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The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior

Damien Geradin*

I. INTRODUCTION

As Einer Elhauge and I noted in the preface to our recently published casebook, modern antitrust law is global antitrust law.¹ This is not so much because large corporations are subject to global antitrust rules, but because their behavior is being reviewed under the antitrust rules of an ever-growing number of jurisdictions. While the last six decades have seen repeated unsuccessful attempts to develop global antitrust rules,² the 1980s and 1990s witnessed significant growth in the number of countries adopting antitrust law statutes and setting up specialized antitrust agencies and/or courts.³ Some one hundred countries currently have antitrust rules in place, and the process has not ended yet. On August 1, 2008, China's Anti-Monopoly Law ("AML") entered into

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¹ See Einer Elhauge and Damien Geradin, *Global Antitrust Law and Economics* 3 (Foundation 2007).

² The setting up of global antitrust rules was first attempted through the United Nations Conference on Trade and Employment, UN Doc E/Conf 2/78 (1948) ("Havana Charter"), available online at <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf> (visited Apr 16, 2009). The Charter, however, never entered into force. For a discussion of the story behind the Havana Charter, see Susan A. Aaronson, *Trade and the American Dream* 86–91 (Kentucky 1996). Later attempts at setting up such rules have also foundered. See id at nn 16–17.

³ See, for example, Israel's Restrictive Trade Practices Law, 5748-1988, 42 LSI 135 (1987–1988) (Isr); Kenya's Restrictive Trade Practices, Monopolies and Price Control Act, (1990) Cap 504 (Kenya); the Cypriot Protection of Competition Law, PI 207/2000; Polish Act of Feb 16, 2007, on Competition and Consumer Protection, DzU 2007 No 50, item 331; Italy's Competition and Fair Trading Act, Gazz Uff del 13 Oct 1990, n 240; the Taiwanese Fair Trade Act of 1992, Faigui Huiban, art 1 (amended 2002); and Vietnam's Competition Law 2005, No 27/2004/QH11 (Vietnam).

force,⁴ and various factors indicate that China will become a significant actor on the global antitrust scene.⁵ As a result, a typical merger between large US corporations now ordinarily requires approval not just in the US, but also in the EU, Canada, Brazil, South Africa, Russia, Korea, and the numerous other jurisdictions that have merger control rules and in which the activities of such corporations may produce market effects.⁶ Similarly, international cartels may trigger administrative, civil, or even criminal investigations not only in the US, but also in a range of other jurisdictions.⁷ The Microsoft cases bear testimony to the fact that firms engaging in certain practices, such as refusal to license or tying, may end up being condemned for abuse of dominance under the antitrust laws of different nations and, as a result, face a variety of remedies that are not necessarily consistent.⁸ Thus, businessmen, lawyers and policymakers can no

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- ⁴ See Fan Longduan [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress on Aug 30, 2007 and effective Aug 1, 2008) ("AML"), available online at <http://www.gov.cn/ziliao/flfg/2007-08/30/content_732591.htm> (visited Apr 16, 2009), English translation available online at <http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf> (visited Apr 16, 2009). For a good discussion of China's competition law regime, see Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 Antitrust L J 73 (2008).
- ⁵ For example, in November 2008, the Chinese antitrust authority rendered its first decision under its newly adopted antitrust law, imposing remedies on the concentration between InBev and Anheuser-Busch. See Ron Knox, *China Puts Conditions on InBev Deal*, 12 Global Competition Review 44 (Nov 18, 2008).
- ⁶ For example, over sixty countries have premerger filing requirements.
- ⁷ See, for example, the Marine Hose Cartel conspiracy between executives of a number of companies to rig bids, fix prices, and allocate markets in the supply of marine hoses. The case involved closely coordinated action between the US Department of Justice, the European Commission, and the UK Office of Fair Trading. As far as the US case was concerned, the relevant executives agreed to plead guilty to charges in the US and to serve prison sentences and pay fines. See US Dept of Justice, Press Release, *British Marine Hose Manufacturer Agrees to Plead Guilty and Pay \$4.5 Million for Participating in Worldwide Bid-rigging Conspiracy* (Dec 1, 2008), available online at <http://www.usdoj.gov/atr/public/press_releases/2008/239884.htm> (visited Apr 16, 2009). Subsequently, the executives were sentenced to imprisonment in the UK for between two and a half to three years for cartel offences. See UK Office of Fair Trading, Press Release, *Three Imprisoned in First OFT Criminal Prosecution for Bid Rigging* (June 11, 2008), available online at <<http://www.offt.gov.uk/news/press/2008/72-08>> (visited Apr 16, 2009). In addition, the European Commission has recently sent a statement of objections to alleged participants in the Marine Hose Cartel. See Memorandum from the European Commission, *Commission Confirms Sending Statement of Objections to Alleged Participants in a Marine Hoses Cartel*, MEMO/08284 (May 5, 2008), available online at <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/284&format=HTML&aged=0&language=EN&guiLanguage=en>> (visited Apr 16, 2009).
- ⁸ Microsoft faced antitrust scrutiny by the EU, US, and South Korea. As far as the EU is concerned, see Commission Decision Relating to a Proceeding under Article 82 of the EC Treaty, Case COMP/C3/37.792 Microsoft, C(2004)900 final (Mar 24, 2004). The decision was later upheld by the Court of First Instance in *Microsoft v Commission*, Case T201/04, 2004 ECR II 271 (2004). At the time of the Commission decision, Microsoft had, however, already reached settlement in US proceedings

longer content themselves with understanding only the antitrust law of their nation. They must also be conversant in the laws of other regimes that form part of the overall legal framework that regulates competitive behavior.

Like many other scholars,⁹ I have supported¹⁰ and even contributed¹¹ to the development and adoption of antitrust law regimes in a growing number of jurisdictions. In recent years, however, my significant involvement in cases dealing with the application of antitrust laws and the participation of authorities from several jurisdictions has given me firsthand experience into some of the pitfalls of the decentralized globalization of antitrust. This decentralization process has taken place over the last few decades as a result of the concomitant failure of nations or international organizations to develop a global antitrust law regime and the decisions of many nations to adopt their own antitrust laws. While the notion of decentralized globalization may sound like an oxymoron, it represents an attempt to describe the fact that antitrust is today a global

(see US Dept of Justice, Press Release, *Department of Justice and Microsoft Corporation Reach Effective Settlement on Antitrust Lawsuit* (Nov 2, 2001), available online at <http://www.usdoj.gov/atr/public/press_releases/2001/9463.htm> (visited Apr 16, 2009)), whilst on February 24, 2006, the Korea Fair Trade Commission (“KFTC”) imposed corrective orders on Microsoft Corporation and Microsoft Korea for their abuse of market dominance.

As far as remedies are concerned, in the US Microsoft was required to (1) disclose application programming interfaces that would permit software developers to interoperate with the Windows operating system with less difficulty, and (2) disclose protocols that it employed to control communication between desktop PCs and servers. In the EU, as far as interoperability was concerned, Microsoft was required, within 120 days, to disclose complete and accurate interface documentation that would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers. As regards to tying, Microsoft was required, within 90 days, to offer to PC manufacturers a version of its Windows client PC operating system without Windows Media Player. Furthermore, the Commission imposed a fine on Microsoft of €497 million. For a good discussion of the remedies imposed on Microsoft in both the EU and US, see Harry First, *Netscape is Dead: Remedy Lessons from the Microsoft Litigation*, working paper no 08-49, NYU Center for L, Econ & Org (2008), available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1260803> (visited Apr 16, 2009). In Korea, the KFTC required Microsoft to unbundle tied products and install Media Center and Messenger Center through which download links to competitors are provided. Furthermore, a fine of 32.49 billion won was levied. See *Microsoft Case* (unpublished document), available online at <[http://eng.ftc.go.kr/files/bbs/2008/MS%20Case\(06.10\).doc](http://eng.ftc.go.kr/files/bbs/2008/MS%20Case(06.10).doc)> (visited Apr 16, 2009).

⁹ See, for example, Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 NYU L Rev 1781 (2000); D. Daniel Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus L J 37 (2007).

¹⁰ See Damien Geradin, *Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries* (World Bank 2004).

¹¹ For several years prior to entering private practice, I worked as a consultant for the “Private Participation in Mediterranean Infrastructures” program cosponsored by the European Commission and the World Bank. One of the objectives of this program was to induce Mediterranean nations to engage in regulatory reforms, including the adoption of antitrust laws and the setting up of antitrust authorities.

phenomenon, not through the adoption of supranational rules, such as in areas pertaining to environmental protection,¹² labor rights,¹³ or human rights,¹⁴ but through the adoption of national rules often varying in scope, objectives, methods, and enforcement methodology.

There is no doubt that the adoption of antitrust rules in a larger number of nations generates benefits, as it allows, for instance, these nations to protect their citizens against international cartels or excessive market concentration. This process has, however, also given rise to challenges for global corporations, some of which are well known. The decentralized globalization of antitrust increases: (1) the cost of doing business and the complexity of large-scale antitrust investigations, which now often have a multi-jurisdictional component; (2) the risk of contradictory decisions where a firm's behavior is reviewed by different antitrust authorities under different sets of rules; and (3) the likelihood that some decisions will be guided by protectionist motives.

The objective of this Article is to raise awareness of a particular problem: in a world where the conduct of a firm is subject to different antitrust regimes, the most restrictive antitrust regime always wins. In other words, the firm in question will be required to ensure that its conduct conforms to whichever regime is most restrictive. The result is global antitrust over-enforcement. As will be seen, this issue, which I refer to as the "strictest regime wins" problem, may lead to situations where the decision of an antitrust authority in one jurisdiction (for instance, taking a negative decision on conduct that is otherwise considered to be procompetitive) may deprive consumers in other jurisdictions of various efficiencies that are well-recognized by their own antitrust authorities. This Article also draws attention to a number of procedural issues, which may negatively impact the ability of corporations investigated in foreign jurisdictions to defend their case.

Against this background, this Article is divided into five sections. Section II describes the process of decentralized globalization alluded to above. Section III discusses the various benefits brought about by the adoption of antitrust regimes

¹² See, for example, the Convention for the Protection of the Marine Environment of the North-East Atlantic (1992), 31 ILM 1312 (1993); Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), 37 ILM 22 (1998).

¹³ See, for example, the Convention Concerning Freedom of Association and Protection of the Right to Organize (1948), 68 UN Treaty Ser 17; Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (1949), 96 UN Treaty Ser 257.

¹⁴ See, for example, the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1985), 24 ILM 535; United Nations Convention on the Rights of the Child (1989), 18 ILM 1448.

in an increasingly large number of nations, as well as the challenges that this has created for multinational corporations. Section IV focuses on the problem of global antitrust over-enforcement described above. Finally, Section V provides a short conclusion.

II. THE DECENTRALIZED GLOBALIZATION OF ANTITRUST

Since the Second World War, various attempts have been made in the context of trade negotiations to develop multilateral antitrust rules. By 1947, the Havana Charter and the International Trade Organization (“ITO”) contemplated such rules, envisaging a chapter containing provisions for the regulation of restrictive business practices.¹⁵ The ITO failed, however, in part because of objections of the US to its antitrust policy provisions. No antitrust-related rules were subsequently included in the original General Agreement on Tariffs and Trade. Discussions over multilateral antitrust rules continued in a variety of international fora. For instance, in the early 1950s, the UN Economic and Social Council attempted to formulate an international agreement on restrictive business practices, which was also rejected by the US.¹⁶ In the 1970s, developing countries decided to pursue the negotiation of a multilateral code on restrictive business practices. These efforts led to the adoption in 1980 of a “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.”¹⁷ The practical importance of this code, however, was limited by its purely voluntary nature.

While efforts to develop binding international antitrust rules remain fruitless, many states have engaged in bilateral cooperation agreements.¹⁸ Pursuant to these agreements, the parties agree to cooperate in the context of international antitrust investigations (for example, by providing that each party notify the other of a pending enforcement action that could impact important interests of the other party).¹⁹ Some of these agreements also identify a set of negative and positive comity principles that can guide both parties as they decide

¹⁵ See Havana Charter, ch 5 (cited in note 2).

¹⁶ Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U Chi Legal F 277, 284–85 (1992).

¹⁷ *Id.* at 285–87.

¹⁸ See, for example, Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, (1991), 30 ILM 1491.

¹⁹ *Id.*, art II.

whether to exercise or forgo jurisdiction.²⁰ These agreements do not lead, however, to any coordination of substantive antitrust laws. In the absence of multilateral competition rules, some nations also started to coordinate their competition policy on a regional basis. Examples include the EU,²¹ the North American Free Trade Agreement,²² and Mercosur.²³

In the 1990s, internationalization of antitrust rules remained at the forefront of international trade discussions. The EU in particular pressed its trading partners for the adoption of a competition law framework in the context of the World Trade Organization (“WTO”).²⁴ This approach was supported by some major trading nations. It was, however, opposed by the US.²⁵ As a result, while the Uruguay Round negotiations led to the adoption of specific agreements over issues, such as intellectual property rights (“TRIPS”) and international investments (“TRIMs”), these negotiations did not lead to the adoption of global antitrust rules. Several agreements that are part of the WTO framework, however, contain antitrust-related provisions. For instance, TRIPS authorizes members to specify, in their legislation or licensing practices, conditions that may, in particular cases, constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.²⁶ TRIMs requires, within five years from the date on which it becomes enforceable, consideration of whether the agreement should be complemented with provisions on investment and competition policy.²⁷

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- ²⁰ See, for example, *id.*, arts V and VI. In this context, see also Agreement between the European Community and the Government of Japan Concerning Cooperation on Anticompetitive Activities, arts V and VI, 2003 OJ (L 183) 12, 14–15; Agreement between the European Communities and the Government of Canada Regarding the Application of Their Competition Laws, 1999 OJ (L 175) 50.
- ²¹ See Consolidated Version of the Treaty Establishing the European Community, title VI, 2002 OJ (C 325) 33, 64–70 (“Treaty Establishing the EC”); Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 OJ (L 1) 1.
- ²² See North American Free Trade Agreement (1993), chapter 15, 32 ILM 605.
- ²³ See Decisión No 18/96, Protocolo de la Defensa de la Competencia, available online at <<http://www.cancilleria.gov.ar/comercio/mercosur/normativa/decision/1996/dec1896.html>> (visited Apr 16, 2009); Decisión No 02/97, Anexo al Protocolo Defensa de la Competencia, available online at <<http://www.sice.oas.org/Trade/MRCSRS/Decisions/DEC297.asp>> (visited Apr 16, 2009).
- ²⁴ See Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 Am J Int L 1, 8–9 (1997).
- ²⁵ *Id.* at 10–11.
- ²⁶ Agreement on Trade Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art 40, 33 ILM 1197, 1213 (1994) (“TRIPS”). See also *id.*, art 8.
- ²⁷ Agreement on Trade-Related Investment Measures, reprinted in Uruguay Round Trade Agreement, Statement of Administrative Action 1, art 9, HR Doc 316, 103d Cong, 1448 (1994).

In 1996, the WTO Ministerial Meeting, held in Singapore, created a Working Group on the Interaction between Trade and Competition Policy.²⁸ The mission of this Working Group was to “study issues raised by Members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that might merit further consideration in the WTO framework.”²⁹ This Working Group produced several reports supporting further WTO initiatives in the antitrust field. The 2001 Doha Ministerial Declaration provided that negotiations over competition would take place after the next WTO Ministerial Meeting based on modalities to be decided at the time.³⁰ Such negotiations were cut short by the issuance of the August 2004 Decision by the General Council of the WTO, which stated that the “Interaction between Trade and Competition Policy” would not form part of the Doha Work Program.³¹ Since then, no other initiatives have been taken towards the adoption of global antitrust rules.

While these efforts to develop global antitrust rules have been unsuccessful, since the Second World War a large number of nations have adopted antitrust laws. The Treaty of Rome, which was adopted in 1957 by the six founding Member States of the EU (which now comprises twenty-seven Member States), contains several provisions prohibiting anticompetitive conduct.³² Antitrust laws were also adopted in many other developed nations (for example, Japan in 1947, Australia in 1974, Korea in 1981 and Canada in 1985). In more recent years, antitrust laws have been adopted in many emerging economies (for example, Mexico in 1992, South Africa in 1998, Russia in 2006, and China in 2008), as well as in developing nations (for example, Kenya in 1988, Jamaica in 1993, Zambia in 1996, and Indonesia in 1999).

The adoption of antitrust law regimes in emerging economies and in developing countries can be explained by several factors.³³ First, some nations have adopted antitrust rules within the framework of trade agreements or as preconditions to joining some trade blocks. Central and Eastern European states

²⁸ Singapore Ministerial Declaration, ¶ 20, (Dec 13, 1996), available online at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> (visited Apr 16, 2009).

²⁹ Id.

³⁰ Doha Ministerial Declaration, ¶¶ 23–25 (Nov 14, 2001), available online at <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> (visited Apr 16, 2009).

³¹ See Text of the ‘July package’—the General Council’s post-Cancún decision of August 1, 2004, available online at <http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#invest_comp_gpa> (visited Apr 16, 2009).

³² See Treaty Establishing the EC, title VI (cited in note 21).

³³ See Geradin, *Competition Law and Regional Economic Integration* at 13 (cited in note 10).

were required, for instance, to adopt a competition law regime in order to join the EU. Second, institutional donors, such as the World Bank or regional development banks, often encouraged emerging economies to adopt competition law regimes and then provided support to these nations to assist them in setting up the regimes. Third, a number of countries realized that the adoption of an antitrust law regime would contribute to the competitiveness of their corporations—thus placing them in a more favorable position to compete with foreign firms and to attract investments—by protecting a competitive market structure. Finally, some nations adopted antitrust law regimes to accompany and help capitalize on the benefits of fundamental economic measures, such as the liberalization of state monopolies.

Thus, while projects to develop global antitrust law regimes have been largely shelved, most nations now possess antitrust law regimes and have established enforcement authorities. Many such regimes have been inspired by the US and/or the EU antitrust model, but, as will be seen below, the degree of coherence between these regimes varies considerably.

III. THE PROS AND CONS OF THE DECENTRALIZED GLOBALIZATION OF ANTITRUST

This process of decentralized globalization, whereby each nation or—in the case of the EU—group of nations enacts its own antitrust laws and develops its own enforcement structure, raises a number of issues.

First, it is questionable whether the development of a global competition law regime, for instance within the framework of the WTO, would have been preferable. The law and economics of federalism literature, which seeks to determine the appropriate level at which regulation should be adopted and enforced,³⁴ identifies a number of circumstances in which centralized regulatory regimes, comprising harmonized rules enforced through common enforcement schemes, are preferable to the kind of decentralized regimes that currently prevail in the antitrust field.³⁵

One such circumstance is when activities carried out in one nation create externalities negatively affecting other nations.³⁶ Air pollution, which typically travels across borders, is thus generally better addressed through international

³⁴ See generally Daniel C. Esty and Damien Geradin, eds, *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford 2001); William W. Bratton, et al, *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States* (Oxford 1996).

³⁵ See Richard B. Stewart, *Environmental Law in the United States and the European Community: Spillovers, Cooperation, Rivalry, Institutions*, 1992 U Chi Legal F 41 (1992).

³⁶ See Esty and Geradin, *Regulatory Competition and Economic Integration* at 33–34 (cited in note 34).

rather than national action. The reason is that the nation in which the pollution is generated may take insufficient account of the harm suffered by citizens located in other nations.³⁷ Anticompetitive conduct of firms located in one nation may also create externalities on consumers located in other nations. This is, for instance, the case of export cartels. In such a case, much like in the air pollution example discussed above, the antitrust authorities of the nation in which the cartelists are located may fail to adequately take into account the welfare of the consumers of the importing nation(s). This is illustrated by the fact that the US, the EU, and many other jurisdictions decline to penalize export cartels.³⁸ The difference with the air pollution example, however, is that export cartels (in other words the externality) will be sanctioned under the antitrust laws of the importing jurisdiction that suffers the anticompetitive effects. Thus, a US cartel that exports to the EU is regulated by EU competition law, while an EU cartel that exports to the US falls within the purview of, and is assessed pursuant to, the provisions of US antitrust law. No international action is thus needed to control the externality in question.³⁹

Another circumstance in which the literature on the vertical allocation of regulatory powers stipulates that centralized (international) action may be necessary relates to the so-called “race to the bottom.”⁴⁰ The race to the bottom is an issue of grave concern in a variety of regulatory fields, such as corporate law,⁴¹ environmental law,⁴² labor law,⁴³ and tax law.⁴⁴ Given the mobility of companies and factories, there exists a general fear among legislators and regulators that jurisdictions with high standards will find it difficult to maintain them in the face of threats from their domestic industries to move to low-standard jurisdictions in order to evade the regulatory burden they might otherwise face. This threat of industrial migration may trigger a phenomenon

³⁷ Id.

³⁸ See Elhauge and Geradin, *Global Antitrust Law and Economics* at 1101 (cited in note 1).

³⁹ As will be seen in Section IV below, a decision by the antitrust authority of one nation may generate externalities on other nations’ consumers.

⁴⁰ See Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L J 1196, 1211–12 (1977). But see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom” Rationale for Federal Environmental Regulation*, 67 NYU L Rev 1210, 1244–47 (1992).

⁴¹ Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J L, Econ, & Org 225 (1985).

⁴² See Stewart, 86 Yale L J at 1211–12 (cited in note 40).

⁴³ See David Charny, *Regulatory Competition and the Global Coordination of Labour Standards*, in Esty and Geradin, eds, *Regulatory Competition and Economic Integration* 311, 324 (cited in note 34).

⁴⁴ See Daniel Shaviro, *Some Observations Concerning Multijurisdictional Tax Competition* in Esty and Geradin, eds, *Regulatory Competition and Economic Integration* 49, 62–63 (cited in note 34).

characterized by competitive deregulation (hence, the term race to the bottom) as high-standard jurisdictions revise their rules in order to avoid competitive disadvantages for their corporations.⁴⁵ While this race dynamic seems to be very real in the above-mentioned regulatory areas, it is absent in the antitrust field.⁴⁶ The presence of weak antitrust standards in a given jurisdiction is unlikely to significantly induce firms to invest in that nation. If firms want to exploit that nation's consumers, they could take advantage of the antitrust laws to do so from abroad without investing in the nation. It is also unclear why they would favor investing or employing in nations that under-regulate anticompetitive conduct. After all, if their aim is to avoid home-country antitrust review of their exports, they would also get that if they invested in the US, the EU, or any other nation that does not ban export cartels. And no matter where they are located, their anticompetitive export practices would still be subject to antitrust review in importing nations.

Thus, some of the main rationales for adopting centralized regimes appear absent in the antitrust field. Even if centralization were desirable in the antitrust area, however, history shows that developing a global antitrust law regime would be difficult.⁴⁷ Several factors impede the development of a global antitrust regime.

First, nations would have to agree on the content of the global law. While almost all antitrust regimes contain rules designed to prevent anticompetitive agreements, abuses of a dominant position, and mergers substantially lessening competition, the content of these rules may differ. For instance, while monopolization is an offense under US antitrust law, it does not seem to be covered by EU competition law.⁴⁸ In contrast, while EU competition law prohibits excessive prices, monopoly pricing is not prohibited under the US Sherman Act.⁴⁹ Antitrust laws in some nations may also be designed to cover "unfair" contractual practices or may exempt some industries from their scope. Some antitrust laws will also ascribe importance to social (non-efficiency related) considerations, whereas such considerations will have no bearing whatsoever in an antitrust assessment in most antitrust regimes.

Second, reaching agreement on the manner in which such global rules would be enforced, if they could even be agreed upon, would also raise

⁴⁵ Daniel C. Esty and Damien Geradin, *Environmental Protection Policies and International Competitiveness: A Conceptual Framework*, 32 *J World Trade* 5 (1998).

⁴⁶ See Fox, 75 *NYU L Rev* at 1789 (cited in note 9).

⁴⁷ See Section II above.

⁴⁸ See Elhauge and Geradin, *Global Antitrust Law and Economics* at 254 (cited in note 1).

⁴⁹ *Id.* at 255.

considerable difficulties. A centralized enforcement system relying on a global antitrust authority would be politically unacceptable for the US and other large jurisdictions. But even if it were acceptable to the main stakeholder nations, the enforcement structures vary so considerably across nations that it would be hard to agree on a set of institutional and procedural rules.⁵⁰ Moreover, a decentralized system would lead to divergent interpretations of the commonly agreed rules, unless of course the case law could be harmonized through appeals lodged before a global antitrust court. It is thus not surprising that the various attempts made in the past to create a global antitrust regime failed as the level of consensus needed to agree on such a regime would be particularly hard to achieve.

A third question raised by this process of decentralized globalization is whether, in the absence of a proper global antitrust law regime, the world is better off with the parallel application of over one hundred different antitrust laws.

There is no doubt that properly structured and enforced antitrust rules will contribute to consumer welfare in the various nations that have adopted such rules. Unsurprisingly, enforcement has been modest in many developing nations.⁵¹ The requisite resources are not necessarily available as antitrust enforcement may not be the primary objective of countries whose citizens suffer from poverty, unemployment, disease, or malnutrition. But even with a modest budget, antitrust authorities can often play a useful “competition advocacy” role by, for instance, making the case for the removal of regulatory or other restrictions to allow entry in certain sectors of the economy that have been traditionally sheltered from competition.⁵² Although one cannot rule out the risk that developing countries’ antitrust authorities can be captured by domestic rent-seeking groups, they may also play a useful role in dismantling local cartels, or perhaps with the help of antitrust agencies of Organisation for Economic Co-operation and Development (“OECD”) countries, protecting their citizens against international cartels to which low-income countries are particularly vulnerable.⁵³

⁵⁰ In the EU the enforcement of antitrust law is essentially administrative in nature, while in the US enforcement is based to a significant extent on private actions.

⁵¹ See Geradin, *Competition Law and Regional Economic Integration* at 57–86 (cited in note 10).

⁵² See Armando E. Rodriguez and Malcolm B. Coate, *Competition Policy in Transition Economies: The Role of Competition Advocacy*, 23 *Brooklyn J Intl L* 365, 397–99 (1997).

⁵³ Margaret C. Levenstein, et al, *International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies*, NBER Working Paper No 9511 at 40 (Feb 2003), available online at <<http://www.nber.org/papers/w9511.pdf>> (visited Apr 16, 2009).

While there is a concern that newly adopted antitrust rules remain a dead letter in many countries, many nations with limited experience in the antitrust field are now taking things very seriously. Countries like Korea and Brazil—and the same is expected to happen in China—are particularly active and clearly want to join the “super league” of antitrust enforcement agencies. These agencies, which enjoy significant resources and are run by well-educated leaders, will typically go beyond mere competition advocacy tasks and consider the full range of conduct that may raise antitrust issues, including abuse of dominance and mergers. Their willingness to deal with complex dominance cases has not gone unnoticed and some of these authorities have been drawn into complex abuse cases, such as *Microsoft*⁵⁴ and *Intel*.⁵⁵ While antitrust intervention may be misguided or pushed too far by excessively enthusiastic officials, the development of antitrust regimes in these countries has more likely than not benefited domestic consumers and the economy as a whole by forcing firms to compete with resulting efficiency benefits.

The process of decentralized globalization of antitrust has, however, posed considerable difficulties for global corporations. While a couple of decades ago, multinational corporations were few in number and most of them originated from the US or the EU, the situation has considerably evolved. The internationalization of markets means that many corporations, large and small, are now operating on a global scale. Moreover, the strong growth of a number of countries in Asia and Latin America means that global corporations are now headquartered in cities like Mexico City, Mumbai, Sao Paulo, Seoul, Shanghai, or Taipei.⁵⁶

In a world where most countries have antitrust laws in place, global firms face a number of relatively well-known challenges. First, the relatively uncoordinated adoption of antitrust regimes enforced by antitrust authorities, whose methods and procedures vary considerably, increases the cost of doing business. Keeping up with the antitrust developments taking place in numerous countries is costly. While this is a cost that can easily be absorbed by corporate giants like IBM or Exxon, it may be more difficult to absorb for smaller, specialized firms. Rules applying to vertical restrictions may, for instance, vary considerably across countries and they may not always be intelligible to in-house lawyers who have to cover several jurisdictions. In the case of mergers, the need

⁵⁴ In relation to the KFTC case, see note 8.

⁵⁵ In relation to the KFTC case, see *Corrective Measures against Intel's Abuse of Dominance*, available online at <[http://eng.ftc.go.kr/files/bbs/2008/Intel%20Case\(08.6.\)1.pdf](http://eng.ftc.go.kr/files/bbs/2008/Intel%20Case(08.6.)1.pdf)> (visited Apr 16, 2009).

⁵⁶ See, for example, TATA Group in Mumbai, AmBev in Sao Paulo, Samsung and Hyundai Corporation in Seoul, and Lenovo in Shanghai.

to file the proposed transaction in numerous jurisdictions may also represent a significant cost.⁵⁷

Second, the process of decentralized globalization also increases the cost and complexity of litigation. The in-house lawyers of firms investigated for alleged anticompetitive conduct in several jurisdictions have to play an immensely complicated coordination role to ensure that their external counsel in one jurisdiction do not take positions that could damage their case in other jurisdictions. These firms also face a particularly daunting task as they deal with agencies whose procedures are often hard to comprehend. For instance, the way an investigation is conducted in Korea or Japan is radically different from the way it is conducted in the US, if only because there is less transparency. These countries do not have a tradition of discussion and disagreement with private parties in the context of public decisionmaking. Hence, the dialogue that typically takes place between investigated firms and antitrust authorities, such as the Federal Trade Commission (“FTC”), the Department of Justice (“DOJ”), or the European Commission, is, in Asian countries, largely absent.

It is hard, of course, to feel sorry for firms that engage in price-fixing and/or market-sharing and have to face the costly consequences of their actions, but in many instances global corporations will be investigated for conduct that may not necessarily be illegal in their own jurisdiction and whose alleged anticompetitive effects may be subject to debate (for example, loyalty rebates). In such cases, parallel investigations in several jurisdictions may significantly distract management and generate staggering legal costs.

Third, the parallel application of different antitrust regimes to a given agreement or conduct increases the risk of contradictory decisions. As noted above, even sophisticated antitrust law regimes, like those in the US and the EU, may diverge on a number of issues, creating the risk that similar practices will be treated differently across jurisdictions. Moreover, even when the relevant legal doctrines do not differ, their application can lead to conflicting conclusions as, for instance, illustrated in the GE–Honeywell merger.⁵⁸ Similarly, the De

⁵⁷ According to a PricewaterhouseCoopers report of 2003 the typical multi-jurisdictional deal involves eight completed or considered filings and leads to, on average, €3.3 million in external merger review costs. See *A Tax on Merger? Surveying the Time and Cost to Business of Multi-jurisdictional Merger Reviews 4* (2003), available online at <http://www.globalcompetitionforum.org/PWC_Merger_Cost_Study_Report_Final_2003_Jun.pdf> (visited Apr 16, 2009).

⁵⁸ As regards the EU, see *Commission Decision Declaring the Incompatibility with the Common Market of a Concentration*, Case No COMP/M.2220 General Electric/Honeywell (July 3, 2001), available online at <http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf> (visited Apr 16, 2009). In relation to the US, see Deborah P. Majoras, *GE–Honeywell: The US Decision*, Address Before

Havilland–ATR merger was approved by Canada but prohibited by the EU.⁵⁹ Nor are international conflicts limited to mergers. In relation to the loyalty discount dispute between Virgin Airlines and British Airways, the EU condemned the very conduct that was deemed permissible under US antitrust law.⁶⁰ And sometimes a conflict in remedial approaches can result. Thus, although Microsoft's efforts to bundle other software into its operating system have been condemned both in the US and EU, the US was not willing to impose the sort of extensive remedies the EU imposed.⁶¹

Finally, there is always the danger that some antitrust decisions will be driven by protectionist motives. Although antitrust authorities are typically sheltered from political and business-interest interferences, this is not always the case. The very idea of setting up “independent” regulators is new in many countries, especially those that have operated under government planning for most, or all, of the twentieth century. The difficulty with antitrust rules, of course, is that they are drafted in broad terms and thus leave a great deal of discretionary power to the enforcing authorities. These authorities are typically subject to judicial review, but often generalist courts lack the relevant skills to properly review complex antitrust decisions, and thus tend to defer to specialized authorities. This is not to say that antitrust authorities are generally “captured,” but when the welfare effects of a conduct are ambiguous and the standards applied are amorphous, as is often the case with unilateral conduct, the danger of political and business-related interferences is particularly grave.⁶²

Antitrust Law Section of the State Bar of Georgia (Nov 29, 2001), available online at <<http://www.usdoj.gov/atr/public/speeches/9893.htm>> (visited Apr 16, 2009).

⁵⁹ As regards the EU, see *Commission Decision Declaring the Incompatibility with the Common Market of a Concentration*, Case No IV/M053 *Aerospaciale-Alenia/De Havilland* (Oct 2, 1991), available online at <http://ec.europa.eu/competition/mergers/cases/decisions/m53_en.pdf> (visited Apr 16, 2009).

⁶⁰ Compare *British Airways v Commission*, 2003 ECR II–5917 (2003), with *Virgin Atl Airways v British Airways*, 257 F3d 256 (2d Cir 2001).

⁶¹ See note 8.

⁶² In a recently published paper, Hew Pate (former US Assistant Attorney General for Antitrust) recommended that the Chinese authorities in charge of enforcing the AML should focus on the clearest antitrust missions, such as breaking down cartels. In contrast, he observed,

Pursuing the more amorphous concepts inherent in merger review and monopolization analysis leaves much more room for mistaken and arbitrary decisions. Decision making under the vague and subjective standards that plague unilateral conduct in the United States and Europe also presents special hazards for a system struggling with corruption and lack of independence. Vague standards are an easy refuge for corrupt decision-making.

See Hew Pate, *What I Heard in the Great Hall of the People—Realistic Expectations of Chinese Antitrust*, 75 *Antitrust L J* 195, 209 (2008). While corruption may be a particularly acute issue in China, vague standards are nevertheless a fertile ground for politicized decisionmaking.

These issues will become increasingly serious in the years to come as markets become even more global and antitrust authorities all around the world become increasingly eager to enforce their domestic antitrust rules. But besides these well-known issues, the multiplicity of coexisting antitrust regimes has created another, more insidious problem for global corporations—when several antitrust regimes apply to a given conduct, the most aggressive regime always wins. This issue is dealt with in Section IV.

IV. THE “STRICTEST REGIME WINS” PROBLEM AND THE RISK OF OVERREGULATION

The strictest regime wins problem can easily be illustrated in the merger-control arena. If a transatlantic merger is reviewed in the US and in the EU, and if the US authorities approve it while the EU authorities prohibit it, the parties to the merger will have to abandon the transaction. This type of situation is rare, but when it occurs, it means that a merger considered to be procompetitive and beneficial to US consumers will be blocked because the EU authorities think otherwise. In this hypothetical case, the EU position may be perfectly justified because, while the merger may generate significant efficiencies in the US, it may also create significant anticompetitive effects in the EU. Likewise, the conflicting decisions may also be due to conflicting policy objectives. Although the merger may produce similar effects in the EU and the US, the European Commission may simply take a stricter stance on the transaction. In that case, the EU would basically deny the US the beneficial procompetitive effects of the transaction, contrary to the policy preferences of its antitrust authorities. Fortunately, in the merger field, such situations are rare as both the US and the EU authorities share the same standard of review, and cooperate closely on mergers that have effects on both sides of the Atlantic.

But conflicts may appear in a less dramatic, though equally serious way in other areas of antitrust law, such as abuse of dominance. Let us assume, for instance, that due to consumer demand, Firm A decides to integrate a piece of software with a piece of hardware.⁶³ The integrated product is sold worldwide to the satisfaction of thousands of customers. Firm B, which produces and sells the software in question, but does not produce the hardware, observes a serious reduction in its software sales because customers prefer the integrated product. It then decides to lodge complaints before the antitrust authorities of jurisdictions X, Y and Z on the ground that A's behavior amounts to

⁶³ Consumer demand for mobile phones with enhanced software functionality, for example, is likely to continue growing. In this regard, witness the success of Apple's iPhone.

anticompetitive tying. The antitrust authorities of jurisdictions X and Y carry out an effects-based test and reach the correct conclusion that the conduct in question is procompetitive since it generates numerous efficiencies that benefit customers. The antitrust authority of jurisdiction Z, which is less sophisticated, follows a formalistic approach and, without much analysis, reaches the conclusion that the integration of the software with the hardware amounts to anticompetitive tying. It adopts an order mandating A to cease its behavior and fines it \$25 million. The fine is obviously bad news, but more serious consequences may ensue. Jurisdiction Z represents a significant market for A, but A is also concerned that investigations may be initiated in other jurisdictions. The firm has no choice but to abandon the production and sale of its integrated product, hence depriving thousands of customers of the efficiencies recognized by the more sophisticated antitrust authorities of X and Y. Even worse, the decision of the antitrust authority of Z, which has been highly publicized by the complainants, has an (intense) chilling effect on the industry's trend towards integrating software with hardware in order to realize efficiencies.

This example shows that the decision of *one* antitrust authority, however misguided, may not only potentially freeze technological innovation in the country to which it belongs, but may also produce such effects in other countries. This is true even if two—but it could also be ten—other antitrust authorities considered that the conduct in question was not only legitimate, but would also benefit consumers. This example forces us somehow to reconsider the position held in Section III that the problem of externality that underpins the rationale for centralized action in many regulatory areas is absent from the antitrust field. In this case, the antitrust authority of Z creates an externality in that it deprives consumers of X and Y of the efficiencies recognized by their own antitrust authorities. The problem, as we have seen in Section II, is that attempts to centralize regulatory decisions have failed in the antitrust field, and there is no prospect that further progress in this regard will be made in the near future.

A further illustration of this problem can be found in the area of rebates.⁶⁴ Granting rebates is a strategy used by dominant and non-dominant firms to increase their sales. Unconditional rebates are a form of price cut,⁶⁵ while

⁶⁴ See Damien Geradin, *A Proposed Test for Separating Pro-competitive Conditional Rebates from Anti-competitive Ones*, World Competition (forthcoming 2009), available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1315292> (visited Apr 16, 2009).

⁶⁵ *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* ¶ 137 (Dec 2005), available online at <<http://ec.europa.eu/competition/antitrust/others/discpaper2005.pdf>> (visited Apr 16, 2009) (“Unconditional rebates, while granted to certain customers

conditional rebates seek to reward customers for their loyalty.⁶⁶ Economists have long recognized that rebates are a source of efficiencies because, for instance, they allow firms to increase output, gain scale and recover their fixed costs more expeditiously.⁶⁷ Rebates are typically not imposed by suppliers, even dominant ones, but negotiated with customers. In some cases, large customers force their suppliers to grant them rebates on pain of shifting their business to other suppliers. While rebates are generally procompetitive, they may, however, be used by dominant firms to foreclose their competitors.

There are very intense scholarly debates on the circumstances in which conditional rebates may have foreclosure effects, and the positions taken by antitrust authorities tend to vary considerably across jurisdictions. The European Commission and the EU courts have, for instance, traditionally analyzed conditional rebates under a restrictive, form-based approach that does not sit well with modern economics.⁶⁸ US agencies and US federal courts have, however, taken a more flexible approach towards rebates, especially when it comes to single-product rebates,⁶⁹ as they have been concerned with the risk that intervention on the basis of antitrust rules might forestall legitimate price competition.⁷⁰ Interestingly, both the European Commission and the DOJ have recently released guidance documents explaining the way they intend to apply their respective provisions dealing with abuses of a dominant position to a range of unilateral practices including rebates and discounts. While the European Commission took a step towards the adoption of an effects-based approach to the assessment of conditional rebates that is better in line with the approach taken by the US courts,⁷¹ the Commission's Guidance Paper remains more

and not to others, are granted for every purchase of these particular customers, independently of their purchasing behavior.”).

⁶⁶ Id (“Conditional rebates are granted to customers to reward a certain (purchasing) behavior of these customers.”).

⁶⁷ See Derek Ridyard, *Exclusionary Pricing and Price Discrimination Abuses under Article 82—An Economic Analysis*, 23(6) Eur Competition L R 286, 291 (2002).

⁶⁸ Geradin, *A Proposed Test for Separating Pro-competitive Conditional Rebates from Anti-competitive Ones* (cited in note 64).

⁶⁹ Id.

⁷⁰ See, for instance, *Barry Wright v ITT Grinnell*, 724 F2d 227, 231 (1st Cir 1983), stating

After all, lower prices help consumers. The competitive marketplace that the antitrust laws encourage and protect is characterized by firms willing and able to cut prices in order to take customers from their rivals. . . . Thus, a legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act's most basic objectives: the low price levels that one would find in well-functioning competitive markets.

⁷¹ See European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (Dec 3, 2008), available online at

restrictive than US law. Here again, global corporations may be faced with a situation whereby one rebate regime may be lawful under US law and unlawful under EU law. And this example ignores the fact that conditional rebates may also fall within the jurisdiction of other antitrust authorities. Intel has, for instance, been recently condemned by the Korea Free Trade Commission on the ground that it had granted anticompetitive rebates to some of its Korean customers.

One could, of course, argue that this problem may be easier to address than the product-integration problem discussed above, as the corporation in question, which for the sake of this example is dominant on the relevant market, could grant rebates to its US customers and not to its European (or Korean) customers. But this approach is unlikely to work as it may not necessarily be easy to distinguish between US, European, or other nations' customers, as some of these customers may be truly global firms. Moreover, granting rebates to some customers while refusing them to other customers may trigger complex discrimination issues that may harm the corporation's commercial reputation. Faced with such difficulties, the global corporation may simply decide to play it safe and grant to all its customers, wherever they may be located, rebates that comply with the most stringent antitrust regimes, even if this prevents it from realizing efficiencies and deprives its customers of the benefit of lower prices.

As is illustrated by the above developments, the proliferation of antitrust laws and authorities around the world creates a serious concern that firms might be dissuaded from adopting procompetitive behaviors due to the risk that such behaviors may create antitrust liability in one or several jurisdictions that take a particularly restrictive, and in some cases misguided, approach to the conduct in question. This concern would not be so serious if corporations could carve out the jurisdictions in question by ceasing to supply customers located in those jurisdictions or treating them in a different manner to avoid liability. In a globalized world, however, such an approach may not be easy. Moreover, some of the most aggressive jurisdictions when it comes to antitrust enforcement are also among the world's largest markets. For obvious reasons, a large US or European corporation could not reasonably decide to carve out Brazil, China, or Korea simply because it has a distaste for their antitrust laws or the way domestic authorities enforce those laws.

Besides harming the welfare of global corporations and their customers, the strictest regime wins problem may have broader policy consequences, as it

<<http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>> (visited Apr 16, 2009); US Dept of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008), available online at <<http://www.usdoj.gov/atr/public/reports/236681.pdf>> (visited Apr 16, 2009).

may effectively deny some nations of the beneficial procompetitive effects of some behaviors or transactions. This may be a source of international tension, which can be illustrated by the statement issued by Tom Barnett, the then Assistant Attorney General for Antitrust, after the Court of First Instance of the European Communities (“CFI”) issued its decision affirming the substance of the European Commission’s March 2004 decision against Microsoft.⁷² This statement observed that: “[T]he standard applied to unilateral conduct by the CFI, rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition.”⁷³ The European position was then contrasted to the US approach whereby:

In the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors. In the absence of demonstrable consumer harm, all companies, including dominant firms, are encouraged to compete vigorously. U.S. courts recognize the potential benefits to consumers when a company, including a dominant company, makes unilateral business decisions, for example to add features to its popular products or license its intellectual property to rivals, or to refuse to do so.⁷⁴

While this statement was not necessarily wise,⁷⁵ it clearly conveyed the frustration felt by the US authorities with respect to the intervention of the European Commission and the CFI.

There is no indication that the strictest regime wins problem is likely to disappear in the forthcoming years, and some factors suggest that it could even be exacerbated by the implementation of the Chinese AML, which has among its objectives promoting the “healthy development of the socialist market economy.”⁷⁶ Can something be done to address the problem? Short of a global antitrust regime that would regulate mergers, agreements, and unilateral conduct

⁷² See US Dept of Justice, Press Release, *Assistant Attorney General for Antitrust, Thomas O. Barnett, Issues Statement on European Microsoft Decision* (Sept 17, 2007), available online at <http://www.usdoj.gov/atr/public/press_releases/2007/226070.htm> (visited Apr 16, 2009).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Criticizing an independent court decision was pointless.

⁷⁶ See AML, art 1, which provides: “This law is enacted for the purpose of preventing and restraining Monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.” Article 1 seems to reflect a certain tension between various objectives that are attributed to the AML. On the one hand, this provision refers to the traditional objectives of competition, such as the promotion of economic efficiency and consumer welfare. On the other hand, the promotion of “fair market competition” is not particularly reassuring as it could open the door to a range of non-efficiency-related considerations. Some observers have pointed to the risk that the AML be used for achieving industrial policy objectives, such as the protection of small and medium-size companies, the protection of domestic enterprises from foreign rivals, or the promotion of domestic innovation.

that produces effects across jurisdictions (an approach that is neither politically feasible nor necessarily desirable), there appears to be no clear solution. As US and European antitrust authorities are the most widely respected and influential regulators in the world, and as US and European corporations are the most widely exposed to the concern expressed above, they should take the lead in exploring strategies to ensure greater coherence in the way antitrust laws are applied all around the world. In this respect, the following efforts should be undertaken (or if already undertaken, should be redoubled).

First, US antitrust authorities and the European Commission should act as role models for the rest of the world's antitrust authorities. The decisions and policy guidelines they adopt are widely read and are a source of inspiration. The US and European antitrust authorities should take this factor into consideration. In this respect, the Guidance Paper on the enforcement of Article 82 EC issued by the European Commission is a source of disappointment. While the Guidance Paper seeks to promote a more modern effects-based approach to the assessment of dominant firms' behaviors, it continues to take particularly restrictive views on a variety of issues and fails to provide dominant firms with proper "safe harbors."⁷⁷ In fact, one of the objectives that seems to have been pursued by the Commission with this Guidance Paper is to leave things "open" so that its ability to intervene against dominant firms is left unconstrained. The US DOJ Report on Single-Firm Conduct is, in that respect, a much more impressive achievement, as it provides a cautious assessment of firms' unilateral conducts and contains proper safe harbors. Thus, it offers helpful guidance to firms whose behavior may fall foul of Section 2 of the Sherman Act. The problem is that EU competition law may be of greater appeal as a source of inspiration to foreign antitrust authorities since it leaves them greater flexibility to intervene against dominant firms. In this respect, EU abuse-of-dominance law has become the dominant source of influence in the world. Many antitrust and economics experts in the EU would have liked the Commission to take a less restrictive position in its Guidance Paper, although the fact it promotes an economically-oriented approach is a step forward and shows not only the national competition authorities of the Member States of the EU, but also the rest of the world's competition authorities, the way to go.

Second, as remarkably exposed by FTC Chairman Bill Kovacic, leading antitrust agencies, such as those of the US and the EU, should learn to evaluate their performance not only in terms of outputs (such as the number of decisions adopted, the number of settlements reached), but also in terms of process (such

⁷⁷ See Geradin, *A Proposed Test for Separating Pro-competitive Conditional Rebates from Anti-competitive Ones* (cited in note 64).

as the quality of the agency's internal operations, and the improvement of its intellectual infrastructure).⁷⁸ There is a natural tendency, of course, especially amongst newly created antitrust authorities, to focus on outputs rather than quality. Quality is usually difficult to measure, but also there is the perception that those who take decisions on the budget of the authorities or appoint (or reappoint) commissioners may be more impressed by numbers than the intellectual rigor of the authority's investigative and decisionmaking processes. The various internal reforms carried out under the leadership of European Commissioner Monti, which, for instance, led to the creation of a Chief Economist's office and the setting up of internal review processes such as the panels of devil's advocates, were very positive developments, which should ideally be exported to other antitrust agencies.⁷⁹ In this respect, the best hope that antitrust authorities around the world will progressively converge around modern standards of assessment of corporate conduct is through the growing importance of economic analysis in antitrust analysis, a factor which has introduced greater analytical rigor in antitrust analysis.

Third, the US and the EU authorities should continue to play a major role in international antitrust fora like the Competition Committee of the OECD⁸⁰ or the International Competition Network ("ICN").⁸¹ Members of the ICN have carried out a variety of substantive projects on mergers, cartels, and unilateral conduct. If anything, greater focus should be placed on the procedural aspects distinguishing US antitrust law, or to some extent EU competition law, from the antitrust regimes of other jurisdictions, particularly in Asia. These differences in procedural aspects relate to the degree of transparency of the investigative and decisionmaking processes. It is a terrifying prospect for global firms to be investigated in jurisdictions where they may not have the ability to receive copies of complaints that have been lodged by competitors and/or have only a limited ability to file their observations during the investigative process. Lack of transparency may not only violate the rights of investigated firms, as they are generally recognized in most jurisdictions, but it may also negatively affect the

⁷⁸ See William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J Corp L 503, 506 (2006).

⁷⁹ See European Commission, Press Release, *Commission Adopts Comprehensive reform of EU merger control*, IP/02/1856 (Dec 11, 2002), available online at <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1856&format=HTML&aged=1&language=EN&guiLanguage=en>> (visited Apr 16, 2009).

⁸⁰ For further information on the Competition Committee of the OECD, see <http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html> (visited Apr 16, 2009).

⁸¹ For further information on the International Competition Network, see <<http://www.internationalcompetitionnetwork.org>> (visited Apr 16, 2009).

quality of the decisionmaking, as the quality of a decision is often linked to the ability of parties to make their views known.

Finally, besides multilateral initiatives, bilateral contacts may also be important.⁸² The US and EU authorities meet on a regular basis with their counterparts from other large agencies. These meetings offer a unique opportunity to positively influence the processes of other agencies, not so much because these agencies should not be free to make their own decisions, but because there may be instances where their lack of experience and/or eagerness to act swiftly and strongly may make them overlook critical issues. One critical component of this interagency dialogue should relate to procedural aspects as firms subject to investigations in foreign jurisdictions should be granted all necessary rights to defend themselves. This should include, at a minimum, the right to detailed information about the allegations and evidence in the investigation, and the right to engage with the case team throughout the investigation, including during the critical period prior to the formulation of tentative, preliminary, or recommended findings and conclusions. While most jurisdictions that have recently adopted competition laws apply substantive provisions that are relatively similar to those applied in the US or the EU, the procedural framework is often underdeveloped and out of line with best practices. This interagency dialogue is also particularly important when a corporation is under investigation in one nation for behavior that would not be deemed anticompetitive in its country of origin or in the majority of countries having antitrust laws. In such cases the risk is particularly high that a decision of an antitrust authority in one jurisdiction creates negative externalities affecting consumers of other nations by depriving them of procompetitive efficiencies.

V. CONCLUSION

In sum, there is no drastic and unique way to address the strictest regime wins problem described above. This problem is a by-product of the decentralized globalization of antitrust which has taken place over the last two decades. While some nations thought that the adoption of antitrust rules in fast-growing economies would benefit their corporations by ensuring that the barriers to entry removed by free trade agreements would not be recreated through restrictions of competition, they probably overlooked the fact that these very corporations could be targeted by long, drawn-out investigations, leading to

⁸² The importance of bilateral antitrust cooperation agreements, for example, has been highlighted on a multitude of occasions. See, for example, Joel I. Klein, *The Internationalization of Antitrust: Bilateral and Multilateral Responses*, Address Before the European University Institute, (June 13, 1997) available online at <<http://www.usdoj.gov/atr/public/speeches/1580.htm>> (visited Apr 16, 2009).

decisions that could potentially affect corporate behavior beyond the jurisdiction in question. Absent a single solution, it seems that efforts designed to improve the intellectual infrastructure of the world's antitrust authorities, as well as the procedures they follow in the investigative and decisionmaking processes, represent the best way to go.

