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# Substance, Procedure, and Institutions in the International Harmonization of Competition Policy

Daniel A. Crane\*

Many people who pay attention to the rapid development of antitrust regimes across the globe hold two tenets in common. First, most of the relevant stakeholders would benefit if competition policy could be harmonized interjurisdictionally.<sup>1</sup> Second, and alas, this beneficial harmonization is unlikely to happen on a significant scale in the foreseeable future.<sup>2</sup> To many, antitrust harmonization is thus a noble but utopian aspiration.

I generally share both the former sentiment and the latter lament but both are far too general to be of much use without further specification. Uniformity of competition policy is valuable to be sure, but not all facets of harmonization are created equal. Some aspects of competition policy are in much greater need of harmonization than others. Also, there is good harmonization and bad harmonization. We are almost certainly better off with a system of antitrust heterogeneity with “better” and “worse” systems than we would be with a uniformly “bad” antitrust system—say, a worldwide regime of small-business protectionism.

Against this backdrop, I aim to do three things in this essay. First, I identify areas where harmonization should be a priority and areas where harmonization is less important. Second, I articulate the preconditions necessary for meaningful harmonization. Finally, I discuss the feedback loops that can occur between three different aspects of harmonization—substance, procedure, and institutions—and suggest an incremental path forward.

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<sup>1</sup> See, for example, Andrew T. Guzman, *The Case for International Antitrust*, in Richard A. Epstein and Michael S. Greve, eds, *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* 99, 109–10 (AEI 2004).

<sup>2</sup> See, for example, Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 Va J Intl L 911, 930–31 (2003).

## I. HARMONIZATION PRIORITIES

What does the world gain from international antitrust harmonization? In part, the answer depends on the exact problem that harmonization would supposedly remedy. Harmonizationists cite many different potential benefits from increased international homogenization of antitrust norms. Some are more compelling than others, and sorting through them is necessary in order to prioritize the difficult tasks ahead.

### A. LESS COMPELLING JUSTIFICATIONS FOR HARMONIZATION

Some justifications advanced for multilateral antitrust harmonization that are not particularly compelling include eliminating discrimination against outsider firms, improving the average quality of antitrust norms, and eliminating export cartels. Of these, discrimination against foreign firms' access to domestic markets has received a good bit of attention. This is a real concern with many egregious illustrations, but it is not primarily an antitrust concern. Antitrust law tends to be concerned with the acquisition and exercise of market power, and trade barriers do not necessarily have anything to do with the acquisition of market power. For example, agricultural trade barriers often take place against a backdrop of intensely competitive local markets. Further, there are existing mechanisms under the General Agreement on Tariffs and Trade and the World Trade Organization ("WTO") to deal with trade barriers that do not rely on antitrust principles.

The problem of trade barriers does not end with tariffs; there are other ways to discriminate against foreign firms. A more subtle version of parochial discrimination occurs when a jurisdiction allows anticompetitive activity in a way that blocks foreign competitors from accessing the domestic market. A case in point is the Kodak-Fuji dispute over the distribution of consumer photographic film and paper distribution in Japan.<sup>3</sup> Japan effectively tolerated (and, indeed, encouraged) vertical exclusive dealing arrangements between manufacturers, wholesalers, and retailers that made it difficult for US firms like Kodak to access the Japanese market.

But, again, harmonization of international antitrust enforcement would not necessarily address this set of problems. Tolerance of anticompetitive agreements in cases like the Kodak photographic film and paper matter exacts a toll on domestic consumers and potential domestic entrants to the market as well. The burden on foreign firms is incidental to the fact that the domestic

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<sup>3</sup> See World Trade Organization, Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper* ¶¶ 10.378–10.382, WTO Doc No WT/DS44/R (Mar 31, 1998).

regime may have adopted a poor antitrust policy that also threatens its own producers and consumers. This is perhaps an example of “bad” antitrust law, but as noted in the introduction and again below, the arguable dearth of antitrust law in some jurisdictions is not a sufficient reason to agitate for harmonization.

A more serious international problem is beggar-thy-neighbor exaction of monopoly rents through the allowance of export cartels. The problem is familiar from US federalism cases, where the Supreme Court has allowed states to mandate cartel behavior by their domestic producers who were primarily exporting out of state.<sup>4</sup> From the short-run perspective of domestic political regimes, this is a perfectly rational strategy to increase the well-being of local producers without internalizing the costs of monopoly pricing. Though it is equally true that the world economy would gain if export cartels were prohibited, individual jurisdictions are not likely to follow this long-run strategy. Unlike in the previous Kodak example, the costs of the anticompetitive restraint are almost entirely exported from the enacting jurisdiction, which means that there is virtually no domestic political constraint against the adoption and perpetuation of the restraint.

What is not at all clear is that international harmonization of antitrust laws—or, at least, harmonization on a multilateral scale—is necessary to curb the harms of export cartels. Under the dominant “effects test” for antitrust jurisdiction, domestic authorities are competent to prosecute importers that have agreed to fix prices in the domestic market, even though the agreement was transacted in a foreign jurisdiction.<sup>5</sup> Further, since trading partners often carry a roughly equal balance of trade, there is no reason why bilateral trade agreements cannot prohibit export cartels between the signatories.<sup>6</sup> Curbing export cartels may seem like a good idea, but the current level of pressure for economic

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<sup>4</sup> See, for example, *Parker v Brown*, 317 US 341, 360–61 (1943) (holding that California raisin proration regulations that effectively kept the crop out of interstate commerce were still within a state’s power to regulate to preserve local well-being, since the regulation was imposed before interstate shipment). See also Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J L & Econ 23, 24–25 (1983) (acknowledging that federal antitrust laws cannot overcome all state regulation).

<sup>5</sup> See, for example, Paul B. Stephan, *Against International Cooperation*, in Epstein and Greve, eds, *Competition Laws in Conflict* 66, 82 (cited in note 1).

<sup>6</sup> Disappointingly, the North American Free Trade Agreement does not prohibit export cartels among the signatory nations and the US implementing legislation explicitly states that the treaty does not affect the legality of US export cartels. The North American Free Trade Agreement Implementation Act, Statement of Administrative Action, ch 15(B), 103rd Cong, 1st Sess (Nov 3, 1993) in HR Doc No 103-159, vol 1, 450, 623. See also Brendan Sweeney, *Export Cartels: Is There a Need for Global Rules?*, 10 J Intl Econ L 87, 104 (2007) (reporting that most bilateral trade agreements with competition provisions barely address export cartels).

efficiency does not translate into a strong imperative for multilateral antitrust harmonization.

One benefit of harmonization would come from the adoption of better substantive norms. Opponents of harmonization often point out that there is no reason to believe harmonization will lead to improved antitrust norms.<sup>7</sup> However, even supposing that antitrust harmonization increases the average quality of antitrust laws around the globe through the leveraging of best practices, experience, and learning, there is no distinctive reason why harmonization-as-quality-improvement should be more of a goal of antitrust than of any other mandatory regulatory subject.<sup>8</sup> Interjurisdictional sharing of norms may increase the average quality of domestic law, but this is not a sufficiently powerful reason to advocate the abandonment of national sovereignty or distinctiveness on antitrust matters.

## B. MORE COMPELLING REASONS FOR HARMONIZATION

A more compelling reason for antitrust harmonization is to alleviate the burden on international business operations caused by heterogeneous domestic antitrust norms. In order to determine what forms of antitrust harmonization yield the greatest benefits, one must view antitrust heterogeneity from the perspective of the multinational business corporation. In general, the costs of antitrust heterogeneity fall into two categories: (1) increased transactions costs arising from the need to comply with multiple jurisdictions' procedural requirements, and (2) conflicting domestic rules that do not easily mesh with corporations' legal structures or the technological design of the products they sell.

### 1. Complying With Inconsistent Procedural Requirements

The transactions costs of complying with multiple jurisdictions' procedural requirements arise mostly in the merger context. The costs can be further subdivided into two types. First, compliance with merger notification requirements is expensive. For example, one estimate (prepared in 1997 and therefore somewhat dated) suggests that the preparation of Hart-Scott-Rodino premerger notification in the US costs about \$25,000 for mergers that are not investigated and \$500,000 for mergers that are investigated, not including the

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<sup>7</sup> See, for example, Stephan, *Against International Cooperation* at 66 (cited in note 5).

<sup>8</sup> To be sure, the case for harmonization of mandatory regulatory regimes is stronger than for the harmonization of optional regulatory regimes—such as contract—where firms can choose from a menu of governing laws. In the latter case, there is essentially a market for good law, and weak regimes will tend to fail for want of business.

filing fee or indirect costs.<sup>9</sup> Over sixty jurisdictions have merger notification requirements,<sup>10</sup> and the idiosyncrasies of these various regimes require merging firms to retain local counsel and report different information for each jurisdiction covered by the merger. A good deal of waste could be eliminated through multilateral adoption of a centralized filing system.

A deeper problem is that the variance in merger notification requirements can delay or even kill beneficial mergers. Country-by-country variances in notification requirements are so great that putting together an international merger is becoming very dicey work.

Take, for example, the timing of notification. Some countries have premerger notification requirements; others have postmerger notification requirements. This means that sometimes the same stock acquisition must be notified to the competition authorities and reviewed before it closes in the US and Europe and only after it closes in Japan and Korea.<sup>11</sup> From the perspective of international business development, this is the worst of all possible worlds. A business might reasonably prefer a premerger notification requirement on the ground that this gives ex ante certainty or it might prefer a postmerger notification system on the grounds that this prevents delay in the closure of mergers, but no one would prefer a mixed system where the premerger regimes delay the transaction *and* where, even after closing, parties will have no assurance that their transaction will stand because the postmerger regimes are just getting started with their own review. A uniform interjurisdictional rule (premerger, in my opinion) would be far preferable.

## 2. Inconsistent Treatment of Corporate and Technological Structure

The second major cost of antitrust heterogeneity arises from the conflict between corporate business or technological structures and local norms. Consider the wide variety of business practices chosen by an international firm. Among other things, the firm must choose its corporate structure, develop its product, hire employees, select distribution methods, and enter into contracts with upstream suppliers and downstream customers. For the firm operating in many different jurisdictions, some of these practices can be fairly easily

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<sup>9</sup> See Joe Sims and Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 *Antitrust LJ* 865, 891–92 (1997).

<sup>10</sup> International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report* 89 (Feb 28, 2000), available online at <<http://www.usdoj.gov/atr/icpac/chapter3.pdf>> (last visited Apr 15, 2009).

<sup>11</sup> Country-by-country merger requirements are collected by the International Competition Network, available online at <[http://www.internationalcompetitionnetwork.org/media/archive0611/merger\\_templates](http://www.internationalcompetitionnetwork.org/media/archive0611/merger_templates)> (last visited Apr 15, 2009).

conformed to local requirements and some cannot. For example, complying with local labor requirements (such as minimum wage and employee benefit laws) may be somewhat expensive, but one country's idiosyncratic requirements do not affect the firm's ability to operate in other jurisdictions.

Antitrust law does not typically address labor relations, but it does often address vertical contracting with suppliers or customers. Antitrust regimes around the world have a variety of different—and often conflicting—norms with respect to such issues as exclusive dealing, franchisee rights, loyalty rebates, predatory pricing, and intellectual property licensing terms. While an international firm's general counsel may find it annoying to have to learn each country's idiosyncratic antitrust requirements and conform local contracting accordingly, there is relatively little spillover from one country to another. With some exceptions, a country can seal off the contagion of bad antitrust norms outside its borders because contracting is adaptable on a country-by-country basis.

The case is very different when it comes to corporate structure and technological design. When the EU blocked General Electric's acquisition of Honeywell, this meant that the merger could not be consummated in the US either (even though the US Department of Justice ("DOJ") had cleared the deal).<sup>12</sup> The EU thus made industrial policy not only for Europe, but also for the US.

There are two serious downsides to this sort of "everyone for himself" approach to merger policy. For one, it means that the significant economy with the most restrictive merger policy dictates industrial policy to the rest of the world.<sup>13</sup> Since there is no reason to believe that the lowest common denominator is usually the optimal outcome, a system that tends toward the lowest common denominator is likely to produce an unfortunate number of false positives—in other words, to disallow mergers that should be allowed.

But the problem is worse than that. Merger control is not just a "thumbs up, thumbs down" process. It frequently involves negotiation between competition authorities and the merging parties over divestiture packages and conduct remedies. Each competition authority has disproportionate leverage to exact concessions favorable to its own jurisdiction—for example, a promise not to close a domestic plant, a commitment to treat a local competitor with special

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<sup>12</sup> See Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, in Eleanor M. Fox and Daniel A. Crane, eds, *Antitrust Stories* 331, 338, 355 (Foundation 2007).

<sup>13</sup> I say significant economy because the merging parties might decide to cease doing business in any insignificant jurisdiction that tried to hold up the deal.

favor—because each authority has the power to hold up the entire merger.<sup>14</sup> In this sense, the international merger landscape raises the same kind of holdout problems that justify granting eminent domain powers to the government. An international merger regime that allowed a central authority to eliminate these collective-action obstacles to efficient mergers would improve the welfare of all countries and their consumers.

A semi-international example of a government's use of merger control to exact concessions occurred in 2001 when the Arkansas-based retailer Wal-Mart tried to acquire the Puerto Rican supermarket chain Supermercados Amigo.<sup>15</sup> The Federal Trade Commission ("FTC") resolved antitrust concerns by requiring a spin-off of four stores to an up-front buyer.<sup>16</sup> Nonetheless, the Puerto Rican Secretary of Justice, fearing "that Wal-Mart would shift its purchases away from local suppliers and that the merger would eliminate Puerto Rican jobs," sued in the Puerto Rican courts under the Puerto Rican Anti-Monopoly Act to enjoin the merger.<sup>17</sup> She then sought to settle by exacting promises that Wal-Mart would retain Supermercados Amigo's employees and continue purchasing from local suppliers.<sup>18</sup>

The Supermercados Amigo debacle is only quasi-international, because Puerto Rico is a partially autonomous US commonwealth subject to the constraints of the US Constitution. Wal-Mart was able to secure a federal district court injunction against the Justice Secretary's attempted exactions on the ground that they likely violated the "negative" or "dormant" commerce clause of the US Constitution, which generally prohibits a state (or a commonwealth) from discriminating against interstate commerce.<sup>19</sup> As antitrust jurisdictions

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<sup>14</sup> See, for example, Richard M. Brunell, *The Social Costs of Mergers: Restoring "Local Control" As a Factor in Merger Policy*, 85 NC L Rev 149, 192–93 n 158 (2006) (reporting that the Justice Department has taken local interests into account in deciding where to allocate bank divestitures from merger remedies). See also Bruce M. Owen, Book Review, *Imported Antitrust*, 21 Yale J Reg 441, 451 n 37 (2004), reviewing Michal S. Gal, *Competition Policy for Small Market Economies* (Harvard 2003).

<sup>15</sup> See *Wal-Mart Stores, Inc v Rodriguez*, 238 F Supp 2d 395, 403–14 (D Puerto Rico 2002), remanded with instructions to vacate and dismiss with prejudice 322 F3d 747, 750 (1st Cir 2003) (ordering the district court's order vacated without reconsidering its factual findings). The story of the Supermercados Amigo acquisition is told in Eleanor M. Fox, *An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints*, 75 Antitrust L J 173, 183–84 (2008).

<sup>16</sup> See *Wal-Mart Stores*, 238 F Supp 2d at 399 ("Wal-Mart came to an understanding of what the FTC's expectations were before they would free the transaction of antitrust concerns.").

<sup>17</sup> Fox, 75 Antitrust L J at 183 (cited in note 15).

<sup>18</sup> Id.

<sup>19</sup> *Wal-Mart Stores*, 238 F Supp 2d at 414–16, 422. Although the First Circuit eventually ordered the district court to vacate this injunction, it did so largely because both parties settled and filed a joint brief requesting vacatur. Accordingly, the First Circuit never reconsidered the merits of the injunction. See *Wal-Mart Stores*, 322 F3d at 749–50.



proliferate globally, however, it is not difficult to imagine many more such instances arising with no dormant commerce clause backstop. Further, the parochialism in Supermercados Amigo was easy to identify. In the future, well-schooled antitrust agencies may find more subtle ways to exact localist favors without triggering WTO scrutiny on discrimination grounds. Only slightly less problematic than heterogeneous treatment of corporate structure is heterogeneous treatment of a company's technology. When antitrust jurisdictions impose differing requirements on a firm's technological design, this can greatly increase the costs of selling a single product around the world, create artificial incompatibility, and chill technological innovation.

A ready example is the EU's insistence that Microsoft "unbundle" its PC operating system, Windows, and its media player.<sup>20</sup> The European Commission's ("EC") decision effectively required Microsoft to redesign its operating system for the European market, since Microsoft was permitted to continue to carry the "bundled" version of Windows in the rest of the world. In 2005, Microsoft complied with the EC's decision and began to make available "Windows XP Home Edition N," with the "N" conspicuously and clumsily—as if to make the point—standing for "not with Media Player." Although the European Court of First Instance eventually affirmed the Commission's decision,<sup>21</sup> "Edition N" proved highly unpopular with original equipment manufacturers serving the European market and very few installed it on their computers. Microsoft thus redesigned its operating system for the European market only to find no takers.

Another example is France's quixotic battle with Apple's iPod media player. Ostensibly to prevent music piracy, Apple's iTunes online music store embeds music download files with code that only allows iTunes songs to be played on iPods.<sup>22</sup> In 2004, Virgin Media accused Apple of abusing its dominance by linking its downloaded music with its MP3 player.<sup>23</sup> The French Competition Commission rejected the claim,<sup>24</sup> but France passed legislation in 2006 that would have required Apple to allow songs sold on iTunes to be played

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<sup>20</sup> See *Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft)*, C(2004)900 final at 300 (Commission of the European Communities Apr 21, 2004), available online at <<http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf>> (last visited Apr 15, 2009).

<sup>21</sup> *Microsoft Corp v Commission of the European Communities*, 5 CMLR 11, ¶¶ 1088–90, 1167 (Eur Ct First Instance 2007).

<sup>22</sup> See Deana Sobel, *A Bite out of Apple? iTunes, Interoperability, and France's Dadsvi Law*, 22 *Berkeley Tech L J* 267, 267–68 (2007).

<sup>23</sup> See Daryl Lim, *Beyond Microsoft: Intellectual Property, Peer Production and the Law's Concern with Market Dominance*, 18 *Fordham Intel Prop, Media, & Enter L J* 291, 317 (2008).

<sup>24</sup> *Id.*

on other MP3 players.<sup>25</sup> In response, Apple threatened to pull its iTunes service out of France altogether rather than create a different digital rights system for the French market.<sup>26</sup> France subsequently softened the legislation, thus seemingly mooting the controversy, but this kind of confrontation seems increasingly likely in a technologically interconnected world.

Technological heterogeneity is vexing enough when created by differences in extralegal factors including custom, culture, history, independent development, turf protection, and accident. International standardization bodies like the International Organization for Standardization (“ISO”) work hard to reverse these effects. However, though preventing artificial technological heterogeneity is a valuable goal, some preconditions need to be in place in order to achieve this objective.

## II. PRECONDITIONS FOR MEANINGFUL HARMONIZATION

The kind of international antitrust harmonization necessary to facilitate international business transactions faces a number of serious obstacles. Effective harmonization requires not only convergence on substance and procedure but also the creation of international antitrust institutions. Any such institution will necessarily be technocratic—expert and not directly politically responsive.<sup>27</sup> Although there are examples of non-technocratic international institutions—for example, the United Nations General Assembly or the Security Council—there would be no sense in trying to create a politically responsive international antitrust institution. Modern antitrust analysis is dense, technical, difficult, and not the sort of discipline that lends itself to negotiation and deal-cutting in fifteen-member councils manned by career politicians. Effective international antitrust harmonization means agreeing on governing norms and committing them to the administration of politically independent economists and economically informed lawyers.

Before such harmonization can unfold, at least three formidable preconditions must be satisfied.<sup>28</sup> A primary precondition is a general political consensus on the legitimacy both of market economies and of governmental controls on market economies. International technocratic administration of any aspect of antitrust is impossible so long as any participating country continues to

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<sup>25</sup> See *id.* at 317–18 n 132.

<sup>26</sup> Nika Aldrich, *A System of Logo-Based Disclosure of DRM on Download Products*, 8 J High Tech L 57, 62 n 30 (2008).

<sup>27</sup> On the meaning of technocracy, see Daniel A. Crane, *Technocracy and Antitrust*, 86 Tex L Rev 1159, 1162 (2008).

<sup>28</sup> See *id.* at 1211–16 (discussing these criteria as preconditions to a technocratic shift in antitrust enforcement).

face deep political ambivalence about whether private ownership and management of the means of production is legitimate and whether the government may legitimately intervene to correct failures of the private enterprise system. So long as these questions remain deeply controversial, it will be impossible to entrust antitrust decision making to experts on an international level. The existence and stability of an antitrust regime assumes the legitimacy of a regulated market economy, an assumption still very much in doubt in many corners of the globe.

Second, harmonizing jurisdictions must agree on a common answer to antitrust's great existential questions: why do we have antitrust laws and for whose benefit do we enforce them? It will do no good to agree on modes of antitrust analysis (that is, rule of reason, premerger notification, Hirschman-Hirschman Index) without agreeing on why and for whose benefit the relevant technocrats are undertaking the endeavor.

Answering these existential questions is difficult enough within a mature antitrust jurisdiction like the US.<sup>29</sup> It is far more difficult to achieve a consensus on these questions across multiple jurisdictions that have very different understandings about why antitrust law exists. Consider, for example, the contrast between the ostensible goals of antitrust law in the US and the EU. The essential purpose of the antitrust provisions in the Treaty of Rome is the creation of a European common market, whereas the essential purpose of the Sherman Act (at least in its modern iteration) is to enhance economic efficiency and consumer welfare.<sup>30</sup> Whereas common markets often do enhance efficiency, the EU's distributive concerns sometimes lead to results that would be anathema in the US.<sup>31</sup> To be sure, transatlantic differences sometimes reflect disagreement over means rather than ends,<sup>32</sup> but sometimes results look different simply because the two antitrust regimes are pursuing different goals.

Harmonizing goals is no easy task because goals are highly historically contingent. The Sherman Act and the Treaty of Rome grew out of two very different historical circumstances. The Treaty of Rome was framed against a backdrop of two disastrous world wars that wreaked havoc on the European continent. Hence, the Treaty's primary goal was *political*—to prevent another

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<sup>29</sup> Id at 1211–12.

<sup>30</sup> Compare text accompanying note 33 (discussing the Treaty of Rome's background), with text accompanying note 34 (addressing the Sherman Act's creation).

<sup>31</sup> See Aditi Bagchi, *The Political Economy of Merger Regulation*, 53 Am J Comp L 1, 11–12 (2005).

<sup>32</sup> For example, in the GE/Honeywell matter, Mario Monti, the European Competition Commissioner, defended the European view as being in line with the US consumer welfare approach insofar as *goals* were concerned. Fox, GE/Honeywell at 343–44 (cited in note 12).

world war.<sup>33</sup> The Treaty used economics as an instrument to achieve the political end—binding the European nations together economically, so that their fates and fortunes were intertwined.

Historically, the US also needed to use economics instrumentally to bind together its obstreperous states, but it did not choose an antitrust policy to do so. For example, nothing bound the Union together so much as the creation of Alexander Hamilton's national bank, which issued debt to so many constituencies that the failure of the bank would have meant the impoverishment of a wide swath of American society. The framing of the Sherman Act did share one similarity with the Treaty of Rome, however—it occurred within a generation of a disastrous war (the US Civil War that ended twenty-five years before the framing of the Sherman Act).<sup>34</sup> But even prior to the Civil War, the US already possessed the legal tools necessary to achieve a common market—particularly the power of Congress over interstate commerce and the dormant commerce clause, which prohibited states from discriminating against interstate commerce. Unlike the Treaty of Rome, the Sherman Act was not a political antidote to war, but a statute with genuinely economic goals.

We may add to this short account of Europe and the US that many emerging antitrust jurisdictions have their own historical circumstances that shape their own competition policy goals. Russia has moved forward cautiously with competition policy, “liberalizing” its economy through a mixture of underenforced competition laws and a price-regulatory “natural monopolies” law.<sup>35</sup> China relies on economic growth to maintain its holy grail of political stability and sees antitrust law as a driver of economic growth.<sup>36</sup> In this calculus, producer surplus may count far more than consumer surplus. India's new competition act lists the “economic development of the country” as a goal of the

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<sup>33</sup> See Treaty Establishing the European Economic Community (Mar 25, 1957), art 2, 298 UN Treaty Ser 11, 15 (“It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.”).

<sup>34</sup> See Sherman Act, 26 Stat 209–10 (1890), codified as amended at 15 USC §§ 1–7 (2006).

<sup>35</sup> See Organisation for Economic Co-Operation and Development, *Competition Law and Policy in Russia: An OECD Peer Review* 11, 14 (OECD 2004), available online at <<http://www.oecd.org/dataoecd/10/60/32005515.pdf>> (last visited Apr 17, 2009).

<sup>36</sup> See Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 Antitrust LJ 73, 79 (2008) (“The anti-monopoly legislation should promote the further integration of Chinese practice with the international market rules, make Chinese economic growth more attuned to the requirements of economic globalization, and better integrate China into the development patterns of the global economy.”).

law, which may result in permitting anticompetitive activities that ostensibly contribute to “development” goals.<sup>37</sup>

Differing historical foundations do not mean that shared normative goals cannot be achieved over time. Antitrust’s existential purpose need not become frozen at the time of the regime’s creation. The ostensible goals of US antitrust, for example, have changed and adapted considerably over time. Such convergence on an international scale is possible as well. Indeed, some convergence on the existential question may be occurring already.<sup>38</sup>

A final precondition for the success of global harmonization is the adoption of a mode of antitrust analysis that does not require decisionmakers to entertain explicit distributive considerations as among identifiable interest groups—particularly interest groups with a nationally defined character. The technocratic competence of an international antitrust tribunal or agency would be shattered the moment it was directed to decide, for example, whether a merger that would entail reduced competition and price increases in the Russian market should be allowed because it would also entail enhanced competition and price reductions for consumers in the Canadian market. Technocrats simply have no politically legitimate way of deciding how much weight to give the interests of Russian or Canadian consumers and producers. These are inherently political questions.<sup>39</sup>

Fortunately, there are modes of antitrust law that do not rely on such inter-interest-group balancing. In its *Philadelphia National Bank* decision,<sup>40</sup> the Supreme Court rejected the merging banks’ arguments that any anticompetitive effects to retail banking customers in the Philadelphia markets would be more than offset by the fact that the increased lending limits of the merged bank would allow it to better compete with New York City banks that served large Philadelphia businesses. The Court rejected the suggestion that “anticompetitive effects in one market could be justified by procompetitive consequences in another.”<sup>41</sup>

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<sup>37</sup> Aditya Bhattacharjea, *India’s New Competition Law: A Comparative Assessment*, 4 J Competition L & Econ 609, 627 (2008).

<sup>38</sup> Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 Stan J Int L 207, 223 (2003) (“[T]he diverse goals that countries pursue through antitrust laws have in some ways converged in recent years.”), citing Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 Am U Int L Rev 343, 358–59 (2002).

<sup>39</sup> In theory, the international regulators might try to balance the harm to one group against the gains to another group and only permit the merger if the gains exceed the harms. It is very unlikely, however, that such a mode of analysis in the hands of politically unresponsive technocrats would enjoy political legitimacy—particularly given that the measurements of the costs and benefits would be predictive and less than exact.

<sup>40</sup> *United States v Philadelphia Natl Bank*, 374 US 321 (1963).

<sup>41</sup> *Id.* at 370.

The US antitrust enforcement agencies generally continue to follow this principle, evaluating competitive effects market by market and insisting on relief that makes whole each affected market.<sup>42</sup>

Antitrust law is not devoid of distributive consequences. Indeed, antitrust enforcement *should* have distributive consequences—particularly preventing avoidable wealth transfers from consumers to producers. But there is a difference between a regulatory regime having distributive consequences and the assignment of a regulatory analytical mode that requires inter-interest-group balancing. As I have argued here and elsewhere,<sup>43</sup> such balancing is not inherent in modern antitrust law. If international antitrust harmonization is to succeed, such balancing must be excluded in favor of a single-minded antitrust mode that narrowly focuses on identifying and remedying concentrations of economic power with anticompetitive effects in defined relevant markets. Creating international antitrust institutions with a political mandate would be a recipe for disaster.

### III. FEEDBACK LOOPS BETWEEN SUBSTANCE, PROCEDURE, AND INSTITUTIONS

If effective antitrust harmonization cannot succeed so long as the international community falls short of the criteria articulated in the previous section—political acceptance of regulated capitalism, agreement on antitrust ends, and an analytical mode free from explicit balancing of constituent interests—it is no wonder that there is so much pessimism about harmonization's prospects. Prospects for achievement of the first two criteria, in particular, seem remote. Further, general ideological acceptance of regulated capitalism so far exceeds the set of questions with which antitrust is concerned that the antitrust community is at the mercy of broader global currents. For one, the present economic crisis may, in a year or two, have uncontrollable and

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<sup>42</sup> See Federal Trade Commission and Department of Justice, 1992 Horizontal Merger Guidelines § 4 n 36 (rev ed 1997), noting that:

[T]he Agency normally assesses competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agency in its prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies rarely are a significant factor in the Agency's determination not to challenge a merger. They are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small.

<sup>43</sup> Crane, 86 Tex L Rev at 1213–14 (cited in note 27).

unpredictable effects on the politics of global antitrust far greater than antitrust reformers could achieve or undo in a lifetime.

Nonetheless, the antitrust community is not entirely impotent to press toward international harmonization. There are a number of small, incremental steps that could be taken at present. Although these steps could not by themselves or jointly usher in an era of antitrust homogeneity, they could begin to set the stage for future harmonization if or when the preconditions begin to materialize.

The key to such incremental stage-setting is to understand the relationship between harmonization's moving parts and to approach them strategically. International antitrust harmonization has three prongs: substance, procedure, and institutions. Ultimately, an optimal international antitrust regime requires some uniformity in all three prongs, although sequential development may be possible.

Procedure and substance are interrelated categories and any effort to harmonize one without the other will result in frustration. Suppose, for example, that there was a uniform antitrust code of substantive norms applicable to all major economies and yet each country was free to specify its own procedural norms. The practical meaning of the substantive norms would continue to be widely divergent based on each country's choice of procedure. For example, stringent pleading rules in cartel cases prior to discovery could severely limit the number of cartel cases brought, or restrict such cases to causes of action based on governmental enforcement despite the theoretical availability of a private right of action.<sup>44</sup> A rule that allocated the burden of proof to the defendant to prove efficiencies in a merger case would result in a very different merger regime than one that required the government to disprove the existence of efficiencies.<sup>45</sup>

The same is true of institutions. Even with uniform substantive and procedural rules, results would be heterogeneous without the commitment of decisionmaking to international institutions. This is not to say that it is impossible for fairly uniform law to develop across adjacent sovereign institutions with a common cultural reference point. The development of US common law in fifty sovereign state-court systems provides proof that the law can develop fairly uniformly given virtually identical procedural codes and continual cross-reference on substantive norms. But the uniformity of US

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<sup>44</sup> Consider *Bell Atlantic Corp v Twombly*, 127 S Ct 1955, 1965–66 (2007) (articulating pleading requirements in cartel cases that prevent plaintiffs from getting access to discovery until they have plausible evidence of the existence of a conspiracy).

<sup>45</sup> Burdens of proof straddle substance and procedure. See Earl C. Dudley, Jr. and George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent Erie Decisions*, 92 Va L Rev 707, 729 (2006).

common law despite the dispersion of sovereign decisionmaking is attributable to the shared legal culture of US judges across the states. Elite US judges are often products of national law schools with a national curriculum that pays relatively little attention to interstate idiosyncrasies. Judges from different countries interpreting and implementing an international treaty would not be able to draw on this sort of shared legal culture and could not be expected to develop a uniform body of competition law across national borders. National judges from different countries are known to give very different interpretations to the same treaty.<sup>46</sup> Of course, lower federal court judges often differ on the meaning of federal treaties, statutes, or the constitution as well, but at least in a unified federal system there is an institution—the Supreme Court—with corrective powers. Without such an institution, the specification of uniform procedural and substantive norms is unlikely to bring about the kind of antitrust homogeneity necessary to advance international business.

Ultimately, a well-functioning system of international antitrust law requires harmonization in the strong sense—some international institution must interpret and implement the procedural and substantive competition policy norms. Harmonization ultimately needs to occur on all three fronts, but it need not occur simultaneously across them. Thus, for example, while substantive harmonization without procedural harmonization will prove fruitless in the long run and vice versa, tackling substantive harmonization before tackling procedural harmonization (or vice versa) is not out of the question. Indeed, harmonizing one first may make harmonizing the other easier. Shared understanding of a procedural norm's meaning makes it easier for decisionmakers to converge on an adjacent substantive norm's meaning.

Of the three prongs, it seems prudent to begin with the harmonization of procedure. Agreements on procedures seem less threatening to national sovereignty, less irrevocable, and less of a compromise on ideological principles than agreement on substantive norms or the delegation of power to international institutions. At the same time, harmonization of procedures would not only provide some immediate benefits (such as simplified merger notification) but would also provide a framework for nations to share formal antitrust norms. Later agreements on substantive norms and international institutions would be much easier to accomplish against a history of procedural homogeneity.

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<sup>46</sup> See, for example, Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 *Colum L Rev* 628, 653–54 (2007) (noting that while the US Supreme Court confines its use of international human rights treaties to constitutional interpretation, courts in other common law countries use the same treaties to interpret statutes and update their common law).



Proposals for the internationalization of merger procedures, in particular, are not new.<sup>47</sup> Yet resistance to even procedural harmonization remains deep-seated. For instance, in 2000, the DOJ issued an International Competition Policy Advisory Committee report that contained a lengthy and detailed chapter on improving international merger procedures.<sup>48</sup> Its recommendations, however, stopped short of suggesting that jurisdictions formally attempt to harmonize their procedures. To the contrary, the Advisory Committee expressed the view that “many of the transaction costs imposed by merger regimes are rationally related to the efficient review of transactions that have the potential to create appreciable anticompetitive effects within the reviewing jurisdiction and therefore should be taken in stride by companies as a cost of doing business.”<sup>49</sup> Instead of recommending steps toward formal harmonization, the report recommended that each jurisdiction attempt to follow certain principles in framing its merger control provisions. Each jurisdiction should attempt to screen out mergers unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction, establish objectively based notification thresholds, act transparently, retain the authority to challenge mergers that do not trigger premerger notification requirements, and eschew reliance on merger notification fees to subsidize the enforcement agencies’ budgets.<sup>50</sup>

Vague hortatory suggestions such as these are harmless but unlikely to enhance the efficiency of international business in a significant way. What is needed, for starters, is a formal multilateral commitment to a merger clearance process which, even if not centrally managed on substance, would entail procedural convergence on merger clearance. If a critical mass of major economies could agree on even a common merger notification form, that would be a good start. There is no technological reason why multiple enforcement agencies could not share in a common notification system. For example, the US has two merger clearance agencies—the FTC and DOJ—with very different institutional structures and cultures, but they employ a single notification form. Their electronic filing system allows parties to submit their premerger notification form electronically via the Internet. Once the notification form has been processed, it is accessible by both the FTC and DOJ via a shared

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<sup>47</sup> Merit E. Janow, *Transatlantic Cooperation on Competition Policy*, in Simon J. Evenett, Alexander Lehmann, and Benn Steil, eds, *Antitrust Goes Global: What Future for Transatlantic Cooperation?* 29, 48 (Brookings Institution 2000); Jürgen Basedow, *International Antitrust: From Extraterritorial Application to Harmonization*, 60 *La L Rev* 1037, 1051 (2000).

<sup>48</sup> International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report* at 87–163 (cited in note 10).

<sup>49</sup> *Id.* at 94–95 (emphasis omitted).

<sup>50</sup> *Id.* at 155–56.

database.<sup>51</sup> Although there would have to be some hard detail work and compromise over such issues as confidentiality, initial disclosures, timing, and the like, there is no good reason that, for instance, the US, the EU, and some jurisdictions with similar merger control regimes could not kick off a similar international system.

The point, of course, is not merely to create an international merger database. The point is to prove the feasibility of international harmonization through one procedural step, to extend from there to another procedural step, to allow success on procedural harmonization to set the stage for some modest substantive harmonization, and progressively to cede authority to an international institution on specified questions.<sup>52</sup> That assuredly will not happen quickly. But it will not happen at all if the small first steps on procedure are not taken.

#### IV. CONCLUSION

International antitrust harmonization is not an undifferentiated good and is not likely to happen on a large scale any time soon. But antitrust homogeneity is valuable enough to the efficient conduct of international business that it is worth investing current energy to lay the groundwork for future harmonization. Beginning with small steps such as a unified international premerger notification protocol could move us incrementally toward the long-term goal of antitrust homogeneity for international business.

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<sup>51</sup> See Federal Trade Commission and Department of Justice, *Hart-Scott-Rodino Electronic Filing System (EFS)* (May 13, 2008), available online at <<https://www.hsr.gov>> (last visited Apr 17, 2009).

<sup>52</sup> For example, success with procedural coordination of premerger notification might pave the way for a treaty agreement on substantive merger norms for multinational corporations, which could in turn pave the way for an international body with jurisdiction to regulate mergers involving international corporations. In time, a positive experience with international regulation of multinational mergers could set the stage for expansion of the regulatory body's jurisdiction to adjacent issues, such as international joint ventures.



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