraterritoriality and Input Cartels: Life in the Global Value Lane—The Collision Course with *Empagran* and How to Avert It," *CPI Antitrust Chronicle*, Jan. 2015. Moreover, courts have taken a narrow view of jurisdiction in a private damage action against foreign producers of an input that is sold abroad and assembled into a complete product that is sold into the US. *Id.*, regarding the liquid crystal display cartel. See *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014), amended by 775 F.3d 816 (7th Cir. 2015), cert. denied, - U.S. - (2015).

22 Ironically, freeing American businesses from legal constraints on their acts that hurt foreigners was the prime reason US Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which was interpreted to limit foreigners' rights under US law.

23 For the principal European case, see *Åhlström Osakeyhtiö v. Commission* (Wood pulp), Joined Cases C-89/85, 104/85, 114/85, 116-117/85 & 125-129/85, 1988 ECR 5193.

24 In the longer term, export cartels hurt the exporting country. See Fox & Ordovery, *supra* note 16.

25 Group of Experts' Report ("*Van Miert Report*") (1995). See European Commission, XXVIth Report on Competition Policy (1996), p. 95.

26 See Stiglitz, Joseph and Andrew Charlton, *Fair Trade For All: How Trade Can Promote Development*, Oxford, 2005. Chapter 1.

27 See, e.g., Trachtman, Joel. "Legal Aspects of a Poverty Agenda at the WTO: Trade Law and 'Global Apartheid,'" 6 *JIEL* 3 (2003); Reichman, Jerome. From Free Riders to Fair Followers: Global Competition Under the Trips Agreement, 29 *N.Y.U. J. Int'l L. & Pol.* 11 (1997).

28 See Klein, *supra* note 6. For a different explanation of the failure of an antitrust regime in the WTO, see Guzman, Andrew T. "Global Governance and the WTO," 45 *Harv. Int'l L.J.* 303 (2004), and Bradford, Anu. International Antitrust Negotiations and the False Hope of the WTO, 48 *Harv. Int'l L.J.* 383 (2007) (arguing that agreement has been frustrated by lack of flexibility and vision in pursuing cross-issue regulatory bargains and by other collective action problems).

29 See Slaughter, Anne-Marie. *A New World Order*, Princeton, 2004

30 See The Treaty of Rome Establishing the Economic Community, Article 5.

WHERE TO GO FROM HERE

It seems clear that cooperation has worked to lessen tensions and to produce more coherence, and it should be continued and deepened. Cooperation, along with intensive cross-fertilization, has alleviated conflicts and has helped to construct a more nearly seamless world. Merger enforcement has improved. Cartel enforcement has improved. For developing countries, cooperation has helped to transfer useful knowledge, and, anchoring agencies in the culture of competition, it has helped agencies stave off protectionism, parochialism, and excessive regulation.³¹

Still, big tasks remain. Cooperation and soft convergence solve only some of the major antitrust problems of the world.

In contemplating problems and solutions, we have been enlightened by the conversations of the last three decades: the contemplation of the need for international antitrust; the debate regarding models; the failure to embrace the antitrust measures on the Doha agenda; the birth and blossoming of the ICN, which itself has spurred heightened performance of the OECD and the UNCTAD; the surge and appreciation of networking; and the imprint of the subsidiary principle.

I have listed below nine problems, some overlapping, and I ask in each case what can be solved on a horizontal (national or nation-to-nation) level, and what remains to be resolved through higher law or modalities.

THE PROBLEM OF GAPS

In important respects, the laws stop at the nations' shores, and they are riddled with exemptions and non-coverage, often in response to vested interests. The biggest, most obvious gap involves export cartels and world cartels particularly impacting outsiders. In part, this gap persists because of the practical disenfranchisement of victim jurisdictions that lack resources and information and are vulnerable.³² The second biggest, most obvious gap is anticompetitive state action or involvement, including state blessing of cartels and monopolistic abuses that predominantly or significantly hurt foreigners. This gap persists because of the still Westphalian deference to the state as sovereign.³³

Solutions may need to come at a higher level, for the same reason that nations fail to muster the constituencies

necessary to eliminate quotas and reduce tariffs without reciprocal agreements with trading partners. The agreement called for is a "flanking" agreement to perfect nations' promises, already in the WTO, not to sponsor or encourage import or export cartels.³⁴

Other efforts can come at a grass-roots level. The OECD Hard Core cartel recommendation³⁵ urges signatory nations to re-examine periodically their exemptions from a "no cartel" rule and to eliminate unnecessary exemptions. This process is vital to world competition in matters affecting trade and investment. The beginnings of a framework for a multinational agreement can be built ground up, starting with guidelines, principles or best practices; possibly in the OECD or the ICN if the ICN should expand its purview from "antitrust all the time."

THE PROBLEM OF OVERLAPS

A number of jurisdictions' antitrust laws may apply to the same conduct or transactions, and treatment may be inconsistent, conflicting, or over regulatory; remedies may be pile-up remedies.

In addressing overlap problems, the antitrust authorities of the world have made much progress through informal cooperation, with and without bi-lateral agreements. A very high level of cooperation and coordination has been attained, within limits of confidentiality obligations that prevent the sharing of information. The high levels of cooperation are visible in vetting transnational mergers and investigating cartels. Still, occasionally, outcomes in jurisdictions differ, because of differences in legal principles, different appreciation of the appropriate application of the same legal principles, or different factual contexts.

A higher level solution is generally not needed. An intensified level of cross-border communications by officials engaging with the particular facts of the particular case is normally the best solution. Over-regulatory pile-

31 The norm against protectionism and parochialism is deeply engrained in competition policy and advocacy by antitrust enforcers, even if not embraced by politicians. For the point of view of the European Competition Directorate, see Kroes, Neelie. Industrial Policy and Competition Law and Policy, chapter 10 in 2006 Fordham Competition Law Institute (B. Hawk ed. 2009).

32 Otherwise, effects jurisdiction tends to fill the gap.

33 The concept of the Westphalian state reverts to the Peace of Westphalia of 1648, signifying the tight and strong notion of the sovereignty of the state. This has sometimes been referred to as the "billiard ball" theory of the state. I use the concept here in contrast with the porous state, involving pooled and shared competencies to solve problems that transcend borders.

34 Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 154, 159.

on remedies can be avoided by a second jurisdiction's seriously regarding the remedies ordered by a first jurisdiction and attempting to make its remedies consistent and not duplicative.³⁶ Such an obligation of sympathetic consideration could be written into cooperation agreements and could also be developed as an international best practice in the context of the ICN.

There remains to be developed a principle for bridging ad hoc conflicts, such as those that occurred in the merger cases of *Boeing/McDonnell Douglas*³⁷ and *GE/Honeywell*.³⁸ The ICN is an ideal forum for working out a recommended or best practice. For example, where a second jurisdiction anticipates taking a course of action that conflicts with a first jurisdiction, a consensus principle might require that the second jurisdiction sympathetically consider the analysis, reasoning, and remedies of the first jurisdiction and exercise restraint in condemning an approved transaction or unduly burdening a conditioned transaction, with a view to enhancing the economic welfare in the world.

THE PROBLEM OF MYOPIC OR BOUNDED CONCERN, OR DISREGARD

Nations deal with their problems. They are normally indifferent to harms abroad launched by their firms. They feel free to ignore negative externalities abroad. This is the "not my problem" problem: Let the victim nation protect itself, and if it does not have the resources or practical power to induce outsiders to obey the law, so be it.

This problem is integral with the problem of gaps, treated above. Indeed, it provides one explanation for gaps. The cartel externality problem has a natural home in the WTO, as discussed above. As for mergers and monopolies — to the extent they have effects at home as well as abroad — the problems are more likely to evidence themselves as overlaps, and to this extent, are amenable to a horizontal solution. But, this is not always the case. The big cement merger now being consummated (Holcim/Lafarge) principally hurts small developing economies; and mergers, agreements, and conduct may create buying power that hurts poor commodity producers (e.g. of cocoa beans), while the developed world is oblivious.

THE PROBLEM OF PAROCHIALISM: "HAPPY TO HURT YOU AND AGGRANDISE ME"

Parochialism and vested interest lobbies provide another reason for gaps and selfish concern. Parochialism, when it exists, adds invidiousness to the restraint and underscores the importance of a common solution. Parochialism could, for example, be identified and condemned by an ICN principle. Indeed, discrimination based on nationality is already condemned by ICN merger principles.³⁹

THE PROBLEM OF LACK OF "VISION FROM THE TOP"

In many cases, problems are truly global and integral. This is the case, for example, for transnational mergers where markets transcend borders. Productive efficiencies at home may not enure to consumers or the market at large.

A make-do solution could come at a horizontal level. The solution requires flexibility of law and remedies beyond state bounds. For example, as suggested by the US advisory committee, the IGAD Climate Prediction and Applications Centre (ICPAC), the forum having the most contacts might take on the project of analysing the whole merger, its benefits, and its harms, wherever they fall. It might host interventions by other complaining jurisdictions and grant relief copious enough to cure problems worldwide as if the world were in its nation.⁴⁰ Best or recommended practices could be worked out in the ICN. The necessary flexible extension of law and process would need to be legislated by national legislators — not an easy task under today's norms; but, norms might change if one is forced to confront the fact that the alternative is either disarray or centralized international antitrust.

THE PROBLEM OF "ANTITRUST AS AN ISLAND," ISOLATED FROM THE MAINLAND OF POLITICAL ECONOMY

Antitrust is not an island unto itself. It is deeply interrelated with trade; foreign investment; the free movement of goods, services, and capital; the law of intellectual property; sectoral regulation; and the wide variety of proposed and actual industrial policies.

This is a problem in search of articulation, as witnessed by the coming of age of antitrust in China;⁴¹ the pressures on antitrust in the wake of the financial crisis;⁴² the voices of

36 | See ICPAC Report 76-78.

37 | *Boeing/McDonnell Douglas*, Case IV 877, 1997 O.J. (L336) 16 (8 Dec. 1997).

38 | *General Electric Co v. Commission*, Case T-210/01, [2005] ECR II-5575.

39 | See www.internationalcompetitionnetwork.org. Go to Working Groups, Mergers, Recommended Practices.

40 | ICPAC Report, *supra* note 3, 76-78.

41 | China's merger enforcement is particularly aggressive when it sees national or strategic interests at stake. See, e.g., Martina, Michael. "Insight: Flexing antitrust muscle, China is a new merger hurdle," *Reuters*, 2 May 2013.

42 | See Lewis, David. *Chilling Competition*, in *International Antitrust Law & Policy*, 2008 FORDHAM COMP. L. INST. (B.Hawk ed. 2009)

the developing countries in the negotiations at the Doha trade round (distribution and equity matter); and the United Nations (UN) project to alleviate poverty and promote inclusive sustainable development.⁴³

There is room for constructive work and debate on appropriate and inappropriate industrial policy. Because the debate sits on charged territory, serious debate is often suppressed. Work should be done at the WTO to narrow the bounds of permissible antidumping laws and subsidies in view of their distortion of international trade and particular harm to developing countries. Work should also be done at a horizontal networking level, perhaps at the ICN. To begin, a working group can ask, in the context of financial crisis: what general principles define protective measures that may be helpful to a nation and those measures unlikely to be helpful? What national measures are likely to be helpful to world welfare, and how can they be coordinated to that end; which are harmful to world welfare and how could and should they be discouraged?

THE PROBLEM OF INVENTING 130 WHEELS WHEN ONE WILL DO (BETTER)

This is the problem of unnecessary and costly duplication. An example is premerger notification. Some 80 jurisdictions require premerger notification, filing and waiting to complete covered mergers. Large multinational mergers must normally comply with the rules and processes of each.

The ICN has addressed this problem. It has adopted recommended practices concerning, for example, the earliest date on which filing is permitted, so that firms can coordinate their filings and the required nexus with the jurisdiction, so that nations do not reach out unduly to grasp and tax mergers that threaten them no harm. More work needs to be done. There is a need for a common clearing house option for merger filings, so that one document filed in one place can provide all the necessary preliminary information.⁴⁴ This can be done horizontally — by agreement among the jurisdictions. The ICN can be the forum for working out the details.

THE SPECIAL PROBLEMS OF DEVELOPING AND TRANSITIONAL COUNTRIES

The special problems are three fold. First, developing countries and emerging regimes are often unable to protect themselves from offshore acts and transactions that harm them. They do not have the resources, information, and practical power. Therefore, they are especially vulnerable; even though many are on a fast upward learning curve and deserve to be commended and admired. Second, the substantive rules of law most suitable for them are often

different from the rules of law most suitable for developed economies with well-functioning markets, little statism, qualitatively less corruption, mature antitrust systems, and large expert staffs; yet, when international standards are formulated, they commonly replicate those of the developed countries.⁴⁵ Third, and related to both points above, the developing countries and emerging antitrust jurisdictions need help; they need a transfer of knowledge and knowhow useful to their own contexts.

The third problem identified above is best handled on a horizontal level and is under control, although still in need of more thinking and action. Technical assistance is delivered generally by more developed countries to less developed ones. The EU, Germany, South Africa, Italy, the US, other nations, and groups working with donors, such as International Development Research Centre, have been generous providers of technical assistance. Peer reviews by the OECD and the UNCTAD have been extremely helpful. A working group of the ICN arranges for informal exchange of advice, pairing givers and receivers, who conduct their work through telephone and the Internet.⁴⁶ All these projects and arrangements can be deepened. On-the-ground technical assistance can be better coordinated. The problem of home-country bias in advice-giving can be addressed through awareness and consciousness raising, but not through higher law.

The first problem — vulnerability — has been treated in part above. If altruism will not move national policy, a better appreciation of the local good as a function of the common good might help.⁴⁷ The better situated nations could use their national legislative powers to require their nationals to account for all harms they cause by consensus violations (e.g., hard-core cartels),⁴⁸ and at least to expand their rules

⁴³ See The Growth Report, Strategies for Sustained Growth and Inclusive Development, Michael Spence, chair (2008), available at <http://www.growthcommission.org>; United Nations Summit to adopt the post-2015 development agenda, 25 Sept. 2015, <https://sustainabledevelopment.un.org/?page=view&nr=1064&type=13&menu=1634>.

⁴⁴ See ICPAC Report, page 97, note 24, for a proposal by Eleanor Fox as well as an explanation of the hurdles to achieving such a system.

⁴⁵ See Fox, Eleanor, "Linked-In: Antitrust and the Virtues of a Virtual Network," supra note 5; Sokol, Daniel. "Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age," 4 Berkeley Bus. L.J. 37 (2007).

⁴⁶ See www.internationalcompetitionnetwork.org. Go to Working Groups, Advocacy & Implementation, Network Support Program.

⁴⁷ In matters of world cartels, for example, the international good is the local good. See E. Fox and J. Ordober, The Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action, 19 World Competition L. & Econ. Rev. 5 (December 1995).

⁴⁸ Progress has been made in other fields. An example is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. March 22, 1989, 1673 U.N.T.S. 125. The Basel Convention provides that any state that is party to the convention may prohibit import of hazardous wastes. The other parties to the agreement are then required to prohibit the export of hazardous wastes to the prohibiting country. Export cartels are the hazardous wastes of exporting countries.

of discovery, so that violators within their borders and the evidentiary trails they leave can be explored at the scene of the wrongful acts.

The vulnerability problem means that developing countries with poor legal systems are not only unlikely to deter incoming cartels, but also are unlikely to provide a system that will compensate their citizens, even while victims abroad get considerable recoveries. This is both unfair and inefficient. The US has stepped back from the plate by its holding in *Empagran*,⁴⁹ and other countries are not likely to come to their aid.⁵⁰ This means either the developing countries must accelerate their economic and institutional progress and capability in some substantial way to help themselves — perhaps through regional free-trade groupings, which can give them critical mass (but this is a slow and uncertain process), or a world or transnational system or resource must be developed, or the problem will remain unattended. For example, a specialised group might be charged with analysing data on proven cartels, such as the vitamins, lysine, or air fuel; with identifying who was over charged by how much; and with administering a fund for pay-outs.⁵¹

THE PROBLEM OF DIFFERENTIAL LAW

The remaining problem is the problem of differential law and the likelihood that developed countries' law will be the international standard even when it is not the best standard for developing countries, both because developed countries have the expertise and power to "sell" their standard and because developing countries may not have the expert staffs and advisors to develop and successfully advocate the standards that are best for them, even as a dual-track alternative.⁵² This problem can be partially addressed by regional groupings, by more learning, and by greater awareness. In any event, it is a problem suitable for horizontal solution. It cannot be solved, and indeed could be undermined, by a detailed version of top-down antitrust.

CONCLUSION

The lack of traction thus far of world antitrust in the WTO, the rise of networking, and the common sense attraction of subsidiarity have focused our thinking on lower-level solutions to world problems. Today, we are searching for horizontal solutions.⁵³ We are less hopeful and less trustful that comprehensive higher law will solve real problems. At the same time, our intellectual travels over the past two decades have helped to identify the situations in which only higher-level solutions will do. Problems that may be fully resistant to lower-level solutions are outward-oriented harm (export/world cartels) and the trade-restrictive state action that supports it. For this problem, we need flanking principles in the WTO. Other desirable multilateral solutions, such as a common clearing house option for merger filings, multilateralisation of cooperation agreements, and a centre for data analysis of identified world cartels, can be addressed at the networking level. At least, the development of models can begin at the grass-roots level. The idea of a Doha Dome over a roots-up garden⁵⁴ was a good idea in 2003 and is a good idea today (despite the virtual failure of the Doha trade round). The roots and their offshoots could grow under a common canopy of open and free competition not distorted by cronyism, parochialism, and artificial borders. The dome is sure to be no more concrete than a virtual roof over our heads. It can guide us toward a coherent framework. It cannot protect us from the rain and sleet; but it probably never would have done so, even in the headier days of the vision of one-world antitrust in the WTO.

49 | See *supra* n. 13.

50 | See, however, Case No. 3622 (C2227), *Fiattimpresit-Mannesmann Demag-Techint/Italimpianti*, Bolletino della Autorita Garante della Concorrenza e del Mercato, Mar. 4, 1996 (Italian Antitrust Auth. Feb 15, 1996), granting relief likely to help the country (China) that would suffer the anticompetitive effect of the merger.

51 | This idea was suggested to me by my student, Laura Collins, N.Y.U. Law, J.D. class of 2010.

52 | See note 5 *supra*. Differential "best practices" may be indicated in connection with state restraints, exclusionary conduct, and buyer power restraints. They may be reflected in laws of jurisdictions that need less highly technical and more administrable rules of law.

53 | A number of horizontal solutions were proposed by the ICPAC Report. Some of these have been referred to herein. For a more complete account, see Appendix A.

54 | See Fox, Eleanor. "International Antitrust and the Doha Dome," 43 Va. J. Int'l 911 (2003). The "Doha Dome" was the skeletal framework suggested by the Doha trade agenda: non-discrimination, due process, cooperation, assistance, and an obligation of nations to adopt and maintain a rule against cartels. See text at notes 25-26 *supra*.

APPENDIX: A

Selected recommendations of the International Competition Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (2000)

Excerpt from Testimony of ELEANOR M. FOX before the Antitrust Modernization Commission Hearing on International Issues Washington, D.C. February 15, 2006

available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Fox_final.pdf

The ICPAC Report makes many recommendations on methodologies to enhance cooperation and eliminate unnecessary conflict in the case of international mergers and international cartels. I refer the Commission in particular to Chapter 2 (Mergers: Facilitating substantive convergence and minimizing conflict), Chapter 4 (Cartels: Interagency cooperation), and Chapter 5, third subsection (Positive comity).

ICPAC took a cosmopolitan approach. It recommended, among other things, expanding bilateral cooperation, including cooperation with newer competition systems⁵⁵ and it recommended including on a discussion agenda multilateralization of inter-jurisdictional cooperation.⁵⁶

ICPAC emphasized multi-jurisdictional work-sharing in merger review:

"The Advisory Committee views the creation of a nearly seamless multijurisdictional merger review system as the ultimate goal of all of these efforts toward expanded cooperation and coordination."⁵⁷

Cooperation at the merger remedy stage was singled out for its importance. ICPAC suggested:

In some cases it may be feasible to have only *one jurisdiction negotiate remedies with the merging parties that will address the concerns of both that jurisdiction and other interested jurisdictions*. In other words, the reviewing jurisdictions would identify the remedies necessary to address their competitive concerns, and the jurisdiction best positioned to negotiate and obtain the desired remedies would do so. An approach of this kind, for example, was successfully employed by the United States and the EU in the Halliburton/Dresser transaction. There, rather than negotiating separate undertakings with the merging parties, the EC relied on the provisions of a U.S. consent decree to satisfy its concerns regarding a perceived global problem in drilling fluids.⁵⁸

ICPAC also underlined the importance of work-sharing at the review stage. It said:

In appropriate cases, it may be beneficial to limit the number of jurisdictions conducting independent second-stage reviews of a proposed transaction. Where the concerns of one country are likely to be the same as and subsumed by the concerns of a more distinctly affected investigating jurisdiction, it may be appropriate for the first country to refrain from independent investigation.

* * *

One way to safeguard against the possibility that the proceeding agency may reach a different result on the merits or a remedy different from the one the other jurisdictions might have reached, while at the same time gaining efficiency in the process and other potential benefits is to ensure sufficient participation in the process by the other jurisdictions. One jurisdiction could coordinate the investigation of a proposed transaction, take into account the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested jurisdictions.⁵⁹

ICPAC considered yet more advanced work-sharing as a vision for the future. It described this as follows:

The Advisory Committee also considered whether an even higher level of work sharing might be possible after more procedural and substantive convergence among merger review regimes has occurred. At this advanced level of work sharing, the coordinating agency would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would endeavor to evaluate procompetitive and anticompetitive effects of a proposed transaction on a global scale, taking into account all of the merger's costs and benefits to competition, not only the net effects

⁵⁵ ICPAC Report, p. 200.

⁵⁶ *Id.*, p. 284.

⁵⁷ *Id.*, p. 76.

⁵⁸ *Id.*, p. 77, noting use of this approach also in Federal Mogul/T&N.

⁵⁹ *Id.*, pp. 78, 80 (footnote omitted). The Report continues: Under this advanced work-sharing arrangement, the coordinating agency would perform a centralized information gathering function following initial notification by the merging parties to all reviewing agencies. The coordinating agency would then assess the competitive effects of the proposed transaction in all relevant product and geographic markets. Each interested jurisdiction would be invited to submit comments to the coordinating jurisdiction regarding its particular concerns. The assessment of the coordinating agency would be binding on the coordinating agency but could either serve as a recommendation to other interested jurisdictions (with a presumption in favor of accepting the recommendation) or be binding on those jurisdictions as well.

within its borders. This approach arguably is superior to an approach in which each jurisdiction analyzes the effects of a proposed transaction within its own borders and ignores the harms or the benefits that the transaction may generate elsewhere. Multimarket assessment would position the coordinating jurisdiction to account for what had previously been viewed as externalities, thereby enabling it to assess the net effects of the proposed transaction (under a neutral welfare standard) on a global scale. The coordinating jurisdiction could then design remedies to address the concerns of all interested jurisdictions.⁶⁰

For my own part, as a member of ICPAC, I suggested two further initiatives; one to put a check on over regulation, and one to provide a path to resolve system clashes. I quote below from the relevant portion of my Separate Statement.⁶¹

Over regulation: Globalization has put pressure on our system in which the laws of numerous nations apply to the same conduct or transaction. The pressure comes especially at the point at which competition law is regulatory rather than liberalizing; paradigmatically, premerger notification filing-and-waiting regimes. In this area, sound regulation requires coordination, and modes adopted by the European Union for its internal market are often instructive. I would go further than the Advisory Committee to propose an opportunity for mutual recognition of premerger notification filings when the market of a would-be regulating nation is subsumed by the broader global market.⁶²

System clashes: We must find international solutions for systems clashes, probably with international dispute resolution. Actual cases provide helpful laboratories. Boeing's acquisition of McDonnell Douglas - which the U.S. cleared and the EU threatened to enjoin [and which nearly erupted into a trade war] - is such a case. . . .

There are various possible agreements that nations might consider that would keep an international merger on track as a competition case and prevent diversion into a trade war. The Advisory Committee has proposed several progressive measures, on the order of transparency.

I believe that we must move further, in view of the need for a world view and in view of the fact that conflict will otherwise always be resolved in favor of the nation that imposes the most aggressive remedies. In the absence of international rules and dispute resolution, we may eventually find it necessary to give the nation at the centre of gravity a trumping right to enjoin or allow the merger (while other interested nations might retain the right to implement more modest, tightly tailored relief). But if any nation is, legitimately, to wear the mantle of *parens patriae* for the world, it would be obliged to count all costs of the merger, even those outside of its borders, as if they fell within its borders.⁶³ Indeed, we may reach the point — not just in merger law — at which counting all costs is an important obligation of all competition authorities vetting international transactions.

If national authorities do not broaden their perspectives to count all costs of conduct or transactions by their firms, we will probably move to international antitrust sooner rather than later, for these problems are world problems.⁶⁴

Finally, as reflected above, many potential clashes can be diffused. The best way to diffuse them is not to decree comity or convergence but to solidify norms of talking, listening, reasoning and engaging. When authorities appear to be reaching different evaluations, e.g., of whether a multinational merger is anticompetitive, the authorities should explore and then pin-point for one another exactly where their differences lie, identifying inferences, presumptions, premises, and critical evidence. By that means, they may be able to resolve differences. If not, they should be able to understand the basis of divergence.

60 | *Id.*, p. 81.

61 | Separate Statement of Eleanor M. Fox, ICPAC Report, Annex 1-A.

62 | I spelled out my proposal for an opt-in clearing house system as follows at ICPAC Report, p. 97, Chap. 3, footnote 24: Advisory Committee Member Eleanor M. Fox suggests another approach to facilitate efficient coordination of filings and reduce the burden on parties of multiple notifications. She proposes a common clearinghouse for premerger notification by firms that elect to opt into such a system. One way to achieve this would be to permit the merging parties to file with a disinterested clearinghouse on the day of the first filing. Alternatively, if the first filing is in a mature antitrust jurisdiction and covers international markets where all or most of the impacts would occur, all interested nations would be bound to accept the first filing as their first and basic information about the merger. The notified centre or jurisdiction would announce the filing to member nations (or to interested or potentially interested nations). The recipient agencies would be bound to use the information only for merger review. Any country receiving the announcement that believes its system requires notification of the transaction could request a copy of the notification. A copy of this request would go to the merging parties who could contest the jurisdiction of a requesting country before the filing is sent to that country.

63 | My Separate Statement cross-references to the ICPAC Report, p. 64, Chap. 2, footnote 72, which reads as follows: Advisory Committee Member Eleanor M. Fox calls attention to the problem of clashes where one nation decides that a merger is anticompetitive and should be enjoined and another nation decides that a merger is procompetitive and should be allowed. In the absence of formal protocols for resolving the clash, the more restrictive nation always prevails. This member suggests that development of rules of priority in deciding to enjoin or not to enjoin and international merger may be needed. To be entitled to exercise such right of priority, however, the privileged jurisdiction would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would be obliged to count not only the net benefits within its borders, but all of the merger's costs and benefits to competition (under whatever neutral framework for analysis it applies). See Eleanor M. Fox, Extraterritoriality and Merger Law: Can All Nations Rule the World? Antitrust Report 2, Dec. 1999.

64 | [Footnote 7 in Separate Statement of Eleanor M. Fox:] One appropriate "higher" solution would provide for international dispute resolution. The panel would begin to resolve the dispute by choice of law based on centre of gravity. Thus, in Boeing/McDonnell Douglas, the panel would apply the U.S. rule to the true market.

I propose that the AMC consider recommending that the following three norms be adopted by competition authorities and, where appropriate, commissions and courts. The norms could be adopted in the context of ICN.

- (1) In matters involving cross-border spill-overs, competition authorities and courts should be sensitive to the perspectives of other enforcing nations that have ruled on or are addressing substantially the same problem. Where consistent with their law and goals, they should sympathetically consider integrating other nations' perspectives or relevant acts into their own thinking and analysis.
- (2) They should recognize existing relief decreed by another jurisdiction as contextual background, and strive to avoid unnecessary regulation.
- (3) In the event that a second nation takes jurisdiction over conduct or structure roughly within pronouncements of a jurisdiction that proceeds first, the decision-maker should write a reasoned opinion that engages with the first nation's perspective. By attentive and engaged process, some divergent outcomes may be avoided, and others legitimized.

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