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AGAINST PRINCIPLED ANTITRUST

Edward T. Swaine[†]

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PERMISSION. COMMENTS APPRECIATED.

I. Introduction

Competition (or, as it is more commonly known among Americans, antitrust¹) policy is finally on the WTO agenda for the Doha Round, and it's hard to know what to make of that. For some time the primary question was how the WTO should address the intersection of trade and competition policy – practices like monopolization or cartels that may impact severely on market access, thereby limiting the benefits of trade liberalization.² Then globalization and the proliferation of national antitrust laws made

[†] Assistant Professor, Legal Studies Department, The Wharton School, University of Pennsylvania. I would like to thank the organizers of the Sokol Colloquium at the University of Virginia Law School for inviting me to participate, as well as the participants – including Eleanor Fox, Andrew Guzman, John Setear, and Paul Stephan – for helpful comments. I also benefited from comments by participants in a workshop hosted by the Legal Studies Department, and thank its research fund for generous support.

¹ I use the terms interchangeably here, though competition policy is sometimes meant to connote a broader range of instruments for promoting competitive activity. *See* William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265, 281 (2001) (urging analysis of competition policy in post-socialist economies beyond that indicated by an “antitrust-centric” point of view); *cf.* Wolfgang Pape, *Socio-Cultural Differences and International Competition Law*, 5 EUR. L.J. 438, 438-39 (noting different meanings); *id.* at 444 (noting that in bilateral discussions between the United States and the European Community, European negotiators agreed that “competition” should be interpreted as meaning “antitrust” in the American sense).

² The issue did not, however, originate with the WTO, nor is it the only international institution so concerned. *See, e.g.*, United Nations Conference on Trade and Development (UNCTAD), Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/ CONF/10 (1980), revised by U.N. Doc. TD/RBP/CONF/10/Rev.1 (1981), *available at* <http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm>.

the creation of an international antitrust regime a subject of great interest in its own right.³ Finally, this proto-independence has been threatened by initiatives somehow to fold global competition policy into the WTO. Academics and practitioners came to be occupied with whether this was a good idea, and even if it was, whether WTO members would ever agree to put it there.⁴

These questions have been answered but a little by the decision at Doha to put competition policy – or, more accurately, the prior question of whether to *negotiate* a competition policy – on the agenda for the next WTO “round.”⁵ Its highly contingent inclusion means that the WTO’s appropriateness remains at issue in considering how

³ The latest manifestation, the International Competition Network, was launched in late 2001, but it is purely voluntary in nature, and shrinks from the task of elaborating any multilateral codes or establishing any institutions with independent authority. For a general description, see <http://www.internationalcompetitionnetwork.org/about.html>.

⁴ Compare, e.g., Int’l Competition Policy Advisory Comm., U.S. Dep’t of Justice Final Report 279 (2000) [hereinafter ICPAC Final Report] (advising against recourse to WTO as means of addressing private anticompetitive conduct), <http://www.usdoj.gov/atricpac/1c.pdf>; Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT’L L. 478, 487-94 (2000) (criticizing likely efficacy of WTO in addressing global competition needs) with ICPAC Final Report, *supra*, at Annex 1-A (separate statement of Advisory Committee member Eleanor M. Fox) (commending pursuit of WTO regulation for antitrust matters bearing on market access); Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT’L ECON. L. 665, 670-72 (1999) (same).

⁵ The Doha Ministerial Declaration formally announced a “work programme” rather than a “round” of negotiations, essentially an agreement to negotiate about negotiations. Ministerial Declaration of November 14, 2001, ¶ 23, WT/MIN(01)/DEC/1 (Nov. 20, 2001) [hereinafter Doha Ministerial Declaration] (declaring agreement that “negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations”); see also Steve Charnovitz, *The Legal Status of the Doha Declarations*, 5 J. INT’L ECON. L. 207 (2002) (speculating concerning the legal status of the general declaration and that concerning TRIPS and public health). The distinction was important to developing countries resisting any commitment to antitrust negotiations. See Press Release, Major Gains for India at Doha Ministerial Conference, Press Information Bureau, Government of India, Nov. 15, 2001, http://commin.nic.in/doc/nov01_release.htm (“India has also succeeded in warding off any commitments for negotiations in the important areas of Investment, Competition Policy and Transparency in Government Procurement. This has been made possible through extremely hard bargaining on India’s part during the Doha Ministerial Conference.”).

deep any WTO duties should run.⁶ Preliminary indications are that any results may be relatively insignificant. Deep divisions remain between members with developed antitrust laws (such as the United States and the European Community) and the greater number, mainly developing countries, that have little experience with antitrust, considerable skepticism about its implications, and a legacy of distrust from previous efforts to broaden the range of WTO disciplines.⁷ Even multilateralism's staunchest advocates concur that apart from the possible exception of an agreement on hard-core cartels, any substantive principles will be left to national discretion.⁸

⁶ As Professor Jackson has cautioned, the proper question is no longer whether antitrust should be handled by the WTO, since to some degree it is already there. John J. Jackson, *Afterword: The Linkage Problem – Comments on Five Texts*, 96 AM. J. INT'L L. 118, 124 (2002) (“In short, as to competition policy being dealt with by the WTO Agreements, there is already a substantial position for the WTO (those who resist are too late!)”); see, e.g., Mark A.A. Warner, *After Seattle: Is There a Future for Trade and Competition Policy Rule-Making?*, 26 BROOKLYN J. INT'L L. 307, 311-13, 334-61 (2000) (reviewing WTO competition principles pertaining, particularly, to the General Agreement on Trade in Services). Competition concerns may also be indirectly accommodated in the WTO through what are called “non-violation” disputes, under which members may complain against official policies having a disproportionate impact on imports. The most significant example, which illustrates as well the procedure's limits, is the Kodak-Fuji dispute. For analysis, see Patricia Isela Hansen, *Antitrust in the Global Market: Rethinking "Reasonable Expectations"*, 72 S. CAL. L. REV. 1601 (1999).

⁷ For discussions of the political divide between North and South on the competition agenda, see, e.g., Simon Pritchard, *Tying Up the Competition*, S. CHINA MORNING POST, Apr. 26, 2002, at 1; *Report from Doha*, MULTINATIONAL MONITOR, Dec. 1, 2001, at 20. As made clear below, see *infra* text accompanying notes ___, there are important differences of opinion within either camp. But the papers produced by the Working Group on the Interaction between Trade and Competition Policy – the meeting reports and the annual reports, as well as the national submissions they reflect – show that developing countries have particular misgivings. See, e.g., Report on the Meeting of the Working Group on the Interaction between Trade and Competition Policy of 26-27 September 2002, ¶ 17, WT/WGTCP/ M/19 (Nov. 15, 2002) (reporting submissions by India on the nondiscrimination principles).

⁸ See, e.g., Communication from the European Community and its Member States to the Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/222, ¶ (Nov. 19, 2002) [hereinafter Communication from the European Community (W/222)](disclaiming any “need to aim at a more detailed definition of the substantive scope of domestic competition laws,” as “[i]t would be sufficient to envisage that such laws would be firmly based on the core principles (and would include a ban on hard core cartels”); Report (2001) of the Working Group on the Interaction Between

If competition is in fact subject only to mild, consensus-based resolution at Doha, one of the most promising avenues is to agree on a “principled” approach to antitrust. The Doha work program emphasizes clarifying “core principles” that might be applied to global competition law, “including transparency, non-discrimination” – meaning, both national treatment and most-favored nation (MFN) treatment⁹ – “and procedural fairness.”¹⁰ Another principle being discussed, that of special and differential treatment, was separately emphasized in the Doha Ministerial Declaration¹¹ and has also been

Trade and Competition Policy to the General Council, WT/WGTCP/5, ¶ 34 (Oct. 8, 2001) [hereinafter Report (2001)] (submitting that, apart from the consideration of hard-core cartels, “[o]ther aspects of substantive competition law would be left to [national] discretion”). *But cf.* Report (2002) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/6, ¶ 61 (Dec. 9, 2002) [hereinafter Report (2002)] (reporting view that a rule against hard core cartels might be ineffective without provisions addressing other conduct, and that no consensus existed even among already established competition authorities as to these other areas of concern). As noted below, however, it is unclear whether developing countries would effectively be exempted from a hard-core cartel provision, even were it adopted. *See infra* text accompanying notes __.

⁹ The national treatment principle requires a WTO member to refrain from placing other members’ goods, services, or persons at a competitive disadvantage relative to its own. MFN treatment requires a WTO member not to discriminate between other members. Non-discrimination, as used within the Working Group and elsewhere, appears intended to encompass both. *See, e.g.*, Core Principles, Including Transparency, Non-Discrimination and Procedural Fairness, Background Note by the Secretariat to the Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/209, at 2, 3, 4 (Sept. 19, 2002) [hereinafter Core Principles]; *accord* The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency, Background Note by the Secretariat to the Working Group on the Interaction Between Trade and Competition Policy, WT/WGTCP/W/114 (Apr. 14, 1999) [hereinafter Fundamental Principles].

¹⁰ Doha Ministerial Declaration, *supra* note 5, ¶ 25 (providing that “[i]n the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on,” *inter alia*, “the clarification of: core principles, including transparency, non-discrimination and procedural fairness . . .”).

¹¹ Doha Ministerial Declaration, *supra* note 5, ¶ 44 (reaffirming “that provisions for special and differential treatment are an integral part of the WTO Agreements,” and agreeing with members that “all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.”); *see also id.* ¶ 50.

prominent in internal deliberations,¹² though its centrality to the WTO and to the antitrust initiative is less well resolved.

Adopting core principles is keeping with the emerging orientation of WTO law,¹³ and is in many ways an attractive first step. All the proposed principles (again, with the arguable exception of special and differential treatment) seem facially unobjectionable, and the reservations expressed to date by WTO members – though they have increased even since this article was first sketched – have been relatively mild. The United States, for example, has submitted a litany of questions concerning how the core principles might be articulated, but the inference that the project ought not be undertaken at all is only implicit.¹⁴ Moreover, whatever the limitations that may inhere in the core principles (or may be adopted to accommodate skeptics), those principles have at least the whiff of law – unlike some other elements of the Doha competition agenda, like capacity building and technical assistance. The core principles offer, in short, one of the few existing options for adopting a constraint on the independent development of national competition laws. Other initiatives have endorsed similar principles for global competition law,¹⁵ and

¹² See Core Principles, *supra* note 9, ¶¶ 3, 17.

¹³ See Meinhard Hilf, *Power, Rules and Principles – Which Orientation for WTO/GATT Law?*, (2001) J. INT’L ECON. L. 111, 129-30 (noting “remarkable development towards the use of principles in WTO law,” but urging that competing or inconsistent principles be balanced by recourse to a separate principle of proportionality).

¹⁴ See Communication from the United States to the Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/219 (Nov. 6, 2002) [hereinafter Communication from the United States (W/219)] (addressing procedural fairness); Communication from the United States to the Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/218 (Nov. 6, 2002) [hereinafter Communication from the United States (W/218)] (addressing transparency and non-discrimination).

¹⁵ Most recently, for example, the International Competition Network (ICN) adopted the principle that jurisdictions conducting merger review “should not discriminate in the application of competition laws and regulations on the basis of nationality,” that merger reviews “should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits,” and that the merger review should respect various terms designed to ensure procedural fairness. ICN, Merger Notification and Procedures Subgroup, Guiding Principles for Merger Notification and Review arts. 2-4 (adopted Sept. 29, 2002), <http://www.internationalcompetitionnetwork.org/ICN%20NP%20Working%20Group%2>

some of the most expert and insightful academic participants in the debate on global antitrust have commended their adoption.¹⁶

[0-%20Guiding%20Principles.pdf](#). See also Asia-Pacific Economic Cooperation (APEC) Principles to Enhance Competition and Regulatory Reform (adopted at the Eleventh APEC Ministerial Meeting, September 1999) (endorsing principles of non-discrimination, comprehensiveness, transparency, and accountability in applying competition and regulatory principles), <http://www.oecd.org/doc/M00018000/M00018530.doc>; OECD Joint Group on Trade and Competition, International Options to Improve the Coherence Between Trade and Competition Policies, COM/TD/DAFFE/CLP(99)102/FINAL, at 7 (Feb. 10, 2000) (suggesting as examples of “core principles that might be included in any multilateral competition rules . . . the WTO principles of non-discrimination, national treatment, and transparency”). The Draft Antitrust Code generated by antitrust scholars in the early 1990s – known as the Munich Code – also included such provisions, though it failed in large part because it tried to do more. Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993), published and released July 10, 1993, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supp.) [hereinafter Munich Code]; see Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1 (1996).

¹⁶ Professor Eleanor Fox is the most consistent and, as matters have unfolded, far-seeing of those taking this position. See, e.g., Fox, *Competition Law and the Millennium Round*, *supra* note __, at 672 (suggesting that, *inter alia*, multilateral regulation of competition might incorporate principles of non-discrimination as to nationality, transparency as to the application of competition and non-competition criteria, and an obligation to provide “an accessible litigation system accompanied by the safeguards of due process, as recourse for harmed nations and persons (as in TRIPs)”); Eleanor M. Fox, *International Antitrust: Against Minimum Rules; For Cosmopolitan Principles*, ANTITRUST BULL. 5, 8-9 (1998) (same); Eleanor M. Fox, *Global Problems in a World of National Law*, 34 NEW ENG. L. REV. 11 (1999) (describing “[p]rocedural and process rules [that] could require transparency, nondiscrimination, and internalizing costs,” and that “nations could be obliged to establish a procedural system with due process so that aggrieved parties can obtain adjudication of their rights under transparent rules of law”); Eleanor M. Fox, *Global Markets, National Law, and the Regulation of Business: A View From the Top*, 75 ST. JOHN’S L. REV. 383, 396 (2001) (advocating transparency and non-discrimination based on nationality). But she is not alone. See, e.g., Donald I. Baker *et al.*, *The Harmonization of International Competition Law Enforcement*, in COMPETITION POLICY IN THE GLOBAL ECONOMY 441-47 (Leonard Waverman *et al.* eds., 1997) (advocating, *inter alia*, national treatment and transparency as fundamental principles for harmonized antitrust); Ignacio Garcia Bercero & Stefan D. Amarasingha, *Moving the Trade and Competition Debate Forward*, 4 J. INT’L ECON. L. 481 (2001) (advocating WTO agreement based on principles of non-discrimination and transparency); Bernard Hoekman, *Competition Policy and the Global Trading System*, 20 WORLD ECONOMY 383

Part II of this paper takes a deliberately contrarian view – namely, that core principles are not at all where global competition law at the WTO should begin. I assume that competition law is desirable – though one can have too much of a good thing¹⁷ – and nothing in this analysis turns on the argument that antitrust must be specially adapted, or suspended outright, in order to accommodate the needs of the developing world.¹⁸ I also hasten to acknowledge that the core principles can, if voluntarily adopted and properly leavened on a national level, prove highly desirable for both the adopting nation and the WTO as a whole. But imposing such principles prematurely is another matter, and I try to sketch the drawbacks to any such attempt, stressing in particular the (defensible) compromises of these core principles even within mature antitrust regimes.

Part III then addresses proposals at the opposite end of the spectrum, which would take advantage of the WTO's breadth by exchanging real substantive antitrust provisions for concessions in other issue areas. Such proposals rely on a newer, yet fundamental, feature of the WTO constitution – namely, the idea of a “single undertaking.” But

(1997), *reprinted in* 4 THE GLOBAL TRADING SYSTEM 234, 243-44 (Kym Anderson & Bernard Hoekman eds., 2002) (citing advantages of incorporating core principles). For a rare exception, see P.J. Lloyd, *The Architecture of the WTO*, 17 EUROPEAN J. POL. ECON. 327 (2001) (arguing in favor of non-discrimination generally, but resisting any incorporation of antitrust law within the WTO).

¹⁷ See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (rev. ed. 1993) (critiquing pre-modern U.S. antitrust); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998) (describing incentives for over- and underregulation of international competition).

¹⁸ See Frédéric Jenny, *Globalization, Competition and Trade Policy: Issues and Challenges*, in TOWARDS WTO COMPETITION RULES 3, 15-25 (1999) (detailing, and critiquing, arguments that antitrust may be unsuitable for economic or political reasons, or unnecessary in light of other laws tending to promote deregulation and free markets). For a strikingly cautionary argument to this effect from two FTC economists, see A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust for Reforming Economies*, 18 HOUS. J. INT'L L. 311, 312 (1996) (concluding that “conclude that antitrust policies adopted in reforming economies should be strictly limited in scope”).

Such objections might weigh heavily against a robust global antitrust regime, and might also have purchase against more incremental steps at building such a regime. The concerns advanced here, in contrast, assume that antitrust accomplishes important economic and political goals, and that impairing antitrust regime-building – for example, by frustrating its application by sophisticated enforcers, or by retarding the adoption and enforcement of such laws by other nations – is presumptively bad.

antitrust is ill-suited to take advantage of this mode of bargaining, and again the costs of doing so probably outweigh the likely gains.

If competition policy is disassociated from these principles, what can the Doha do? Part IV breezily concludes by suggesting that two comparatively unprincipled approaches – the pursuit of existing bilateral initiative and their voluntary, multilateral offshoots, or the negotiation of a plurilateral, antitrust-only accord – offer incremental advantages over their more principled counterparts. Approaches predicated more on the *assumption* of national regimes than on their requirement, I suggest, demand the right amount of antitrust virtue from WTO members: that is, no more than the market will bear.

II. The Problem with Core Principles

A. Non-Discrimination

The principles of non-discrimination – meaning, again, the combination of MFN and national treatment – are fundamental to the operation of the WTO,¹⁹ and so it is only natural that the WTO members would consider extending them to competition law. To some degree, the question is treated as having been asked and answered. As participants in the Working Group have noted, not only is the non-discrimination norm generally applicable within the WTO framework, but it already has some application to

¹⁹ See, e.g., GAIL E. EVANS, *LAWMAKING UNDER THE TRADE CONSTITUTION* 40 (2000) (identifying national treatment and MFN as “constitutional principles”); Lloyd, *supra* note 16 (arguing that the “internal architecture” of the WTO is based, imperfectly, on non-discrimination, and should be reformed to implement fully that objective); John H. Jackson, *The WTO “Constitution” and Proposed Reforms: Seven “Mantras” Revisited*, 4 J. INT’L ECON. L. 67, 72-73 (2001) (identifying MFN as one of seven “mantras” central to the WTO); Debra Steger, *Afterword: The “Trade and . . . “Conundrum – A Commentary*, 96 AM. J. INT’ L. 135, 137, 139 (2002) (arguing that non-discrimination and affiliated legal principles now predominate over market access and reciprocity norms). Non-discrimination principles are also significant outside the WTO’s confines. Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT’L L.J. 246, 270 (1996) (“Through the centuries of treaty and municipal law practice, MFN and national treatment have been the staples of non-discrimination and the most frequently invoked standards of international economic law.”).

competition law. Furthermore, many national laws contain an explicit or implicit non-discrimination principle.²⁰

The ubiquity of the non-discrimination principle is of uncertain significance. On the one hand, it is difficult to credit the argument that this demonstrates the need to incorporate it as a principle of WTO law.²¹ On the other hand, though some Working Group participants have suggested that further invocation of the principle would be redundant and presumably wasteful, that argument is not particularly telling. The non-discrimination principles are applied to competition issues involving goods only through the WTO's most general and abstract obligation,²² one that has had little practical import

²⁰ See Core Principles, *supra* note 9, ¶¶ 23, 26-30, 38-39.

²¹ The European Community, however, tried to make that case:

The importance of non-discrimination - *both MFN and national treatment* - for the multilateral trading system as well as national competition laws hardly needs stressing. It is difficult to imagine any situation in which a competition law regime would establish a distinction on the basis of the nationality of firms and to date discussions in the Working Group have shown no such examples. It is also our assessment that most if not all existing domestic competition laws do not prescribe discrimination against firms on the basis of nationality. Although significant substantive differences remain between various domestic competition laws, non-discrimination . . . come[s] across as important elements of commonality in these laws.

Communication from the European Community (W/222), *supra* note 8, ¶ 11.

²² Article XVI:4 of the Marrakesh Agreement provides simply that “[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, [hereinafter WTO Agreement], in Results of the Uruguay Round of Multilateral Trade Negotiations 1 (1994), 33 I.L.M. 1125, 1246. While this suggests that states must conform all laws bearing on the WTO's concerns, “it leaves open the question what those obligations are.” Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons From the History of Supreme Court Review*, 20 MICH. J. INTL L. 775, 787 n.86 (1999) (citations omitted); see also GATT Secretariat, *The General Agreement on Trade and Tariffs Uruguay Round Agreements: Report on Environmental Issues*, at 59 (Aug. 1994) (stating that “[t]he requirement that each WTO member ensure the conformity of its laws with its obligations under the Uruguay Round Agreements simply reflects the

even in the trade area.²³ The existing authority for matters touching on services is broader,²⁴ but again less clear than it might be, and necessarily limited to antitrust matters relating somehow to services. Finally, the notion that many *national* antitrust regimes already reflect such a norm, explicitly or implicitly, is hardly a decisive objection. For members already having an explicit commitment of that kind, an international agreement would ossify that commitment, and increase the cost of betraying it; for members having an implicit commitment to non-discrimination, a WTO provision would also make that commitment explicit, and improve transparency; with respect to members having no commitment whatsoever, the benefits would be apparent.

Or would they? Even if we assume that adopting non-discrimination principles would not be redundant, why would we want them in the first place? Apart from simply asserting that non-discrimination (together with transparency) is “central to the effective administration of competition law and policy,”²⁵ the Working Group posited several

basic requirement that governments abide by the obligations to which they have agreed.”).

²³ A WTO Panel recently ignored the attempted invocation of Article XVI:4 as a separate ground for objection to Section 301. Seung Wha Chang, *Taming Unilateralism Under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Sections 301-310 of the Trade Act of 1974*, 31 L. & POL’Y INT’L BUS. 1151, 1189-90 (2000) (noting, and criticizing, omission); see WTO Panel Report, United States-- Sections 301-310 of the Trade Act of 1974, WT/DS152/R (Dec. 19, 1999).

²⁴ Article II of the General Agreement on Trade in Services (GATS) imposes a general MFN obligation, subject to national exceptions approved by other members. General Agreement on Trade in Services, art. II, WTO Agreement, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 325 (GATT Secretariat 1994), 33 I.L.M. 1167 (1994) [hereinafter GATS]. The national treatment obligation, detailed in Article XVII, obligates a member country to afford “treatment no less favourable than it accords to its own [domestic] like services and service suppliers,” but permits unilateral exceptions to be detailed by member schedules. *Id.* art. XVII. The antitrust ambit of the GATS is separately established. Article VIII requires certain limited undertakings with respect to the abuse of a dominant position by monopoly suppliers of services, and Article IX imposes a duty to consult and afford sympathetic consideration to other complaints regarding anticompetitive conduct in services. In addition, the GATS contains a great number of sector-specific provisions. See Warner, *supra* note 6, at 334-61.

²⁵ Core Principles, *supra* note 9, ¶ 18. The cited antecedent reports, and the underlying national submissions, lend little insight into this assertion, save as noted below.

advantages. First, adopting a non-discrimination norm for antitrust ensures better consistency with the fundamental norms and objectives of the WTO.²⁶ Second, taking small, uncontroversial steps toward elaborating an antitrust regime helps build confidence and momentum in the broader enterprise, and adopting core principles in particular may help establish a climate of mutual trust.²⁷ Third, non-discrimination principles may be a bulwark against domestic pressures to favor local companies, and may in the process reassure foreign investors and encourage their investment.²⁸ The symbolic value may be the more important, since – perhaps for reasons of politesse – the Working Group’s proceedings lack examples of any actual discrimination that would be redressed, and there is relatively little evidence of any other official complaints to that effect.²⁹

Assuming that pursuing these ends is appropriate, the prospect of securing them by dint of core principles alone seems dim, both for generic reasons and for reasons peculiar to antitrust. In both cases, the balance of considerations counsels against jump-starting antitrust with non-discrimination.³⁰

²⁶ Core Principles, *supra* note 9, at ¶ 20.

²⁷ Core Principles, *supra* note 9, at ¶ 20; *see, e.g.*, Report on the Meeting of the Working Group on the Interaction between Trade and Competition Policy of July 5-6, 2001, ¶ 17, WT/WGTCP/ M/15 (Aug. 14, 2001) [hereinafter Report M/15] (reporting submission by EU representatives that adopting core principles would be necessary because “in order to facilitate international cooperation on competition policy, it was important to create a climate of mutual trust”).

²⁸ Core Principles, *supra* note 9, at ¶ 21; *see, e.g.*, Report (2001), *supra* note 8, at ¶ 19.

²⁹ A U.S. submission to the Working Group, for example, submitted that “[o]ur experience thus far has that other countries’ antitrust laws and policies generally are non-discriminatory too, both by design and in practice.” Communication from the United States to the Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/131, at 7 (July 13, 1999); *see also* OECD Secretariat, Rights of Foreign Firms under Competition Laws, COM/DAFFE/CLP/TD(98)23 (Feb. 3, 1998) (concluding that OECD members effectively observe national treatment in applying their antitrust laws).

³⁰ As this formulation suggests, matters might be very different were substantive terms on the table at the same time, but with the possible exception of hard-core cartels, they are not. *See supra* text accompanying notes ___. To the extent the agenda changes in the future, there is no reason why a non-discrimination principle, or any other core principle, could not be adopted then.

1. Generic concerns

The most frequently vetted objection to MFN obligations in international trade is the free-rider problem: because a state knows it can secure any benefit extended to another party, it has no incentive to make concessions; because every party knows that, fewer concessions will be made and fewer mutually beneficial bargains will be made. A state may also be deterred from offering a concession to another state or states if it must extend that concession to all states benefiting from MFN status.³¹ There are countervailing considerations, of course. MFN avoids certain abuses of bargaining power, and provides security for countries concerned that their bargains will be overtaken by more favorable terms.³² And trade agreements are clearly reached notwithstanding. The risk of any disruption appear to turn on the number of parties, their respective bargaining power, and the sequence of negotiations.

National treatment may create analogous bargaining problems, albeit in a more informal and asymmetric situation.³³ Such obligations may, if credible, serve the valuable function of checking domestic favoritism.³⁴ But they may also check other impulses. For example, if a state is contemplating lowering the threshold for merger notifications, in order to satisfy the interests of local companies preferring immediate scrutiny to prolonged uncertainty, it may be deterred from doing so by the administrative

³¹ See Henrik Horn & Petro C. Mavroidis, *Economic and Legal Aspects of the Most-Favored Nation Clause*, 17 EUR. J. POL. ECON. 233, 253 (2001) (discussing model, and distinguishing between free-riding problems and “costly concessions”).

³² For emphases on these considerations as a counterweight to the free rider problem, see Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW 58-63 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997); Horn & Mavroidis, *supra* note 31, at 255-58 (2001). For a more reserved appraisal of the value of MFN in preventing concessions from being undermined, see Alan V. Deardorff, *Comments on Chapter 1*, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW, *supra*, at 80-82.

³³ A national treatment obligation does not formally guarantee that domestic parties will be treated as well as foreigners, but it is usually assumed that their political accommodation more than suffices. See, e.g., Baker *et al.*, *supra* note 16, at 441.

³⁴ Cf. David W. Leebron, *A Game Theoretic Approach to the Regulation of Foreign Direct Investment and the Multinational Corporation*, 60 U. CIN. L. REV. 305, 335 (1991) (discussing function of national treatment in bilateral investment treatments, including significance of credibility).

burden of extending the same benefit to foreign entities – and perhaps as a consequence shrink from attempting pilot programs. Local companies, for their part, may be reluctant to press for legal reform were the reform's benefits unavoidably extended to foreign entities – perhaps especially where those entities have expended none of the lobbying effort – and the admixture of parochialism and free-riding problems may retard any efforts at reform. To be sure, the nondiscriminatory policy is still likely to be the better one in both instances, and WTO members may individually be inclined to elect it in any event, but imposing the obligation is associated with identifiable costs as well.

These drawbacks may seem marginal in nature, but they are made more vexing by virtue of the underdeveloped state of international antitrust. First, MFN's adverse effects are surely heightened when that obligation is unaccompanied by any substantive concessions. Unlike the GATT, GATS, or TRIPS agreements (or, for that matter, numerous bilateral agreements), in which an MFN obligation was adopted simultaneously with a material reduction in barriers to trade, adopting core principles at this point would *precede* any substantive obligations of note. Under these circumstances, the obligation provides very little by way of reassurance to members making concessions to one another (because no such concessions have yet been made), while accentuating the relative bargaining gains potentially held hostage by free riding. Imagine, for example, that the European Community wished to persuade a developing country to abandon the view that aggressive deregulation made adopting an antitrust law unnecessary (having already, of course, extracted a commitment that any antitrust law it adopted would adhere, hypothetically, to the core principles).³⁵ Many means of applying pressure would exist, and it is not self-evident that we would want the Community to have any effective means at its disposal. But the MFN obligation – and the national treatment obligation, with which it frequently overlaps in result – would likely deprive it of the ability to make favorable treatment under Community law contingent on the country's adoption of its own laws, and it is difficult to perceive the offsetting benefit.

³⁵ See Jenny, *supra* note 18, at 18-19 (reporting argument that deregulation may obviate the need for antitrust); see also *supra* note ___ (noting view submitted by some developing countries that no competition laws should actually be required).

Such obvious strong-arming is largely hypothetical,³⁶ but more subtle kinds of discrimination are established policy. Some domestic legislation is reciprocity-oriented.³⁷ Moreover, at least prior to the Supreme Court's decision in *Hartford Fire*,³⁸ American courts took the state of foreign antitrust law into account in deciding whether to exercise jurisdiction over antitrust cases touching on foreign affairs,³⁹ and the federal agencies continue to do so as a matter of official policy.⁴⁰

³⁶ *But cf.* Raj Bhala, *Hegelian Reflections on Unilateral Action in World Trading System*, 15 BERKELEY J. INT'L L. 159, 201-02 (1997) (describing proposed fair trade in financial services legislation, under which the United States would be entitled to afford national treatment on condition of foreign reciprocation).

³⁷ In the National Cooperative Production Amendments of 1993, for example, the United States limited the application of provisions capping recoverable damages for claims arising from conduct within the scope of a notified production joint venture to circumstances where the venture's principal facilities are within the United States, U.S. persons control all the joint venture parties, or any foreign persons controlling hail "from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint ventures for production." 15 U.S.C. § 4306. Those provisions allow considerable latitude for foreign laws – it would appear satisfactory, for example, for a country to have no antitrust laws at all, so long as they as there is no discrimination against U.S. persons – but exert a pressure inconsistent with non-discrimination norms.

³⁸ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

³⁹ *See, e.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979); *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976). *But see, e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980); *In re Ocean Shipping Antitrust Litigation*, 500 F. Supp. 1235 (S.D.N.Y. 1980); *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976). *Cf.* Restatement (Third) of Foreign Relations Law of the United States § 403 (1987)

⁴⁰ U.S. Dep't of Justice & Fed. Trade Comm., *Antitrust Enforcement Guidelines for International Operations*, § 3.2, 4 Trade Reg. Rep. (CCH) ¶ 13,107 (1995), 68 Antitrust & Trade Reg. Rep. (BNA) supp. 1 (1995) (explaining that in deciding whether to investigate and enforce U.S. antitrust law extraterritorially, the federal agencies will consider among other factors the degree of conflict with foreign law or articulated foreign economic policies; the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and the effectiveness of foreign enforcement as compared to U.S. enforcement action). The Guidelines further note that "in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be

Second, in contrast to the bulk of the trade regime, the “products” at issue are highly differentiated. Trade law is sometimes distinguished from antitrust law on the ground that the former generally addresses governmental measures while the latter addresses private conduct.⁴¹ But that is not the whole story, even if we put to one side state enterprises and regulatory barriers to competition. At this stage of international antitrust’s development, such norms as have developed are principally intergovernmental in character. The United States is obligated under a number of bilateral agreements, for example, to cooperate with coordinate antitrust authorities in pursuing matters of interest to the parties singly or jointly, and other established antitrust agencies have similar webs of agreements. Under these agreements, coordination is less focused on the nationality of the enterprises concerned than with where their conduct has effects.⁴²

This is hardly an unusual form of international economic relations, but it complicates the application of non-discrimination analysis. Because such relations rely on mutual trust, the parties involved select one another with an eye toward their partners’ expertise, regulatory capacity, and integrity. Indeed, in the International Antitrust Enforcement Assistance Act of 1994 (IAEAA),⁴³ which authorizes the U.S. antitrust agencies to enter into bilateral agreements with foreign governments for mutual

affected,” and recall the agencies' obligation to take into account the legitimate interests of foreign nations “in accordance with the recommendations of the OECD and various bilateral agreements.” *Id.* § 3.2 & n.73.

⁴¹ See Lloyd, *supra* note 16, at 348; Tarullo, *supra* note 4, at 489.

⁴² In the 1991 U.S./E.C. Agreement, for example, the important interests triggering notification of the other signatory – and serving as the basis for further cooperation – include matters that: (a) are relevant to enforcement activities of the other Party; (b) “[i]nvolve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory”; (c) involve a merger or acquisition in which at least one of the transacting companies or its parents is within the other Party's territory; (d) “[i]nvolve conduct believed to have been required, encouraged or approved by the other Party”; or (e) “[i]nvolve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.” U.S.-E.C. Agreement Regarding the Application of Competition Laws, Sept. 23, 1991, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504 (1998), 1991 O.J. (L 95) 45, *corrected at* 1995 O.J. (L 131) 38, <http://www.usdoj.gov/atr/public/international/docs/ec.htm>. For a general description of these and other bilateral agreements, see Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 646-60 (2001).

⁴³ 15 U.S.C. § 6201 et seq. (2000).

assistance in antitrust matters, Congress required as a precondition that any foreign partner have comparable ability to provide assistance, in addition to the specific capacity to protect confidential information from disclosure.⁴⁴ A comprehensive non-discrimination obligation would, in theory, mean that the United States (and each of its partners, and those involved with each other in similar bilateral agreements) would have to extend its benefits – for example, providing notification of antitrust enforcement activities affecting the important interests of the other party, respect principles of comity in deciding whether and how far to enforce, and provide assistance to the enforcement activities of the other party (“positive comity”) – to all WTO members, or commit an international delict.

Anticipating this type of problem, the Working Group has posed the question whether bilateral cooperation would raise MFN issues were a core principles approach pursued.⁴⁵ Its tentative answer has been that while guidelines might be necessary to resolve potential conflict between MFN and bilateral obligations, it would be unmanageable to make cooperation obligatory – in other words, that MFN would of necessity yield.⁴⁶ That answer, while perhaps necessary, seems less than satisfactory.

⁴⁴ *Id.* § 6211(2)(A)-(C). In addition to elaborating the protocol for protecting against breaches of confidentiality, the Act also requires that in the event of a breach and absent adequate assurances that the breach would not occur again, the agreement with the foreign government must be terminated. *Id.* § 6211(2)(G).

⁴⁵ *See* Core Principles, *supra* note 9, ¶ 42 (“The concern has been expressed that application of the principle of non-discrimination in a multilateral framework on competition policy could raise issues if a country cooperates to a greater extent with certain countries than with others. Would this raise MFN issues or would each bilateral relationship be treated as separate and distinct? It has been suggested that guidelines might be needed on this matter.”).

⁴⁶ Report (2001), *supra* note 8, ¶ 28 (“The point was also made that due to constraints in human capacity, it would not be possible for all requests for cooperation in the field of enforcement to be met. This was a key reason why cooperation under the proposed framework should be voluntary. That is, countries would not be required to provide enforcement assistance in all circumstances. It was noted further, that, in principle, this entailed a potential for issues to arise in relation to the MFN principle. Guidelines might be needed on this matter. Notwithstanding this, the proposed framework could provide substantial benefits including by enabling competition authorities to meet regularly within a solid institutional framework.”); accord Report (2002), *supra* note __, ¶ 21. The European Community, which like the United States has

Even under the bilateral agreements themselves, cooperation is not required.

Considering forbearance or assistance is, however, and it would appear inconsistent with both the core principles of non-discrimination and transparency were some members entitled to such consideration and others not.⁴⁷

Equally important, exempting such agreements derogates significantly from the non-discrimination principle. The treatment of customs unions and free trade areas under the GATT and other agreements is a source of continuing controversy, and one might conclude that the legal limitations on such exemptions are highly ineffective.⁴⁸ But there, at least, the exempted agreements sit atop significant concessions applicable to all members, and in theory pursue the complete liberalization of trade that is already substantially liberalized.⁴⁹ In contrast, to date the only species of international antitrust involves bilateral relations – or, at most, principles developed in the context of closed clubs like the OECD – and applying their mix of “positive” and traditional comity may result in more or less antitrust enforcement as between the parties, rather than a one-way ratcheting toward liberalization.⁵⁰ Bilateral antitrust, in other words, may or may not

a number of bilateral and regional cooperation agreements, has stated more firmly that such agreements would be exempted from the nondiscrimination principles, relying less on capacity limits than on the prospect that WTO members might seek to take advantage of bilateral relationships to which they were not entitled. *See* Communication from the European Community (W/222), *supra* note 8, ¶ 17.

⁴⁷ *See* Swaine, *Local Law of Global Antitrust*, *supra* note 42, at 725-41.

⁴⁸ *See* JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 165-67, 169-73 (2nd ed. 1998).

⁴⁹ *Id.* at 165-67; *see, e.g.*, GATT art. XXIV; Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, 33 I.L.M. 1161.

⁵⁰ Traditional or “negative” comity, put generally, requests that an antitrust authority consider the other party's interests in deciding whether to initiate an investigation or proceeding, in determining an investigation's scope, and in determining remedies. Positive comity, the newer and less frequently employed of the two notions, involves honoring the request of an antitrust authority for the investigation of anticompetitive activities occurring within the requested party's territory that affect the requesting authority's important interests. For a discussion of the two notions, see OECD Committee on Competition Law and Policy (CLP), *Making International Markets More Efficient Through "Positive Comity" in Competition Law Enforcement* ¶ 11 (DAFFE/CLP(99)19) (June 1999).

enhance the application of antitrust law to particular activities, and so exempting it may prove inconsistent with the assumptions of non-discrimination.

2. Antitrust considerations

The above-described difficulties – namely, that of adopting non-discrimination principles prior to substantive concessions, and adapting those principles to predominantly intergovernmental relations – apply essentially without regard to the nature of antitrust. Other concerns are more topical in nature. To begin with, it is by no means clear how the non-discrimination principles might apply to antitrust problems. Unlike subsidies and other issues typically assessed for consistency with national treatment, there is relatively little behavior that might be classified as “internal” in character, or that treats foreigners distinctly – though antitrust laws do typically show less interest in foreign effects,⁵¹ and sometimes distinguish between inward-bound and

⁵¹ See, e.g., Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a (providing that the Sherman Act “shall not apply to conduct” involving trade or commerce with foreign nations unless “such conduct has a direct, substantial, and reasonably foreseeable effect” on trade or commerce in the United States, and “such effect gives rise to a claim” under the provisions of the Sherman Act); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 n.23 (1993) (explaining that the FTAIA “was intended to exempt from the Sherman Act export transactions that did not injure the United States economy.”). This is discriminatory insofar as it reflects less concern for foreign consumers – though many would consider international law to have dictated a similar, or narrower, jurisdictional scope. But it does not distinguish in any formal regard between would-be plaintiffs on the basis of nationality. See, e.g., *Pfizer v. India*, 434 U.S. 308, 314 (1978) (“The fact that Congress’ foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations.”); *id.* at 313-20 (holding that, absent contrary indications in the Sherman and Clayton Acts, that treble-damages remedies are equally available to foreign governments); *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003) (concluding that subject-matter jurisdiction exists over suits by foreign plaintiffs who are injured solely by anticompetitive conduct’s effects on foreign commerce, so long as the conduct’s effect on U.S. commerce give rise to a Sherman Act claim by those plaintiffs or by another private plaintiff); *id.* at 358-59 (concluding, in upholding foreign plaintiffs’ standing, that foreign plaintiffs are not less appropriate parties to enforce antitrust laws than would be domestic plaintiffs); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (2d Cir. 2002) (holding that the FTAIA allows suit by buyers and sellers at foreign auctions whose injuries does not arise from the

outward-bound commerce having equivalent effects.⁵² And such laws still more rarely distinguish between one state (and its persons or products) and another based on their respective nationalities, unlike tariffs and similar measures subject to a traditional MFN analysis. As a result, applying the non-discrimination principles to antitrust would place an uncommon degree of stress on the accurate characterization of corporate nationality, a question fraught with difficulty.⁵³

It is hard to tease from the Working Group's proceedings any practical examples as to how either non-discrimination principle might be applied in practice. The Group has been clearer, however, regarding the categorical exemptions it is contemplating, over and above that for bilateral relationships. For one, it emphasizes that the intent of WTO regulation of antitrust is "*not* to encroach upon the domain of industrial, development or social policy," so that the attendant non-discrimination principles "would have no implications for the broader question of the extent to which a market is open to foreign

conduct's harm to domestic commerce, so long as the conduct had "domestic effect violat[ing] the substantive provisions of the Sherman Act."). *But compare* 15 U.S.C. § 15(b) (providing that, by virtue of amendments enacted subsequent to *Pfizer*, that foreign governments are generally limited to single damages), *with id.* § 15a (authorizing United States government to recover treble damages), *and id.* § 15c (authorizing U.S. states to recover treble damages in *parens patriae* suits); *cf.* *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427 (5th Cir. 2001) (holding that foreign and domestic plaintiffs alike must show that their claims, and not merely someone else's, arose from the anticompetitive conduct's effects on U.S. commerce).

⁵² *See, e.g.*, Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (2000) (providing limited exception from the Sherman Act for associations engaged solely in export trade); Ulrich Immenga, *Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy*, in *ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY?* 93-94 (John O. Haley & Hiroshi Iyori eds., 1995) (citing examples from other jurisdictions); Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 397 (1997). ("If there is one fundamental precept among national competition systems, it is a rule against cartels. If there is one common exception to that rule, it is the export cartel. Even the most vigorous competition law enforcers accept a cartel affecting only foreign markets as either a good thing, a bad thing with statutory authorization, something regrettably beyond its jurisdiction, or somebody else's problem").

⁵³ For a recent argument regarding the ineffectiveness of prevailing U.S. tests, see Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563 (1999). An alternative basis for a discrimination claim, relating to the nationality of a country seeking traditional or positive comity, is address above.

investment.”⁵⁴ This suggests, for example, that foreign acquisitions of domestic companies could not be resisted on nationality grounds within antitrust law proper, but could be separately restricted by any number of other legal provisions.⁵⁵

In addition, the consensus view appears to be that non-discrimination in antitrust “would not preclude the enactment of sectoral exceptions, exemptions and exclusions from national competition regimes.”⁵⁶ On its face, this approach would permit a member to establish a separate regime for a particular industry or service sector. It would also tolerate procedural variations, such as a requirement that labor representatives be permitted to take part in merger review, and the pursuit of potentially divergent objectives, like the preservation of small and medium-sized businesses. Perhaps most strikingly, special provisions could perhaps also be made for “joint activities relating to export promotion” – that is, the much-criticized export cartels⁵⁷ -- which not incidentally provide the most obvious evidence that antitrust policy is driven by national self-interest.⁵⁸

Such loopholes seem big enough to drive a truck through, but others may be more significant. It would be extraordinarily difficult, most concede, to evaluate whether antitrust laws – however broad their purview – are actually being *enforced* on a discriminatory basis. Enforcement discretion is generally regarded as indispensable to an

⁵⁴ Core Principles, *supra* note 9, ¶ 35 (emphasis in original).

⁵⁵ Conversely, the domestic acquisition of the same target might be approved, notwithstanding graver antitrust concerns, on familiar national champion grounds. Any such decision is likely to be made in the application of more general provisions, however, and so implicates the as-applied questions raised by non-discrimination. *See supra* text accompanying notes __.

⁵⁶ Core Principles, *supra* note 9, ¶ 36.

⁵⁷ *Id.* ¶¶ 36-37; *see supra* note __ (citing examples). This is not, of course, free from controversy. *See, e.g.,* Communication from Thailand to the Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/213 Rev. 1, ¶ 2.1 (Sept. 26, 2002) (describing preservation of export cartels as “unacceptable”).

⁵⁸ *See, e.g.,* Alan O. Sykes, *Externalities in Open Economy Antitrust and their Implications for International Competition Policy*, 23 HARV. J. L. & PUB. POL’Y 89, 92-94 (1999). As Professor Sykes stresses, though, such cartels are likely the tip of the iceberg, given the incentives involved. *Id.*; *see also infra* text accompanying note __ (discussing perceived need for a single undertaking approach).

antitrust regime.⁵⁹ Many considerations enter into whether and how enforcement actions are pursued, and it is difficult to envision any effective means for evaluating a particular matter was favored or disfavored on grounds of nationality. Comparing fully litigated cases would require thoroughgoing review, and where cases are pretermitted without conclusive fact-finding or even a complete investigation, something like a *de novo* proceeding would have to be undertaken. Any review would then have to examine differing degrees of culpability, differences in available (and admissible) evidence, differing degrees of assistance from the parties, and differing effects within the country in question.⁶⁰ Even where each of two cases involving discrepant nationalities presents a convincing basis for intervening, they may be treated differently for reasons having nothing to do with nationality. Antitrust enforcers almost certainly have to husband resources in a manner that precludes wholly equitable treatment – such that taking one case does not mean that an identical case will be taken – and may desire, for example, to protect the government’s long-term litigating position by choosing the best facts on which to present a new or controversial theory.⁶¹

No doubt mindful of these and related considerations, the Working Group appears already to have dismissed the possibility of applying the non-discrimination principles to any as-applied challenges to member antitrust policies, instead focusing solely on explicit

⁵⁹ See, e.g., Gordon Borrie, *The Need for Discretion in the Application of Competition Law*, in INTERNATIONAL HARMONIZATION OF COMPETITION LAWS ch. 4.4 (Chai-Jui Cheng et al. eds., 1995); Ignacio De Leon, *The Dilemma of Regulating International Competition under the WTO System*, 3 EUR. COMP. L. REV. 162, 172 (1997); Communication from the European Community and its Member States, at 6, WT/WGTCP/W/175 (July 26, 2001), <http://docsonline.wto.org/DDRDdocuments/t/WT/WGTCP/W175.DOC>; Sir Leon Brittan, *The Need for a Multilateral Framework of Competition Rules*, Address Before the Organisation for Economic Cooperation and Development (OECD) Conference on Trade and Competition (June 29-30, 1999).

⁶⁰ W/131, *supra* note 29, ¶¶ 16, 21.

⁶¹ Cf. Communication from the United States, *Administering a Competition Law and Policy: The Mechanics of Setting and Pursuing Policy Goals with Finite Resources*, WT/WGTCP/W/164 (June 26, 2001) (describing the variety of considerations bearing on case selection, and the need for discrimination in general).

de jure discrimination.⁶² However commendable that concession, it virtually eliminates the advantages of adopting non-discrimination norms.⁶³ Any discriminatory impulse can easily be channeled into as-applied discrimination, which not incidentally is less visible and thus less likely to prompt retaliation. Assuming antitrust officials would otherwise be legally authorized, or temperamentally predisposed, to discriminate on the basis of nationality, it seems unlikely that they would regard continuing to do so as an abuse of their considerable prosecutorial discretion.⁶⁴ And even if the adoption of core principles prompts such officials to self-regulate, the diversity of actors entitled to enforce

⁶² Report (2001), *supra* note 8, ¶ 27; Core Principles, *supra* note 9, ¶ 39. As the European Community put it,

It is important to stress, however, that we are *only* suggesting a binding core principle as regards *de jure* discrimination in the domestic competition law framework, i.e. the treatment accorded to firms according to the wording of the laws, regulations and guidelines of general application. The main reason for limiting WTO provisions to *de jure* discrimination is that, when transposed to a competition context, the concept of *de facto* discrimination could raise complex questions about the enforcement policies, priorities and prosecutorial discretion of competition authorities, including how competition law is being applied to individual cases.

Communication from the European Community (W/222), *supra* note 8, ¶ 14; *accord* Communication from Japan to the Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/217, at 4 (Sept. 26, 2002). I use the term as-applied in the text to distinguish it from the way “de facto discrimination” is sometimes used in the trade literature – that is, to refer to national laws that have some kind of disparate impact on imports. *See* Lothar Ehring, De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment – Or Equal Treatment, Jean Monnet Working Paper 12/01 (2001); Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test*, 32 INT’L L. 619 (1998).

⁶³ *See* Jenny, *supra* note 18, at 11 (noting that “[p]rosecutorial discretion is another tool used by competition authorities to calibrate their efforts in certain directions or regarding certain sectors”).

⁶⁴ *Cf.* De Leon, *supra* note 59, at 172 (arguing that “by its very nature, discretion associated to antitrust enforcement must always be excessive and arbitrary”).

competition laws in regimes like the United States and the European Community will make it difficult to obtain any universal subscription.⁶⁵

3. Conclusion

Given the uncertain nature of the problem being redressed, and the loopholes in the norms being proposed, the potential benefits to adopting qualified norms of non-discrimination seem vanishingly slight. For many of the same reasons, it must be conceded, the potential drawbacks may also seem minimal. If discrimination is rare (and the productive, instrumental use of discrimination still rarer), barring it will not sacrifice an important tool in antitrust diplomacy; if the loopholes are plentiful, any legitimate ends can probably be pursued regardless. There would then remain the more abstract advantages of rendering antitrust consistent with the WTO constitution, building momentum, and building confidence in the integrity of new antitrust enforcers.

Such claims, I would argue, are precisely where the argument for pursuing non-discrimination grows weakest. First, as explored above, antitrust regulation lacks the outward-looking (and inward-looking) perspectives generally associated with MFN and national treatment obligations, respectively, and furthermore relegates the bulk of governmental decision-making to a level of administration ill-suited to international control. It is doubtful, given these characteristics, that any adaptation of non-discrimination will bear a close resemblance to its use in the trade context, and still less likely that it will bring credit to that usage.

⁶⁵ See *infra* text accompanying notes __ (discussing role of state and private enforcement). It is difficult to predict whether other actors would be equally inclined to discriminate. Private enforcement actions, which account for the “vast bulk” of actions filed in U.S. district courts (WT/WGTCP/W/164, *supra* note 61, at 9 n.26), do not seem especially prone to discriminate on the basis of nationality, and any instinct to do so probably pales in comparison to the relative difficulties foreign defendants pose in terms of discovery and relief. The susceptibility of states to political considerations is disputed. Compare Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-41 (2001) (describing state enforcers as lacking in resources, prone to capture, and essentially incompetent), with Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 G.W.U. L. REV. 1004 (2001) (defending state enforcers against criticisms, while reserving question of whether a strong case can be made for state enforcement).

Second, unless it is supposed that *any* accord on antitrust is a step forward – in the same sense that there is no such thing as bad publicity⁶⁶ – it is hard to see non-discrimination as a confidence-building measure. In exempting industrial policy, permitting sectoral exceptions, and generally licensing the pursuit of “non-antitrust” goals, the Working Group would legitimate a thin version of antitrust that sidesteps any genuine commitment to market access. Whatever one’s feelings toward what is sometimes labeled the Chicago approach to antitrust analysis, this hybrid approach seems to ignore the most coherent antitrust argument for non-discrimination: as the United States put it in supporting the adoption of national treatment, “discriminating against parties or firms on any ground, including their nationality, would be fundamentally inconsistent” with the overriding ambition of protecting competition, not competitors, and eschewing the pursuit of non-antitrust goals.⁶⁷ What is more, the free-riding risks created by non-discrimination may make it difficult to capitalize on any momentum that a consensus-oriented declaration of core principles would appear to create, and so frustrate any deeper (and more meaningful) integration of global antitrust.

Finally, because the Working Group understandably would pull back from addressing as-applied discrimination, it is unlikely that adopting core principles would reassure private parties harboring doubts about the integrity of antitrust enforcers – who would, in their own right, lose one formal means of retaliating against non-reciprocal treatment. It may be doubted, indeed, whether establishing nationality as a basis for complaint does anything more than reinvigorate an acute sensitivity. Established antitrust regimes are only gradually progressing beyond alleging disparate national treatment,⁶⁸

⁶⁶ The pressure to move forward was perceived, though not exactly seconded, by Professor Fox. See Fox, *Competition Law and the Millenium Round*, *supra* note __, at 671 (noting the “consensus that discussions should continue; but discussions must normally either move forward or dissipate”).

⁶⁷ See Communication W/131, *supra* note 29, ¶ 13. For a more skeptical view of this credo, see Edward T. Swaine, “*Competition, Not Competitors, Nor Canards: Ways of Criticizing the Commission*,” 23 U. PA. J. INT’L ECON. L. __ (2002) (forthcoming).

⁶⁸ See Swaine, *Competition, Not Competitors*, *supra* note 67 (noting relative absence of discrimination allegations in recent dispute regarding the GE-Honeywell merger). Contrast William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J.

and it may be that further incorporating non-discrimination obligations in the WTO's antitrust provisions will cause harmful backsliding,⁶⁹ without providing us with a concrete means of attacking any genuine problems.

B. Transparency and Procedural Fairness

Unless one is irrationally fearful of ghosts, it is hard to speak ill of the transparency principle. For one, the idea that antitrust laws and enforcement decisions should be made available to the public seems beyond peradventure. The other reason it is hard to criticize, unfortunately, is that it is hard to pin down exactly what else transparency might portend. According to the Working Group, transparency in the WTO framework “has at least three dimensions: first, publication; second, uniform, impartial and reasonable administration of measures that have an impact on trade; and third, the rights of parties to legal proceedings that might lead to the adoption of measures that would have an impact on trade, for example the right to be heard.”⁷⁰ Other definitions have been voiced, both within the WTO context and otherwise,⁷¹ but all make it hard to observe the WTO's attempted distinction between transparency and procedural fairness, and support the idea that they should be considered together.⁷²

It should first be noted, however, that transparency in the immediate context concerns the transparency of national laws and procedures, not transparency at the WTO

805, 839-52 (2001) (noting, and critically evaluating, claims of economic nationalism in the Boeing-McDonnell Douglas merger).

⁶⁹ Cf. Tarullo, *supra* note 4, at 493-94 (expressing concern that WTO agreement might “strain cooperative relationships between competition authorities of different countries”).

⁷⁰ Core Principles, *supra* note 9, ¶ 7.

⁷¹ See, e.g., Bo Vesterdorf, *Transparency – Not Just a Vogue Word*, 22 *FORDHAM J. INT'L L.* 902, 903 (1999) (reckoning, by Judge of the Court of First Instance of the European Communities, that transparency involves “(1) the right to a statement of reasons for a decision, (2) the right to be heard before a decision is taken, (3) a party's right of access to the file, and (4) the public's right of access to information”); Jeffrey Waincymer, *Transparency of Dispute Settlement Within the World Trade Organization*, 24 *MELB. U.L. REV.* 797, 802, 804-06 (2000) (noting broad meanings of transparency).

⁷² Cf. Core Principles, *supra* note 9, ¶ 9 (claiming that, in contrast to principles of non-discrimination and transparency, “relatively little” discussion in the Working Group has been devoted to procedural fairness).

itself. The latter is a significant concern in its own right, particularly as concerns the dispute resolution process. But proposed solutions have proven equally controversial, perhaps suggesting that transparency is not so straightforward as it might first appear.⁷³ To the extent the WTO's own procedures for articulating and adopting antitrust principles are subject to attack for a lack of "legislative" transparency, those concerns may cast a pall over its proposal for national commitments – at least to the extent they actually require meaningful reform.

1. Publication

An obligation to publish remains largely uncontroversial. The principle problem, in fact, is that it is *so* uncontroversial that international norms are unnecessary. National antitrust regimes do, in fact, make their laws available.⁷⁴ To the extent omissions develop – say, as fledgling antitrust regimes come into being – the abundant incentives multinational companies have to root them out, coupled with the commercial interests of publishing services and the advent of the internet, mean that that any omissions should be short-lived.⁷⁵

An obligation to publish decisions implementing that law, or to disclose evidence upon which decisions were based, is trickier. Which decisions are worthy of publication seems open to debate. Virtually every national regime has lacunae, such as the general U.S. practice of refraining from disclosing the basis for clearance decisions (in contrast to

⁷³ The controversies involve, for example, the rights of third parties to participate in dispute resolution. Compare G. Richard Shell, *The Trade Stakeholders Model and Nonstate Participation in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359 (1996) (arguing for enhanced participation by nonstate parties in WTO dispute resolution), and G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995) (same), with Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 300-02 (1996).

⁷⁴ Communication from the United States, W/131, *supra* note 29, ¶ 7 (reporting that "[f]rom our understanding, all of these [national antitrust] laws (together with accompanying regulations) are published - if not always readily available outside the country in question - and the agency charged with enforcing the laws is identified").

⁷⁵ E.g., International Bar Ass'n, Global Competition Forum, <http://www.globalcompetitionforum.org/> (indexing global antitrust laws).

European Commission procedures),⁷⁶ and decisions to settle almost invariably involve less disclosure – though it is not wholly clear why.⁷⁷ There also seems to be universal acknowledgment of the respect owed confidential information, and the need to develop safeguards to maintain the confidentiality of any such information,⁷⁸ but varying national schemes have impaired international cooperation thus far.⁷⁹

The more profound difficulty with publication transparency, however, has to do with the possibility of developing antitrust law through decisions, as against a (potentially) more transparent reliance antitrust code. Though the relative significance of judicial decisions and administrative regulations has varied over time,⁸⁰ the U.S. system has consistently been oriented toward the common law-like elaboration of vague provisions in the Sherman Act and other antitrust statutes.⁸¹ Because this method makes it more difficult, on average, to predict the course of the law, and even difficult to

⁷⁶ No doubt mindful of this difference, the ICN's new Guiding Principles for Merger Notification and Review require transparency as to "the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any *adverse* enforcement decisions on the merits." Guiding Principles, *supra* note 15, art. 2 (emphasis added).

⁷⁷ See generally William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 847-49 (2001).

⁷⁸ Core Principles, *supra* note 9, ¶ 7.

⁷⁹ See, e.g., Baker *et al.*, *supra* note 16, at 455-59.

⁸⁰ Spencer Weber Waller, *Prosecution By Regulation: The Changing Nature of Antitrust Enforcement*, 77 OREGON L. REV. 1138 (1999) (emphasizing increasing trend toward administrative mechanisms).

⁸¹ See, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."); see also *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997) (observing that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition'" (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 688)); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) (describing the Sherman Act as a "charter of freedom," with "a generality and adaptability comparable to that found ... in constitutional provisions"); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544-47, 551-52 (1983) (contrasting broad enactments such as the Sherman Act that invite courts to fashion common law with more precise enactments whose gaps should not be filled).

determine how the law stands at any given point in time, it may be thought inconsistent with any principle of transparency. Much the same might be said at a more substantive level concerning the U.S. “rule of reason,” which has indisputably helped facilitate the case-by-case method of the common law approach.⁸²

This tension hardly proves that the principle of transparency ought give way. Many would argue that it is the U.S. system that is flawed,⁸³ and mere inconsistency with prevailing U.S. practices, by itself, scarcely renders objectionable (or even suspect) contrary international principles. The point, instead, is that transparency requires tradeoffs with other potential values – such as the purported genius of the common law method – and may prove more controversial in its application than might otherwise be imagined, even for countries that are still making the choice as to the kind of antitrust regime they will adopt.⁸⁴

A final caveat involves the relationship between transparency and the core principle of non-discrimination. As noted above, the decision not to pursue any international regulation of as-applied discrimination is probably well considered. But if a bar on *de jure* discrimination is pursued, and has any tangible impact, one effect may be to drive discrimination underground. If transparency is highly valued, the net effect may be negative: regulated parties would, presumably, prefer to be able to determine by surveying a country’s laws whether it is inclined to discriminate, and driving that approach from the public view can only make everyone worse off.

⁸² If for no other reason than by inspiring litigation. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12 (1984) (“Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason”); *id.* at 12 n.24 (noting difficulties vagueness poses for settlement) (citing Frank H. Easterbrook, William S. Landes, & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. L. & ECON. 331, 353-64 (1980)).

⁸³ See, e.g., Philip Marsden, “Antitrust” at the WTO, ANTITRUST, Fall 1998, at 28 (noting skepticism of WTO Secretariat regarding application of rule of reason and biases of enforcers).

⁸⁴ Cf. Report M/15, *supra* note 27, ¶ 19 (describing submission by India noting that, with reference to the adoption of core principles by developing countries, Indian experience had been that “not everything could be spelt out in such a law and that some matters had to be left for the evolution of jurisprudence over a period of time”).

2. Administration

Transparency and closely allied principles of procedural fairness may also require “uniform, impartial and reasonable administration” by national regulators.⁸⁵ The general drift of this obligation is again unobjectionable, but its precise contours raise complications. The most significant complication may concern the standing of diversified enforcement systems. The United States has made a choice, for better or for worse, to sacrifice coherence in antitrust enforcement for the sake of comprehensiveness. The array of federal, state, and purely private antitrust enforcers⁸⁶ – not to mention federal and state antitrust law – indisputably increases the cost of noncompliance with antitrust law. At the same time, it is the antithesis of “uniform, impartial and reasonable administration.”

Take, for example, the now hoary example of Microsoft. At the federal level, one agency initiated and then ceased enforcement activity, then another agency renewed scrutiny and prosecuted Microsoft to the hilt, until an intervening election brought a change in administration and the effective abdication of a hard-won remedy. At the state level, attorneys general fluctuated in their support for the federal government’s positions – in a fashion correlated not only with changes in the federal position, but also with their own political fortunes, sometimes enhanced by campaign assistance from either Microsoft or its opponents – and nonparticipating states (at least) retained the right to initiate separate proceedings. Finally, Microsoft’s rivals and consumers of its products

⁸⁵ See Core Principles, *supra* note 9, ¶ 9 (describing requirements imposed by Article X of the GATT).

⁸⁶ Technically speaking, state antitrust authorities invoking federal law also litigate in a private capacity. 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* § 335a, at 286 n.1 (2d ed. 2000). While it is also possible to address state attorney generals as one with their purely private counterparts, e.g., Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 *YALE J. INT’L L.* 219 (2001), their interests and the risks they pose in international matters are also differentiable. See Swaine, *Local Law of Global Antitrust*, *supra* note 42, at 750-77 (discussing role of state and private enforcement of federal antitrust in international matters).

sued it on a variety of antitrust bases arising under federal and state law.⁸⁷ Were Microsoft a foreign company, there can be little doubt that it would have cause to complain about the lack of uniformity and reason in its uncoordinated prosecution⁸⁸ -- and it may yet have cause to do so in Europe.⁸⁹

More generally, the diversity of antitrust options that has long distinguished the United States is increasingly prevalent elsewhere, as evidenced by the European Community's recent decision to substantially decentralize its enforcement authority.⁹⁰ As the European amendments reflect, the fragmentation of antitrust enforcement is not purely an historical artifact, but instead may reflect a deliberate decision to increase the means for enforcement, and increase local political accountability, at the potential cost of uniformity and transparency.⁹¹ and it could not but detract from the overall uniformity

⁸⁷ See, e.g., E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565, 603 (2002) (explaining that, even if the federal government successfully renounces its original quest to break up Microsoft, "the case against Microsoft in favor of divestiture could go forward for at least two reasons. First, several state attorneys general have stated that they will continue to pursue litigation against Microsoft even if the federal government settles its case. Second . . . [the decision in] *American Stores* empowers private litigants to seek divestiture as a remedy for injuries caused by antitrust violations. Any number of litigants could continue to seek the divestiture of Microsoft.") (internal citations omitted).

⁸⁸ For representative criticisms, see Lionel Kestenbaum & James W. Olson, *Federal Amicus Intervention in Private Antitrust Litigation Raising Issues of Extraterritoriality: A Modest Proposal*, 16 INT'L L. 587 (1982); Swaine, *Local Law of Global Antitrust*, *supra* note 42, at 750-77; Diane P. Wood, *United States Antitrust Law in the Global Market*, 1 IND. J. GLOBAL LEGAL STUD. 409, 416 (1994); cf. Swaine, *Local Law of Global Antitrust*, *supra* note 42, at 777-83 (considering pertinence of state antitrust law to international matters).

⁸⁹ See Paul Meller, *European Trade Group Files Suit Over Windows XP*, N.Y. TIMES, Feb. 11, 2003 (describing five-year old investigation by the European Commission into Microsoft practices, and new complaint by private group filed near the end of the Commission proceedings).

⁹⁰ Council Regulation No. 1/2003 of 16 December 2002 on the Implementation of the Rules of Competition Laid Down in Articles 81 and 82 of the Treaty, OJ (L) 1/1 (Jan. 4, 2003) (available at http://europa.eu.int/eur-lex/en/dat/2003/l_001/l_00120030104en00010025.pdf).

⁹¹ Diversification may in fact have some stabilizing effects, such as by compensating for a change in the political leadership presiding over national antitrust enforcers, but they are probably less profound in international matters, given the potential for compensating behavior by other national competition authorities. See Swaine, *Local*

and transparency of antitrust procedures. The underlying lesson is that the administrative virtues being advanced by the Working Group may be at the expense of other, credible antitrust values.

3. Participation

Finally, transparency and procedural fairness are considered to entail a right to participate in the decision-making process, both as a means for checking the authority of government officials and as an end in its own right. The two most problematic entailments, involving judicial review⁹² and third-party rights of initiation and participation,⁹³ warrant careful scrutiny.

Here too, the performance by established antitrust authorities is mixed, and may shed some light on its feasibility elsewhere. With respect to judicial review, for example, the European Community has been widely criticized for lacking meaningful judicial intervention in merger cases: combining the Commission's injunctive authority with the

Law of Global Antitrust, *supra* note 42, at 563-64 (noting that stability of U.S. enforcement policy "is of diminished benefit in international matters, as the proliferation of foreign antitrust authorities, and expanded notions of foreign antitrust jurisdiction, make it likely that global practices and transactions will be caught by more than one national authority," and that any self-correction in U.S. enforcement levels "diminishes the ability of the U.S. government to ensure external complementarity, such as by suspending antitrust enforcement in deference to foreign authorities tendering a request for traditional comity").

⁹² See Core Principles, *supra* note 9, ¶ 9 (noting, in GATT context, emphasis on right to judicial review); *cf.* ICN, Guiding Principles, *supra* note 15, at art. 4 ("Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, and should have an opportunity to express their views in relation to those concerns. Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body.").

⁹³ See Core Principles, *supra* note 9, ¶ 13 (noting "the need for firms to have access to domestic competition law systems, whether through complaints presented to the competition authorities or through the judicial system"); *cf.* Guiding Principles, *supra* note 15, at art. 4 ("Third parties that believe they would be harmed by potential anticompetitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process."); OECD, International Options, *supra* note 15, at 7 (suggesting as possible core principle private party "rights to petition a competition agency to take action, and/or the right to bring private court cases").

difficulty of obtaining a swift judicial decision leaves the merging parties' right to judicial review far less effective than it might be. But it is not as though the European system was *designed* to discourage review. The essential idea, instead, was to act swiftly and decisively on the merger, which is to the parties' benefit, while recognizing that obtaining timely judicial intervention of *any* kind – again, either to enjoin the transaction, or as at present, to afford the parties relief – is difficult given the limited capacity of the Community's court system.

The Commission is aggressively rethinking its system in light of these criticisms, and in light of the emerging capacity of the Court of First Instance.⁹⁴ But some such balancing of considerations will likely have to be undertaken by novice antitrust systems as well, and it is not clear how simply requiring that judicial review be afforded will help them to resolve the inevitable allegations that they have too little. Even in non-merger contexts, it is also possible (if not equally so) to have too much judicial review; such intervention may make the law less predictable and transparent, sap the incentives of enforcement officials to get it right in the first place, or simply lack expertise.⁹⁵

As to the rights of third parties to participate or bring their own actions, it is revealing that the same recourse is extolled because it allows the introduction of *non-competition* considerations.⁹⁶ The difficulty of reconciling the rights of third parties with the rights of the parties under investigation, as well as the enforcers' need for assistance with their vulnerability to being misdirected, has been a bur in transatlantic antitrust,

⁹⁴ See Mario Monti, Merger Control in the European Union: A Radical Reform, Speech before the International Bar Association Conference on EU Merger Control (Nov. 7, 2002), http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/54510IRAPID&lg=EN&display= (proposing reforms that would, inter alia, increase flexibility concerning the time frame for Commission review and further facilitate judicial review).

⁹⁵ Cf. Swaine, *Competition, Not Competitors*, *supra* note 67 (discussing similar considerations in merger context).

⁹⁶ See Report M/15, *supra* note 27, ¶ 11 (reporting South African submission respecting the right for active labor participation in merger assessment as exemplifying the fact that “it was possible to apply the same competition principles that would be applied anywhere else in the world and, at the same time, advance specific economic objectives which were embodied in [the South African Competition] Act and were important to the country's development”).

most recently in the controversy concerning the failed GE-Honeywell merger. U.S. criticisms of the Commission's amenability to competitor submissions in that matter may have been simplistic, and turned in no small part on the Commission's controversial economic case for blocking the transaction.⁹⁷ At the same time, it is difficult to deny the possibility that an antitrust agency can be used for misplaced interventionism, rent-seeking, or even captured outright, particularly in a less mature antitrust regime,⁹⁸ and insisting on third-party access may simply worsen the odds.⁹⁹ Obliging countries to entertain private suits, similarly, may seem appropriate in contexts where the overriding focus is on the consumer, but perhaps less so where the prevailing philosophy emphasizes goals like the protection of local industry or small and medium-sized enterprises.¹⁰⁰ Put generally, it may be mistaken to accept the core principles espoused by mature antitrust systems while rejecting the substantive principles that make them sustainable.

Finally, the inter-institutional effects of transparency and procedural fairness must be carefully considered. Because antitrust enforcement is the interface between antitrust and its subjects, it is critical to be attuned to procedural niceties in its administration. But in domestic affairs, an antitrust agency is but one of many participants in establishing

⁹⁷ See, for the last time, Swaine, *Competition, Not Competitors*, *supra* note 67, *passim*.

⁹⁸ For a nice summary of the concerns, see De Leon, *supra* note 59, at 171-72. It is noteworthy, though, that many of the relevant studies demonstrating government failures in antitrust administration concentrate on the United States. See, e.g., D. T. Armentano, *Time to Repeal Antitrust Regulation?*, 35 ANTITRUST BULL. 311 (1990); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985); Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. L. & ECON. 73 (1985); Thomas J. DiLorenzo & Jack C. High, *Antitrust and Competition, Historically Considered*, 26 ECON. INQUIRY 423 (1988); Fred S. McChesney, *Law's Honour Lost: The Plight of Antitrust*, 31 ANTITRUST BULL. 359 (1986).

⁹⁹ Recognizing the criticisms of its past practices, the Commission is proposing that third-party functions be balanced in merger cases by improving the opportunity for merging parties to respond. See Monti, *supra* note 94. Alternatively, the risks might be ameliorated somewhat by requiring the disclosure of contacts between government officials and third parties. But assuming either practice is generally respected, it would be defensible to protect the identity of confidential complainants, thereby ensuring that the tension remains.

¹⁰⁰ See *supra* text accompanying notes ____.

policy; if core principles limits its effectiveness, it may reduce the agency's ability to promote an antitrust agenda as against other governmental and non-governmental participants that may be hostile to that agenda.¹⁰¹ By way of analogy, attempts to implement the transparency norm in the European Community have fallen unequally on the Commission, and risked both compromising its authority relative to the far less transparent Council and impairing its ability to work effectively with the European Parliament.¹⁰² Just so, it is increasingly difficult to speak of any single agency as maintaining responsibility for national competition policy,¹⁰³ and it is important to avoid any such assumption in establishing rules that may handicap its most ardent proponent.

C. Distending the Core

As the Working Group has observed, the Doha Ministerial Declaration adverted nonexclusively to “core principles, *including* transparency, non-discrimination and procedural fairness,” and that has opened the door to the possibility of incorporating special and differential treatment.¹⁰⁴ The basic objective of that principle is to incorporate the “concepts of progressivity, flexibility and capacity-building” as “integral elements of the proposed multilateral framework.”¹⁰⁵ Capacity building simply involves the donation of resources, training, education, and technical assistance.¹⁰⁶ Flexibility mainly formalizes the notion that exemptions or exclusions should be available – or, in what is regarded as the same thing, countries should be able “to choose from the menu of

¹⁰¹ One can appreciate the possibilities for this role even within a framework that is highly cautious about antitrust. *See, e.g.,* A.E. Rodriguez & Malcolm B. Coate, *Competition Policy in Transition Economies: The Role of Competition Advocacy*, 23 *BROOK. J. INT'L L.* 365 (1997).

¹⁰² Juliet Lodge, *Transparency and Democratic Legitimacy*, 32 *J. COMMON MKT. STUD.* 343, 355-59, 364-66 (1994).

¹⁰³ *See* G. Bruce Doern, *The Internalization of Competition Policy*, in *COMPARATIVE COMPETITION POLICY: NATIONAL INSTITUTIONS IN GLOBAL MARKETS* 302, 318-21 (G. Bruce Doern & Stephanie Wilks eds., 1994) (describing overlapping interests of national institutions bearing on the formulation of international competition policy).

¹⁰⁴ Core Principles, *supra* note 9, ¶ 3 (quoting Ministerial Declaration; emphasis added by Working Group); *see also id.* ¶ 17.

¹⁰⁵ Report (2001), *supra* note 8, ¶ 31.

¹⁰⁶ Report (2001), *supra* note 8, at ¶¶ 39-46.

prohibitions that could be embodied in competition law those aspects that were relevant for its particular economy, in view of its market structure level of development [sic], the types of anti-competitive conduct that were prevalent and other characteristics.”¹⁰⁷

Progressivity demands the gradual implementation of any agreed norms – emphasizing, theoretically, the priority of adopting antitrust laws, but potentially permitting qualifying states (at least) to establish competition laws on a regional basis only,¹⁰⁸ and even relieving them from any obligation to adopt a competition law within a definite time-frame.¹⁰⁹

It may be difficult, of course, to properly categorize WTO members for the purposes of any such treatment,¹¹⁰ making it difficult to disregard the possibility that states choosing not to adopt a competition law may delay for quite some time – perhaps having already received support for the endeavor. But leaving aside the significance of such exemptions for the substantive terms of any multilateral agreement, they clearly bear upon the viability of the other core principles. Non-discrimination does not require reciprocity, and so does not imply that developing countries need to accord a developed country’s enterprises and nationals the same treatment that they themselves are accorded. But flexibility and progressivity are nonetheless in tension with non-discrimination. As a representative from India noted in a tentative observation, permitting development-oriented exclusions means that “it might be perfectly legitimate for a developing country competition authority to allow large domestic firms to merge so that they could go some way towards competing on more equal terms with multi-nationals.” But “[t]he same

¹⁰⁷ Report (2001), *supra* note 8, ¶ 32.

¹⁰⁸ See Communication from the European Community (W/222), *supra* note 8, ¶ 8.

¹⁰⁹ *Id.* at ¶ 8; Report (2001), *supra* note 8, ¶¶ 32-39; see also Report (2002), *supra* note __, ¶ 61 (reporting view that for many developing country WTO members, even establishing a competition law “would be costly and burdensome”).

¹¹⁰ This problem looms with respect to special and differential treatment in general. See OECD, Joint Group on Trade and Competition, The Role of “Special and Differential Treatment” at the Trade, Competition, and Development Interface, COM/TC/DAFFE/CLP(2001)21/Final, at 20-21 (Dec. 4, 2001) [hereinafter OECD, Special and Differential Treatment] (querying whether distinctions should be drawn between categories of developing countries). To the extent any general categorization is simply imported for antitrust purposes, the problem of fit may be worsened.

authority might wish to prohibit mergers involving multinationals within their territory on the basis that they were already large enough to achieve relevant economies of scale,”¹¹¹ and it becomes extremely difficult to say why that distinction is impermissible. To the extent such distinctions are supposed to unfold, and then recede, over in sync with a country’s development, they equally confound transparency, and may even be inconsistent with the procedural fairness owed the subjects of antitrust law.

The ultimate question, again, is whether this is worse than the alternatives. Even if countries are not required to adopt competition laws, and each permitted to adapt any law adopted to its heart’s content, something is better than nothing. Establishing core principles, furthermore, creates an ideal to which countries may aspire and gradually acclimate.¹¹²

As noted previously, one problem is that the meaning of the core principles may be compromised for other WTO endeavors. Though they have never been present in any wholly unadulterated form, the core principles are usually accompanied by concessions implying something more than a conditional commitment to market reform. Even if any fallout is limited to antitrust, the integrity of genuine non-discrimination, transparency, and procedural fairness – and their full aspirational pull – may be sullied. Finally, to the extent that the core principles are taken seriously, they may deter countries otherwise inclined to adopt a law.¹¹³ As discussed in greater detail below, there may be an independent value to letting countries elect antitrust policies more or less on their own, but it would in any case be premature to establish an international measure that genuine progress might fail.

¹¹¹ See Report M/15, *supra* note 27, at ¶ 19; see also OECD, Special and Differential Treatment, *supra* note 110, at 17-18 (noting reservations about ease of reconciling non-discrimination with special and differential treatment).

¹¹² Cf. Report (2001), *supra* note 8, ¶¶ 38, 45 (addressing concerns that adopting core principles in the absence of antitrust laws may be premature).

¹¹³ Report (2001), *supra* note 8, ¶ 38; Report M/15, *supra* note 27, ¶ 38.

III. The Problem with Meta-Principles

If the above analysis has purchase, and core principles are resisted – or simply regarded as insufficient – perhaps more substantive terms are the answer. Adopting substantive provisions at the same time as core principles would reduce the relative significance of any free-riding, provide a material standard by which adherence to core principles could be assessed, and more likely result in concrete action against anticompetitive behaviors.

As previously noted, the Working Group has seemed to disavow any such ambition, and perhaps with good reason. Submissions by WTO members reveal very different sentiments on the appropriate norms, and history does not augur well for any multilateral agreement. As Professor Guzman has carefully explained, the lack of progress is unsurprising. Different countries have different interests, depending (among other things) on their trade patterns, and we should not be surprised if a net importer favors antitrust enforcement in excess of the optimum while a net exporter prefers less enforcement.¹¹⁴ Though this suggests that national-level regulation will veer between excess and laxity, and that net gains might be obtained from international cooperation, it will equally be hard to reconcile the two perspectives in any international forum.¹¹⁵ The result might explain past failures at multilateralism and continuing features of the regulatory landscape.¹¹⁶

The problem is intractable, Professor Guzman has argued, only if antitrust is artificially segregated from other issues, and bargaining made difficult. If countries desiring concessions on antitrust are able to arrange transfer payments of another kind (say, by reducing barriers to trade in areas of interest to those making concessions)

¹¹⁴ Assuming the ability to apply antitrust laws extraterritorially, the net importer will have due concern for consumer welfare, but tend to slight profits earned through efficiency gains to producers; the net exporter, on the other hand, will heed producer profitability but slight consumer welfare. Guzman, *Is International Antitrust Possible?*, *supra* note 17, at 1521. Without extraterritoriality, international antitrust policy will on the whole underregulate, since foreign firms behaving anticompetitively, and exporting, cannot be successfully constrained. *Id.* at 1523.

¹¹⁵ *Id.* at 1524-31.

¹¹⁶ *See id.* at 1532-38.

agreements on substantive antitrust terms may actually be feasible.¹¹⁷ The WTO, given the breadth of the issues it addresses, is a natural environ for this kind of horse-trading,¹¹⁸ as the TRIPS agreement arguably illustrates.¹¹⁹

As Professor Guzman recognizes, an antitrust agreement may not be realizable until institutional reforms make the WTO a friendlier environment for negotiating and

¹¹⁷ Quite apart from the role concessions may play in making agreement feasible, they may ameliorate the transitional hardships that antitrust enforcement could impose on transitional economies.

¹¹⁸ The argument is most fully developed, in general terms applicable to antitrust, in Andrew T. Guzman, *Global Governance and the WTO*, U.C. Berkeley Public Law Research Paper No. 89 (Aug. 2002), http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID321365_code020815630.pdf?abstractid=321365; see also Guzman, *Is International Antitrust Possible?*, *supra* note 17; Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142 (2001). See also Marco C.E.J. Bronckers, *More Power to the WTO?*, 4 J. INT'L ECON. L. 41, 44-45 (2001); Brian Hindley, *Competition Law and the WTO: Alternative Structures for Agreement*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 333, 343 (Jagdish Bhagwati & Robert E. Hudec eds., 1997) (noting difficulty in reaching agreement on antitrust due to "lack of mutually acceptable concessions"); Bernard M. Hoekman, *Determining the Need for Issue Linkages in Multilateral Trade Negotiations*, 43 INT'L ORG. 693 (1989). As Professor Leebron explains, in addressing generally the general motives for linkage, cross-issue bargaining may be necessary not only where Pareto-superior agreements are unavailable, but also where a party or parties deems a Pareto-superior agreement insufficiently reciprocal. See David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 13 (2002).

¹¹⁹ See generally Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property* (U.C. Berkeley Working Paper Series No. 2000-20), http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID248317_code001107520.pdf?abstractid=248317. Whether TRIPS may be extrapolated to antitrust is beyond the scope of this paper, but two banal caveats deserve mention. First, however unsophisticated many countries were with respect to intellectual property, and however ideologically divisive those issues may potentially be, TRIPS profited considerably from the drafters' ability to incorporate norms and members from the World Intellectual Property Organization (WIPO). See Leebron, *supra* note 118, at 19-20. Antitrust has no such precedent. Second, an indispensable issue for cross-issue trades – the trust of the parties – may have been partly exhausted in the aftermath of TRIPS, as developing countries came to recognize the potential costs of recognizing intellectual property rights and to doubt the market access commitments by the developed countries. This is reflected in the emphasis on implementation issues at Doha. Doha Ministerial Declaration, *supra* note 5, ¶ 12.

implementing non-trade issues.¹²⁰ His argument depends heavily, however, on maintaining what I clumsily term a meta-principle of the WTO – namely, the single undertaking method. With scattered exceptions,¹²¹ the Uruguay Round was negotiated and the WTO founded on the premise that that agreements are best resolved in a multilateral setting requiring participation by all members in all agreements¹²² – as opposed to permitting members to opt in to such agreements as they may individually determine, the approach preferred under the Tokyo Round.¹²³ Although the single undertaking approach appeared in practice to have significant negative distributional consequences for the developing countries,¹²⁴ and notwithstanding that Doha has been billed as the “Development Round,” the same principle was specifically endorsed by the Doha Ministerial Declaration and appears to be a fixed component of future

¹²⁰ For a more skeptical appraisal, see Tarullo, *supra* note 4, at 489-94 (describing institutional features of WTO impairing its ability to address antitrust problems).

¹²¹ At present, there are two “plurilateral” agreements to which WTO members can voluntarily subscribe – the Agreement on Civil Aircraft and the Agreement on Government Procurement. Plurilateral Trade Agreements, Apr. 15, 1994, WTO Agreement, Annex 4, at http://www.wto.org/english/docs_e/legal_e/final_e.htm; see David Palmetier & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT’L L. 398, 399 n.8 (1998) (noting that “[t]wo other plurilateral agreements, the International Dairy Agreement and the International Bovine Meat Agreement, were terminated at the end of 1997”), citing Deletion of the International Dairy Agreement from Annex 4 of the WTO Agreement, Decision of Dec. 10, 1997, WTO Doc. WT/L/251 (Dec. 17, 1997); Deletion of the International Bovine Meat Agreement from Annex 4 of the WTO Agreement, Decision of Dec. 10, 1997, WTO Doc. WT/L/252 (Dec. 16, 1997).

¹²² See Jackson, *The WTO “Constitution”*, *supra* note 19, at 72 (identifying the single undertaking concept as a “mantra,” or constitutional principle, of the WTO, and indicating reservations).

¹²³ See JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 302 (3rd ed. 1995) (distinguishing “GATT a la carte”).

¹²⁴ See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339, 356-60 (2002) (contrasting Tokyo Round, in which developing countries were able to receive rights under the subsidies and anti-dumping codes without assuming their obligations, with the “power play” single undertaking strategy adopted by the United States and the EC in the Uruguay Round).

negotiations.¹²⁵ Such an approach is arguably essential, too, to persuading otherwise unconvinced net exporters to agree to (and abide by) a substantive antitrust code under the auspices of the WTO.¹²⁶ If the single-undertaking approach has not yet resulted in a

¹²⁵ See Doha Ministerial Declaration, *supra* note 5, ¶ 47 (“With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.”); see Alice Enders, *The Role of the WTO in Minimum Standards*, in CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 61, 72 (Pitou van Dijck & Gerrit Faber eds., 1996) (arguing that “[t]he experience of the Uruguay Round . . . point[s] to the need for a new ‘single undertaking’ approach in a future round in order to ensure a global adherence to the new agreements”); Friedl Weiss, *WTO Dispute Settlement and the New Economic Order of WTO Member States*, in *id.* at 77, 79-80 (describing single undertaking approach as “the most radical innovation” of the WTO Agreement and an institutional basis for future agreements).

¹²⁶ See Guzman, *Global Governance*, *supra* note 118, at 19-28; see also *id.* at 35-39 (describing scope of WTO, as opposed to stand-alone agreements, as creating a disincentive to exit). At an earlier juncture, the European Commission apparently espoused a plurilateral, stand-alone antitrust agreement from which developing countries could opt out after the close of negotiations – raising essentially the same risks posed by the Tokyo Round agreements. See OECD, *Special and Differential Treatment*, *supra* note 110, at 19-20 (citing EU Commission Paper: State of Play and Strategy for the New WTO Round – Note for the Attention of the 133 Committee (Dec. 13, 2000)). Developing countries, too, found fault. See UNCTAD, *Closer Multilateral Cooperation on Competition Policy: The Development Dimension – Consolidated Report on Issues Discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy held between 21 March and 26 April 2002*, ¶ 48 (May 15, 2002), <http://r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/DohaFinal-en.pdf> (describing “danger of plurilateral negotiations” as being “that later, developing countries having opted out would face an agreement which did not take into account their needs, and which was even less development-friendly. There was also concern that plurilateral agreements might eventually become part of a ‘single undertaking’ or package, as was the case for a number of agreements at the end of the Uruguay Round.”).

Professor Guzman also emphasizes the importance of dispute resolution procedures to increasing the credibility of commitments. *Id.* at 28-35. Though examining the application of the WTO’s dispute resolution process is beyond the scope of this paper, it should be noted that the net effect of the Uruguay Round may actually have been to *diminish* the sanction for noncompliance. See Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System* (John M. Olin Law & Economics Working Paper No. 143 (2nd ser.) 2002). It is unclear whether entrusting competition to the WTO would increase or

substantive antitrust agenda, perhaps it is because the WTO is not yet appropriately designed to negotiate non-trade agreements, or perhaps because its members have not yet grasped the point.¹²⁷

But some alternative explanations also come to mind. One possibility is that the model's diagnosis of the antitrust impasse is somehow flawed. Professor Guzman's model supposes that developed countries, as net exporters of goods in imperfectly competitive markets, will be the parties opposing international antitrust, while developing countries – as net importers of such goods, and exporters of more homogenous products – will favor the adoption of stricter policies.¹²⁸ In practice, however, while the United States has been reluctant to endorse any substantive multilateral antitrust policy,¹²⁹ the developing countries have been no more enthusiastic about the competition agenda at Doha, perhaps in part because they perceive the compromised solution as inequitable.¹³⁰

decrease the sum of tools available to states desiring to enforce compliance with preferred methods or outcomes.

¹²⁷ It is disconcerting, however, that the idea of linking non-trade issues has encountered such resistance in the past, if it really promises Pareto-superior solutions. See Hoekman, *supra* note 118, at 696 & n.8, 697 (noting procedural constraints at the beginning of the Uruguay Round on cross-sectoral negotiation). At the very least, it complicates any public choice analysis of negotiations. Compare *id.* at 697 (asserting domestic political constraints on cross-issue linkage) with Guzman, *Is International Antitrust Possible?*, *supra* note 17, at 1529-31 (providing public choice perspective on why antitrust-only negotiations might fail).

¹²⁸ See, e.g., Guzman, *International Antitrust and the WTO*, *supra* note __, at 16; Guzman, *Is International Antitrust Possible?*, *supra* note 17, at 1536-37.

¹²⁹ U.S. representatives, for example, have expressed fear that substantive WTO negotiations might result in standards pitched at the “lowest common denominator.” Joel I. Klein, A Note of Caution with Respect to a WTO Agenda on Competition Policy, Remarks to the Royal Institute of International Affairs (Nov. 18, 1996) [hereinafter Klein, A Note of Caution], <http://www.usdoj.gov/atr/public/speeches/jikspch.htm>. Some experts interpret that as expressing concern that EU, rather than U.S., standards might be adopted, suggesting that an ideological divide – one tending, on average, to reflect greater European interventionism on competition grounds – may be dampening U.S. enthusiasm. It may, on the other hand, reflect the estimation that a lax standard full of exemptions, per expressed developing country preferences, may be adopted, which it might oppose for reasons having little to do with U.S.-EU differences.

¹³⁰ For example, developing countries have voiced objection to the relative inattention to cross-border trade, as in the likely exemption for export cartels, and resulting emphasis on essentially domestic reform – an imbalance benefiting the

Its advocates have been countries like Japan, Norway, and (most significantly) the EU and its member states, suggesting further that developed countries are scarcely of one view.¹³¹ For whatever reason, the model's predictions do not entirely pan out.

It remains the case, though, that a division of opinion exists, and it might be possible to imagine the kind of trade that a single undertaking regime can facilitate – say, one in which the developed countries (driven by EU preferences) bargain for the agreement of developing countries to heightened international antitrust standards. A more systemic difficulty, however, is that determining the transfer price is difficult, if not impossible, in the case of antitrust.¹³² Any such estimates are imprecise, of course, but several features of international antitrust make the problem more significant. The critical question from a developed country's point of view (again, by way of generalization) will be to determine the effect of a WTO pact on a developing country's antitrust enforcement. But the acknowledged importance of preserving the discretion of antitrust enforcers, and the difficulty of controlling for other actors (including the courts and private complainants invigorated by any commitment to transparency and procedural fairness), make it difficult to enforce compliance and even to determine whether a country is transgressing – let alone to anticipate in advance any effect a pact might have.¹³³ Furthermore, because countries have adopted antitrust laws in waves, due to perceived internal benefits, it will be hard even to reckon whether a WTO pact is strictly necessary to make formal institutional changes. Conversely, from the developing country point of view, estimating the transfer price will also be challenging. Discussions within the Working Group suggest that many countries have only the most rudimentary grasp of

developed countries, resulting in preferences consistent with what Professor Guzman would have predicted under the circumstances. See Report (2002), *supra* note __, ¶ 27; see, e.g., Communication from Thailand (W/213 Rev. 1), *supra* note __, ¶¶ 1.2, 2.1, 2.2.

¹³¹ See *supra* note __.

¹³² I put aside here any general problems concerning the estimation of transfer prices for non-trade matters, which may be soluble. See generally Hoekman, *supra* note 118.

¹³³ Professor Guzman specifically notes enforcement as to a barrier to antitrust-only agreements, see Guzman, *Is International Antitrust Possible?*, *supra* note 17, at 1540-41, but there is no reason to think it would be any less disabling for achieving a linked agreement.

what antitrust law entails, let alone any more precise understanding regarding its net costs and benefits over time.

If deriving initial negotiating positions would prove difficult, the negotiations themselves may be even more so – in part due to ideological differences that Professor Guzman understandably does not try to incorporate in his model.¹³⁴ At the core of the U.S. position in international negotiations has been the premise that, contrary to a simple exporter/importer model, an antitrust regimen strengthens domestic firms for international competition – a line of thinking drawn from American business schools,¹³⁵ but not one confined to America.¹³⁶ Many developing countries disagree, and the inability of the negotiating parties to agree on whether antitrust “pays for itself” is likely to frustrate negotiations to a substantial degree.¹³⁷ The entire dialogue, in fact, may be counterproductive. Kenneth Abbott has suggested elsewhere that the “obsessive quid pro quo thinking” born of tariff negotiations makes it difficult to reach agreement even on issues, like corruption, where a remedy may be mutually beneficial¹³⁸ – and one may fairly wonder whether that mentality is reinforced with each attempt at bargaining in that mode.

¹³⁴ They are mentioned, that is, as extrinsic factors that would merely buttress the conclusion that negotiating “pure” antitrust agreements is difficult, see Guzman, *Is International Antitrust Possible?*, *supra* note 17, at 1509, 1511-12, & 1539, but do not resurface in his discussion of linked agreements. *Id.* at 1545-46.

¹³⁵ See, e.g., A. Douglas Melamed, *Antitrust at the Turn of the Century*, Address Before the Fourth International Symposium on Competition Policy, Seoul, Korea, at 4 (Dec. 7, 1999), <http://www.usdoj.gov/atr/public/speeches/5232.htm>, quoting MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 662 (1990) (“Few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry. . . . Firms that do not have to compete at home rarely succeed abroad”).

¹³⁶ OECD, *Special and Differential Treatment*, *supra* note 110, at 17-18 (noting submission by Japan that “Japan’s experience indicates that international competitiveness can eventually be further strengthened by increasing competition among domestic companies, rather than regulating competition through exemptions”).

¹³⁷ Similar problems attend negotiations concerning conventional barriers to trade, of course, since it may be argued that reducing such barriers confers benefits on a nation’s consumers that overwhelm the harm they may do to its producers. But the behavior of most countries demonstrates that they share a skepticism toward that appeal, arguably to a greater degree than with antitrust.

¹³⁸ See Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. INT’L ECON. L. 275, 293 (2001).

The disagreement also relates to a distinct disadvantage of bartering for antitrust. The strength of antitrust law in those countries that have adopted it turns to an underappreciated degree, in my view, on the degree to which they have elected it and cultivated it over time. Putting to one side questions about how extensively antitrust must be adapted to local circumstances,¹³⁹ and the success of legal transplants in general,¹⁴⁰ the strongest regimes, the United States¹⁴¹ and the European Community,¹⁴² can basically be said to have come into their own. Other cases, such as Germany and Japan, are obviously more complicated, though they tend to substantiate the point.¹⁴³ It is

¹³⁹ See generally Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557 (1994). William Kovacic has written extensively on this point. See Kovacic, *supra* note 1; see also William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U.J. INT'L L. & POL'Y 436 (1996); William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995); William E. Kovacic, *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 ANTITRUST L.J. 253 (1991).

¹⁴⁰ For a relatively optimistic view, see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 12-14 (2d ed. 1993),

¹⁴¹ See Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT'L L. 197, 199-208 (1998); Waller, *Neo-Realism*, *supra* note 139, at 574-81.

¹⁴² See DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 431 (1998) (summarizing argument that "competition law in Europe is fundamentally *European*") (emphasis in original).

¹⁴³ The standard account is that the United States forced Germany to adopt antitrust laws after World War II, but German antitrust in fact had distinctive pre-war roots that influenced its implementation and application of a much broader successor scheme. See David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 25, 62-67 (1994); Sullivan & Fikentscher, *supra* note 141, at 208-26. Japan, too, was forced to some degree to adopt antitrust laws after World War II, though there are complications to that account. See Harry First, *Antitrust in Japan: The Original Intent*, 9 PAC. RIM. L. & POL'Y J. 1 (2000) (arguing that, contrary to popular belief, Japanese government negotiators played a significant role in adapting American antitrust model to national political and economic goals). It would appear, however, that the principal reason why antitrust "took" in Germany and not in Japan had a great deal to do with the prior acceptance of its premises in national legal and economic thought, which allowed Germany (and not, until much later, Japan) to recognize that decartelization was not

difficult, admittedly, to isolate time or autonomy as a variable in those nations' accomplishments, and no easier to claim that a country's acquiescence in a trade-related obligation is involuntary in any strict sense.¹⁴⁴ But intuition suggests that paying for the consent of countries that would not, by hypothesis,¹⁴⁵ otherwise agree to accept antitrust law is less likely to produce self-enforcing and effective national regimes, and more likely to place stress on the enforcement machinery of the WTO.¹⁴⁶ The bottom line is

merely an attempt by the Allies to contain its national economic power. *See generally* JOHN O. HALEY, *ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS, 1947-1998* (2001).

The simpler story, perhaps, is that Japan precisely illustrates the problems with imposing antitrust: while its officials now extol antitrust as an unalloyed good, its application of those laws in international matters has frequently been called into question, and there is room even to doubt the effectiveness of even their most recent reforms – which were motivated, again, largely to appease foreign critics. *See* James D. Fry, Note, *Struggling to Teethe: Japan's Antitrust Enforcement Regime*, 32 *LAW & POL'Y INT'L BUS.* 825 (2001).

¹⁴⁴ Compare Julie Mertus, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations: What International and Domestic Laws Can Teach the United States*, by Thomas David Jones, 21 *HOUS. J. INT'L L.* 581, 581-82 (1999) (book review) (arguing generally that “the legal transplant process is generally marked by some form of coercion, . . . states that adapt their laws to conform with the laws of politically powerful states are rewarded . . . while those that do not are penalized”) (citations omitted) with Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 *ECOLOGY L.Q.* 295 (2001) (arguing that “whatever the possibilities for the use of power to make law, trans-echelon legal borrowing [from national law] into international treaty law is decidedly less likely to be coercive (and hence more likely to be Pareto-efficient) than is transnational legal borrowing”). Like Professor Wiener, I assume the relevant level of analysis is at the state level, though that plainly makes the comparison with other kinds of coerced transplantation hazardous.

¹⁴⁵ It may be that developing country governments are merely posturing in order to extract a better bargain, or in order to make more credible their claim to local elites that they are compelled (albeit by a bargain to which they ultimately agreed) to enforce antitrust law against them. In either case, though, it would be harder to claim any unique advantages from a multilateral, single-undertaking form of agreement.

¹⁴⁶ The issue of externally imposed transplants, and their relative efficacy, receives relatively little attention in the comparative law literature, but nothing in that literature belies that a transplant's success turns in part on the balance of the forces of change and the forces of resistance – which in the case of externally imposed transplants may be directly correlated with one another. *Cf.* Alan Watson, *Comparative Law and Legal Change*, 37 *CAMBRIDGE L.J.* 313, 332-34 (1978) (describing stability of law as

that persuading countries to accept antitrust in exchange for other commitments may easily neglect their need to internalize antitrust norms,¹⁴⁷ and hold little advantage relative to the more explicitly coercive techniques of reciprocity and discrimination. Forcing antitrust, furthermore, may make it more likely that the agencies applying it will use its tools to protect competitors rather than promote competition.¹⁴⁸

Subjecting antitrust to the single undertaking principle may therefore fall far short of any optimal policy.¹⁴⁹ It seems probable that that no such agreement would be reached in the foreseeable future. Even if one were, the transfer price could easily be too high or too low, meaning that the optimal competition law we might idealize could be offset by inappropriate concessions of some other kind (though it is possible that, were they to come in the form of reduced barriers to trade, even an exorbitant transfer price might improve welfare). Finally, in a world where the population of politically feasible concessions is limited, involving antitrust law in WTO-style bargaining may mean that fewer chits are available for future bargaining over non-trade issues – like labor law, or

determined, in part, by strength of “pressure forces” and “opposition” forces). It would appear, however, that the European Union may have effectively managed that balance in imposing its antitrust laws on the Central European nations eager to accede. Eleanor M. Fox, *The Central European Nations and the EU Waiting Room – Why Must the Central European Nations Adopt the Competition Law of the European Union?*, 7 BROOK. J. INT’L L. 351 (1997).

¹⁴⁷ Cf. Steven P. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 432, 531 (2001) (citing “key insight from international relations theorists and others that internalization is critical to successful implementation of international norms, whether in human rights or other areas of the law”).

¹⁴⁸ For a similar assertion, see William H. Page, *Antitrust Review of Mergers in Transition Economies: A Comment, With Some Lessons from Brazil*, 66 U. CIN. L. REV. 1113, 1117 (1998) (“The dangers of perverse use of antitrust are multiplied if antitrust is imposed on countries that do not willingly adopt it. Donor organizations like the World Bank have imposed requirements for implementation of antitrust laws as conditions for loans. Countries that grudgingly acquiesce in these requirements are not likely to carry out an effective antitrust enforcement policy.”).

¹⁴⁹ It is important to recall that stringency of this objective. National antitrust regulation, with extraterritoriality, can reduce a great deal of anticompetitive behavior; international cooperation can be achieved, particularly in the absence of extraterritoriality. See Guzman, *Is International Antitrust Possible?*, *supra* note 17, at 1528-29. The problem is that neither is likely to maximize world welfare, though how much either would fall short would be hard to quantify.

human rights – that might be equally deserving of emphasis (even as the cross-issue style of antitrust bargaining, as noted previously, sets a precedent for such negotiations). If antitrust is really to be linked to other topics in international trade law, the potential gains should be compared to those realizable for other potential agenda items, and will likely be found wanting.

IV. Conclusion: Conditioning Principles

There are limits, happily enough, to the case against principled antitrust. For example, were the WTO members were to reach consensus on a significant provision concerning hard-core cartels, there would be less room to object to marrying that substantive term with principles of non-discrimination, transparency, and fair procedures in its application. If an agreement of genuine substance is being put in place, there are sound arguments for accompanying it with core principles that tend, in general, to improve global welfare and consistency with the rest of the WTO, at least if the details can be worked out.

Failing that, some unprincipled alternatives deserve consideration. One is to stick with the status quo, dynamically speaking – that is, the combination of creeping extraterritoriality, the progressive forging of “soft” bilateral cooperative agreements, and modest multilateralism of organizations such as the OECD and the new International Competition Network, all of which cater to more established national antitrust regimes. The argument for the status quo has been made elsewhere both in summary fashion¹⁵⁰ and at ponderous length,¹⁵¹ but two features deserve brief mention here.

First, while the bilateral relationships that have been forged are limited in their scope and ambition, and cover a minute fraction of the WTO members, they create what

¹⁵⁰ Former Assistant Attorney General Joel Klein was known to respond to calls for a WTO antitrust agenda by saying, “If it ain't broke, don't fix it.” See, e.g., Ernst-Ulrich Petersmann, *Competition-Oriented Reforms of the WTO World Trade System-Proposals and Policy Options*, in *TOWARDS WTO COMPETITION RULES: KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) ON TRADE AND COMPETITION* 43, 62 (Roger Zach ed., 1999) (noting, and reacting to, Klein’s perspective).

¹⁵¹ See Swaine, *Local Law of Global Antitrust*, *supra* note 42.

should be regarded as local international law – intergovernmental obligations for procedural coordination that have the potential to expand beyond their immediate cast of countries and bind antitrust authorities to coordinate their activities with their peers.¹⁵² The International Competition Network provides indirect evidence of this potential.¹⁵³ The arguments for establishing core principles, or in the alternative relying on meta-principles, are largely premised on the perception that there is nothing to lose, but the potential for local international law may inspire greater caution. For example, to the extent that a principled approach poses risks to existing relationships – by calling into question the compatibility of those relationships with the non-discrimination principles, or reviving national discrimination as a rhetorical claim – their costs may outweigh their advantages.

Second, it is perhaps noteworthy that these nascent principles emerged from what can only be characterized as an unprincipled beginning – the U.S. assertion of the ability to enforce its antitrust laws extraterritorially, coupled with its subsequent practice of moderating that jurisdiction through comity (again, through standards of its own design). One might go further, and urge the unmoderated assertion of authority as a spur to genuine international cooperation.¹⁵⁴ But for immediate purposes, it suffices to note that

¹⁵² *See id.* at 725-41. As I stress, this obligation is “very elementary”:

Nations exercising antitrust authority over foreign parties or relating to activities taking place in foreign nations are to consider moderating the exercise of their authority in order to accommodate that nation's legitimate interests, including by considering the prospect that the other nation might redress any harm by exercising its own antitrust jurisdiction. Nations should also give full consideration to requests that they investigate and regulate restrictive business practices having adverse effects on other nations. Finally, in order to facilitate these ends, antitrust authorities should provide notice and share information to the extent consistent with their domestic laws and interests.

Id. at 738.

¹⁵³ *See supra* note __.

¹⁵⁴ *See* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 152-67 (1998); Thomas

beginning in any unprincipled fashion does not always result in chaos, and there are countless examples in international relations where principled beginnings actually do.

A different tack would be to shed the semblance of WTO multilateralism and opt instead for a plurilateral, stand-alone agreement governing antitrust. This has been tried before, without success, and so the disadvantages are easily stated.¹⁵⁵ But so are the advantages. Rather than manufacturing consent, such an approach would be the most likely to elicit able and committed signatories. Reciprocity could form an important part of the agreement's negotiation and terms, with implications both for developing *and* developed countries.¹⁵⁶ Participation might also be made contingent on possessing an established antitrust framework permitting, for example, mutual assistance on matters of concern to another antitrust authority, or coordination of remedies in merger cases. Finally, because competition authorities having domestic effect might be presupposed, the first substantive areas for international agreement might be those pertaining to market access – areas thematically linked to and belonging within the WTO, but too easily

W. Dunfee & Aryeh S. Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883 (1984).

¹⁵⁵ In 1993, the so-called Munich group of experts proposed a draft International Antitrust Code, which they envisioned as a plurilateral GATT agreement. Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993) (July 10, 1993), reprinted in 64 *Antitrust & Trade Reg. Rep. (BNA)* No. 1628 (Aug. 19, 1993) (Special Supp.). But the proposal did not go very far, in part because it was uncommonly ambitious in its scope. *See id.* at S-7 through S-9 (reporting alternative, minimal approach); Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 *MINN. J. GLOBAL TRADE* 1 (1997) (criticizing Munich proposal).

¹⁵⁶ With respect to the United States, for example, foreign signatories might demand a certain level of commitments by state enforcers, as with the Government Procurement Agreement. Matthew Schaefer, *Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA*, 23 *CAN.-U.S. L.J.* 441, 472-73 (1997) (describing bargaining between the United States and Canada concerning the sufficiency of its state commitments); Matthew Schaefer, *Twenty-First Century Trade Negotiations, the US Constitution, and the Elimination of US State-Level Protectionism*, 2 *J. INT'L ECON. L.* 71, 78 (1999) (same).

excluded in negotiations with countries reluctant to create antitrust solely as a vehicle to facilitate foreign entry.¹⁵⁷

Independent of their service within the plurilateral framework, such an approach would stand a better chance of founding antitrust authorities with integrity. For reasons previously stated, adopting a multilateral WTO agreement consisting of core principles, replete with exceptions to accommodate the most reluctant members, may inadvertently give rise to antitrust agencies prone to behaving in an unprincipled fashion – at least where the purposes of antitrust are more narrowly understood. As the U.S. and European experiences have demonstrated, even relatively sophisticated, secure, and well funded agencies can enforce rules that in hindsight diminish consumer welfare – such as by impairing competition-enhancing vertical arrangements, blocking mergers that promise real efficiency gains, or imposing overly stringent limitations on productive horizontal relationships.

A plurilateral arrangement would moderate those tendencies in part by permitting the more graduated, careful, and voluntaristic creation of national antitrust regimes. But it would also encourage a more dedicated application of side-payments should anyone

¹⁵⁷ *Contrast, e.g.*, Communication from the European Community (W/222), *supra* note __, ¶ 18:

Non-discrimination - in relation to a competition agreement - has no bearing on the question of whether foreign firms have access to a particular market. This depends on a range of trade and investment factors outside the scope and ambit of a WTO competition agreement. In other words, by making the operation of the domestic market more efficient and more transparent, an effective domestic competition policy enables traders and investors to fully benefit from market access concessions the importing or host country may *already* have made, but does not imply any greater market access concessions. As a matter of fact, effective application of competition policy actually helps importing or host countries to avoid some of the perceived risks that are sometimes associated with market access concessions or FDI, that is, of foreign firms or investors with market power disproportionate to that of domestic firms, abusing such power.

choose to accelerate the process.¹⁵⁸ Rather than paying for antitrust through the reduction of barriers to trade, a plurilateral regime might involve genuine, concessionary capacity building and technical assistance for developing countries desirous of agreement but without the means to fulfill any terms. Institutions, scholarship has repeatedly established, are a condition precedent to meaningful economic reform.¹⁵⁹ Literally buying foreign antitrust laws and officials may seem the antithesis of a principled strategy, but it perhaps holds greater promise for a principled future.

¹⁵⁸ Cf. Leebron, *supra* note 118, at 14 (noting that “in the negotiations over the environment, developed countries agreed to establish a fund for developing countries to pay for certain measures of environmental protection, rather than simply agreeing to make an unrestricted side payment,” and that “in the Uruguay Round trade negotiations, developed countries agreed to adjust their food assistance to compensate for the adverse effects on the food-importing developing countries of the restriction on agricultural export subsidies”).

¹⁵⁹ See De Leon, *supra* note 59, at 171-72; Kovacic, *Institutional Foundations*, *supra* note 1.