



1-1-2005

## Idea Merchants and Paradigm Peddlers in Global Antitrust

Mel Marquis

Follow this and additional works at: <https://scholarlycommons.pacific.edu/globe>



Part of the [International Law Commons](#)

### Recommended Citation

Mel Marquis, *Idea Merchants and Paradigm Peddlers in Global Antitrust*, 28 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 155 (2014).  
Available at: <https://scholarlycommons.pacific.edu/globe/vol28/iss2/4>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Global Business & Development Law Journal by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# Idea Merchants and Paradigm Peddlers in Global Antitrust

Mel Marquis\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	156
A. <i>Competitive Forces in Global Antitrust Enforcement</i> .....	156
B. <i>Structure of this Article</i> .....	163
II. WHICH MARKET PLAYERS? .....	163
III. MODES OF COMPETITION .....	166
A. <i>Competing Visions of a Global Framework for Antitrust Law</i> .....	166
B. <i>Bilateral Relationships</i> .....	174
1. <i>Bilateral Cooperation Agreements</i> .....	176
2. <i>Trade Agreements with Competition Provisions</i> .....	179
3. <i>Conclusion on Bilateral Relationships</i> .....	182
C. <i>Regional Relationships</i> .....	184
D. <i>Competition in Competition Ideas</i> .....	187
1. <i>The American Approach</i> .....	188
2. <i>Europe's Approach(es)</i> .....	190
3. <i>Competition between the American and European Approaches to Competition Law</i> .....	200
4. <i>Widening of the Geographic Field and of the Competitive Parameters</i> .....	204
IV. CONCLUSION .....	207

---

\* Ph.D., LL.M, J.D., B.A. Part-Time Professor of Law and Co-Director of the European Union Competition Law and Policy Workshop at the European University Institute, Florence; Co-Founder and Co-Director of the Rome Antitrust Forum; Visiting Professor, Renmin University Law School, Beijing. I am grateful to my fellow participants at the workshop organized by Professor Antoine Vauchez and Dr. Julie Bailleux at the European University Institute in June 2013 for their helpful comments on a preliminary presentation. I would also like to thank Professor Eleanor Fox of New York University School of Law and Professor Alberto Heimler of the Scuola Nazionale dell'Amministrazione in Rome, each of whom provided very helpful feedback on an earlier draft. The article is dedicated to Kakuryu Nagao (1946-2013), who is missed.

*In the global field of antitrust law, policy paradigms are pushed and pulled by forces analogous to those of the market. Policy entrepreneurs (typically competition law agencies) operate in a setting where, notwithstanding various cooperative platforms, competition and rivalry occur and manifest themselves in a number of dimensions. This article is thus premised on the notion that competition enforcers across jurisdictions compete among themselves on a global ‘market’. It ventures beyond extant scholarship by elaborating more fully on the modes through which this competitive behavior is pursued. The primary competitive relationship explored is that between enforcers in the United States and enforcers in the European Union, but the article also accounts for antitrust having ‘gone global’, with the multiplication of antitrust jurisdictions and thus new entrants around the world.*

## I. INTRODUCTION

### A. *Competitive Forces in Global Antitrust Enforcement*

By rough analogy to other fields of activity, in the world of competition law, competition authorities and competition law systems compete for what may loosely be termed market share.<sup>1</sup> With competition law, while notional degrees of market share defy precise measurement, we might take as an imperfect proxy certain observed isomorphic processes. Isomorphism should not necessarily be understood as mimicry; actual and potential “buyers” of concepts and paradigms may be sophisticated enough to absorb attractive ideas by way of a self-regarding selective adaptation and vernacularization that partly or fully takes account of local needs and other constraints such as the cultural infrastructure and political (and political economy) constraints, as well as institutional resources, (in)capacities and (dys)functions. A “transaction” can thus occur not only where an isomorphic shift is purely mimetic but also where the shift is a matter of degree or hybridization. Occasionally, exported ideas fail to take root in foreign soil. They may have no chance to flourish due to resource/capacity constraints and weak institutions and enforcement; or there may be a mismatch between elite-level approximation or replication of foreign solutions and a country’s cultural/multi-cultural norms or shifting political currents. And in the end, an

---

1. Foreign competition law approaches imposed on Latin American countries, largely as part of conditional loan packages, illustrate how the leveraging of paradigms can backfire. *See generally* COMPETITION LAW AND POLICY IN LATIN AMERICA 9-11 (Eleanor Fox & D. Daniel Sokol eds., 2009); Julian Peña, *Competition Policies in Latin America*, in *HANDBOOK OF RESEARCH IN TRANS-ATLANTIC ANTITRUST* 732 (Philip Marsden ed., 2006).

injudicious transaction may breed contempt, which may have far-reaching consequences.<sup>2</sup>

From the perspective of the “merchants” and “peddlers,”<sup>3</sup> the more they can stimulate isomorphic processes, the easier it will be to achieve greater degrees of substantive, procedural, institutional and intellectual convergence across jurisdictions.<sup>4</sup> This objective dovetails with that of gaining, as it were, a large share of the market. Attentive observers have cautioned that convergence is not to be pursued as an inherently desirable goal; relative costs, risks and benefits as well as capacities should be taken into account along with the particular contextual fabric of the jurisdiction or group of jurisdictions that may be interested in making a “purchase.”<sup>5</sup> One risk may be that a foreign-spawned tool or principle, which may be based on a chain of possibly contingent choices, could exacerbate pre-existing problems. For example, a green light for territorial restrictions agreed between non-competitors, which flashed on in the United States in the late 1970s, was deemed inapposite in the European context, where markets across the Continent tended to be, and in many cases still are, highly fragmented (and not only because of enlargements to the East).<sup>6</sup> Another risk

---

2. The backlash and shift toward socialism is described in more political terms in Jorge G. Castañeda, *Latin America's Left Turn*, FOREIGN AFFAIRS (May-June 2006), available at <http://sandovalhernandezj.people.cofc.edu/r21.pdf>. The impediments to successful transplants, and the importance of adequate pre-conditions, have been highlighted in a substantial corpus of literature. See, e.g., Daniel Berkowitz, Katharina Pistor & Jean-François Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003); Tay-Cheng Ma, *Legal Transplant, Legal Origin, and Antitrust Effectiveness*, 9 J. COMPETITION L. & ECON. 65 (2013). See also FRANZ KRONTHALER, IMPLEMENTATION OF COMPETITION LAW IN DEVELOPING AND TRANSITION COUNTRIES 89-90 (2007). Diffusion as a complex, multi-faceted phenomenon is discussed in William Twining, *Diffusion of Law: A Global Perspective*, 1 J. COMP. L. 237 (2004); William Twining, *Social Science and Diffusion of Law*, 32 J. L. SOC'Y 203 (2005). For a legal anthropology perspective, see Julia Eckert, *Who is Afraid of Legal Transfers?*, in ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE 171 (Günter Frankenberg ed., 2013).

3. See *infra* Part II.

4. Cf. DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION 278 (2010).

5. See *infra* Part III.

6. The distinct, historically determined structure of the European economy is a factor relevant not just to vertical restraints doctrine but to other areas of the law, as well as the application of Article 102 TFEU. For example, fragmented markets may hinder the process of creative destruction or similar self-corrective mechanisms. Cf. Gustavo Ghidini & Emanuela Arezzo, *La prospettiva costituzionale della tutela della concorrenza [A Constitutional Perspective on the Protection of Competition]*, in ALLE FRONTIERE DEL DIRITTO COSTITUZIONALE: SCRITTI IN ONORE DI VALERIA ONIDA [AT THE FRONTIERS OF CONSTITUTIONAL LAW: ESSAYS IN HONOR OF VALERIA ONIDA] 859, 871 (Marilisa D'Amico & Barbara Randazzo eds., 2011) (Europe “thus appears reluctant to entrust the protection of competition to a merely *potential* perspective [...]”) (translation and emphasis are by the author of this article; the term ‘potential’ refers to pressures from potential competition). See also John Vickers, *Competition Law and Economics: A Mid-Atlantic Viewpoint*, 3 EUR. COMPETITION J. 1, 6 (2007) (“competitive self-righting mechanisms” in Europe may be less robust as compared to the U.S. because of Europe’s history of extensively monopolized markets, largely as a result of government intervention). Vickers also tentatively raises the point that, since Europe had not developed its private enforcement capacities to any degree comparable to the enormous litigation apparatus in the U.S. (a gap the EU is gradually and timidly addressing, although positive developments mainly concern only business-to-business litigation), more rigorous standards for unilateral conduct in Europe may be less apt to inhibit desirable aggressive competition on the part of dominant firms. See *id.*

may be harm to competition law's perceived legitimacy if a particular form of competition law is pushed too hard on a culture deeply rooted in different prior beliefs and values.<sup>7</sup> The un-reflexive assumption that convergence between systems, concepts and analytical approaches is desirable for its own sake has therefore understandably been criticized.<sup>8</sup> An additional critique that has been aired is that if convergence were adopted by all actors and jurisdictions as an

---

7. See Thomas Cheng, *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 CHI. J. INT'L LAW 433, 489 (2012) (advocating culturally sensitive convergence, and not opposing convergence as such). According to Cheng, the risk is linked to the relative permanence of local cultural values, which do not change fundamentally despite forces of globalization. In this regard, he cites Ronald Inglehart & Wayne Baker, *Modernization, Cultural Change, and the Persistence of Traditional Values*, 65 AM. SOCIOL. REV. 19, 21-22 (2000). At page 22, Inglehart and Baker write: "Weber [in THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1904)] argued that traditional religious values have an enduring influence on the institutions of a society. Following this tradition, Huntington [in THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996)] argues that the world is divided into eight major civilizations or 'cultural zones' based on cultural [and specifically, religious] differences that have persisted for centuries. [...] Scholars from various disciplines have observed that distinctive cultural traits endure over long periods of time and continue to shape a society's political and economic performance. For example, Putnam [in MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993)] shows that the regions of Italy in which democratic institutions function most successfully today are those in which civil society was relatively well developed in the nineteenth century and even earlier. Fukuyama [in TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1995)] argues that a cultural heritage of 'low-trust' puts a society at a competitive disadvantage in global markets because it is less able to develop large and complex social institutions. Hamilton [in 'Civilizations and Organization of Economies', in THE HANDBOOK OF ECONOMIC SOCIOLOGY 183 (Smelser & Sedberg eds., 1994)] argues that, although capitalism has become an almost universal way of life, civilizational factors continue to structure the organization of economies and societies: 'What we witness with the development of a global economy is not increasing uniformity, in the form of a universalization of Western culture, but rather the continuation of civilizational diversity through the active reinvention and reincorporation of non-Western civilizational patterns' (p. 184)." Cheng would nevertheless likely agree that although culture is slow to change and path dependencies tend to be durable, it does not follow that efforts to engender a "competition culture" are futile. Mindful of the point made by Inglehart and Baker, expectations and strategies of social change should be realistic and, to the extent possible, harmonious with the logic and philosophy of a particular "cultural zone." Furthermore, with respect to the developing world, some recommended "building blocks" have been identified by, e.g., Sokol and Stephan: "In order to build competition culture, competition authorities must choose their cases carefully so as to maximize positive media coverage, information dissemination, and interest by ordinary members of the public. Bid-rigging cases [which most taxpayers can avidly applaud] may be a good place to start." D. Daniel Sokol & Andreas Stephan, *Prioritizing Cartel Enforcement in Developing World Competition Agencies*, in COMPETITION LAW AND DEVELOPMENT 137, 153 (D. Daniel Sokol, Thomas Cheng & Ioannis Lianos eds., 2013). Sequencing, strategic planning, and the identification of genuine shared interests thus become avenues to dissolving or at least softening cultural barriers, rather than trying to break through them.

8. For broader discussion of the advantages and risks of participation in global convergence, see generally Cheng, *supra* note 7. For discussion of the rhetoric and mechanisms of convergence and a variety of impediments to it, see GERBER *supra* note 4, at 281-292. Within the specific context of competition laws and enforcement patterns in the European Union, the convergence process has rather unique dynamics which set it apart from the subject of global convergence. See, e.g., Laurence Idot, *Réflexions sur la convergence des droits de la concurrence* [Reflections on the convergence of competition laws], November 2012, 4-2012 CONCURRENCE <http://www.concurrences.com/Journal/Issues/No-4-2012/Articles-1371/The-convergence-of-competition>.

overriding goal, desirable innovation might be suppressed.<sup>9</sup> Kerber and Budzinski therefore plead for diversity and experimentation as part of a discovery procedure needed to address Hayek's problem of constitutional ignorance.<sup>10</sup>

Furthermore, even supposing convergence were desirable, as things stand today there are some areas of law (abuse of dominance in particular) in which differences in objectives, implementation capabilities and institutions appear to preclude the identification of any truly universal approach and thus render the convergence enterprise, even as between developed countries let alone the rest of the world, largely illusory.<sup>11</sup>

Taking account of the risks, drawbacks and in some cases the impracticability of convergence, and particularly where the "country of import" is a developing or least developed country, its historical-cultural, social and economic conditions may be so different that they are advised to be eclectic with their choices, and to "develop their own brand of competition law, resisting pressures to copy 'international standards' without regard to fit."<sup>12</sup> As noted later, some of them are following this advice.<sup>13</sup> Meanwhile, starting from somewhat different, or rather overlapping, premises—and responding to the counter-risk that this recommended diversity might lead to excessive fragmentation—one of the catch phrases circulating in recent years has been "informed divergence."<sup>14</sup>

---

9. Cf. Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 31, 35-36 (Michael Greve & Richard Epstein eds., 2004).

10. *Id.* at 36-39, 55 (Hayekian "knowledge problem requires that an international system of competition laws must sustainably produce variety and generate new knowledge"); See also OLIVER BUDZINSKI, THE GOVERNANCE OF GLOBAL COMPETITION: COMPETENCE ALLOCATION IN INTERNATIONAL COMPETITION POLICY 72-80 (2008); Wolfgang Kerber, *The Theory of Regulatory Competition and Competition Law*, in ECONOMIC LAW AS AN ECONOMIC GOOD: ITS RULE FUNCTION AND ITS TOOL FUNCTION IN THE COMPETITION OF SYSTEMS 27 (Karl Meessen ed., 2009).

11. See generally Giorgio Monti, *Unilateral Conduct: The Search for Global Standards*, in RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 345 (Ariel Ezrachi ed., 2012).

12. Eleanor Fox, *Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries*, in COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES 273, 273 (Josef Drexler, Mor Bakhoun, Eleanor Fox, Michal Gal & David Gerber eds., 2012). Fox recognizes that an internal evaluation, sensitive to local conditions and needs, may lead a jurisdiction to conclude that the benefits of copying or otherwise embracing a global standard outweigh the disadvantages. But she stresses the importance of making an informed choice. See *id.* at 286, 290; see also Eleanor M. Fox and Michal S. Gal, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience* (New York Univ. Law & Econ. Working Paper No. 14-11), forthcoming in ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW (Josef Drexler, Mor Bakhoun, Eleanor Fox, Michal Gal & David Gerber eds., 2015) (need for eclectic, tailored solutions). The costs and benefits to be considered by a developing country when deciding whether to move closer to a competition model based on neoclassical economics are discussed in detail by GERBER, *supra* note 4, at 13.

13. See discussion *infra* at section III.D.4.

14. Strictly speaking, and as originally used, "informed divergence" operates at the level of the diverging actor, which (as highlighted particularly in footnote 12 and accompanying text) should be making well-informed choices about whether to follow global standards. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 287, 374 (1997). The popularity of the term 'informed divergence' stems from Slaughter's later use of it in ANNE-MARIE SLAUGHTER, A NEW

This reference to divergence may in reality be a long-term convergence strategy.<sup>15</sup> But it is a “soft” strategy that allows for flexibility, which is meant in part to be a pressure valve enabling the convergence process to advance.<sup>16</sup> The concept of informed divergence seems to exhibit an inherent tension that is unlikely ever to be fully resolved, even if such full resolution were desirable. It is not inconceivable that one day we may see a move from markets toward hierarchies or quasi-hierarchies: some form of top-down (and partial) harmonization in some areas of competition law may occur. Such a development would substantially change the character of discussions about convergence, and the locus of debate might then shift to processes of splintering and drift. But most would agree that top-down global harmonization of broad scope, *e.g.*, via a WTO framework agreement or via some new international institution, will not happen in the foreseeable future.<sup>17</sup> For some, this is just as well.<sup>18</sup>

---

WORLD ORDER 24, 172 (2004). However, the term is helpfully also used ‘multilaterally’ to imply that the relevant community of interest is or should be equally informed of, and that it understands or should understand, the divergence and the reasons for it. *Cf.* John Fingleton, Competition Agencies and Global Markets: the Challenges Ahead, Speech Given as Part of the Mellon Sawyer Seminar Series (June 5, 2009), available at [http://www.oft.gov.uk/shared\\_of/speeches/2009/spe0909paper.pdf](http://www.oft.gov.uk/shared_of/speeches/2009/spe0909paper.pdf), at 27. Of course, if no brakes were applied to the informed divergence concept, then the risk of unraveling would rear its head again, but the group dynamics of the ICN tend to serve as a buffer against disintegrative tendencies.

15. Fingleton refers to the “interplay” between convergence and informed divergence. He also seems to assume that divergent approaches will ultimately be phased out, in particular when developing economies reach a certain stage of development. *See* Fingleton, *supra* note 14 at 27 (specifically, points 87 and 90). For the notion that informed divergence is intended to lay the groundwork for possible long-term convergence, *see* Eleanor Fox, John Fingleton and Sophie Mitchell, *The Past and Future of International Antitrust: Gaps, Overlaps and the Institutional Challenge*, in BUILDING NEW COMPETITION REGIMES: SELECTED ESSAYS 163 (David Lewis ed., 2013), at section V of the chapter. The interplay between convergence and divergence has also been noted by other authors. *See, e.g.*, Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT’L L. 207, 246 (2003).

16. A flexible margin for divergence is, of course, a reflection of the global preference, thus far, for soft law solutions and soft institutions. In some cases, it may be that the divergence is not easily discerned from an external point of view, as it emerges through a more subtle process of adaptation. *Cf.* D. Daniel Sokol, *International Antitrust Institutions*, in COOPERATION, COMITY AND COMPETITION POLICY 187, 196 (Andrew Guzman ed., 2011) (“In soft law antitrust, broad principles in antitrust allow for each country to adopt the language and theoretical underpinnings behind it in a manner that can be more easily incorporated within the existing legal and political traditions. This flexibility allows for ‘fit’ within an existing tradition and is not a pure transplant across legal systems . . .”). If broad principles are adopted with the possibility to frame them within different theoretical perspectives, then a degree of divergence seems likely given high degrees of heterogeneity across a large number of jurisdictions and “culture zones.” That is to say, “informed divergence” may be a strategy of managed convergence but at the same time it is a conceptual description of what may be an endemic feature of the international system when hard obligations have not been undertaken.

17. *See, e.g.*, Fingleton, *supra* note 14, at 18; D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1099 (2010); DANIEL CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 229 (2011). Crane suggests laying a foundation for plurilateral or multilateral hard law gradually and issue-by-issue, beginning with procedure and progressing to substance and institutions. His example is pre-merger notification, which could be standardized as a step toward a treaty on substantive merger norms. *See* CRANE, *supra* at 243. On the need for hard law solutions for certain issue-specific challenges, *see also infra* note 58.

18. One risk with a multilateral consensus-based agreement is to get stuck with a bad deal that can’t feasibly be reversed, although a carefully crafted agreement might provide for a workable solution by its own

While convergence is often a central point of emphasis in the modern global antitrust conversation and cannot be ignored, the present article develops a related but different theme: the interest here is on the supply side, and the drive to increase market share, which may perhaps also be interpreted as the drive to project soft power, to borrow Joseph Nye's popular term.<sup>19</sup> In this context, the self-interest of key actors, in a broad sense, is not the whole story, but it plays a central role.<sup>20</sup> Another related dynamic at play is the distorted lens through which many if not all of us see the world, a lens of self-certified enlightenment. Many American antitrust lawyers seem predisposed to the sentiment that they understand antitrust in a privileged way; after all, the U.S. was the undisputed antitrust heavyweight champion for 70 years until the 1960s finally witnessed the incipient influence of competition authorities in Bonn and Brussels. In Europe, meanwhile, many at some level hold to the view that while competition law principles and antitrust-type analytical tools took longer to develop in Europe, lawyers there have surpassed the Americans in competition enlightenment, for example because in Europe there is a somewhat richer history of competition law ideas from which to draw. At least some European competition experts may feel that while Chicago, or an alloyed version of Chicago, has been the slow death of American antitrust, Europe has largely escaped this fate, and that even in the age of the *more economic approach* (thought by many to be a post- or anti-ordoliberal approach with de-ethicizing overtones), it is the EU competition law regime that keeps an otherwise largely unaccountable global industry honest.<sup>21</sup>

---

terms. Apart from this, some argue that global hard law is in fact undesirable and inferior to the voluntary system of soft convergence and cooperation that has developed in the last dozen years. See Anu Bradford, *International Antitrust Cooperation and the Preference for Nonbinding Regimes*, in COOPERATION, COMITY AND COMPETITION POLICY 319, 343 (Andrew T. Guzman ed., 2010) ("First, as cooperation under nonbinding agreements is largely self-enforcing, the added value of a binding agreement with provisions for monitoring, enforcement, and sanctions is trivial. Second, in the absence of coordinated domestic interest group support for international antitrust cooperation, a binding agreement would not provide states with any domestic political economy rents and therefore will remain a low national priority. Finally, the emerging voluntary convergence will slowly eradicate negative externalities stemming from decentralized antitrust regimes, making the case for a binding international agreement less compelling.").

19. See, e.g., JOSEPH S. NYE JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2005).

20. The term "self-interest" is not primarily a reference to national welfare- or budget-maximizing strategies, or profit-shifting in the sense of strategic trade theory. A government (and/or legislator) may well be guided by such strategies, and if it (they) can (openly or subtly) dictate the policies of the competition authority established in the jurisdiction concerned, the authority would no doubt act self-interestedly in this narrow sense as well. Similarly, a competition authority may be co-opted directly by (globally active) commercial interests. Without denying these possibilities, the reference to self-interest in the main text is concerned with a wider range of motivations including, for example, the desire to achieve prestige and gain influence in a global community of interest, and to respond to or anticipate competitive pressures generated by the activities of rival authorities engaged in a similar game. These motivations seem particularly relevant where and to the extent that competition authorities engaged in the global promotion of their own competition law regimes operate with relative independence from globalized industry and from other organs of government.

21. A side note here is that, by its own terms, a "more economic approach" is not an 'exclusively economic approach' (which probably cannot be practiced even in the U.S., not least because subtextual content will always seep into competition law as conceived or as applied, as it can do in practically all areas of law).



The theme here, then, is the conscious/unconscious will to compete for influence via the diffusion of ideas, paradigms, techniques, norm and institution design, and so on. The term “competition” may fail to capture the simultaneous cooperative efforts made among competition authorities, and in this sense the alternative term “co-opetition” could be used.<sup>22</sup> However, with some exceptions the emphasis in this text is on competition and not cooperation; since the co-opetitive dimensions are not explored in detail, this terminology is not used either.

With regard to competition among competition authorities, the aim is not to set out to prove that such competition produces good results, as it tends to do in most real markets.<sup>23</sup> Previous work suggests that “yardstick” competition among competition law institutions (as opposed to the usual Tieboutian competition among legislators analyzed in most discussions of regulatory competition, where regulatees/voters can relocate or otherwise select laws) will indeed tend, in general, to be welfare-enhancing.<sup>24</sup> This is a sensible view; it seems quite improbable that adequate agency self-improvement could take place in the absence of competitive forces. I take the desirability of such yardstick competition as a given and do no more than conduct an indicative survey of the modes in which competition authorities compete globally through their activities.

---

Giorgio Monti has commented on this, explaining that “there are good reasons for the Commission to insist in its public communications that its approach is only about using *more* economics, because contemporary EC competition law is governed by: a distributive concern about ensuring consumer welfare (which is very difficult to implement in certain instances); other non-economic values; a policy choice (at present at least) in favor of efficiency in the short term over long term dynamic efficiencies; and a wish to see the law enforced to protect the process of competition.” Giorgio Monti, *EC Competition Law: The Dominance of Economic Analysis?*, in *THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES* 3, 12-13 (Roger Zäch, Andreas Heinemann & Andreas Kellerhals eds. 2010) (emphasis added) (footnote omitted). Later in the text we return to consider further the last of Monti’s themes, the protection of the “process of competition.”

22. See Daniel Esty & Damien Geradin, *Regulatory Co-Opetition*, 3 J. INT’L ECON. L. 235 (2000); Damien Geradin & Joseph McCahery, *Regulatory Co-opetition: Transcending the Regulatory Competition Debate*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE* 90, 93 (Jacinta Jordana & David Levi-Faur eds., 2004) (“a flexible mix of competition and cooperation between governmental actors, as well as between governmental and non-governmental actors”). The regulatory co-opetition perspective does not *require* a mix of competition and cooperation. It is a broad framework that accommodates pure competition, pure cooperation, and combinations of the two.

23. See Kerber & Budzinski, *supra* note 9, at 31.

24. *Id.*, with references. This is not to say that competition law authorities never compete in ways comparable to interjurisdictional competition between legislators (*e.g.*, to attract scarce capital). For example, as suggested *supra* note 20, it may be that competitive pressures on legislators sometimes create derivative pressures on competition authorities; where this is so, a risk of regulatory degradation may arise. However, in general, the assumptions that must hold in order to draw a direct analogy with regulatory competition may be either unrealistic or too uncertain, or both. Cf. Eleanor Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781-1807, 1789 (2000) (“[U]nlike the phenomenon of corporate charters, states or nations are not in direct competition with one another to have the most desirable competition law from the viewpoint of a firm that is a target of opportunity of that nation or state.”).

*B. Structure of this Article*

The remaining text proceeds first by setting out how the structure of the “market” is evolving and who the main players are (part II). Then, more expansively it considers the processes by which competition in this sense manifest themselves (part III). In this context, reference is made first of all to the contrasting grand visions (hard law versus soft law, supranational versus *souverainiste*, etc.) that have been embraced and pushed by the most prominent rival jurisdictions as to how antitrust should be governed at the global level (section III.A). The analysis then turns to international antitrust cooperation, another competitive field where different strategic formats are employed and where interest has intensified in the absence of formal multilateral antitrust governance (sections III.B and III.C). A final focal point concerns “competition in competition ideas” (section III.D). This form of competition concerns alternative models with regard to what antitrust law should seek to achieve, and consequently how it should be shaped. A summary of the main points concludes the article (part IV).

II. WHICH MARKET PLAYERS?

Inevitable reference is made above and below to the United States and the European Union. Historically, since most of the few then-existing competition law regimes worldwide tended to be weak in terms of political power and/or legal powers, and since they amounted in some cases to extensions of the economic policies of the dominant political party (which in turn was beholden to industry), the number of (generally) functional and influential regimes was arguably three: those in the US, the EEC, and Germany. As Claus Ehlermann says in a recent book review,<sup>25</sup> DG IV faced two competitors, the most prominent initially being the Bundeskartellamt (BKA), followed later by the federal American agencies (counting the DOJ and FTC, which certainly compete *inter se*, as a single rival<sup>26</sup>). Others have similarly referred (albeit without reference to

---

25. Claus-Dieter Ehlermann, 51 COMMON MKT. L. REV. 326, 327 (2014) (reviewing THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW (Kiran Klaus Patel & Heike Schweitzer eds., 2013).

26. With an already quite checkered history behind it, the influence and stature of the FTC from the 1960s to the 1980s was at another low ebb, meaning that during this period DG IV’s perceived rival would have been principally the DOJ. It may be added that U.S. federal antitrust enforcement also competes to some extent with enforcement at the state level. See, e.g., Richard Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL’Y 5, 8, 10, 11, 13 (2004). The unstructured federalist governance in the US is contrasted with the EU’s more juridified framework in Firat Cengiz, *Management of Networks between the Competition Authorities in the EC and the US: Different Politics, Different Designs*, 3 EUR. COMPETITION J. 413 (2007). In further detail, see FIRAT CENGİZ, ANTITRUST FEDERALISM IN THE EU AND THE US ch. 4 (2012).

the BKA) to the “duopolistic” market on which the Community and the U.S. operated as competitors.<sup>27</sup>

But today we live in a multipolar world, to use an already-stock phrase, and the transformation has occurred in a breathtakingly short time span. Against a background of (i) globalized markets, (ii) increased exposure to international trade including, occasionally, cartelized trade, (iii) sometimes, a perceived need to attract foreign investment to support local development (although FDI arguments are double-edged), and (iv) a process of reincarnation in Eastern Europe following the disintegration of the USSR, the antitrust idea has grown and reproduced,<sup>28</sup> with the adoption of over 60 new competition laws in the 1990s alone.<sup>29</sup> Today there are more than 120 jurisdictions outfitted with competition laws,<sup>30</sup> even if it is important to recognize that the implementation and (funding of) enforcement of such laws remains in many cases inadequate.<sup>31</sup> With this

---

27. See William Kovacic, *Dominance, duopoly and oligopoly: the United States and the development of global competition policy*, GLOBAL COMPETITION REV. 39 (December 2010). Only a dozen years ago, after the European Commission had attracted the notice of U.S. newspapers with its handling of the *Boeing/McDonnell-Douglas* and *GE/Honeywell* merger cases, Fred McChesney made the rather anachronistic observation that the U.S. was “still the dominant antitrust enforcer” but that the European Community was “striving to create a niche for itself.” McChesney, *Talking ‘Bout My Antitrust Generation: Competition For and in the Field of Competition Law*, 52 EMORY L.J. 1401, 1436 (2003); McChesney, *Talking ‘Bout My Antitrust Generation*, 27 REG. 48, 55 (2004) (same quoted language).

28. The term “antitrust idea” is borrowed from Lawrence Sullivan and Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT’L L. 197 (1998).

29. See, e.g., Imelda Maher & Anestis Papadopoulos, *Competition agency networks around the world*, in RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 60, 87, 345 (Ariel Ezrachi ed., 2012). David Lewis has observed that in many countries the adoption of a competition law came too late: “[W]hat is remarkable is how frequently liberal market policies were implemented without first introducing the competition rules necessary to underpin the effective functioning of the newly ‘liberalized’ markets. This latter omission has opened the door to monopolization and concomitant abuses, which have caused a great deal of the misery and inequality that often accompanied liberalization.” Lewis, *Embedding a Competition Culture: Holy Grail or Attainable Objective?*, in COMPETITION LAW AND DEVELOPMENT 228, 229 (D. Daniel Sokol, Thomas Cheng & Ioannis Lianos eds., 2013). Two additional points seem nearly self-evident: first, it is not just competition rules but a constellation of policies, which by purpose or effect become a country’s competition policy, that deserve attention; second, without a minimal development of functioning institutions, the simple adoption of competition rules will likely have only symbolic value, if any. See, e.g., William Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265 (2001); Michal Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries*, in UNCTAD, COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES 21 (2004).

30. See Hugh Hollman, William Kovacic & Andrew Robertson, *Building Global Antitrust Standards: The ICN’s Practicable Approach*, in RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 89, 90 (Ariel Ezrachi ed., 2012).

31. For a cross-country statistical and econometric analysis of around 100 countries, of whom 80 had competition laws and 21 did not, see Abel Mateus, *Competition and Development: What Competition Law Regime?*, in COMPETITION LAW AND DEVELOPMENT 115, 123-34 (D. Daniel Sokol, Thomas Cheng & Ioannis Lianos eds., 2013). Sixty-seven of the 80 countries with a competition law had established a competition authority, but in only 30 countries did the authority appear to have resources suitable for its tasks; indeed, by a stricter measure only 12 did. Mateus concludes at page 24 that “governments around the world have not placed competition law enforcement among their highest priorities and have generally not endowed their [competition authorities] with sufficient resources for effective enforcement.” (footnote omitted) Mateus, *supra* at 24.

dispersion and diffusion of laws, the supply side of the market has become, as Kovacic says, oligopolistic.<sup>32</sup> China has risen—or pounced, and seems to have the better part of the antitrust world mesmerized.<sup>33</sup> In Japan, the JFTC in the last decade has started to shake free of its dog-that-didn't-bark past and to become a serious, though still idiosyncratic, institution.<sup>34</sup> Competition authorities in, for example, Brazil and South Korea have become very active, and punch above their weight.<sup>35</sup> Australia, another significant antitrust jurisdiction, has had remarkable regional and global influence, the pending “root and branch” review notwithstanding;<sup>36</sup> and for the future, India could potentially become yet another important jurisdiction if the efforts of the Competition Commission can earn it credibility and provoke cultural change. (This will likely take years to accomplish; several factors will have to conspire if the necessary environment is to be created.) Meanwhile, among the EU Member States it is no longer only the Bundeskartellamt that commands attention; intra-regional competition occurs routinely in the sister jurisdictions of the EU, paradoxically in parallel with an intensification of interaction and cooperation, a sort of grand “concerted practice” established formally by, and informally in connection with, Regulation

---

32. See Kovacic, *supra* note 27.

33. Two recent edited volumes indicate the torrent of competition law activity in China during the first five years of its application. See CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS 5 (Adrian Emch & David Stallibrass eds., 2013); THE CHINESE ANTI-MONOPOLY LAW: NEW DEVELOPMENTS AND EMPIRICAL EVIDENCE (Michael Faure & Xinzhu Zhang eds., 2013).

34. For arguments as to why the enforcement of competition law in Japan has been experiencing a long-awaited renaissance, see Mel Marquis & Tadashi Shiraishi, *Japanese Cartel Control in Transition*, CEU SAN PABLO MADRID WORKING PAPER NO. 47/2014, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2407825](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407825) (also discussing the December 2013 amendments to the Antimonopoly Act); Simon Vande Walle, *Competition and competition law in Japan: between scepticism and embrace*, in ASIAN CAPITALISM AND THE REGULATION OF COMPETITION: TOWARDS A REGULATORY GEOGRAPHY OF GLOBAL COMPETITION LAW 123 (Michael Dowdle, John Gillespie & Imelda Maher eds., 2013).

35. On Brazil, see Marcelo Calliari & Denis Alves Guimar es, *Brazil: Toward a Mature Cartel Enforcement Jurisdiction?*, in COMPETITION LAW IN THE BRICS COUNTRIES 13, 13 (Adrian Emch, Jose Regazzini & Vassily Rudomino eds., 2012) (“Brazil has experienced a veritable revolution in antitrust enforcement in the last 10 years, particularly in relation to cartel enforcement”). On South Korea, see Jaemin Lee, *Korea*, in THE POLITICAL ECONOMY OF COMPETITION LAW IN ASIA 47, 47 (Mark Williams ed., 2013) (while the KFTC answers to the Korean Prime Minister, the enforcement of competition law based on a consumer welfare criterion but also encompassing fair trade rules “has become one of the major tasks of the Korean government and the KFTC has been the vehicle to implement this objective”—which it is doing with notable verve).

36. See, e.g., GERBER, *supra* note 4, at 262 (attributing Australia's influence, like that of Canada, to the country's neutrality, independence, eclecticism, and “lack of power”, i.e., the ability to relate to other countries without necessarily causing them to assume a defensive or suspicious posture, an advantage hegemony often do not have). For further discussion of Australia, see Deborah Healey, *Australia*, in THE POLITICAL ECONOMY OF COMPETITION LAW IN ASIA 344, 344 (Mark Williams ed., 2013) (“Australia has a strong competition law, well-developed competition policy and a significant ongoing commitment to markets and competition.”). In early 2014 the Australian Government launched a far-reaching review of national competition laws and policy. See The Australian Government Competition Policy Review, Competition Policy Review Issues Paper 14 April 2014, [http://competitionpolicyreview.gov.au/files/2014/04/Competition\\_Policy\\_Review\\_Issues\\_Paper.pdf](http://competitionpolicyreview.gov.au/files/2014/04/Competition_Policy_Review_Issues_Paper.pdf). A final report is expected in 2015.

1/2003.<sup>37</sup> (Here again one could refer to “co-opetition” among European competition authorities—both horizontal and vertical, since the Commission is not free from co-opetitive pressures from “below” despite its central role and ultimately superior powers.

It therefore seems that, more than ever before, except perhaps in 1962 when the European Commission was endowed with substantial enforcement powers,<sup>38</sup> competition is breaking out in the global antitrust “space”. The European Commission and the U.S. agencies remain the market leaders, certainly. As Sokol says they still “compete for dominance” in relation to “system design and analytical presumptions”,<sup>39</sup> and inevitably they are used as the main examples in this paper. Nevertheless, there is a growing field of other significant players, and a general dynamism in the market for market governance.

### III. MODES OF COMPETITION

If the global antitrust field is now characterized by oligopolistic competition with two market leaders, a key question to be explored is: in what arenas, or through which mechanisms, does global competition take place? In this third part of the article, we take a tour through these arenas and mechanisms, or to cut syllables, these “modes” of competition. The tour is not exhaustive, but a sense of the “multi-market” nature of competition among antitrust enforcers seems to emerge from a consideration of the modes discussed below.

#### A. *Competing Visions of a Global Framework for Antitrust Law*

By the 1990s, one of the big questions being debated was: which vector of governance ought to apply to the enforcement of antitrust?<sup>40</sup> Considering, for example, that (i) effective policing of internationally active cartels and efficient merger control often require significant coordination among agencies from various jurisdictions (the number of which was growing fast, as noted above), or that (ii) divergence of rules across jurisdictions tends to create externalities, or that (iii), inconsistent application within one and the same jurisdiction can result

---

37. For a thumbnail statistical ‘scoreboard’ of how various Member States have performed in the post-2004 “modernization” era (taking numbers of envisaged final decisions notified to the Commission as an indicator), see Wouter Wils, *Ten Years of Regulation 1/2003—A Retrospective*, 4 J. EUR. COMPETITION L. & PRAC. 293, 295-296 (2013) (with the “top ten” on this admittedly decontextualized index being France, Germany, Italy, Spain, the Netherlands, Denmark, Greece, Romania, Slovenia and Hungary; the UK was 12th; Poland was 15th).

38. See Lorenzo Federico Pace & Katja Seidel, *The Drafting and the Role of Regulation 17: A Hard-Fought Compromise*, in THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW 54 (Kiran Klaus Patel & Heike Schweitzer eds., 2013), for the story surrounding the adoption of Regulation 17/62.

39. Sokol, *supra* note 16, at 211.

40. See, e.g., LEON BRITTON, EUROPEAN COMPETITION POLICY: KEEPING THE PLAYING-FIELD LEVEL (1992).

in discrimination and competitive distortions, was there a need for supranational institutions? Or was it better to preserve decentralized, sovereignty-based enforcement? Relatedly: was it desirable to have formal frameworks of cooperation, or was informal and spontaneous cooperation the better approach?

Sensing a window of opportunity sliding open, then-Competition Commissioner Leon Brittan in 1992 began to advocate the envelopment of certain aspects of antitrust enforcement within the structures of what was to become the World Trade Organization,<sup>41</sup> just months after twelve legal experts led by Wolfgang Fikentscher had begun to give the idea shape in a far-reaching Draft International Antitrust Code (DIAC), eventually published in July 1993.<sup>42</sup> For a while, Commissioner Brittan's initiative gained some momentum and was supported by the incoming Competition Commissioner in 1993, Karel van Miert (if not always by DG IV officials).<sup>43</sup> In December 1996, competition law became a 'Singapore issue' (a dubious honor), and in submissions to the WTO's Working Group on Trade and Competition Policy, the Commission took the (revised) position that multilateral WTO rules should be developed to ensure the prohibition of hard core cartels and to ensure that each WTO Member's competition law met common standards of non-discrimination, transparency, and due process.<sup>44</sup>

---

41. See *id.* at 53. Following a reallocation of portfolios within the Commission in 1993, Brittan assumed responsibility for trade matters and became the European Community's lead negotiator in the Uruguay Round.

42. See Wolfgang Fikentscher, *Competition Rules for Private Agents in the GATT/WTO System*, 49 *AUSENWIRTSCHAFT* 281 (1994); Wolfgang Fikentscher, *The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration - The Institutional and Jurisdictional Architecture*, 72 *CHL.-KENT L. REV.* 533 (1996); Daniel Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 *MINN. J. GLOBAL TRADE* 1 (1997); Eleanor Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 *PAC. RIM L. & POL'Y J.* 1, 29-36 (1995); Eleanor Fox, *Toward World Antitrust and Market Access*, 91 *AM. J. INT'L L.* 1, 15-16 (1997). See also Eleanor Fox, *A Liberal Competition Code for the World Whose Time Has Not Yet Come*, remarks delivered at the Global Competition Law Conference, Chicago, 28 October 2011 and reported in *CONCURRENCES* n° 1-2013, at point 1 where the members of the Munich Group understood that political constraints likely precluded the full realization of their proposals but proceeded deliberately on a normative (*de lege ferenda*) basis to establish "the best that world antitrust law and institutions could be." Eleanor Fox and Lawrence Sullivan, also among the Munich Group participants, considered that the DIAC's substantive rules were too specific and failed to leave room for national diversity; they prepared an 'alternative DIAC' with rules they thought to be less intrusive. See generally *id.* (with points 16-52 reproducing and commenting in hindsight on the alternative Code).

43. Fox, *Toward World Antitrust and Market Access*, *supra* note 42, at 9.

44. The drivers behind the EU's (or at that time the Community's) attempt to introduce a competition law discipline within the framework of the WTO included the natural affinity of European officials for supranational structures with binding rules and legal consequences such as the WTO, particularly given the analogy between WTO trade liberalization and the Community/Union's own internal fight against trade barriers. For the former point, see Matthew Baldwin, *EU Trade Politics: Heaven or Hell?*, 13 *J. EUR. PUB. POL'Y* 926, 933 (2006); on the latter, see Fox, *Toward World Antitrust and Market Access*, *supra* note 42, at 4-10; ANESTIS PAPADOPOULOS, *THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY* 215-16 (2010). Papadopoulos adds other factors as well, such as the goal of promoting broad convergence through multilateralism, and that of gaining greater market access abroad for European firms; and, less publicly, a desire to obviate the extraterritorial application of antitrust law by the U.S. agencies against European companies, and the possibility of using the Singapore issues as bargaining chips to delay agricultural reform. *Id.* at 216-219.

But it was not to be. In speeches beginning in 1996 and becoming more trenchant through 1999,<sup>45</sup> Joel Klein, the then-Assistant Attorney General for Antitrust (AAG), announced his skepticism at the proposal to extend the WTO's competences to competition law (*i.e.*, to extend them beyond their current oblique application to antitrust issues<sup>46</sup>), and this set the stage for a key counter-move. In 1997, Klein enlisted an expert advisory committee—the International Competition Policy Advisory Committee (ICPAC)—to study and recommend to Klein and to the Attorney General ways of developing desirable forms of global antitrust governance. In a celebrated report of February 2000, ICPAC stated: “While recognizing that certain core WTO nondiscrimination principles of national treatment and transparency would also apply to the enforcement of domestic competition laws, the ICPAC Report specifically endorsed a more modest role for the WTO than the establishment of new competition rules subject to WTO dispute settlement.”<sup>47</sup> At the same time, ICPAC unveiled its idea of, among other things, a new “Global Competition Initiative” consisting of a

---

45. See Joel I. Klein, Acting Assistant Att’y Gen., U.S. Dep’t of Just., *A Note of Caution with Respect to a WTO Agenda on Competition Policy*, Address at The Royal Institute of International Affairs (Nov. 18, 1996) (transcript available at <http://www.justice.gov/atr/public/speeches/0998.pdf>); Joel I. Klein, *A Reality Check on Antitrust Rules in the World Trade Organization, And a Practical Way Forward on International Antitrust*, in ORG. FOR ECON. CO-OPERATION & DEV., *TRADE AND COMPETITION POLICIES: EXPLORING THE WAYS FORWARD* 37 (1999).

46. A few scattershot rules in the WTO Agreements address certain matters that are also of concern to antitrust. For example, under Article VIII GATS, a WTO member is supposed to ensure that monopolies and exclusive service providers established in its jurisdiction operate consistently with the most favored nation (MFN) principle, and that they do not abuse their monopoly position in a way that jeopardizes the value of any specific commitments the member has made. Article IX GATS requires a WTO member to consult upon request (but the obligation goes no further than this) if another member complains about other anticompetitive business practices causing harm to it. See PETROS MAVROIDIS & MARK WU, *THE LAW OF THE WORLD TRADE ORGANIZATION (WTO): DOCUMENTS, CASES AND ANALYSIS*, 764 (2nd ed. 2013). See also, *e.g.*, Eleanor M. Fox & Amadeo Arena, *The International Institutions of Competition Law: The Systems’ Norms*, in *THE DESIGN OF COMPETITION LAW INSTITUTIONS* 444, 452-460 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013); BRENDAN J. SWEENEY, *THE INTERNATIONALISATION OF COMPETITION RULES* 330, 375-377 (2010); Mitsuo Matsushita, *Basic Principles of the WTO and the Role of Competition Policy*, 3 WASH. U. GLOBAL STUD. L. REV. 363 (2004); Brendan Sweeney, *Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition*, 5 MELB. J. INT’L L. 375, 401-413 (2004); Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body’s Experience*, 26 FORDHAM INT’L L. J. 1505 (2003); Daniel Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT’L L. 478, 489-494 (2000); Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097 (1995). Few are under the delusion that the WTO agreements establish cohesive rules to ensure that WTO members punish, prevent or even discourage firms from engaging in most forms of anticompetitive behavior. Outside of the telecommunications sector, where WTO members can opt in to the terms of a “Reference Paper” and thereby undertake to police the conduct of major telecoms suppliers (see Eleanor M. Fox, *WTO’s First Antitrust Case - Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT’L ECON. L. 271 (2006)), the limited experiments of WTO panels in solving antitrust problems have generally ended in disappointment. It could hardly be otherwise, given that, regardless of provisions such as the above-described Article VIII GATS, the WTO has no competence whatsoever to impose sanctions directly on private actors.

47. Merit E. Janow & James F. Rill, *The Origins of the ICN*, in *THE INTERNATIONAL COMPETITION NETWORK AT TEN* 21, 30 (Paul Lugard ed., 2011).

voluntary network of competition enforcers (and non-governmental advisors but no trade officials) developing soft instruments and working toward cooperation, consultation and soft convergence on “process” issues (but not initially on substantive rules<sup>48</sup>). This was of course the genesis of the International Competition Network, which has been a powerful magnet, more so than many might have thought possible when it made its first imagined appearance in the ICPAC report.<sup>49</sup> Meanwhile, the idea of bringing some aspects of competition

---

48. See Int’l Competition Policy Advisory Committee Final Report, Op. Att’y Gen. 282-285 (2000), available at <http://www.justice.gov/atr/icpac/chapter6.htm> [hereinafter ICPAC], where Merit Janow and Jim Rill, two of the ICPAC members, explain that they had several meetings with U.S. officials, including AAG Klein, reassuring them that “the objective of the GCI was to provide a consultative forum focusing initially on process and it was not designed to force substantive harmonization;” see also Janow & Rill, *supra* note 47, at 37; cf. Monti, *supra* note 11, at 354, 360. On the other hand, the ICN’s later work has perhaps inevitably crept into substantive fields and has generated thinly veiled messages to the ICN membership about where their substantive rules and application thereof should be moving.

49. Obviously, the success of the ICN does not mean it is free of deficiencies. For example, as several observers have pointed out, the competition authorities of small and developing countries have sometimes found themselves sidelined in the ICN’s activities and decision-making, while the bigger and more established players, quite plausibly acting on impulses emanating in part from global commercial interests, set the agenda or attempt to set it. See Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 *FORDHAM INT’L L. J.* 1, 46-54 (2009); Fox & Arena, *The International Institutions of Competition Law*, *supra* note 46, at 483 (but also noting at 483 and 485 that the ICN is accountable to its members); Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 *INT’L LAW* 151, 167-168, 171 (2009) [hereinafter *Linked-in*]; Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 *SW. J. L. & TRADE AM.* 211, 235 (2007); Kathryn McMahon, *Competition Law and Developing Economies: Between “Informed Divergence” and International Convergence*, in *RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW* 209, 233-35 (Ariel Ezrachi ed., 2012). Asymmetric influence in international organizations—not only because Great Powers and medium powers can overwhelm and thus tend to inhibit any dissent but also simply because participation has high relative costs for small countries—is hardly a problem unique to the ICN or competition law. Furthermore, Sokol points out that some minimal threshold of asymmetric power may be a condition of the ICN’s success, as it ensures the necessary investment on the part of the U.S. and the EU. See D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 *BERKELEY BUS. L. J.* 37, 107 (2007). In that sense, a symbiotic relationship, of sorts, may develop between the powerful and less powerful members. On the other hand, given the ICN’s voluntary nature, the possibility of a widespread feeling of lack of “ownership” among its members bears risks, as reflected in the discourse of the ICN’s leadership. See, e.g., Andreas Mundt, *The ICN’s 12<sup>th</sup> Birthday—What’s New?*, *COMPETITION POL’Y INT’L* (October 2013), at 3 (“focus and inclusiveness will remain indispensable elements of our path forward”) (emphasis added). For the likely reasons why the ICN has been rapidly accepted by the global community of antitrust enforcers (save the authorities established in China, which I surmise may be seeking (i) to consolidate their standing, while making the political point that China can resist international norms if it so wishes, leaving themselves the option (ii) to join the ICN later in a position of increased strength and prestige, and thus possibly greater “bargaining power”, even if entry is formally free with nothing to bargain about), see Sokol, *supra* at 105, 116, 121-22; D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 *GEO. MASON L. REV.* 1055 (2010). For further reflections on the ICN, see, among others, Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, in *THE INTERNATIONAL COMPETITION NETWORK AT TEN: ORIGINS, ACCOMPLISHMENTS AND ASPIRATIONS* 51 (Paul Lugard ed., 2011); Hollman et al., *supra* note 30, at 92; BUDZINSKI, *supra* note 10, at 142-47; Yane Svetiev, *The Limits of Informal International Law: Enforcement, Norm-generation, and Learning in the ICN*, in *INFORMAL INTERNATIONAL LAWMAKING* 271 (Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, eds., 2012); Marie-Laure Djelic, *International Competition Network*, in *HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS* 80 (Thomas Hale & David Held eds., 2011); Marie-Laure Djelic & Thibaut Kleiner, *The International Competition*



law firmly under the wing of trade law was rejected in the fall of 2003 in Cancún amidst Doha Round talks.<sup>50</sup> It has not been revived, and it is hard to imagine a change in the wind in the coming years. A multilateral trade deal agreed in Bali in December 2013 is of little moment. That agreement may come as a relief from a trade perspective, having spared multilateralism in trade from an ignominious demise; but on the whole it is unambitious and does not address cross-border competition law issues.<sup>51</sup> There is simply no political momentum at present for the development of a WTO-level competition law initiative of a scope comparable to those contemplated in the discussions from 1996 to 2003.<sup>52</sup>

With the WTO relegated to the background as far as competition issues are concerned, the ICN is riding a wave of popularity and good will. It has been described as not just successful but *dramatically* successful and it continues to perform important roles.<sup>53</sup> Unavoidably, the organization puts further strain on

---

*Network: Moving Towards Transnational Governance*, in TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION 287 (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., 2008). See also Marie-Laure Djelic & Sigrid Quack, *Overcoming Path Dependency: Path Generation in Open Systems*, 36 THEORY & SOC'Y 161, 177-79 (2007).

50. Among many others, see Josef Drexler, *International Competition Policy after Cancún: Placing a Singapore Issue on the WTO Development Agenda*, 27 WORLD COMPETITION 419 (2004); Taimoon Stewart, *The Fate of Competition Policy in Cancun: Politics or Substance?*, 31 LEGAL ISSUES OF ECON. INTEGRATION 7 (2004); Andrew Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004); Aditya Bhattacharjee, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective*, 9 J. INT'L ECON. L. 293 (2006); Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383 (2007); Fox, *Linked-in*, *supra* note 49, at 154-57; PAPADOPOULOS, *supra* note 44, at 225-42; Alberto Heimler, *Competition Policy as a Tool of EU Foreign Policy: Multilateralism, Bilateralism, and Soft Convergence*, in THE FOREIGN POLICY OF THE EUROPEAN UNION: ASSESSING EUROPE'S ROLE IN THE WORLD 82 (Federiga Bindi ed., 2010); GERBER, *supra* note 4, at 101-07; EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 1246-47 (2011).

51. See *Bridges Daily Update # 5: Historic Bali Deal to Spring WTO, Global Economy Ahead*, ICTSD (December 7, 2013), <http://ictsd.org/i/wto/wto-mc9-bali-2013/bridges-daily-updates-bali-2013/180991/>.

52. The ultimate effects of future preferential trade agreements such as the Transatlantic Trade and Investment Partnership are difficult to predict; most likely, such PTAs bode ill for multilateralism in general (though it is not *entirely* inconceivable that they could prompt key developing countries to engage more seriously with multilateral initiatives). This is not to suggest that there is no pending discussion of a return to the WTO as a forum for developing some kind of system to deal with issues of international competition law. For example, it is argued that a functioning competitive order on a worldwide basis is a global public good and that, given the limits of other global solutions (soft law, soft convergence and extraterritorial application of domestic laws), the WTO seems to be a logical forum in which to hammer out such competition law disciplines. See Lúcio Tomé Fêiteira, *Right to Development and International Transfer of Technology: a Competition Law Perspective*, in NEW TECHNOLOGIES AND HUMAN RIGHTS: CHALLENGES TO REGULATION 91 (Mario Viola de Azevedo Cunha, Norberto Nuno Gomes de Andrade, Lucas Lixinski & Lúcio Tomé Fêiteira eds., 2013). In the latter essay, Tomé Fêiteira carries forward Josef Drexler's proposal of a new perspective in which the protection of competition in its global dimension assumes a "quasi-constitutional character" in the WTO system. See Drexler, *supra* note 50, at 456. As discussed *infra* note 58, and in light of the political climate alluded to here in the main text, the WTO may conceivably prove relevant for initiatives drawn more narrowly than the proposals that were on the table in the run-up to Cancún.

53. Fox, *Linked-in*, *supra* note 49, at 173; Fox describes the ICN as a success when judged by its own organizational mission and as a success relative to other international organizations. See *id.* at 165-66. In another essay she emphasizes the subsidiarity principle as a key factor behind this success. See Eleanor M. Fox, *Antitrust without Borders: From Roots to Codes to Networks*, in COOPERATION, COMITY, AND COMPETITION

the resources of smaller authorities.<sup>54</sup> But it has clearly not been made redundant by (nor has it made redundant) the host of crisscrossing policy networks engaged in some of the same activities, like those organized under the aegis of the OECD or UNCTAD,<sup>55</sup> or those meeting in newer fora such as, *e.g.*, the African Competition Forum.<sup>56</sup> As time goes on, however, the limitations and latent tensions of the ICN<sup>57</sup> may lead to a collective and parallel search for solutions to

---

POLICY 265 (Andrew T. Guzman ed., 2011) [hereinafter *Antitrust without Borders*]. Her references to subsidiarity are not accidental, as subsidiarity can operate not only as a decentralizing force but as a justification for centralized solutions, depending on the particular problems requiring a response and the distribution of capacities within a given system (in this case the international system of competition law jurisdiction).

54. Agencies that belong to both the ICN and other competition policy networks participate to varying degrees in these organizations if they have, despite tight budgets, the money and personnel to do so. Although financial aid is sometimes generated by ICN fundraising activities, smaller agencies are nonetheless typically faced with resource dilemmas and must sometimes choose between investing in one forum or another. On the phenomenon of ‘overlapping networks’, see Maher & Papadopoulos, *supra* note 29, at 84-6. See also Dan Sjöblom & Monica Widegren, *ICN Membership—Opportunities and Challenges for a Competition Authority*, in THE INTERNATIONAL COMPETITION NETWORK AT TEN 21 (Paul Lugard ed., 2011) (discussing the resource dilemmas of the Swedish authority, as it is granted no additional funds or personnel by the government for its ICN work; and as the attention the authority gives to the ICN must compete with its other activities).

55. As the theme of this essay is competition, one might note that in some senses the ICN, as a new entrant (or, with respect to some activities, as a potential entrant), has put a bit of pressure on the OECD and on UNCTAD to continue to innovate and supply high quality services. Cf. Fox, *Antitrust without Borders*, *supra* note 53, at 273; Fox, *Linked-in*, *supra* note 49, at 166 n.46. On the other hand, Jenny stresses the complementarities of the ICN and the OECD Competition Committee, and explains that: “The overlap between the two institutions is minimal (some may be found in the area of technical assistance) even when the two organizations take up issues that seem similar.” Frederic Jenny, *The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities*, in THE INTERNATIONAL COMPETITION NETWORK AT TEN 93, 104 (Paul Lugard ed., 2011).

56. The inaugural meeting of the African Competition Forum convened in Nairobi on 3 March 2011. Delegates from 19 African countries participated, together with representatives of several international organizations and other guests. The introductory speech on that occasion by Uhuru Kenyatta, at that time Kenya’s Minister of Finance (and today a highly controversial figure), is posted on YouTube. Uhuru Kenyatta launching The African Competition Forum, YouTube (Mar. 15, 2011), [http://www.youtube.com/watch?v=UX7LtqGA\\_\\_w](http://www.youtube.com/watch?v=UX7LtqGA__w) (linking competition policy in Africa to allocative efficiency, consumer welfare and the de-concentration of economic power to promote an economic equivalent of political democracy). As Maher and Papadopoulos explain, the African Competition Forum is “expected to be the basis for the development of agency capacity in the region and to promote awareness and appreciation of competition principles among government officials and other market participants. It will facilitate interactions between African competition agencies, enabling them to share experiences, expertise and knowledge. The scheme may, in the long term, lead to the harmonization of competition laws of the participating countries.” Maher & Papadopoulos, *supra* note 29, at 83-4. The activities of the Forum are described, and informative newsletters are available, on a dedicated website: see African Competition Forum, <http://www.africancompetitionforum.org/> (last accessed February 7, 2015).

57. Given the inescapable heterogeneity among the ICN’s members, it has been suggested at least with regard to some areas of the law that working toward “superior practices,” and the implicit expectation that ICN members can and will conform as far as possible to them, is an inappropriate basis for the ICN system. On this view, it would be better if the goal pursued in the ICN were simply for its members to (better) understand each other’s laws. See Monti, *supra* note 11, at 345. If this more modest aim were adopted, the term “informed divergence” would acquire its more natural meaning, as opposed to its current significance (see *supra* notes 15-16 and accompanying text) as a kind of pressure valve that moderates the pace of and to some extent “legitimizes” a broader convergence process. On overcoming obstacles of selectivity and bias in communication between different social groups, such as lawyers and economists but more generally between actors who

problems that cannot be addressed in an ICN context, in particular due to some of its defining features – no *de jure* power whatsoever, and a fundamentally modest albeit elastic mandate. It should not be ruled out that, despite the retreat from the WTO at Cancún and the prevailing wisdom that competition is to be kept out of that more formal environment, a cautious new impetus might arise in the coming years, leading to the launch of certain issue-specific initiatives that could generate (possibly plurilateral) WTO rules in a circumscribed field.<sup>58</sup> In such a

---

disagree, *see* Akihiko Nakagawa, *Toward a Dialogistic Competition Policy*, 20 HOKKAIDO J. NEW GLOBAL L. & POL'Y 171 (2013).

58. To cite just one example, there are the bitter experiences developing countries have had being exploited by export cartels. The term “export cartels” in this context excludes exporters colluding on the direct or delegated instructions of a government, since the latter may constitute a measure subject to challenge under Article XI:1 GATT, as experience in the raw materials sector shows; the reference is thus limited to export cartels falling outside of that provision. Many scholars have written about the virtues and vices of export cartels, including recently Ariel Ezrachi, *Domestic and Cross-Border Transfer of Wealth*, in *COMPETITION LAW AND DEVELOPMENT* 199 (D. Daniel Sokol et al. eds., 2013). Not all export cartels are pernicious; but some have been compared to hazardous waste, and here there is a troubling international regulatory gap. Externalities imposed on developing countries – in particular, those lacking the capacity for credible extraterritorial law enforcement – can result in exorbitant wealth transfers in favor of foreign price-fixers, transfers likely exacerbated in the age of severe penalties for cartelists that get caught in developed jurisdictions (since credible sanctions tend to encourage “trade diversion” in illegal conduct where there is sufficient capital mobility). Certain WTO provisions, including for example Article 11.1(b) of the Agreement on Subsidies and Countervailing Measures, could conceivably be interpreted in a manner that disciplines export cartels in a few countries, including large ones. *See* D. Daniel Sokol, *What Do We Really Know About Export Cartels and What is the Appropriate Solution?*, 4 J. COMPETITION L. & ECON. 967, 977-78 (2008). Article 11:3 of the Agreement on Safeguards could potentially be invoked to challenge *explicit* exemptions for export cartels, such as those provided for in U.S. law. But it is almost inconceivable that Article 11:3 could be applied against the more common forms of implicit exemption, such as one finds under EU law – which arise *de facto* from the Westphalian tradition that states do not normally regulate (mis)conduct with purely foreign consequences (*i.e.*, where the “effects test” fails). *Cf.* ROLAND WEINRAUCH, *COMPETITION LAW IN THE WTO: THE RATIONALE FOR A FRAMEWORK AGREEMENT* 147 (2004) (“For example, [the question of] whether the mere non-enforcement of competition law against import cartels falls within the scope of [Article 11:3] is highly doubtful.”). And if implicit exemptions or non-enforcement cannot be challenged under Article 11:3, then even a successful challenge of an explicit exemption does not really remove the possibility for the defendant WTO member to maintain an exemption. Furthermore, since non-violation complaints at the WTO constitute a notoriously weak discipline, it must be concluded that the current ensemble of WTO provisions is inadequate to address the export cartel problem. Particularly in the developing world – *i.e.*, where many countries opposed and derailed a WTO-level competition law regime – there have been calls for an issue-specific WTO-level solution involving new provisions, or for the development of a joint solution by the WTO and UNCTAD. According to one approach, a high-level commission could be appointed to study and define the problem and focus objectives, following which it would prepare an initial draft of a multilateral agreement for further consideration. (See CUTS, *Contribution to the UNCTAD Roundtable on Cross-border anticompetitive practices: The challenges for developing countries and economies in transition* (2012), available at [http://www.cuts-international.org/pdf/CUTS\\_contribution\\_at\\_UNCTAD-IGE\\_2012.pdf](http://www.cuts-international.org/pdf/CUTS_contribution_at_UNCTAD-IGE_2012.pdf), at 6.) Sokol has advanced a more defined approach, suggesting an enforceable WTO obligation of notification and transparency, with clearance procedures for “legitimate export joint ventures” in home jurisdictions that would beneficially raise the cost of cross-border predatory collusion. It appears that other pure export cartels (it is not entirely clear which ones) would be bereft of any antitrust immunity. *See* Sokol, *supra* at 980-982. Solutions such as this seem fit for further consideration. However, not everyone accepts that a global solution is necessary to combat export cartels. *See* CRANE, *supra* note 17, at 231 (taking the view – questionable, to my mind – that extraterritoriality and bilateral trade agreements can adequately address the problem). For further examples of leftover issues from the years of trade-and-competition discussions that seem, in the main, insoluble in the framework of the ICN, *see, e.g.*, Fox,

scenario, and depending on the enterprise taken up, it may be expected that certain industrial interests in the developed world would mobilize against and seek to sabotage, or seek at least to persuade governments to water down, any such rules.<sup>59</sup> A strong effort should therefore be devoted to stimulating a cultural change, reinforced if necessary by *quid pro quos* to alter the incentives of developed countries.<sup>60</sup>

Further digressions about the ICN's nature, work and capabilities could be added. But to return to the central theme, one perceives – in the episode described above regarding the emergence of the ICN<sup>61</sup> – a contest between two models, each championed by a different jurisdiction. They were not just two models that happened to “be there.” The search for and development of a new global initiative was really a search for an *American* global initiative, and a strategic response to Europe's attempt to promote supranationalist governance in international antitrust.<sup>62</sup> The choice of the ICN as the leading framework for global cooperation in this field has been quite a coup for the U.S. DOJ, even though DG Comp itself was ambivalent about DG Trade's WTO gambit,<sup>63</sup> and even though all the EU Competition Commissioners from Mario Monti and Neelie Kroes to Joaquín Almunia and now Margrethe Vestager have fully supported the ICN's activities.<sup>64</sup> At the same time, the ICN's broad appeal has

---

*Linked-In*, *supra* note 49, at 168 and 173. In addition to export cartels, Fox refers to the adverse effects of antidumping used as a trade remedy, market access impediments, the use of state authority to immunize private conduct from antitrust attack, and more generally, issues at the intersection between competition law and trade law (whereas the ICN is supposed to be all antitrust all the time, a formula meant to exclude trade matters). *See also* Fox, *Antitrust without Borders*, *supra* note 53; Fox, Fingleton and Mitchell, *The past and future of international antitrust*, *supra* note 15; Brendan Sweeney, *Global Competition: Searching for a Rational Basis for Global Competition Rules*, 30 SYDNEY L. REV. 209, 219-226, 243-244 (2008), with references; Brendan Sweeney, *International Competition Law and Policy: A Work in Progress*, 10 MELBOURNE J. INT'L L. 58, 61-62, 69 (2009); SWEENEY, *supra* note 46, at 399-401 (and chapter 9 generally).

59. *Cf.* Bradford, *Preference for Nonbinding Regimes*, *supra* note 18, at 327 (“The United States would also likely oppose rules banning export cartels [ . . . ]”). Sokol recalls the strident objections of the U.S. Department of Commerce (reflecting those of certain private interests) to any attempt to curtail the Webb-Pomerene Act during the Antitrust Modernization Commission hearings. *See* Sokol, *supra* note 58, at 975 n.42.

60. *See* Sokol, *supra* note 58, at 981 (“To provide an incentive for [exporting countries] to agree to the WTO solution, developing world countries would need to provide increased market access in other areas.”); Bernard Hoekman & Kamal Saggi, *Tariff Bindings and Bilateral Cooperation on Export Cartels*, 83 J. DEVELOPMENT ECON. 141 (2007) (showing that *ceteris paribus* a developing country could offer greater market access through tariff reductions but recognizing that tariff bindings required by trade agreements already in force constrain this possibility, effectively raising the “price” of the pecuniary or non-pecuniary *quid pro quo*).

61. The above version of events is quite abbreviated. For a fuller analytical discussion of the rise of the ICN, *see generally* THE INTERNATIONAL COMPETITION NETWORK AT TEN (Paul Lugard ed., 2011).

62. *See* BUDZINSKI, *supra* note 10, at 7143. *But Cf.* GERBER, *supra* note 4, at 111 (explaining that the ICN launch “had the strategic effect of further undermining support for a multilateral competition law project”) and at 115 (explaining that some interpreted ICPAC's hearings in Washington, D.C. “as a means of reasserting [U.S.] control of the agenda of transnational competition law development”).

63. *See* PAPADOPOULOS *supra* note 44, at 243-45. Furthermore, DG Trade's support for the WTO option sat awkwardly next to the opposition of significant business interests, as expressed by UNICE in position papers. *See id.* at 214-15.

64. *See id.* at 243; Ehlermann, *supra* note 25, at 326.

furnished scholars focusing on Slaughter's "new world order" and related ideas with a useful case study of transnational network governance and communities of interest.<sup>65</sup>

The question of whose preferred model prevailed is however of little importance for our purposes. What seems significant is the emergence in the 1990s of two competing and possibly incompatible visions of global governance,<sup>66</sup> arguably reflecting the anxiety of a former hegemon about its influence and leadership role being diverted to its chief rival. One might perhaps say something similar about the Commission's full self-immersion in the ICN: to ignore it would have assured American dominance in an emerging, high-stakes sector.

### B. *Bilateral Relationships*

In the field of antitrust, and to oversimplify a bit,<sup>67</sup> bilateral relationships are established in two main ways: (i) by concluding a bilateral cooperation agreement ("BCA"), nearly always with non-binding terms and no dispute resolution mechanism (amounting *de facto* to "soft" commitments from the perspective of international law<sup>68</sup>), or its cousin, a Memorandum of Understanding ("MOU", signed at the agency level),<sup>69</sup> or (ii) by concluding a

---

65. See, e.g., Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 114-20 (2009); Svetiev, *supra* note 49, at 271-75. For an early exposition of network governance as a response to the "globalization paradox", see Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS 183 (Sept.-Oct. 1997).

66. Informal networks can undoubtedly operate side by side with formal institutions and binding multilateral rules. When a WTO framework agreement on competition law issues was being discussed, the European Commission considered that the ICN could function as a complement to what would have been the relevant WTO disciplines. See FIONA MARSHALL, COMPETITION REGULATION AND POLICY AT THE WORLD TRADE ORGANISATION 147 (2010). Nevertheless, one may argue that reliance on the ICN as a central competition agency network and reliance on the WTO as a dispute resolution forum spring from quite different philosophies about antitrust sovereignty, and it may be argued furthermore that the full expression of the ICN concept as we know it and the formal incursion of the WTO into the antitrust field would at the very least pose some mutual tension. Hypothetically speaking, if a broadly framed WTO agreement on competition law were adopted, the ICN's role and functioning would likely have to be redefined to some extent.

67. For a more taxonomical discussion, see Valerie Desmedts, *International Competition Law Enforcement: Different Means, One Goal?*, 8 COMPETITION L. REV. 223, 237-49 (2012).

68. See Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy*, 1 WASH. U. GLOBAL STUD. L. REV. 463, 468-9 (2002).

69. "First generation" BCAs have been concluded on the basis of somewhat diverse legal authority depending on the jurisdiction concerned. For example, in the U.S., such agreements have taken the form of executive agreements; therefore, in the absence of ratification by the U.S. Senate they do not constitute international treaties. By contrast, so far as the European Commission is concerned and with respect to agreements reached with third countries (but not agreements of lesser stature, *i.e.*, so-called "administrative arrangements"), jurisprudence of the European Court of Justice requires the intervention of the EU legislator, which first authorizes the Commission to negotiate the terms and later 'concludes' the agreement, thereby making it definitively valid under the Treaty on the Functioning of the European Union. The 1991 cooperation agreement with the United States thus had to be approved by a joint decision of the Council and the Commission in 1995. See Case C-327/91, *France v. Commission*, 1994 E.C.R. I-3641, ¶ 43 (Commission

trade agreement with competition provisions (“TACP”), whose terms create international obligations but whose competition chapters may be either binding or, not uncommonly, merely discretionary.<sup>70</sup> In addition, with or without such agreements in place, agencies frequently engage in regular or *ad hoc* informal cooperation within the bounds of their legal capacities.<sup>71</sup> Informal cooperation of this kind may follow the general contours of more formal agreements while avoiding their less expedient provisions, and it is also often inspired by or based on the Recommendation of the OECD Council on international enforcement cooperation<sup>72</sup> or based on other instruments such as Best Practices documents.<sup>73</sup> The observed popularity of “soft” commitments worldwide in the cooperative competition-related frameworks just described is the flipside of the story recounted above in relation to the failed WTO framework agreement, which would have entailed binding obligations and dispute settlement procedures. Particularly in an environment of uncertainty, the softer the obligation, the lower the risk of entering into a cooperative arrangement (and of unintended

---

lacked competence to conclude agreements with third countries). That does not mean, of course, that the mutual promises in the U.S./EU agreement are binding; to the contrary, the provisions are designed deliberately to avoid non-discretionary obligations and any kind of binding dispute settlement. As for the enhanced commitments undertaken in “second generation” BCAs (see *infra* section B.1), such an agreement must be authorized *ex ante* by legislation or *ex post* by ratification, or both.

70. For example, in the free trade agreements concluded by the U.S. with other countries (mostly on a bilateral basis with the exception of NAFTA and, looking ahead, the Trans-Pacific Partnership), there are generally enforcement cooperation provisions but these are “soft,” non-binding terms within a broader “hard law” instrument. By contrast, some competition-related terms—in particular, those relating to state-owned/controlled enterprises or privileged monopolies—embody firmer commitments, and dispute settlement may be invoked by either contracting party. For more detail and nuance regarding forms of bilateral cooperation, see generally COOPERATION, COMITY AND COMPETITION POLICY (Andrew Guzman ed., 2011); PAPADOPOULOS, *supra* note 44, at 52-92. For a detailed examination of the “soft” competition chapters in preferential trade agreements with a focus on Latin America, see D. Daniel Sokol, *Order without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231 (2008) (underlining the contrast between the non-enforceable competition provisions and the harder commitments covering other areas pertaining to trade policy in the same agreements).

71. The most important legal limitation concerns the exchange of confidential information, a delicate matter both legally and politically, not least because powerful business interests tend actively to oppose the development of lawful mechanisms by which such information may be shared. In the absence of authorized sharing, agencies can however exchange not just public information but also “agency confidential” information, *i.e.*, information generated internally regarding issues such as market definition, theories of harm or corrective remedies, or information, prior to any public announcement, concerning the fact that an agency is investigating a particular firm or group of firms. On the exchange of agency confidential information, see, *e.g.*, Thomas Deisenhofer, *International Cooperation in Merger Cases—An EU Practitioner’s Perspective*, in EUROPEAN COMPETITION LAW ANNUAL 2010: MERGER CONTROL IN EUROPEAN AND GLOBAL PERSPECTIVE 227 (Philip Lowe & Mel Marquis eds., 2013).

72. Organization on Economic Co-operation and Development, *Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings* (September 16, 2014), available at <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>. For background leading up to the influential 1995 version of the OECD Council’s Recommendation, see, *e.g.*, BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AUTHORITIES AT THE INTERNATIONAL LEVEL 56 (2002).

73. See, *e.g.*, *Best Practices on Cooperation in Merger Investigations*, EUROPA.EU, [http://ec.europa.eu/competition/mergers/legislation/best\\_practices\\_2011\\_en.pdf](http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf) (Oct. 14, 2011).

consequences with costly exit, if any); and possibly the greater the capacity of the parties to bypass lawmaking formalities that might end in deadlock (which also implies a correspondingly weaker base of legitimacy for the softer solutions).<sup>74</sup>

### 1. Bilateral Cooperation Agreements

With regard to the first category, after the U.S. had already been party to BCAs with Canada, Germany, and Australia since 1959, 1976 and 1982 respectively, the U.S. and the European Community in 1991 concluded a well-known BCA which included *inter alia* positive comity provisions<sup>75</sup> and which has served as a template for many of the BCAs that followed in the next two decades.<sup>76</sup> The EU has subsequently concluded similar agreements with Canada in 1999, Japan in 2003, and South Korea in 2009.<sup>77</sup> The U.S., which has a strong proclivity for bilateral agreements as a matter of foreign policy,<sup>78</sup> struck agreements with Canada in 1995, then with Brazil, Israel and Japan in 1999<sup>79</sup> (together with a second-generation BCA with Australia the same year—see below), Mexico in 2000,<sup>80</sup> and with Chile's competition authority in 2011.<sup>81</sup>

---

74. Cf. W. Michael Reisman, *Remarks* (panel on "A Hard Look at Soft Law"), 82 AM. SOC'Y INT'L L. PROC. 373, 377 (1991). See also, among others, Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423, 434-450 (2000) (discussing how soft law permits parties to calibrate lower levels of obligation, precision and/or delegation, and giving examples of different permutations); Sokol, *supra* note 16, at 196-7.

75. The U.S. also entered into specific positive comity agreements with the EU in 1998 and with Canada in 2004. The provisions of these agreements have never been formally employed, although some informal positive comity requests have been made, to little effect. See, e.g., ICPAC, *supra* note 48, at iv, vii, <http://www.justice.gov/atr/icpac/1c.pdf>.

76. In brief, the 1991 agreement provided for mutual notification of relevant cases; coordinated investigations (with the aid, in particular in cases involving merger control or in cartel cases where a leniency application has been made, of waivers of confidentiality by key parties to permit the sharing of sensitive information); continual dialogue on a wide range of matters; traditional comity (basically, abstention out of respect for the important interests of a foreign jurisdiction); and positive comity (*i.e.*, the possibility to request a foreign jurisdiction to act against conduct harming the important interests of the requesting jurisdiction). *Id.*

77. DG Competition also has MOUs with the competition authorities of Brazil (2009), Russia (2011), China (2012), and India (2013). An earlier MOU with South Korea (2004) foresaw and then ripened into a more formal BCA. A similar upgrade could conceivably take place with the Chinese authorities in 2015 when the MOU comes up for review. See *European Commission signs Memorandum of Understanding with the Competition Commission of India*, EU COMPETITION & REGULATORY (Slaughter and May, London, Eng.), Nov. 22, 2013, available at <http://www.slaughterandmay.com/media/2038182/eu-competition-and-regulatory-newsletter-22-nov-28-nov-2013.pdf>.

78. See, e.g., Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Ann-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000).

79. See, e.g., ICPAC, *supra* note 75 at vii.

80. Agreement Regarding the Application of their Competition Laws, U.S.-Mex., July 11, 2000, T.I.A.S., available at <http://www.ftc.gov/policy/cooperation-agreements/us-mexico-agreement-regarding-application-their-competition-laws>.

81. Agreement on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, of the one part, and the Fiscalía Nacional Económica of Chile, on the other

These agreements apply in addition to those with Germany and Australia, which remain in place.<sup>82</sup>

Several authorities have suggested that the various “first generation” BCAs have been of limited value, for example because they do not provide for the exchange of confidential information absent the consent of relevant parties, or because positive comity has never gained any traction in practice.<sup>83</sup> Without denying the limitations of first generation agreements, one may also posit that the negotiation and use of such agreements has created real value for the jurisdictions concerned to the extent that it has enabled agencies to build a communicative infrastructure and to intensify personal contacts, develop trust, and exchange expertise.<sup>84</sup> A related point is that an implicit and less visible benefit, which was also an important driver of the earliest agreements but which today appears to be taken for granted, may be the avoidance or management of tension due to the actual or potential extraterritorial enforcement of competition laws.<sup>85</sup>

---

part, U.S.-Chile, Mar. 31, 2011, T.I.A.S. 11-331, available at <http://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/110331us-chile-agree.pdf>.

82. See, e.g., ICPAC, *supra* note 48, at iv. Like the EU, the U.S. agencies have also concluded a few MOUs with competition authorities of other countries, specifically those of Russia (1999), China (2011), and India (2012). *International Competition and Consumer Protection Cooperation Agreements*. F.T.C. (Sept. 19, 2014), <http://www.ftc.gov/policy/international/international-cooperation-agreements>.

83. See, e.g., ICPAC, *supra* note 48, at xiii-xiv (“[I]n many respects, at present the bilateral agreements still remain limited instruments. Because they do not alter existing law or otherwise expand the powers of antitrust authorities, they do not expand the possibilities for the sharing of confidential or privileged information without the provider’s consent [. . .]. They may not provide a mechanism for resolving disputes that continue after the end of consultations. Further, the agreements do not implicate substantive law nor seek to reach any formal procedural harmonization between the signatory jurisdictions.”). For discussion of the non-impact of positive comity, see, e.g., Philip Marsden, *The Curious Incident of Positive Comity—The Dog that Didn’t Bark (And the Trade Dogs that Just Might Bite)*, in COOPERATION, COMITY AND COMPETITION POLICY 301 (Andrew Guzman ed., 2011).

84. In the workshop on which this contribution is based, I suggested that some first-generation cooperation agreements (including MOUs) might in this sense be regarded as “seeding” agreements potentially preparing the ground for bolder steps. A similar perspective is put forward by Brendan Sweeney, who refers more specifically to positive comity: “Perhaps the greatest benefit of positive comity will be its intangible benefits, those that arise from the fact that states have agreed to communicate their competition concerns to one another. If this dialogue produces greater understanding, greater levels of trust and confidence and perhaps greater convergence, it will have served a useful purpose.” SWEENEY, *supra* note 46, at 297. See also Randolph Tritell & Elizabeth Krause, *The Federal Trade Commission’s International Antitrust Program*, Presentation at the ABA’s 61<sup>st</sup> Annual Antitrust Law Spring Meeting in Washington, April 11, 2013, at 4 (“In addition to providing a legal framework for cooperation, the agreements have been catalysts to facilitate closer working relationships.”). Of course, two agencies can also develop trust and coordinated communication or working methods in the absence of any agreement. From this point of view, a first-generation agreement might be regarded by the agencies concerned as being superfluous; the same consideration would not apply, however, with respect to second-generation agreements (see *infra* notes 88-91 and accompanying text), for which even systematic informal cooperation cannot substitute. Cf. PAPADOPOULOS, *supra* note 44, at 80-1.

85. See Tritell & Krause, *supra* note 84, at 4 (“While the first agreements were motivated primarily by a desire to reduce and manage conflicts that arise from extraterritorial enforcement of antitrust laws, modern agreements seek mainly to enhance enforcement cooperation.”). Conflicts have of course arisen, and have fed media frenzies, but overall what seems more remarkable is the *absence* of conflicts that boil over. The potential for conflict may however depend on various factors including among others the substantive field of law,



While it remains to be seen whether positive comity will ever come of age (which may depend on the jurisdiction pairs concerned), the obstacles to cooperation resulting from the confidentiality obligations imposed on competition agencies are in some limited measure addressed by other instruments, at least as concerns certain jurisdictions. In the first place, a country that has criminalized cartel conduct, *e.g.*, the U.S., can employ the procedures provided for in (non-antitrust-specific) mutual legal assistance treaties, or “MLATs,” to obtain confidential information (and to cooperate in other relevant ways, such as by collecting evidence) if it has concluded an MLAT with another country, *e.g.*, Canada.<sup>86</sup> However, a legal gap may remain in scenarios involving two countries X and Y where X seeks the transmission of confidential information by authorities in country Y but either Y has not criminalized cartels or it has done so but there is no MLAT or equivalent agreement between the two countries.<sup>87</sup> The constraints that limit the exchange of confidential information in the absence of an MLAT—which describes the vast majority of country combinations X and Y—have become increasingly acute, as anticompetitive behavior with multi-jurisdictional effects are nowadays a pervasive characteristic of the globalized economy.

The response of certain jurisdictions to confidentiality constraints and to the frequent need for access to evidence located abroad has been to turn to “second generation” agreements, which embody enhanced commitments in hard law instruments (*i.e.*, treaties agreed on the basis of enabling acts) and which thus take the original BCAs a significant step further. These agreements are heterogeneous but among their key common elements are provisions authorizing the exchange of confidential information between competition authorities without need for any waiver from the party or parties concerned—generally subject to restrictions intended to preserve the rights of defense, to limit disclosure of business secrets, personal data and leniency materials, and to ensure that the use of evidence in the requesting jurisdiction does not exceed the powers of the transmitting agency. For example, in the second-generation BCA signed in May 2013 between the EU and Switzerland, the requesting party (in particular, Switzerland) is barred from using information received from the EU via the

---

geographic overlap, frequency of interaction and the magnitude of the commercial stakes, which may have political economy implications.

86. Technically, the 1990 MLAT between the U.S. and Canada, which has been used several times (in addition to their 1995 and 2004 comity agreements), does not require that the underlying conduct be of a criminal nature in the country receiving the request (a feature which is not common to all the MLATS that the U.S. has concluded). However, requests between these countries are evaluated case-by-case and limitations are imposed on the use to which the transmitted information may be put. At least in the realm of antitrust, since requests between the U.S. and Canada are made essentially in relation to horizontal cartels, which are criminally illegal in both countries, the absence of a dual criminality requirement is academic.

87. For further details on MLATs, *see, e.g.*, ABA SECTION OF ANTITRUST LAW, INTERNATIONAL ANTITRUST COOPERATION GUIDE (2004). More recently, *see* SWEENEY, *supra* note 46, at 314-17; OECD, *Improving International Co-operation in Cartel Investigations*, OECD Document DAF/COMF/GF 29-30, 267-71 (2012).

treaty mechanism as evidence to put individuals in prison.<sup>88</sup> Another second-generation agreement has been negotiated between the EU and Canada.<sup>89</sup> Australia concluded a second-generation agreement already in 1999 with the U.S., and in 2007 concluded another one with New Zealand (with an additional Australia-New Zealand inter-agency agreement concluded in 2013). In the case of the U.S., despite its agreement with Australia, the underlying enabling legislation is problematic in that it appears to require foreign treaty partners to allow the use of shared information for purposes beyond the competition matter animating the request of the U.S. enforcer, which would present a legal-political obstacle in many jurisdictions.<sup>90</sup> No country but Australia, which has its own enabling legislation in place,<sup>91</sup> has ventured to negotiate with the U.S. an agreement of the same intensity. Finally, Denmark, Iceland, and Norway in 2001 concluded a second-generation trilateral cooperation agreement, made quadrilateral when Sweden joined the group in 2003.

## 2. Trade Agreements with Competition Provisions

In addition to bilateral agreements that specifically concern cooperation in the enforcement of competition law, bilateral trade agreements with competition law provisions or chapters are another means of pursuing a range of related objectives.<sup>92</sup> Trade agreements with competition provisions (TACPs) are noteworthy because, among other reasons, they constitute a significant

---

88. Agreement between the European Union and the Swiss Confederation Concerning Cooperation on the Application of their Competition Laws, May 17, 2013. For the relevant and understandably elaborate provisions on the exchange of confidential information, see *id.* at art. 7(4) to art. 10. Further details are discussed in Patrik Ducrey, *The Agreement between Switzerland and the EU Concerning Cooperation in the Application of their Competition Laws*, 4 J. EUR. COMPETITION L. & PRACTICE 437 (2013); David Mamane & Samuel Jost, *Let's work together—An EU/Swiss co-operation agreement has far-reaching implications*, COMPETITION LAW INSIGHT 8 (13 November 2012).

89. See European Commission, *Staff Working Document Accompanying the Commission Report on Competition Policy 2012* 15 (SWD (2013) 159 final, 2013).

90. The relevant legislation is the International Antitrust Enforcement Assistance Act of 1994 ('IAEAA') 15 U.S. §§ 6201-6212 (1994). See ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS 39-40 (April 2007) available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) (calling on the U.S. Congress to clarify that the IAEAA does not in fact require that treaty provisions must permit the U.S. authorities to use transmitted information for non-competition purposes), cited in Edward Swaine, *Cooperation, Comity and Competition Policy: United States*, in COOPERATION, COMITY AND COMPETITION POLICY 3, 19 (Andrew Guzman ed., 2011).

91. The relevant Australian laws are the Mutual Assistance in Business Regulation Act 1992 and the Mutual Assistance in Criminal Matters Act 1987. In addition, Section 15AAA of the Competition and Consumer Act 2010 enables the Australian Competition and Consumer Commission to share confidential information with foreign agencies even where no intergovernmental or inter-agency agreement has been concluded. For details regarding Australia's relatively progressive regime, see Marek Martyniszyn, *Inter-Agency Evidence Sharing in Competition Law Enforcement*, 19 INT'L J. EVIDENCE & PROOF 11 (2015).

92. See PAPADOPOULOS, *supra* note 44, at 93-144.

instrument of the EU's external relations policy.<sup>93</sup> The number of such trade agreements has grown significantly in the last 20 years, and the EU has been one of their prominent promoters, originally in the wake of the Soviet Republic's disintegration and then, in the last decade, as a hedge against the remote odds of WTO members reaching consensus in the Doha Development Round.<sup>94</sup>

With the EU-Korea Free Trade Agreement (2010), the trilateral EU-Columbia-Peru Free Trade Agreement (2011), and the pending trade and investment agreement between the EU and Canada,<sup>95</sup> the number of bilateral (or trilateral) TACPs to which the EU is a party is now around 30. In general, the U.S. seems to have been less concerned with concluding TACPs, although there are such agreements in force between the U.S. and Singapore (2004), Australia (2005), Peru (2006) and South Korea (2007).<sup>96</sup> Furthermore, the form of the EU's TACPs often goes beyond traditional free trade measures, and extends to a wide range of integration measures and other fields, particularly in the case of "association agreements" (AAs) and "stabilization and association agreements" (SAAs). In part this is explained by the fact that the agreements can serve as a pre-condition for joining the restricted club of EU Member States, but the EU also concludes broad agreements with countries that have little or no hope or desire to accede. Papadopoulos assigns the EU's bilateral trade agreements to three categories: (i) those with candidate or potential candidate countries; (ii) those with countries participating in the European Neighborhood Policy (*i.e.*, Euro-Med countries and countries in Eastern Europe and Central Asia); and (iii) those with selected trade partners, in particular Mexico (1997), Chile (2002),

---

93. See, *e.g.*, Umut Aydin, *Promoting Competition: European Union and the Global Competition Order*, 34 J. EURO. INTEGRATION 663 (2012) (discussing the bureaucratic self-interest of DG Competition in seeking to extend – by way of trade agreements and other forms of agreements – the global reach of the EU competition law model).

94. Cf. Blanca Rodríguez-Galindo, Head of International Relations Unit at the European Commission on Competition and Development, Presentation at ICN Conference, Moscow (May 29, 2007) (available at <http://www.internationalcompetitionnetwork.org/library.aspx?page=37>). ("Given that competition matters are off the agenda of the multilateral negotiations for now, we would try to move on competition issues bilaterally in the context of the new generation of market-access driven Free Trade Agreements . . .").

95. The title of the EU-Canada agreement—the COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)—reflects the extent of its ambitions. Negotiations on the CETA were concluded on September 26, 2014, and the Agreement is subject to formal approval procedures on both sides. Further details are available at the European Commission's Trade website: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/> (last accessed February 7, 2015).

96. If negotiations ultimately bear fruit, the Transatlantic Trade and Investment Partnership Agreement between the U.S. and the EU will contain competition provisions and their intensity remains to be seen. One may also mention the sector-specific Open Skies agreement between these jurisdictions, which in Annex 2 contains specific cooperation provisions with regard to competition, administered by the Open Skies Joint Commission (with representatives of the European Commission and of the U.S. Department of Transportation). No provision is made for the exchange of confidential information. Joint work has been produced, however. See EUROPEAN COMMISSION AND UNITED STATES DEPARTMENT OF TRANSPORTATION, TRANSATLANTIC AIRLINE ALLIANCES: COMPETITIVE ISSUES AND REGULATORY APPROACHES (November 2010), available at [http://ec.europa.eu/competition/sectors/transport/reports/joint\\_alliance\\_report.pdf](http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf).

South Africa (1999), now joined by the above-mentioned agreements with Korea, Columbia-Peru, and Canada (with still other agreements under negotiation).

The various agreements are heterogeneous not just across those categories but within the categories as well. The taxonomy will not be pursued further here in any detail, but some general observations can be made. One is the simple point that competition law is never neglected when the EU concludes bilateral (or trilateral) trade agreements. Even where the EU already has a bilateral cooperation agreement with the trading partner, as in the case of South Korea, a part of the trade agreement will nevertheless be devoted to competition, though typically with fewer details insofar as bilateral cooperation is concerned.<sup>97</sup> Second, some of the agreements, specifically those concluded with actual or potential candidates for accession to the EU, tend toward “deep” integration, *i.e.*, they focus on ‘behind the border’ issues. The EU enjoys sufficient political and economic leverage in these scenarios to make the trade agreements in some sense analogous to adhesion contracts, and the EU uses them to extend the reach of its internal market (although free movement, especially free movement of persons, may be subject to strict conditions and post-accession phase-ins). The EU thus tends to extract far-reaching obligations from such countries.<sup>98</sup> In the case of agreements between the U.S. and its trading partners, there may well be asymmetric bargaining power but, unlike the EU, the U.S. may not hold a comparable trump card strong enough to insist on an isomorphic remodeling of its trade partner’s substantive arrangements in the field of competition law.<sup>99</sup> A

---

97. The inclusion of competition provisions in trade agreements gives DG Trade an opportunity to negotiate on matters which, in the context of bilateral cooperation agreements, would be negotiated by officials of DG Competition. It is not entirely clear how policy coherence is managed between the two Directorates. It has been intimated that the process may be relatively haphazard given the small number of individuals (*i.e.*, ten) working in the International Affairs Unit of DG Competition, who have a host of other duties to discharge. See PAPADOPOULOS, *supra* note 44, at 106, n.44.

98. The EU is undoubtedly alive to the risk that a potential candidate country will undertake to adopt or reform a competition law in such a way as to mimic EU rules but then fail to implement the reform in what the EU regards as an adequate manner. See generally K.J. Cseres, *The Impact of Regulation 1/2003 in the new Member States*, 6(2) COMPETITION L. REV. 145, 166-78 (2010). This may have been perceived as a risk particularly in the case of countries with illiberal economic legacies. Cf. GERBER, *supra* note 4, at 197-8 (noting the interest of the EU, in light of that risk, in exporting eastward its “more economic approach”). Such implementation problems can rarely be solved by the content of international agreements alone; however, with regard to actual and potential candidate countries, the EU has the leverage of conditionality not just until the conclusion of an agreement but until the closing of accession negotiations and the subsequent ratification of the accession treaty on the EU side (*i.e.*, by all the Member States and by the EU itself). See Cseres, *supra* at 162 (citing Frank Schimmelfennig and Ulrich Sedelmeier, *Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe*, 11 JOURNAL OF EUROPEAN PUBLIC POLICY 661 (2004)). Once a country has joined the EU conditionality no longer plays a role, but of course membership entails the normal obligations and enforcement mechanisms under the Treaties, including the possibility of direct infringement procedures and indirect challenges via preliminary rulings. For an illustrative case (involving one of the original Member States), see *Vlaamse federatie van verenigingen van Brood- en Banketbakers, Ijsbereiders en Chocoladebewerders (VEBIC) VZW*, 2010 E.C.R. I-12471.

99. An interesting question is why the EU has in fact not gone further and experimented with institutional engineering in its agreements with suitor countries. For example, in the ‘Europe agreements’ that applied

third point is that while the EU may enjoy only limited direct leverage with other trade partners, *i.e.*, those that have no realistic prospect of accession, this does not necessarily mean that the EU is unable to influence them meaningfully. The record is uneven but the EU—particularly where it is in a position to offer financial aid and/or technical assistance—has been able to steer national outcomes in the general direction of its preferences, as it has done for example in Armenia and Azerbaijan. Even in relation to the third category enumerated above, *i.e.*, countries that can negotiate with the EU on a more “equal” footing (in particular because EU exporters are keen to gain access to their relatively larger markets), the EU can at least potentially shape outcomes in the “socialization through cooperation” (repeated game) manner referred to in connection with first-generation bilateral cooperation agreements.<sup>100</sup>

### 3. *Conclusion on Bilateral Relationships*

The idea proposed here is that the negotiation of a BCA or a TACP, and the corresponding cooperation that ensues thereafter—which can be either formal, with the actual triggering of the agreement’s provisions, or informal and pragmatic in order to avoid the involvement of diplomatic channels or cumbersome procedures—provides a conduit through which influence is exerted. If the BCA or TACP is concluded between jurisdictions/authorities of asymmetric power (or even where relative symmetry prevails), it may well be motivated in part by the desire to maintain or spread influence. To a certain extent there seems to be an ongoing competitive game involving the U.S. and EU among others, in which “getting to” jurisdiction X before a rival does may yield dividends to the extent that ideas, beliefs and techniques can be shaped through those processes of negotiation and cooperation. The cultivation of bilateral relationships may thus be regarded as another mode of global competition. Within this mode of competition one may furthermore observe some degree of product differentiation, with the U.S. tending to favor bilateral cooperation agreements with ultimately discretionary commitments, and using MLATs where

---

between the EU and the countries that acceded to the Union in 2004 and 2007, there was no attempt to require those countries to establish an “ideally” designed agency. *Cf.* Cseres, *supra* note 98, at 145. Two possible explanations suggest themselves. First, institutional reforms may imply many more direct and indirect costs than legislative reforms of a lesser order, and may thus appear to be more difficult to extract absent side payments. Second, the adoption by the EU of a standard institutional model for ‘export’ might be seen as inconsistent with the fact that the shape of competition enforcement institutions across the incumbent Member States themselves is marked by considerable diversity. Nevertheless, despite the lack of obligations to embark on institutional reforms, most of the “new” Member States (*i.e.*, those acceding since 2004) have in fact responded to the system of networked governance in the field of EU competition policy by establishing institutional arrangements inspired by models typical of the older Member States (which are however in several cases currently experiencing significant or radical restructuring). *See id.* at 155. With regard to the restructuring of institutions, *see generally* EUROPEAN COMPETITION LAW ANNUAL 2014: INSTITUTIONAL CHANGE AND COMPETITION AUTHORITIES (Philip Lowe, Mel Marquis & Giorgio Monti eds., forthcoming).

100. GERBER, *supra* note 4, at 199-200.

they apply,<sup>101</sup> whereas the EU has generally preferred to incorporate competition provisions (alongside political/democratic, social and cultural provisions) in more formal agreements with its commercial partners, its neighbors, and the countries that are or may one day be candidates applying for membership.<sup>102</sup> That is not to say that commitments made between the EU and its trading partners need be formally obligatory; in general, the intensity of obligation depends on the relative bargaining power of the parties, which means that those countries seeking specific benefits from the EU will be subject to the greatest *de facto* pressure, and those seeking membership will accept *de jure* commitments.<sup>103</sup>

In addition to the varying degrees of normativity just mentioned, another feature that distinguishes the competition chapters of EU trade agreements compared to the provisions in U.S. agreements is the character and intensity of the *substance* of the relevant provisions.<sup>104</sup> The EU agreements go further inasmuch as they provide that, when the common trade between the EU and its partner is affected by a given business practice, EU-compatible competition rules are to be applied to that conduct.<sup>105</sup> (Conversely, where the common trade is not affected, and where the trading partner is not an actual or candidate country harmonizing its internal regime with that of the EU, the foreign jurisdiction remains essentially free to maintain purely domestic rules that diverge entirely from the EU rules.<sup>106</sup>) Where the EU can bring significant pressure to bear, in the manner described above, it will go further still and oblige its partner to converge substantively on EU rules by reforming national competition laws or adopting new ones.<sup>107</sup> This channel of “exportation” is not limited to rules on restrictive agreements and abuse of dominance. The strong tendency of the EU to insist on rules concerning state aid, public undertakings and undertakings with exclusive or special rights further illustrates how the EU seeks to use its trade agreements as vehicles of international (one-way) harmonization.<sup>108</sup>

---

101. PAPADOPOULOS, *supra* note 44, at 88.

102. *Id.* at 92.

103. *Cf. id.* at 138-141 (discussing the diverse methods of dispute settlement provided for in the EU’s trade agreements, their intensity and their implications for the delegation/precision/obligation formula mentioned *supra* note 74).

104. *Id.* at 104 (citing EUROPEAN COMMISSION, EUROPEAN NEIGHBOURHOOD POLICY: STRATEGY PAPER 5 (2004)).

105. *See id.* at 105.

106. As a matter of EU law, even the Member States are permitted zones of substantive divergence when trade between them cannot be affected, and sometimes even when it can be. However, a comparison between third countries and EU Member States is doubtful since, in general, it seems more likely for any given anticompetitive transaction or practice in a Member State to be capable of affecting trade between Member States than it is for a given transaction or practice in a third country to affect trade with the EU. The direct impact of a convergence rule in a third country will thus depend to some degree on the volume of its trade with the EU as a proportion of its overall commerce.

107. PAPADOPOULOS, *supra* note 44, at 115.

108. *Id.* at 116-17, Table 4.3 (2010). Of course, rules designed to minimize or eliminate unnecessary public obstacles to competition have been seen (somewhat akin to David Gerber’s point—*see supra* note 98) as

But there is another dimension of product differentiation that may be signaled here as well, which is again linked to the philosophy behind the external policies of the U.S. and the EU. This relates to the idea that promoting competition law and policy within the context of a regional grouping, *i.e.*, in a manner modeled on the EU itself, is normatively desirable. For the countries engaged in such initiatives, EU-style regionalism, including in this case regional competition law, is often seen as a strategy that can at least potentially enable them to overcome a variety of difficulties. With the growth of regional models of competition law in their various forms, an implicit rivalry emerges between regionalism and the quite different model generally employed and espoused by the U.S. in its global relations. The next section briefly considers these alternative models.

### C. *Regional Relationships*

On the one hand, the international community has been unwilling to move toward consensus on a formal multilateral framework for competition law (*supra* section III.A). On the other, the shortcomings of nationally bounded competition law in a commercially globalized environment persist. In addition to the bilateral cooperation and trade agreements discussed above (*supra* section III.B), a natural strategy for countries lacking the resources or experience necessary to maintain a credible enforcement system acting alone is to develop formal and/or informal cooperation mechanisms at a regional level. Lucian Cernat has observed that many developing and transition countries in Asia, Central and Latin America and above all Africa have in fact established such arrangements, some of which have significant and problematic overlapping membership;<sup>109</sup> and Michal Gal has outlined the many reasons why in regional competition law solutions there is vast potential waiting to be let loose.<sup>110</sup> The result is a feast for acronym enthusiasts: we may refer to, among others, ASEAN, CARICOM, OECS, CEMAC, SADC, SACU, WAEMU, EAC, ECOWAS and COMESA, and the possibilities multiply when other languages are used.<sup>111</sup>

Apart from the sensible theoretical arguments in favor of regional initiatives, the countries that have experimented with regional approaches to competition

---

essential inoculants for countries formerly under soviet control. See PAPADOPOULOS, *supra* at 115 (citing John Litwack, *Legality and Market Reform in Soviet-Type Economies*, 5(4) J. ECON. PERSPECTIVES 77 (1991)).

109. Lucian Cernat, *Eager to ink, but ready to act? RTA proliferation and international co-operation on competition policy*, in COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS 1 (Philippe Brusick, Ana Maria Alvarez, & Lucian Cernat eds., 2005).

110. Gal has written numerous thoughtful papers on the topic. See, e.g., *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 U. TORONTO L. J. 239 (2010); *International antitrust solutions: Discrete steps or causally linked?*, in MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW? 239, 251-60 (Josef Drexel et al. eds., 2011).

111. See, e.g., Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, *supra* note 110, at 291.

law enforcement had a clear point of reference: the European Community or European Union.<sup>112</sup> The EU plainly embodies a regional competition law regime *par excellence*. And the European experience suggests that an indirect, if long-term benefit of a successful regional regime is the reinforcement of concurrent national regimes. For example, it can no longer be said that the Netherlands is a “cartel paradise.”<sup>113</sup> Competition decisions in the UK are generally (*i.e.*, putting aside extraordinary cases) no longer made according to public interest criteria.<sup>114</sup> And in France, invigorated public enforcement is matched by a ‘competition culture’ that has matured and is now almost taken for granted.<sup>115</sup> For its part, and anthropomorphizing a bit, the EU may be intoxicated by its own success (the term “success” being necessarily relative given Europe’s penchant for existential and constitutional crisis), and may be innately keen to encourage international efforts to develop facsimiles or derivatives of EU solutions with varying degrees of supranational content.

While the EU common market and competition model have influenced several groupings to some extent, most explicitly so in the case of the West African Economic and Monetary Union (WAEMU), a quite different model, that of the North American Free Trade Area (NAFTA), has by comparison been neglected. The NAFTA Agreement provides for free trade among Canada, Mexico and the U.S., but with respect to competition its provisions are unambitious.<sup>116</sup> Low-stakes cooperation in the NAFTA style also characterizes the South African Development Community (SADC) and the South African

---

112. See, *e.g.*, MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 412 (2010); GERBER, *supra* note 4, at 256-57.

113. For the background to the Dutch story, see Bram Bouwens & Joost Dankers, *The Invisible Handshake: Cartelisation in the Netherlands, 1930-1980* (2009), presented at the XVth World Economic History Conference, Utrecht, available at [http://vkclibrary.uu.nl/vkc/seh/research/Lists/Seminar%20Program/Attachments/102/bouwens\\_invisible\\_2007.pdf](http://vkclibrary.uu.nl/vkc/seh/research/Lists/Seminar%20Program/Attachments/102/bouwens_invisible_2007.pdf). See also Wendy Asbeek Brusse & Richard Griffiths, *Paradise Lost or Paradise Regained? Cartel Policy and Cartel Legislation in the Netherlands*, in COMPETITION POLICIES IN EUROPE 15 (Stephen Martin ed., 1998).

114. See STEPHEN WILKS, IN THE PUBLIC INTEREST: COMPETITION POLICY AND THE MONOPOLIES AND MERGERS COMMISSION (1999).

115. See Laurence Idot, *How Has Regulation N°1/2003 Affected the Role and Work of National Competition Authorities? The French Example*, CONCURRENCES, June 2013, at 1, 8-9.

116. Articles 1501(1) and 1501(2) NAFTA provide for mutual consultation from time to time regarding the effectiveness of competition law measures undertaken by each Party; and provides further that “[t]he Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information [...]”. North American Free Trade Agreement art. 1501(1) & 1501(2), Dec. 17, 1992, 32 I.L.M. (1993). However, Article 1501(1) specifically excludes recourse to dispute settlement under the Agreement in relation to all of the above principles of cooperation. For more on the competition provisions in the NAFTA agreement, see, *e.g.*, Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 356-60 (1997). While it is not yet known what specific form the competition provisions of the Trans-Pacific Partnership Agreement (U.S. plus eleven others) will take, it seems unlikely that the agreement will go beyond mutual notification, the sharing of information (*i.e.*, non-confidential information unless a waiver is obtained) and other general modalities of cooperation. *Id.* at 358. The chapter on regulatory coherence may have competition policy implications in a broader sense for some of the countries concerned. *Id.* at 358-59.



Customs Union (SACU); but nearly all other regional competition law frameworks have taken the EU approach as a source of inspiration (translating it, however, into highly diverse institutional structures and competences).<sup>117</sup> The EU has not been a neutral observer of this tendency; to the contrary, the EU has financially underwritten some of the regional initiatives, including in particular the WAEMU, the Common Market for Eastern and Southern Africa (COMESA), and the Andean Community.<sup>118</sup>

Despite the hopes one may have for regional competition law around the world, it must be acknowledged that all of the initiatives, with the exception of the EU itself, have yielded disappointing results.<sup>119</sup> This seems to be the clear thrust of recent evaluations.<sup>120</sup> The situation is not hopeless. For example, the tensions over jurisdictional claims regarding the application of competition and merger control rules by COMESA may be overcome with time and iterative adjustments. And a series of lessons may be drawn from the initial regional integration efforts, which may guide reforms in the coming years.<sup>121</sup> But a note of pessimism is yet in order. With exceptions, the failings of regional agreements thus far may be linked to problems that defy any remedy in the medium term.<sup>122</sup> One obvious cause of difficulty consists of the resource constraints afflicting the countries and institutions that participate in the regional groupings, and the finite well of international solidarity.<sup>123</sup> Some of these countries also find themselves in groupings with other countries of radically different character and level of development. A still more brutal reality is that many of the latter countries bear the unflattering title of “basket case” economies and political regimes, or even borderline failed or failing states. Some are rife with corrupt institutions, some are embroiled in civil or international wars or conflicts. Many of these regional efforts thus face a grim horizon. Some may yet gain momentum and succeed: the current intensification of cooperation within ASEAN, for example, may fuel

---

117. Alberto Heimler & Frederic Jenny, *Regional Agreements*, in *BUILDING NEW COMPETITION LAW REGIMES: SELECTED ESSAYS* 183, 183-201 (David Lewis ed., 2013).

118. *Id.* at 186.

119. *Id.* at 183, 186.

120. See the contributions in *COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES*, *supra* note 12; Heimler & Jenny, *supra* note 117. See also Alberto Heimler, *Effectiveness of Enforcement Cooperation in Developing Countries: What Role Can Existing Institutions Play?*, Aug. 4, 2013, at 6-13, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2335919](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335919) (skeptical about supranational solutions and their cost, and suggesting a focus on simpler forms of cooperation); DABBAH, *supra* note 112, at 409-10, 412-17.

121. Careful syntheses of lessons are provided by Josef Drexl, *Economic Integration and Competition Law in Developing Countries*, in *COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES*, *supra* note 12, at 231 and by Michal S. Gal & Inbal Faibish Wassmer, *Regional Agreements of Developing Jurisdictions: Unleashing the Potential*, in *COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES*, *supra* note 12, at 291. See also Fox and Gal, *supra* note 12, at 41-42.

122. DABBAH, *supra* note 112, at 416.

123. *Id.* at 414.

rising expectations, although that organization too faces formidable challenges.<sup>124</sup> Others will likely go nowhere. They may have to be reborn or renounced, or they may quietly wither.

For present purposes, one may simply note that competing models for international cooperation were “on offer,” and the model promoted by the EU proved to be far more appealing for ‘consumers’ worldwide than the available alternative. The general failure of these consumers to use the EU prototype in a sufficiently imaginative way, or the failure to realize that local conditions in some areas likely required a new prototype or a sufficiently differentiated hybrid, is a separate discussion that is omitted here.

#### *D. Competition in Competition Ideas*

In section III.A above, it was suggested that the U.S. and the EU endorsed competing visions for a global governance architecture, to use a popular term, in the field of competition law. At a different, more traditional level one may observe a competitive struggle concerning the question of how antitrust problems should be approached analytically by policy-making and decision-making institutions. This friendly rivalry inevitably reflects something of a cleavage in values and prior beliefs, and on each side of this cleavage a complex of smaller but significant second-order fault lines may also be found. The terms of discourse that follows are limited to “approaches” and “models”. Such an analysis can only scratch the surface of the discussion surrounding values, beliefs and systems of belief.<sup>125</sup>

---

124. Barring possible delays, the ASEAN Economic Community is due to be launched at the end of 2015. By that time each ASEAN member country is required to have promulgated a comprehensive competition law (some will fail to meet this deadline). One feature of the new initiative will be a coordination mechanism for competition law enforcement, the details of which remain to be worked out. ASEAN Secretariat, *ASEAN Economic Community*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (2014), <http://www.asean.org/communities/asean-economic-community>.

125. For a recent elaborate study, see Ioannis Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*, in *HANDBOOK ON EUROPEAN COMPETITION LAW: SUBSTANTIVE ASPECTS 1* (Damien Geradin & Ioannis Lianos eds., 2013). From a normative perspective, Lianos stresses that the interminable debates on the goals of competition law too often omit the fundamental question of which institutions (markets, judicial process, political process and so on), or rather which mix of institutions, should be assigned the task of pursuing and implementing those goals. Comparing and then choosing among imperfect alternatives, he says, should in fact precede debates over goals. In addition to this Komesarian (and, as applied to the competition law sphere, Sokolian) normative perspective, Lianos’ essay provides a helpful map of the “goal structures” found in both U.S. antitrust (a narrower structure, though not free of ambivalence) and EU competition law (broader, evolving, contested). The essay covers utilitarian and welfarist traditions as well as deontological and process-based traditions, and casts doubt on some of the categories often taken for granted (raising, for example, the possibility that at least some strands of ordoliberalism are consequentialist and not deontological). *Id.* at 33.

1. *The American Approach*

In the United States, the Supreme Court and the federal antitrust agencies (not to mention the heterogeneous state attorneys general) do not always see eye to eye. Occasionally, for example, a federal enforcer will express doubts or criticism regarding a Supreme Court judgment.<sup>126</sup> Furthermore, while the Supreme Court has shown rather little interest in applying techniques of modern industrial economics (particularly where they seem to be merely speculative “possibility theorems,” as the standard epithet describes them), the high degree of expertise within the federal agencies enables them to engage in sophisticated policy prescriptions (as in, *e.g.*, the 2010 U.S. Horizontal Merger Guidelines) and sophisticated empirical work in connection with concrete cases (*e.g.*, in challenging the *Staples/Office Depot* merger<sup>127</sup>). But although a majority of the Supreme Court may sometimes lean ‘to the right’ of the agencies, in particular when the Assistant Attorney General for Antitrust has been appointed by a Democratic President and given the mandatory bipartisan composition of the Federal Trade Commission,<sup>128</sup> the general paradigms and background assumptions embraced by each of these institutions are not very different. In-house, the agencies may engage routinely in game-theoretic exercises and may explore dynamic competitive effects in great detail, but the point of departure when analyzing a competition problem is the same question that has been asked throughout the 1980s and the 1990s: when assessing competitive effects, what will be the net effect on output?<sup>129</sup> Doubt is resolved in favor of non-intervention, which reflects a faith in the relative superiority of markets (*vis-à-vis* occasionally frail institutions) that remarkably persists even today, dissenters “on the left” notwithstanding, within the antitrust milieu.<sup>130</sup> This faith is captured in formulas

---

126. In several speeches, for instance, then-FTC Commissioner Tom Rosch questioned the wisdom of certain *obiter dicta* in the Supreme Court’s *Trinko* judgment (*Verizon Comm’n Inc. v. Law Offices of Curtis V. Trinko, LLP.*, 540 U.S. 398 (2004)), which is notable for, among other things, its contention that rigorous antitrust constraints can dampen the incentive of companies to strive toward superior performance and enhanced innovation.

127. See *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997); Jonathan B. Baker, *Econometric Analysis in FTC v. Staples*, 18 J. PUB. POL’Y & MARKETING 11 (1999).

128. Bipartisan here means, as American readers are well aware, 3:2, or 2:2 if the 5th seat is temporarily vacant. 15 U.S.C. § 41 (2014).

129. It will be plain that no significant investigation of output effects is conducted in cases involving, in particular, naked anticompetitive conspiracies between competitors.

130. It is said that one need not dig deep to find, underneath the economics-based claim that non-intervention in the absence of demonstrable output effects guarantees efficient case outcomes, a distinct political ideology. This political ideology attaches great weight to the “autonomy of the dominant or leading firms”, and it produces a stylized concept of efficiency that systematically excludes the possibility that efficiency (in particular, dynamic efficiency) could best be served by protecting rivalry, mavericks and “upstarts”. See Eleanor M. Fox, *The Efficiency Paradox*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 77, 86 (Robert Pitofsky ed., 2008). The paradox, then, is that, as it has come to be understood and applied, the efficiency orientation that dictates

that have been fondly recited on occasion by U.S. enforcers, such as “First, do no harm” or “Let the markets work”.

The output model, framed by the idea that type I errors are more costly than type II errors,<sup>131</sup> and that abstention is therefore the proper course when it is not clear—either on “per se” logic or following a (full or truncated) “rule of reason” inquiry—that a practice will lead to a net loss of output, may be encapsulated by the term “Chicago school antitrust” (even though Chicago is composed of different strands of thought not free of internal tensions). But the idea of a Chicago-based output model must be nuanced because an ulterior question can determine non-intervention even where it is found that net output would suffer as a result of a given practice. The ulterior question is: even if we can say abstractly that certain behavior can yield either greater or lesser output depending on a variety of factors that have to be examined case-by-case, is a typical judge (or a lay jury) capable of engaging in such inquiry, admittedly with the aid of an adversarial process, and reaching the right result within a tolerable margin of error? In the United States, the approach to the latter question is influenced by the consequences of erroneous judgments, as they can by statute lead to heavy civil liability (or to out-of-court settlements in the shadow of that liability risk). Although this concept of “administrability”—*i.e.*, the question of whether tools

---

antitrust law in the U.S. “protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency,” *id.* at 77, and “thus protects inefficiency,” *id.* at 88.

131. Error-cost reasoning is the influential legacy of work done especially in the 1980s by then-Professor Frank Easterbrook. While this reasoning seeks to minimize both type I and type II errors, there is also a common tenet, suggested by Easterbrook himself (inspired by Ronald Coase’s work) according to which a type I error (false conviction) is more costly than a type II error (false acquittal). The basic point rests on two assumptions: on the one hand, although a false acquittal will result in or prolong an anticompetitive practice (and its related rents), the marketplace will ultimately resolve the matter through self-healing (*e.g.*, new entry, perhaps enabled by efficient access to capital); on the other hand, a false conviction will amount to a distorted market interference by government that cannot be corrected through the same self-healing properties of the market. *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984). Courts and agencies might thus ironically become ‘anticompetitive’ instrumentalities of consumer harm. The idea that the risk of false positives should be accorded greater weight than the risk of false negatives is of course pointedly contested. *See, e.g.*, John Fingleton & Ali Nikpay, *Stimulating or Chilling Competition*, in FORDHAM COMPETITION LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW AND POLICY 385, 388-90 (Barry E. Hawk ed., 2009); Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010). In the context of themes running through the present paper it is worth underlining that Easterbrook’s point of view is clearly based on what he perceived as robust markets, which may be true in the U.S. but is hardly a universally reliable assumption. *See* Philippe Brusick & Simon J. Evenett, *Should Developing Countries Worry About Abuse of Dominant Power?*, 2008 WIS. L. REV. 269, 274-7 (2008). David Lewis, for example, describes a quite different balance between over-enforcement and under-enforcement in *Chilling Competition*, in FORDHAM COMPETITION LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW AND POLICY, *supra*, at 419, 420-5. *Cf.* Alberto Heimler & Kirtikumar Mehta, *Monopolization in Developing Countries*, Oct. 3, 2013, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2335653](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335653). In the latter paper, Heimler and Mehta make a similar observation about the distinctiveness of the U.S. and add, at the last page of the draft, that an empirical review reveals that young jurisdictions have “well understood” the risk of false positives in abuse of dominance cases. They point out that the focus of competition authorities in these jurisdictions has been actual foreclosure “rather than a preoccupation with restrictions of competition that may give grounds for assuming potential foreclosure.” *Id.* at 18.

and concepts (as applied to liability rules but also to remedies) can be applied workably in concrete settings—has driven first and foremost the Supreme Court, the federal agencies necessarily internalize the concept in their own decision-making. It is remarkable that with regard to both values just described (output is to be maximized, and liability rules must be administrable), doubt is to be resolved in favor of abstention. Two different “schools” thus have common ground to stand on. Bill Kovacic has captured this confluence of ideas with the metaphor of a double helix.<sup>132</sup> Beyond the pruning of liability rules and the strengthening of procedural filters to minimize the number of cases that survive, the double helix is also reflected in the Supreme Court’s philosophy of the *scope* of antitrust: in particular, in sectors governed substantially by regulation, such as network industries or markets subject to security laws, antitrust has in effect been relieved from its post.<sup>133</sup>

To abbreviate, and though certain authors have sometimes used other labels, the U.S. model of antitrust can be summed up roughly as an “output” model or a “double helix” model, as nuanced above. What of the European Union?

## 2. *Europe’s Approach(es)*

Here too, distinctions should be drawn between the way EU competition law is understood by the EU Courts, and especially the ECJ, and the way it is understood by the “agency”, *i.e.*, the European Commission.<sup>134</sup> A further distinction may be made with respect to the authors of the competition rules contained in the Treaty of Rome, today known as the Treaty on the Functioning of the European Union. At least traditionally there has been a widespread belief in Europe that the competition rules were of ordoliberal content.<sup>135</sup> There are

---

132. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007); *See also* William H. Page, *Aareeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 ANTITRUST BULL. 909 (1996); Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917 (2003) (reviewing RICHARD A. POSNER, *ANTITRUST LAW* (2001)); For recent discussion, *see generally* Nicola Giocoli, *Old Lady Charm: Explaining the Persistent Appeal of Chicago Antitrust*, May 30, 2012, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2070666](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2070666).

133. *See generally, e.g.*, Douglas H. Ginsburg & Daniel E. Haar, *Resolving Conflicts between Competition and Other Values: The Roles of Courts and Other Institutions in the US and the EU*, in EUROPEAN COMPETITION LAW ANNUAL 2012: COMPETITION, REGULATION AND PUBLIC POLICIES 417 (Philip Lowe & Mel Marquis eds., 2014).

134. The importance of considering differences between courts and agencies in any analysis of competition law where courts play a significant role is likewise highlighted in Eleanor Fox, *Monopolization and Abuse of Dominance: Why Europe is Different*, 59 ANTITRUST BULL. 129 (2014) (discussing, *inter alia*, the divergent case law in the U.S. and the EU).

135. It is always useful to recall that the ordoliberal tradition comprises diverse strands with occasionally quite distinct points of emphasis. Elaborate discussion is out of place here but it may be noted that the crucial “Hayekian turn” in ordoliberal studies occurred only after the composition of the competition rules of the Treaty. To the extent that those rules bear some ordoliberal paternity, therefore, the link would appear to be

good reasons to doubt that the shaping of the competition rules was driven solely by ordoliberal ideas. More accurately, their genesis reflected a compromise between very different competition-related values (*e.g.*, on the one hand the desire to have an “economic constitution” protecting economic liberty against coercion from private and public sources of power, and on the other hand the desire to promote industrial upsizing, efficient production and global competitiveness).<sup>136</sup> However, those who underline the ordoliberal character of European competition law are on firmer ground when referring to the policies and agency culture of DG IV within the European Commission, in particular during the period from the 1960s through the 1980s.<sup>137</sup>

---

limited to the “formative” *ordo* era, which preceded the fusion of many of the original concepts with Austrian ideas about competition, liberty, the State and the social order.

136. Researchers scrutinizing the archived preparatory documents have reached rather different conclusions, but one author has argued strenuously that there is little evidence of ordoliberal influence in the relevant documents. See Pinar Akman, *Searching for the long-lost soul of Article 82 EC*, 29 OXFORD J. LEGAL STUD. 267 (2009). While the latter paper is an illuminating and essential contribution, my own impression, due to the context of the negotiations as a whole (whose linkages included a significant agreement to postpone decisions on fundamental issues such as how the enforcement of the rules should be structured, who should enforce them and with what powers, etc.), is that smoking gun evidence of an ordoliberal program with regard to Articles 101 and 102 is indeed scarce (other than the final, “trump” condition contained in Article 101(3), whose activation however has normally been pre-empted by the way Article 101 and the other conditions of Article 101(3) have been applied) because the German negotiators who were ordoliberally inclined may not have been particularly doctrinaire to begin with (at least as regards Müller-Armack; as for von der Groeben, his views seem to have become more resolutely “ordo” at a later stage when he was made DG IV’s chieftain), and because the compromises made (which were conditioned in part by the long-running legislative debate in Germany) may have diluted what otherwise might have been rules of more distinct ordoliberal character (although, as regards Article 102, it has been noted that as of the late 1950s the ordoliberals had not fully worked out an approach to the treatment of dominant firms: see Heike Schweitzer, *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC 119 (Claus-Dieter Ehlermann & Mel Marquis eds., 2008). That dilution does not mean that the ordoliberal influence was absent. Widening the lens beyond Article 101 and 102, one could take the view that, apart from the Common Agricultural Policy, the Treaty as a comprehensive instrument, and especially its common market planks (including the free movement rules but also state aid and tax discrimination rules), coincided rather closely with ordoliberal views. The difficulty lies in separating out causal elements, since one could make a similar point about any orientation (in particular, Ricardian trade theory) that was based on the classical liberal tradition, to which the *ordo* scholars decidedly belonged. Even with respect to Article 106 (which provides that Member States must respect the rules of the Treaty including in particular its competition rules), although I have elsewhere followed J.O. Haley in recognizing its affinity with *ordo* values, that provision was originally proposed by the negotiators from the Benelux countries (as an antidote to France’s intimidating public sector); the German delegation merely endorsed the idea once it had been introduced. Having drifted too far already, the excursus may be cut short with two quick points. First, notwithstanding the above observations, Akman’s point that the ordoliberal genesis of Article 102 has been greatly exaggerated is easy to accept; it is now being incorporated into textbooks, for example. See RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW*, 7<sup>TH</sup> EDITION 22, 196 (2012). Second, as EU lawyers know but as others may not, the “original intent” of the Treaty of Rome counts legally for nothing. (See, *e.g.*, Schweitzer, *History, Interpretation and Underlying Principles*, cited above; Lianos, *supra* note 125, at 71-72, with references.) The canons of interpretation developed by the ECJ leave it free to follow a path completely contrary to any discernible original design if this contrary path were divined by the Court to be the Treaty’s true *telos*.

137. Historians do not unanimously support this claim, however, since, for example, DG IV also had its share of social democrats, including those of a Dutch persuasion. For contrasting views, see the various

Since the 1990s, DG IV (now DG Competition) has absorbed many influences that have shaped its policies. It has drawn eclectically on “modern” approaches that it perceives to be consistent with its mission as a competition enforcer. Famously, it decided to break with old institutional habits and to turn toward a “more economic” approach,<sup>138</sup> a vague expression that has at least two related dimensions. First, in (i) selecting and de-selecting cases, (ii) resolving or settling selected cases, and (iii) building policy approaches, DG Competition has embraced tenets and techniques associated with certain branches of economic theory and research. Since the late 1990s, for example, its policies on the control of vertical agreements have been palpably influenced by transaction cost economics. And DG Comp has been open to the theoretical advances of post-Chicago industrial organization studies. Post-Chicago concerns regarding unilateral conduct, vertical foreclosure in general, and, in the field of horizontal merger control (and like the U.S. agencies), unilateral effects from concentrations in differentiated markets, have shaped both the policies and practice of the Commission. A second dimension of the “more economic” approach concerns the choice of policy *objectives*.<sup>139</sup> In a move of both practical and symbolic significance, the Commission, particularly under the leadership of Mario Monti and Neelie Kroes, adopted “consumer welfare” as its magnetic North.<sup>140</sup> Consumer welfare, however, can be understood in different ways.<sup>141</sup> In the U.S., consumer welfare is sometimes confusingly used as a synonym for the (generally short-run) welfare of society as a whole.<sup>142</sup> As used in the EU, the standard view is that the term consumer welfare reflects a criterion of distributive justice<sup>143</sup> and tends to denote a narrower concept in which producer welfare is important but

---

contributions in *THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW* (Kiran Klaus Patel & Heike Schweitzer eds., 2013).

138. DG Comp’s policy turn toward “more” economics has provoked a significant field of critical literature. See, e.g., Heike Schweitzer, *The Role of Consumer Welfare in EU Competition Law*, in *TECHNOLOGIE ET CONCURRENCE: MÉLANGES EN L’HONNEUR DE HANNS ULLRICH [TECHNOLOGY AND COMPETITION: ESSAYS IN HONOR OF HANNS ULLICH]* 511 (Josef Drexler, Reto Hilty, Laurence Boy, Christine Godt & Bernard Remiche eds., 2009).

139. As noted earlier, the term “more economic approach” appears to leave room for the Commission to factor in non-economic concerns, and the boundaries of the Commission’s discretion in this regard are not entirely clear. See *supra* note 21.

140. See, e.g., Lianos, *supra* note 125, at 19-20.

141. In further detail, see *id.* at 20-23.

142. This very loose use of language is associated with the Chicago school and with Robert Bork in particular. See generally, e.g., RUDOLPH PERITZ, *COMPETITION POLICY IN AMERICA*, REVISED EDITION, 240-245, 374 (1996); See also J. Thomas Rosch, [then-] Commissioner, Federal Trade Commission, *I say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?*, Address Before the Federal Trade Commission (Sept. 8, 2007), available at <http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf>, at 16; Charles Rule & David Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 ANTITRUST BULL. 677 (1988).

143. See Lianos, *supra* note 125, at 26-29. However, as Lianos points out, lurking in even the most aseptic version of a maximum efficiency norm is a choice about distributive effects. See *id.* at 9, 57.

ultimately of a lower rank.<sup>144</sup> Truer to its name, consumer welfare thus does not refer to an “output” model but to a long-run consumer welfare criterion more consistent with the idea of a dynamic “competitive process” in which potential threats to competition, such as where new entrants or “mavericks” might be suppressed or brought to heel, are treated seriously. The idea that defending the “competitive process” in the sense of maintaining ongoing rivalry and an “effective competition structure”<sup>145</sup> (which today is often – though not uncontroversially – linked to competition from hypothetical equally-efficient rivals as opposed to competition from all comers irrespective of relative efficiency<sup>146</sup>) takes precedence over short-term efficiency gains is thought to be

---

144. In the context of the exemption contained in Article 101(3) as understood by the Commission, Whish and Bailey explain that “[i]t is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration [ . . . ] Negative effects on consumers in one geographic or product market cannot normally be balanced against and compensated by positive effects for consumers in unrelated markets [unless the markets are related and] the consumers affected by the restriction and benefiting from the efficiency gains are substantially the same.” WHISH & BAILEY, *supra* note 136, at 22, 163. In order for the exemption to apply, it is not necessary to show that a particular consumer who is harmed is then compensated for his particular injury. Giorgio Monti fleshes this out further in a hypothetical vertical restraint scenario where the restraint purports to expand the market: “[O]ne looks at the ‘overall impact’ on consumers affected by the agreement. So if before the vertical restraint 100 consumers bought the good, and after the restraint there are 200 new customers, the overall effect is positive and the practice benefits from Article [101(3)]. Yet it may not be easy to do this kind of calculation at all (it will necessarily be an ex ante assessment in that one will want to enjoin the restraint before it has a significant market impact), and when comparing qualitative improvements and price increases the Commission acknowledges that this will be a matter of ‘value judgment’.” See Monti, *supra* note 21, at 9.

145. The “competitive process” idea seems necessarily to require an approach to competition law that is sensitive to market structure, but any parallel to be drawn with the “structure-conduct-performance” paradigm (pioneered and pursued by economists such as Edward Mason, Joe Bain, Corwin Edwards, Carl Kaysen and economist/lawyer Don Turner among others) must be qualified because of the generally static conception of the latter, from which the former diverges entirely. See, e.g., (in English), Erich Hoppmann, *The Development of an Idea on the Norm for a Policy of Competition*, 13 ANTITRUST BULL. 61 (1968); and for a concise account, Roger Van den Bergh & Peter Camesasca, *EUROPEAN COMPETITION LAW AND ECONOMICS: A COMPARATIVE PERSPECTIVE*, 2<sup>nd</sup> EDITION 89-90 (2006) (also referring to post-Hoppmann approaches that differ on details). The idea of the competitive process is closely linked to that of the “freedom to compete”, or *Wettbewerbsfreiheit*. A recent description is provided in Roger Zäch & Adrian Künzler, *Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law*, in *THE DEVELOPMENT OF COMPETITION LAW* 61 (Roger Zäch, Andreas Heinemann & Andreas Kellerhals eds., 2010). As the authors state, “[t]he goal of competition law [ . . . ] is to ensure the freedom to compete of individuals and thus to safeguard the competitive process”. *Id.* at 61. The freedom to compete then “generally leads to competition and competition leads to an efficient allocation of resources and thus to consumer welfare”. *Id.* Although it appears that protecting the freedom to compete is “thus to safeguard the competitive process,” this can be understood the other way around: if the competitive process is protected then individuals are guaranteed the possibility to exercise their economic liberty. But the central point for the European “efficiency versus freedom” debate is that consumer welfare is expected to be no more than, and no less than, an anticipated by-product of the freedom to compete paradigm. For a discussion of varying views within the economic freedom tradition, see Lianos *supra* note 125, at 30-36.

146. Traces of the idea that foreclosure of equally efficient competitors may deserve closer scrutiny because their exclusion has more serious consequences for consumers may be seen in its earlier case law, but the ECJ now seems to be embracing the idea more firmly. See *Deutsche Telekom AG v. Commission*, 2010 E.C.R. I-9555 (various paragraphs); *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 E.C.R. I-527 (various paragraphs); *Post Danmark A/S v. Konkurrencerådet*, judgment of the ECJ of 27 March 2012,



consistent with the Treaty; and at the same time it may preserve some (limited) degree of continuity with DG Comp's "ordoliberal" past, in which the policy paradigm depended on the conception of competition as a dynamic process (which in turn is partly informed by the notion of competition as a discovery procedure). The Commission's interest in post-Chicago approaches and its tendency to avoid overvaluing short-term efficiency gains results in a greater readiness to intervene in competition cases, and implicitly signals a greater faith in its own relative ability to secure desired outcomes compared to the ability of "the market" to do so. In this regard the Commission's slogan, "*making markets work better*"<sup>147</sup> (emphasis added), is quite telling.

Finally, there are the EU Courts, and in particular the ECJ. Contrary to what is sometimes loosely asserted, the idea that the Court was in its heyday (or was then and still is) an ordoliberal institution has never been convincingly established.<sup>148</sup> It is submitted, rather, that perhaps with some exceptions any ordoliberal-inflected judgments of the Court were produced not on any endogenous basis resting on the identity or predilections of the judges individually or collectively, but rather because a disposition of a given case that was consistent with ordoliberal views fit well under the circumstances with the Court's vision of the Treaty, in particular its free movement and competition rules and associated doctrines such as the "*effet utile*" of those rules, and of European integration. Here one could cite judgments such as those in *Continental Can*, *Dassonville* and perhaps *Säger* and *France v Commission*.<sup>149</sup> It must be added, though, that in recent years the ECJ has embraced a notion which, among

---

ECLI:EU:C:2012:172, ¶¶ 21, 25 and 38). The ECJ may have different views with regard to the "equally efficient competitor" concept in the specific context of conditional rebates granted by a dominant firm, but pending cases will permit the ECJ to clarify its position and to resolve this tension if it so chooses. (For starkly contrasting views in this regard, compare Wouter Wils, *The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance*, 37 WORLD COMPETITION 405 (2014) with, among others, Luc Peepkorn, *Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates*, CONCURRENCES No. 1-2015, p. 43.) As a matter of policy, the Commission reserves for itself some room for maneuver in cases where dominant firm conduct threatens to expel from the market a less efficient rival whose presence is apt to lead to a more competitive outcome relative to the counterfactual. See GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS, 2009 O.J. (C 45) 7, para. 24 ("The Commission will take a dynamic view of [the constraint imposed by the less efficient rival], given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency.").

147. This motto has appeared prominently on the Commission's competition home page. See European Commission, [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html) (last visited October 24, 2014).

148. A recent review of the ECJ's antitrust jurisprudence rejects the notion that the Court has been concerned with the (German and Hayek-derived) concept of a "freedom to compete" (see *supra* note 145), which is an important but not the only version of an ordoliberal program. See Pinar Akman, *The role of "freedom" in EU competition law*, 34 LEGAL STUD. 183 (2014).

149. Respectively: *Europemballage and Continental Can v. Commission*, 1973 E.C.R. 215; *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837; *Säger v. Demmeyer & Co Ltd*, 1991 E.C.R. I-4221; *France v. Commission*, 1991 E.C.R. I-1223.

other interpretations, may appear to be compatible with ordoliberal thought. It is the idea that the EU legal order must protect competition “as such (as an institution).”<sup>150</sup> When taken literally, this idea seems to transform competition from a medium through which ulterior values such as social welfare or consumer welfare are pursued into a self-justifying end goal. The adoption of the “as such” formula by the Court in its *T-Mobile* judgment<sup>151</sup> may have seemed to vindicate, to some extent, the popular criticism that the ECJ was an “ordoliberal” Court and was therefore (i) biased against concepts such as anticompetitive foreclosure, whereby foreclosure would only be a concern if the excluded rival were efficient, since otherwise consumers would not in general be any worse off, and (ii) biased, more generally, against any tradeoffs between liberty and efficiency.<sup>152</sup> It is not clear that ordoliberalism is really at play here,<sup>153</sup> but it is clear that there is a concern for market structure and for the plight of at least some competitors and some consumers, all of which if interpreted in a certain way can be reconstructed, by those who wish to do so, as being part of an ordoliberal approach. In any event, the ECJ’s preoccupation with competition “as such” now seems to be a staple of Article 101 jurisprudence.<sup>154</sup> In the context of Article 102 the Court has

---

150. This formula originated in the Opinion of Advocate General Kokott in *British Airways plc.*, 2007 E.C.R. I-2331. As the Advocate General states in para. 68: “Article [102 TFEU], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus competition *as such (as an institution)*, which has already been weakened by the presence of the dominant undertaking on the market.” (Emphasis in original; citations to case law omitted.) The foregoing quote, which on the surface appears to reflect an ordoliberal commitment to competition’s “constitutional” nature, should be considered in light of the text that immediately follows in the same paragraph: “In this way [*i.e.*, by protecting competition as such], consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.” The latter idea—that the structure of the market is protected in pursuit of an ulterior objective (*i.e.*, the avoidance of consumer disadvantage)—appears to be at odds with the standard ordoliberal view that consumer benefits, while important, materialize as a subsidiary by-product of the competitive process (see *supra* note 145). Similarly, the counterintuitive idea that the “competition as such” imperative in fact instrumentalizes competition in service of efficient resource allocation and the diverse aims of the EU has been noted as a plausible interpretation. See Lianos, *supra* note 125, at 53.

151. *T-Mobile Netherlands*, 2009 E.C.R. I-4529, ¶ 38: “[A]s the Advocate General pointed out at point 58 of her Opinion, [Article 101 TFEU], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.” For her part, Advocate General Kokott had directly transposed to the instant case the “as such (as an institution)” concept that she had announced in *British Airways* (quoted in the previous footnote). Paragraph 58 of her Opinion in *T-Mobile Netherlands* states: “[Article 101 TFEU], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus competition *as such (as an institution)*. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.” (Emphasis in original.)

152. However, the Court in *British Airways* also confirmed that dominant firms could come forward in Article 102 cases with evidence of efficiencies counterbalancing the anticompetitive effects of their behavior. See *British Airways plc.*, 2007 E.C.R. I-2331.

153. There is a risk that the “as such (as an institution)” language will be decontextualized. See *supra* note 150, particularly where Kokott’s coda to the quoted language appears.

154. See *GlaxoSmithKline Services Unlimited*, 2009 E.C.R. I-9291, ¶ 63 (“like other competition rules laid down in the Treaty, Article [101 TFEU] aims to protect not only the interests of competitors or of

not (yet) seized the opportunity to “reimport” the “competition as such” logic, even if it is where firms are dominant that the presumed “weakness” of the market structure is most likely to be a concern.<sup>155</sup>

An opportunity for such a reimport presented itself in a 2012 case that attracted some attention, but the Court took a different tack and proceeded to clarify that Article 102 in no way precludes dominant companies from competing “on the merits.”<sup>156</sup> This normally ambiguous phrase—on the merits—is now defined by the ECJ as competition on the basis of features appreciated by consumers: better offers in terms of price, quality, choice and innovation.<sup>157</sup> The fate of the “competition as such” concept remains to be seen, and the Court might well decide to incorporate it within its Article 102 case law (rather than allowing the apparent asymmetry of the two fields to persist). But whether it is “competition as such” or “competition on the merits” as now defined (or an awkward admixture of the two) that guides the Court’s future jurisprudence, neither concept is likely to alter the Court’s trademark approach in cases where agreements or practices have the actual or potential impact of dividing the internal market along territorial lines coinciding with national borders.<sup>158</sup> Here all bets are off, and the integrationist “genome” of the Treaty will in most cases pre-

---

consumers, but also the structure of the market and, in so doing, competition as such”); *Protimonopolný úrad Slovenskej republiky*, judgment of the ECJ of 7 February 2013, ECLI:EU:C:2013:71. Similarly, see *Visa Europe and Visa Int’l Serv.*, 2011 E.C.R. II-1729 (interests of competitors and of consumers, the structure of the market and “competition as such”).

155. The conventional judicial wisdom has been that, in Europe, dominant firms have a “special responsibility” not to distort competition any more than the very existence of the dominant position has already distorted it. This line of thinking is sometimes portrayed as quite innocuous but it seems to establish a kind of informal and unconscious suspicion of aggressive competitive behavior by dominant firms; it has occasionally led to dangerous conclusions. For example, in *Microsoft*, 2007 E.C.R. II-3601, ¶ 664, the then-Court of First Instance stated that “Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.” This improvident remark, when taken literally, evinces a gross misunderstanding of Article 102, under which a firm can by no means infringe the provision merely by gaining market share or even growing to become a monopoly in a given market. For further discussion of the “special responsibility” doctrine, see Kathryn McMahon, *A Reformed Approach to Article 82 and the Special Responsibility Not To Distort Competition*, in *ARTICLE 82 EC: REFLECTIONS ON ITS RECENT EVOLUTION* 121 (Ariel Ezrachi ed., 2009).

156. *Post Danmark A/S*, 2012, ECLI:EU:C:2012:172, ¶¶ 22, 25. For discussion of *Post Danmark*, see Ekaterina Rousseva & Mel Marquis, *Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU*, 4 J. EUR. COMPETITION L. & PRACTICE 32 (2013). While the judgment is welcomed as a positive development, Rousseva and Marquis point out at pages 47-48 that the case law of the ECJ seems to be moving simultaneously in different directions, particularly when its jurisprudence on conditional rebates granted by dominant firms is taken into account. It appears likely that the Court will have the opportunity to rectify this, or to fail to do so, within a few years.

157. See *Post Danmark A/S*, ECLI:EU:C:2012:172, ¶ 22.

158. As Barry Hawk once said, the aim to establish and maintain a single market was the “first principle” of European competition law. As Arved Deringer once said, impeding market integration was a “basic sin.” See Clifford Jones, *The Second Devolution of European Competition Law: Empowering National Courts, National Authorities, and Private Litigants in the Expanding European Union*, UNIVERSITY OF PITTSBURGH ARCHIVE OF EUROPEAN INTEGRATION (Mar. 29, 2003), <http://aei.pitt.edu/2882/>. Many have written about the centrality of the market integration objective in the sphere of EEC/EC/EU competition law. For a recent summary, see Lianos *supra* note 125, at 17-19.

determine the outcome. In the absence of very exceptional circumstances, any practice that significantly hinders the free movement of goods or services will be held unlawful. This special and crucial zone of jurisprudence also aligns the Court, for “exogenous” rather than “endogenous” reasons, with the ordoliberal idea that public and private constraints on economic liberty must be prevented or dismantled.

While the US model can be reduced either to the words “output model”, which is simplistic but on the whole reasonably accurate, or to the more nuanced “double helix” model, it is more difficult to capture the EU model in a short phrase, especially since it may be an amalgamation of several models. A point of departure is that EU competition law is not statutory law subject to *lex posterior derogat*, but “primary” law. It is elevated, in material though not formal terms to the rank of constitutional law (since by judicial interpretation the Treaty, materially but not formally, establishes a constitutional order).<sup>159</sup> This implies, among other things, that from a legal point of view, and contrary to the U.S. position (see above), it would be entirely objectionable if the Court of Justice were to hold simply that the presence of sector-specific regulation renders application of the EU competition rules in the given sector redundant or wasteful. To the contrary, in the EU system, competition rules co-habit with regulation

---

159. The premise here—*i.e.*, that while the Sherman Act may be a potent social symbol it is not legally imbued with constitutional status—may be contrasted with the less orthodox view presented in Zäch & Künzler, *supra* note 145. According to these authors, antitrust legislation in the U.S. “came to be viewed as a charter of freedom on a par with the Bill of Rights. The constitutional status of American anti-trust legislation is emphasized in the paradigmatic arguments of the US Supreme Court ruling in the case of *Topco Assocs. Inc.*, 405 U.S. 596. ‘Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete [...]’ The goal of [the Sherman Act, as amended by the Clayton Act] is to protect the individual’s freedom to compete. In contrast, consumer welfare as such is not mentioned. Thus the legislation correctly implemented the constitutional mandate.” Zäch & Künzler, *supra* note 145, at 65-66. From the standpoint of constitutional law, it cannot be concluded that the lush language used by the Supreme Court in *Topco* elevated the Sherman Act to the rank of constitutional law, or even to any intermediate super-statutory status. First, as a matter of context, and putting aside the *obiter* nature of the quote (and putting aside the fact that the Court’s later case law on horizontal restraints was seldom guided by *Topco*, a rare exception being *Palmer*, 498 U.S. 46, 49-50), Justice Marshall in *Topco* spoke for five justices; Chief Justice Burger dissented, Justice Blackmun concurred only in the result (not the reasoning), and neither Powell nor Rehnquist participated in the judgment. Against that background, consider a case decided shortly after *Topco* but before the Court’s *volte face* in the well-known case of *GTE Sylvania*, 433 U.S. 36. Specifically, in *Gordon*, 422 U.S. 659, 685-86, the same Supreme Court justices that had decided *Topco* (but with Powell and Rehnquist this time) held unanimously that a law adopted by Congress after it adopted the Sherman Act—in this case the Securities and Exchange Act of 1934—had repealed the Sherman Act insofar as SEC implementing regulations allowed a stock exchange to determine the commissions charged by member brokerage firms; in essence, the Congress was thereby able to carve out an exemption for such an agreement, which otherwise would have been *per se* illegal, from the application of Section 1 of the Sherman Act. There is a conspicuous absence of the Magna Carta language of *Topco*, or of any comparable language, and the Sherman Act was treated as an ordinary statute. Several other (and more recent) examples of both express and implied repeal of the Sherman Act by the Congress—including even the Clayton Act itself, which trimmed the scope of the Sherman Act in relation to labor unions and agriculture—could be mentioned. *See also* Ginsburg & Haar, *supra* note 133.

(whether of national or EU legislative origin), and will generally take precedence in case of conflict.<sup>160</sup> The rules can be applied in particular where, for example for public choice reasons,<sup>161</sup> such regulation is incompatible with the competition rules or where a regulatory system has failed, systematically or as applied in a given case.<sup>162</sup> This system of hierarchy follows from basic principles of EU law.<sup>163</sup> Sometimes, in discussions of institutional design the crucial question of the rank that should be assigned to competition law is neglected,<sup>164</sup> but this simple example of differences in the scope of U.S. law and that of EU law underlines the importance of that issue. Moving beyond the matters of scope and hierarchies of norms, Eleanor Fox emphasizes that EU competition law protects “rivalry” and

---

160. There is a well-known derogation for services of general economic interest, but it does not apply automatically and it does not entail sector-wide exemptions. Indeed, the sectoral exemptions (or partial exemptions) that apply today under EU law are comparatively few. The Euratom Treaty creates a special regime in the field of non-military use of nuclear materials, but this does not establish a blanket exemption for the nuclear industry; in light of Article 106a(3) Euratom, and despite a textual deletion made by the Treaty of Lisbon, Euratom precludes the application of the TFEU competition rules where supply or pricing activities are specifically regulated under the latter Treaty (agreements concerning the supply of nuclear equipment and agreements between producers of nuclear materials are not so regulated). The TFEU establishes partial derogations for agriculture and transport (where secondary law is relevant) and for military equipment. Secondary law establishes limited “block” exemptions in the insurance and motor vehicle sectors. To consult the relevant provisions, see *Rules Applicable to Antitrust Enforcement*, EUROPEAN COMMISSION (2013), [http://ec.europa.eu/competition/antitrust/legislation/handbook\\_vol\\_3\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_3_en.pdf).

161. See, e.g., HEIMLER, *supra* note 50 (highlighting the option of insulating competition law from the vagaries and distributional effects of special interest politics by way of constitutionalizing competition rules framed in general terms, as the Treaty of Rome does (and citing the “Hilmer Report”: FREDERICK HILMER ET AL., NATIONAL COMPETITION POLICY (Australian Government, 1993), <http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf>).

162. If the regulation (or the relevant public authority’s decision) has the effect of removing an undertaking’s autonomy so that the undertaking is essentially compelled to act contrary to the competition rules, the undertaking will legally be free of fault but the Treaty rules may nevertheless potentially apply as against the author of the regulation (or the against the authority, as the case may be). Further exposition of this subject is beyond the scope of this article.

163. See *Deutsche Telekom*, 2010 E.C.R. I-9555; Damien Geradin, *Limiting the Scope of Article 82 of the EC Treaty: What can the EU learn from the U.S. Supreme Court’s Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?*, 41 COMMON MKT. L. REV. 1519, 1549 (2004); PIERRE LAROCHE, *Contrasting Legal Solutions and the Comparability of EU and US Experiences*, in ANTITRUST AND REGULATION IN THE EU AND US 76, 84-86 (François Lévêque & Howard Shelanski eds. 2009); Alexandre de Stree, *Background Paper*, in ORG. FOR ECON. CO-OPERATION & DEV., THE REGULATED CONDUCT DEFENCE 39-40 (BOX 3) (DAF/COMP 2011); MONTI, *supra* note 11, at 355; GINSBURG AND HAAR, *supra* note 133 at fn 13 and accompanying text. For further discussion on the relationship between the EU competition rules and sectoral regulation, see, e.g., Alexandre de Stree, *Interaction between the Competition Rules and Sector-Specific Regulation*, in LAURENT GARZANITI & MATTHEW O’REGAN, TELECOMMUNICATIONS, BROADCASTING, AND THE INTERNET - EU COMPETITION LAW AND REGULATION 867 (3rd ed. 2010).

164. One can appreciate the pragmatic reasons for this neglect. Constitutional reform tends to be a rare event, and building up the necessary momentum to reform a constitution merely to embed competition rules within it is not realistic. Any such reforms would normally have to accompany wider discussion of constitutional change. Furthermore, the conventional idea of constitutional law tends to pre-suppose that the rule of law is firmly in place, which is certainly not universally so.

“openness” of markets,<sup>165</sup> and in doing so she describes the enforcement tendency without needing to identify the underlying philosophy. It is sometimes said that Europe embraces a “competitive process” model, but this immediately poses difficulties because in the US, the term “competitive process” has very different, often Darwinist connotations linked closely to short-term welfare and output.<sup>166</sup> For that matter, this problem of language is being compounded in the sense that the protection of an “effective competitive process” has become a popular formulation of competition law objectives for a variety of jurisdictions and is thus becoming increasingly entrenched, as seen in the work of the ICN.<sup>167</sup>

Perhaps a way to avoid that confusion, which has already caused significant damage, is to say that EU competition law is driven by a “dynamic competitive process” model.<sup>168</sup> But EU competition law is ultimately inseparable from the treaty in which it is embedded (whose character is revealed through the well-known canons of interpretation of the ECJ, including selectively applied teleology<sup>169</sup>). From the point of view of the ECJ, the objectives of the competition rules must be situated coherently within the objectives pursued by the treaty as a whole.<sup>170</sup> Therefore, even the designation “dynamic competitive process” is a

---

165. Eleanor Fox, *We Protect Competition, You Protect Competitors*, 26 WORLD COMPETITION 149, section III (2003). This is a recurring theme in Fox’s work. *See, e.g.*, Fox, *supra* note 130, at 86; Fox, *Linked-in*, *supra* note 49, at 153 (the European institutions protect “dynamic rivalry, market access, and the competitive structure of the market”).

166. In my view, one way to underline the difference in usage is to note that in the EU, the term “competitive process” is used when an authority seeks to intervene, whereas in the US the term is more often used to caution against false convictions in cases of aggressive market conduct. By way of digression, protecting the competitive process in the EU context must be reconciled with the prohibition of excessive prices under the EU case law, whereas even the highest monopoly prices cannot be touched by Section 2 of the Sherman Act outside the realm of *de facto* essential facility cases. *See, e.g.*, *Deutsche Telekom*, 2010 E.C.R. I-9555. Although it may not be immediately obvious how the excessive pricing offense can fit with the competitive process paradigm, one could say that an appropriate remedy in such a case under Article 102 TFEU is the dismantling of (artificial) entry barriers that enable the dominant firm to charge exorbitant prices. Such a remedy would then permit the competitive process to reassert itself.

167. *See* Monti, *supra* note 11, at 352-354 (discussing the ICN Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-created Monopolies of 2007, and noting the language difficulty).

168. My tentative use of the term “dynamic competitive process” is not to be confused with the identical term used by Blair in a different context. *See* Douglas Blair, *On Variable Majority Rule and Kramer’s Dynamic Competitive Process*, 46 REVIEW OF ECONOMIC STUDIES 667 (1979).

169. *See, e.g.*, JOXERRAMON BENGOTXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE* 233-270 (1993) (discussing the Court’s various interpretive techniques). The idea that the Court uses teleological reasoning selectively may arguably be supported by its recourse to literalism in some instances. *See id.* at 234-237. Many other studies are devoted to the styles of reasoning employed by the ECJ. *See, e.g.*, ANTHONY ARNULL, *THE EUROPEAN COURT OF JUSTICE*, 2<sup>ND</sup> EDITION, chapter 16 (2006).

170. *See, e.g.*, Lianos, *supra* note 125, at 2. For a recent statement of the systematic interpretation argument, particularly with reference to the post-Lisbon era, *see* Suzanne Kingston, *Competition and Environmental Protection: A Case of Ne’er the Twain Shall Meet?*, in EUROPEAN COMPETITION LAW ANNUAL 2012: COMPETITION, REGULATION AND PUBLIC POLICIES 113 (Philip Lowe & Mel Marquis eds., 2014). The significance of new or altered provisions in the Lisbon Treaty has been observed by other scholars as well. *See, e.g.*, Ioannis Lianos & Arianna Andreangeli, *The European Union: The Competition Law System and the*

simplification that should be used with caution. An alternative term that has been put forward aspirationally is “holistic” competition law.<sup>171</sup> This too calls for caution, as holism might be over-inclusive and could be turned into an epithet by critics quick to equate a complex goal structure with rule by expansive discretion, unpredictability, and errors in both directions, resulting in over-deterrence as well as under-deterrence.

### 3. *Competition between the American and European Approaches to Competition Law*

The U.S. model (emphasizing outcomes first and last) and the more complicated EU model (treating outcomes as important but giving process the final word) are rivalrous and ultimately, it would seem, irreconcilable<sup>172</sup>—even if in general they may converge on case results.<sup>173</sup> How have the two models fared? It may come as no surprise that the European Community/European Union model of competition law has enjoyed far more success on the “market” than has the U.S. model. Although further research should detail jurisdiction-by-jurisdiction why the “output” or “double helix” has not been more readily accepted in the majority of jurisdictions worldwide, the general reasons may be stated without difficulty. In the 1970s, when antitrust was transformed in the U.S., the few jurisdictions elsewhere with fully functional competition law systems

---

*Union’s Norms*, in THE DESIGN OF COMPETITION LAW INSTITUTIONS 384, 406-407 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013). For extensive critical discussion of the aims of competition law in the EU (using the U.S. as a comparative case), see BEN VAN ROMPUY, ECONOMIC EFFICIENCY: THE SOLE CONCERN OF MODERN ANTITRUST POLICY? NON-EFFICIENCY CONSIDERATIONS UNDER ARTICLE 101 TFEU (2012).

171. See Lianos, *supra* note 125, at 47-62.

172. Cf. Monti, *supra* note 11, at 353 (referring to a “fundamental schism” between “those who believe that one should merely protect the process and not consider the likely outcomes (on the basis that beneficial outcomes will result provided we ensure markets remain competitive) and those who think that absent proof of anticompetitive effects in terms of higher prices or reduced output, one is likely to over-enforce the law, reducing economic welfare” (footnote omitted)).

173. Notwithstanding the relevant differences, Monti warns against assuming that a welfare-driven approach and a European “traditionalist” approach will diverge on outcomes; such will be the case only on the margins. See generally Monti, *EU Competition Law from Rome to Lisbon—Social Market Economy*, in AIMS AND VALUES IN COMPETITION LAW 27, 45 (Caroline Heide-Jorgensen, Christian Bergqvist, Ulla Neergaard & Sune Troels Poulsen eds., 2013) (“Three beliefs underpin the traditionalist response: first, economic freedom is more important than efficiency; second, monopoly is less likely to yield economic benefit than competition; third, it is hard to predict all welfare effects. This is the essence of the difference, which will arise only rarely.” (footnote omitted) Monti’s example of where outcomes would diverge is a proposed “merger to monopoly” that would be efficient inasmuch as it would reduce the production costs of the merged entity, which then may or may not entail reduced prices for consumers. Clearly, “traditionalists” would decline to approve such a merger, whereas adherents of the efficiency paradigm would merely insist on rigorous evidence of the claimed efficiencies. This example highlights the fact that a *pure* efficiency approach, as opposed to a genuine consumer welfare approach, omits or at least yields to other policy domains the additional distributive question of whether consumers will truly benefit from the efficiencies gained as a result of the merger. The assumption, rather, is that society will be better off when such efficient elimination of rivalry is allowed.

(essentially, Germany and the European Economic Community<sup>174</sup>) already had intellectual foundations underpinning their competition law paradigm which precluded a reductionist output model. In the 1980s and especially the 1990s, when interest in competition law around the world began to surge, the countries adopting new competition laws—mostly developing countries—realized that their needs and background conditions were quite different from those of the U.S.<sup>175</sup> As Dan Crane suggests, for example, “many developing countries weren’t ready to adopt an antitrust policy that seemed designed to do very little.”<sup>176</sup> Crane adds that the EU “arguably filled the gap and became a much more important source of ideas for developing antitrust regimes like China, India, South Africa, and Brazil.”<sup>177</sup> Eleanor Fox—who was herself instrumental in the early development of the competition laws of certain developing countries such as

---

174. In Japan, the JFTC in the 1970s reasserted itself and began to make a rather dramatic impact (until competition policy faded again in the 1980s), but nevertheless it would be a stretch to characterize Japanese competition law even in the 1970s as fully functional. Marquis & Shiraishi, *supra* note 34. There were other competition law regimes in place in the 1970s, of course, but each was held back by a variety of factors such as faulty legislative drafting, institutional and political economy factors, overbroad exemptions and so on. For example, competition law enforcement in India under the Monopolies and Restrictive Trade Practices Act 1969 was notoriously weak. Another example is Australia, where, despite competition rules going back to 1906, enforcement under the amended Trade Practices Act 1974 did not gain strong momentum until the 1990s (largely by virtue of the recommendations in the 1993 Hilmer Report, *supra* note 161).

175. Sokol & Stephan, *supra* note 7, at 2.

176. Crane, *Interview with Eleanor Fox: Networking the world*, CONCURRENCES n° 4-2011, at 2. It is likely that Crane’s words, “designed to do very little,” are deliberately caricaturized in order to capture popular perceptions of the Chicago school that might color its image abroad. In the first place, it has been argued that Chicago’s normative edifice was not “designed” but was (re)constructed following successive analyses of antitrust-relevant business practices conducted by, above all, Aaron Director and his students and associates in the 1950s and 1960s. See Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PENN. L. REV. 925, 926 (1979); William Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1228 (1989). (That seems to be a valid argument as far as the grand Chicago syntheses of Posner and Bork are concerned: these were achieved in 1976 and 1978.) Second, the question of whether Chicago antitrust essentially prescribes agency inaction (outside of cartel enforcement) and presumptive case dismissal of private claims depends on which of its adherents is taken to be its spokesman: Posner, whom Crane calls a Chicago School centrist, has by no means pleaded for a hands-off antitrust policy. See Daniel Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1917-18 (2009) (enumerating fact patterns to which Posner has suggested antitrust liability rules are relevant).

177. Crane, *supra* note 176, at 2. Michal Gal and Jorge Padilla provide evidence of this in *The Follower Phenomenon: Implications for Design of Monopolization Rules in a Global Economy*, 76 ANTITRUST L. J. 899, 903, 920 (2010) (at least 43 jurisdictions have “copied” the EU’s prohibition on the abuse of dominance). Cf. Heimler & Mehta, *Monopolization in developing countries*, *supra* note 131 (noting the popularity among developing countries of an abuse of dominance provision that can be applied to excessive pricing scenarios, unlike Section 2 of the Sherman Act; but also highlighting that developing countries have followed the UNCTAD model law, which also covers compulsory contract terms that may directly or indirectly limit competitors). Of course, it is not taken for granted that the literal replication of a foreign provision of law such as Article 102 TFEU reliably indicates that its interpretation and enforcement will parallel or even compare with the emulated jurisdiction, not least because the institutions responsible for these tasks are different (*i.e.*, legislators are not normally charged with interpreting or applying the law). Nevertheless, the notable frequency of the “grafting” of the EU rule seems significant. In some cases, Article 102 may have been perceived as attractive on the strength of its own apparent merits and accepted spontaneously. In other areas, its acceptance likely reflects active promotion by the EU, including by way of bargaining and/or conditionality.



South Africa—shares Crane’s assessment: “The EU has a more copious view than the U.S. of harm to competition. It seeks to preserve competitive rivalry in concentrated markets and to safeguard openness and access (albeit sometimes without a sufficient rudder). Openness of markets is in the DNA of Europe. EU law is more sympathetic to economies that have suffered severe blockage of markets as a result of pervasive state ownership, privilege, cronyism, and discrimination.”<sup>178</sup> Of course, the U.S. has not failed in all respects when promoting competition policy ideas. The use of leniency programs by competition agencies worldwide in their efforts to detect cartels, and the punishment of cartels by sanctions of “felony” rather than “misdemeanor” intensity, seem to be quite successful U.S. exports,<sup>179</sup> even though the criminal law gambit for cartel conduct remains immature or embryonic in most “importing” jurisdictions due to institutional impediments and/or reasons of culture.<sup>180</sup> Another idea that the U.S. has pushed with some success (in Europe and elsewhere) is that, as alluded to above, outside of hard core categories of

---

178. Crane, *supra* note 176, at 3. With regard to the way U.S. antitrust is perceived from the outside, see GERBER, *supra* note 4, at 204 (“US experience has long been at the center of the competition law story, but the path of US antitrust law development and the set of issues included within it appear narrow from a global perspective. In comparison with European experience and issues, they often have limited relevance to decision makers in other countries and to the issues of global competition law development that many others consider important.”). Further discussion is provided in *id.* at 160-161 (pointing to factors that make the EU experience resonate more with numerous other jurisdictions, including, for example: the history of state ownership and privilege mentioned by Fox; the use of competition law to oppose excessive economic power; Europe’s civil law tradition and its clearer dividing line between public and private law institutions; and the role competition law has played in Europe’s process of political and economic integration).

179. It has been explained that beginning in the 1990s and roughly through 2001, while the U.S. succeeded in stirring up worldwide interest in the fight against cartels and secured at the OECD a 1998 Council Recommendation against “hard core” cartels, the substantive areas to which the European Community had been seeking to draw attention—abuse of dominance and vertical restraints—faded into the background. See Fox, *Linked-In*, *supra* note 49, at 156-157. In footnote 17 of her article, Fox describes this turn of events as a U.S. “victory.” If this process is seen as a global struggle, one might also say that it reflected externally Europe’s introspective modernization experience in the 1990s. That is to say, seeds had already been sown which eventually led the European Commission to reassess priorities internally and to devote far more attention to hard core cartels than to vertical restraints. Arguably, this means that the victory dynamic to which Fox refers partly manifested itself earlier, not so much in the global antitrust discourse but in complex diffusion elements that more directly concerned the interplay between U.S. and EEC/EC antitrust (which cannot be explained adequately in the context of this essay). The story with regard to abuse of dominance problems is somewhat more complicated, and this is where the victory is arguably most apparent, as non-interventionism in this regard probably did not reflect the preferences of the EC/EU even taking account of its internal evolution and investigations.

180. See Harry First, *Your Money and Your Life: The Export of U.S. Antitrust Remedies*, in COMPETITION LAW AND DEVELOPMENT 167 (D. Daniel Sokol et al. eds., 2013) (discussing institutional variations in criminal penalties in a sample of 13 jurisdictions and noting that, with exceptions, few price fixers really go to jail outside the U.S.); Donald Baker, *Trying to Use Criminal Law and Incarceration to Punish Participants and Deter Cartels Raises Some Broad Political and Social Questions in Europe*, in EUROPEAN COMPETITION LAW ANNUAL 2011: INTEGRATING PUBLIC AND PRIVATE ENFORCEMENT OF COMPETITION LAW—IMPLICATIONS FOR COURTS AND AGENCIES 41 (Philip Lowe & Mel Marquis eds., 2014) (questioning the cultural ripeness of criminal sanctions in the European context and suggesting a variety of alternative administrative tools that could be used as substitutes to achieve deterrence objectives).

irredeemable conduct—horizontal price fixing, market sharing, bidrigging and the like—competition problems should be resolved only after an assessment of their competitive effects has been conducted.<sup>181</sup> Nevertheless, by and large the picture presented by Crane and Fox rings true: the EU-oriented ideas of open market maintenance and faith in prophylactic market intervention by public institutions have been broadly accepted worldwide; the Chicago model has in general been studied more for its pitfalls than for its accuracy and appropriateness. Lest we leave the impression that the EU paradigm is a universally irresistible model, however, it may be added that many developing countries are searching for a competition policy that goes beyond that of the EU. The overriding imperative for these countries is economic development. Competition law is often seen as a tool of development policy insofar as having such a law in place can support growth,<sup>182</sup> and of wealth redistribution insofar as it can ameliorate inequitable wealth transfers and distortions associated with

---

181. This idea was actively promoted to undercut a tradition of competition law enforcement in the European (Economic) Community whereby many competition problems could be solved on the basis of categorical reasoning. For example, it was often assumed by EEC/EC enforcers that if restrictions in a vertical agreement were designed to provide territorial protection for a distributor, the agreement was *ipso facto* inimical to the ideal of market integration, and fell necessarily to be condemned irrespective of possible countervailing effects—an insufficiently nuanced view. In the field of unilateral conduct by a firm with a dominant market position, it was traditionally believed (and may still be believed by the EU Courts—a matter to be revealed when a pending controversy reaches final judgment) that conditional sales discounts that create fidelity on the part of customers were *ipso facto* inimical to the “competitive process,” and that there was no need to delve further into the presence/absence of anticompetitive distortions or efficiency effects. Fox & Crane, *supra* note 178.

182. It seems clear that a functioning competition law regime is not, strictly speaking and all else equal, a necessary condition for economic growth. See, e.g., Thomas Ulen, *The Uneasy Case for Competition Law and Regulation as Decisive Factors in Development: Some Lessons for China*, in COMPETITION POLICY AND REGULATION: RECENT DEVELOPMENTS IN CHINA, THE US AND EUROPE 13 (Michael Faure & Xinzhu Zhang eds., 2011); Aditya Bhattacharjee, *Who Needs Antitrust? Or, is Developing-Country Antitrust Different? A Historical-Comparative Analysis*, in COMPETITION LAW AND DEVELOPMENT 52, 58-59 (D. Daniel Sokol et al. eds., 2013). (The possibility of growth absent effective competition law, at least where conditions are ripe, is not confined to Asia. To cite just two examples: the U.S. economy grew at a rate of around 7% from 1869 to 1879; and the Italian economy grew at rates of 6% to 8% between the late 1950s and the late 1960s, thus ramping up essentially before the EEC competition law system could even partially compensate for the lack of a genuine Italian competition law.) Nevertheless, several studies have indicated a positive correlation between effective enforcement of competition laws in developing countries and increased economic growth. See, e.g., John Preston, *Investment Climate Reform Competition Policy and Economic Development: Some Country Experiences*, Case Study Commissioned for the U.K. Dept. of Int’l Dev. (2003), available at [http://siteresources.worldbank.org/INTWDRS/Resources/477365-1327693758977/8397896-1327771331430/dfid\\_preston\\_10.pdf](http://siteresources.worldbank.org/INTWDRS/Resources/477365-1327693758977/8397896-1327771331430/dfid_preston_10.pdf) (noting the need for more country-specific analysis); Fox & Gal, *supra* note 12, at 2-3, with references. And empirical research seems to confirm that sectors marked by competitive pressures tend to exhibit greater relative productivity. See e.g., Mateus, *supra* note 31, at 117-118, with references. It may therefore be unsurprising that, when other growth models, such as Chalmers Johnson’s “developmental state” model, reach a point of exhaustion and diminishing returns, a government may consider a stronger commitment to competition, and a corresponding shift away from excessive intervention or discriminatory industrial policy, as essential factors contributing to productivity and growth or at least buffering against the possibility of worse conditions. Cf. Marquis & Shiraishi, *supra* note 34. In this sense, discussions of whether a functioning competition law regime is a necessary condition of growth should consider the prospects of *sustained* growth and should take account of a country’s medium-term and long-term economic evolution.

(possibly state-supported) market power.<sup>183</sup> The question of how to integrate development and social inclusion objectives (which may be commingled with cultural specificities as well) within a competition law framework is thus in many parts of the world an issue of immediacy and prime importance.<sup>184</sup>

#### 4. *Widening of the Geographic Field and of the Competitive Parameters*

The implicit contest between U.S.-born and E.U.-born ideas does not exhaust the competitive field in this context. The impulse to develop and advocate competition-related ideas and concepts is also felt in other discrete jurisdictions. Examples of such jurisdictions can be mentioned only briefly here, but one of them is the United Kingdom.<sup>185</sup> The now-retired Office of Fair Trading (OFT) for many years sought to provide intellectual leadership via its unusually prolific publication of studies, surveys and introspective initiatives on a variety of subjects.<sup>186</sup> The OFT's efforts had a persuasive impact in foreign quarters,<sup>187</sup> and

---

183. One notable version of this perspective is that (notwithstanding the caveat of the previous footnote) effective competition law promotes functional markets, and well-functioning markets are essential to developing countries because of their intertwined instrumental and ethical characteristics. Markets produce wealth necessary for economic development and for the protection of human rights, each of which are necessary conditions for self-actualization and socioeconomic mobility; and they constitute (on both the supply and demand side) a social institution wherein, provided the possibility of participation is assured, personal freedom can flourish. See AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985) (discussing opportunities (capabilities) as an alternative measure of well-being); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 4-6 (1999) (also cited in several recent studies such as: Robert D. Anderson & Anna Caroline Müller, *Competition and Poverty Reduction: A Holistic Approach*, WTO Staff Working Paper ERSD-2013-02 (Feb. 20, 2013), available at [http://www.wto.org/english/res\\_e/reser\\_e/ersd201302\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201302_e.pdf)); Bhattacharjea, *supra* note 182, at 63; D. Daniel Sokol, Thomas Cheng and Ioannis Lianos, *Introduction*, in *COMPETITION LAW AND DEVELOPMENT* 1, 5 (D. Daniel Sokol et al. eds., 2013). As the latter authors state: "If one were to subscribe to the freedom-based approach to economic development [. . .], one might need to incorporate in competition law analysis special considerations about the impact of competitive behavior on the poor's access to education, health care, and other essentials in life." *Id.* This could be done, perhaps controversially, at a micro level in individual cases, but at a minimum and more importantly it could be done as a matter of policy planning, prioritization, advocacy and joint international efforts. See also Anderson and Müller, *supra*; Bhattacharjea, *supra* note 182, at 62-65; Zsofia Tari & Jeremy West, *Background Note*, in *ORG. FOR ECON. CO-OPERATION & DEV., COMPETITION AND POVERTY REDUCTION* 1, DAF/COMP/GF(2013)1 (2013)). In any case, once again, a long-term and optimistic perspective would suggest that the role of equity-based redistributive concepts incorporated within competition policy as a means to address extreme socioeconomic inequality (and hence extreme political inequality) can be re-evaluated at a later point in time—particularly as applied, if at all, at the micro level—if a developing country "graduates" to middle income status with tolerable levels of wealth distribution and mobility.

184. See Mor Bakhoun, *A Dual Language in Modern Competition Law? "Efficiency Approach" versus "Development Approach" and Implications for Developing Countries*, 34 *WORLD COMPETITION* 495 (2011) (advocating a hybrid concept of "efficient development"); see also Dina Waked, *Competition Law in the Developing World: The Why and How of Adoption and its Implications for International Competition Law*, 1 *GLOBAL ANTITRUST REV.* 69, 82-84 (2008).

185. See, e.g., William Kovacic, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2<sup>ND</sup> CENTURY—THE CONTINUING PURSUIT OF BETTER PRACTICES* (2009), available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf).

186. One may just cite here a small sample of these internally and externally prepared studies, with the following titles: *The Impact of Reverse-Fixed Payments on Competition*; *The Economics of Secondary Product*

were likely intended, in part, to have that effect. It will not be surprising if the new Competition and Markets Authority follows this pattern. Another example of a competition authority staking a claim for itself by providing intellectual leadership and thereby “punching above its weight,” to use this phrase again, is the Swedish Competition Authority (*i.e.*, the Konkurrensverket). For the last decade the Swedish authority has been hosting annual conferences with noted experts (“the pros and cons of X practice”) and publishing the proceedings.<sup>188</sup>

In a different vein but still in relation to the power of ideas, and with a clear connection to the contrasting “systems of belief” marking U.S. antitrust and EU competition law, one may also refer to the alternative conceptions and objectives of the defense of competition in jurisdictions worldwide. A notable example in this regard is South Africa, where the idea of competition law cannot be confined exclusively to concepts such as economic efficiency, well-functioning markets, or the freedom to compete, among others.<sup>189</sup> In South Africa antitrust has been partly conceived of as contributing to a post-Apartheid form of economic democratization, to borrow a phrase normally used in discussions of certain Asian countries.<sup>190</sup> Concerns relating to employment impacts, Black Economic Empowerment, and more generally protection of the public interest partly define its distinctive “goal structure,”<sup>191</sup> and understandably so. Apart from the terms of the law, the decision-making of the South African Competition Tribunal has been praised for being “specifically tailored to the goal of inclusive development.”<sup>192</sup> In short, and although the appellate courts have occasionally rejected the

---

Markets; Competition and Growth; Consumer Behavioural Biases in Competition; The Competition Impact of Environmental Product Standards; The Competitive Effects of Buyer Groups. *See id.* at 79-80.

187. For example, the OFT’s work on prioritization of agency activities and the resulting report issued in 2008 attracted the interest of the U.S. Federal Trade Commission. *See id.* at 88-89, 116 (reviewing the approaches of several other authorities as well; it is not suggested here that the OFT was uniquely influential).

188. Since 2002, the Konkurrensverket has hosted *Pros and Cons* conferences covering a variety of competition-related subjects including consumer protection, standard setting, vertical restraints, high prices, low prices, information sharing, the pros and cons of merger control, and more pros and cons of merger control. *See* Arvid Fredenberg, *Ten Years of Pros and Cons Conferences*, CPI ANTITRUST CHRONICLE (August 2012 (1)).

189. *See, e.g.*, Bakhoun, *supra* note 184 at 495.

190. The South African version of economic democratization is described in part by Lewis, *supra* note 29, at 233 (Robust antitrust was to be an instrument “whereby the economic kingdom would be conquered by the post-apartheid rulers. . . . [C]oncentrated markets and centralized ownership structures, and the powerful interest groups that they supported, were going to be fragmented.”). A Kenyan perspective on the idea of economic democracy to parallel political democracy is referenced in the speech of Uhuru Kenyatta. Kenyatta, *supra* note 56.

191. *See, e.g.*, Trudi Hartzenberg, *Competition Policy and Enterprise Development: the Role of Public Interests in South Africa’s Competition Policy*, in COMPETITIVE ADVANTAGES AND COMPETITION POLICY IN DEVELOPING COUNTRIES 136 (Paul Cook, Raul Fabella & Cassey Lee eds., 2007) (discussing the public interest objectives in the South African context). The reference in the main text to “goal structures” is borrowed from David Gerber, *The Future of Article 82: Dissecting the Conflict*, in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC 37, 110 (Philip Lowe & Mel Marquis eds., 2008).

192. Fox, *supra* note 12, at 284. Moreover, competition law has been used in South Africa (by the Competition Commission) to remedy what may also have been a failure of public health policy, in particular in the context of the pharmaceutical sector and medicines for HIV patients. *See* Monti, *supra* note 11, at 364.

purposive statutory interpretations of the Tribunal,<sup>193</sup> South Africa has produced a novel, culturally attuned philosophy of competition law.<sup>194</sup> The model may not travel well to other social settings that lack a history or present reality of extreme economic inequality and/or caste-like social strata analogous to those that have afflicted South Africa. Yet the idea that competition policy can be a tool to destabilize entrenched social structures, promote socioeconomic mobility and alleviate poverty may resonate in a large number of countries.<sup>195</sup> David Lewis argues, moreover, that a competition authority can be well-positioned to balance between competition issues, such as market power and efficiency, and seemingly incommensurable public interest issues such as employment impacts and small business concerns.<sup>196</sup> If a country follows in the footsteps of the South African legislator and competition authorities, it should however also plan for the accumulation of the necessary political capital and coalition partners, and ensure that it has the necessary legal mechanisms, to add to its portfolio the contestation and dismantling of unjustified state-imposed restrictions of competition.<sup>197</sup> Further, the authority entrusted to balance competition and non-competition

---

193. See Janice Bleazard, *Pigeon-Holed by Precedent: Form Versus Substance in the Application of South African Competition Law*, in BUILDING NEW COMPETITION REGIMES 81 (David Lewis ed., 2013).

194. See Dennis Davis & Lara Granville, *South Africa: The Competition Law System and the Country's Norms*, in DESIGN OF COMPETITION LAW INSTITUTIONS 266 (Eleanor Fox & Michael Trebilcock eds., 2013) (providing a fuller picture of competition law in South Africa and of the problems facing it).

195. The links between competition policy on the one hand and poverty reduction, inclusiveness and mobility on the other have stirred great interest. For example, the African Competition Forum states that its principal objective is “to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries, in order to alleviate poverty and enhance inclusive economic growth, development and consumer welfare by fostering competition in markets, and thereby increasing investment, productivity, innovation and entrepreneurship.” Press Release, African Competition Forum, African Competition Forum launched in Nairobi (Mar. 8, 2011). According to researchers at the OECD, the links between competition policy and poverty, and the possible ameliorative effects of competition policy, require further empirical research; in the meantime, competition authorities should prioritize their work taking into account impact on the poor (e.g., by focusing on essential goods and services, banking and communications), and they should actively engage in advocacy to encourage market-based policies and to counter-balance vested interests. See Tari and West, *supra* note 183; See also Anderson and Müller, *supra* note 183.

196. See David Lewis, Contribution to the Global Forum on Competition (Competition and Poverty Reduction), DAF/COMP/GF(2013)3 (2013) at 7-11, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2013\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2013)3&docLanguage=En). In the context of the EU, the European Commission sometimes acts, theoretically under the control of the EU Courts, as mediator of a range of interests unconfined to competition concerns strictly defined. See Monti, *supra* note 21, at 15-16 (citing Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POLITICS 103 (2001) (defining Commission as a “trustee” rather than merely an agent, and as a part owner of the policies for which it is responsible). With specific regard to Article 101(3) TFEU, whose breadth continues to provoke debate, the Commission’s role as mediator of interests raises questions as to how to define the role national courts and agencies ought to play when applying that provision (or when applying EU competition law generally). Different solutions could have different consequences for the principle of the uniform application of EU law. See WHISH & BAILEY, *supra* note 136, at 159-160 (presenting, briefly, this set of dilemmas).

197. See Lewis, *supra* note 29.

concerns should be prepared for the possibility that such a mandate might attract *ad hoc* attempts by government officials to influence that balance.<sup>198</sup>

As yet another example in the context of alternative visions of competition policy goals one may also mention China. In the People's Republic, competition law is now presented as an integral part of the socialist market economy and serves, in tandem with (albeit in conflict with) industrial policy as an instrument of State-led capitalism.<sup>199</sup> China's competition law framework (which must be considered together with the country's institutional features, including a highly specific judiciary<sup>200</sup>) has borrowed some genetic materials from the EU model but it is in its present state a far cry from its cousin and bears only a slight resemblance. Chinese competition law presents yet another model from which to "choose"—potentially a rather appealing one for countries not ready to cut their economies free from the umbilical cord of the State—or for countries with changing preferences wishing to restore a close connection that has been lost.

#### IV. CONCLUSION

This article emerges from preparations for a workshop focusing on the transnational circulation of policy paradigms wherein the case study chosen was the field of competition law. The argument presented in the foregoing text is that policy paradigms in this context are actively pushed and pulled according to forces analogous to those of the market, and that policy entrepreneurs (typically competition law agencies) operate in a setting where—notwithstanding various cooperative platforms—competition and rivalry occur and manifest themselves along a number of dimensions. An important premise of the article is thus the notion advanced by other scholars that competition enforcers across jurisdictions compete among themselves on a global market. Building on that premise, an attempt has been made to elaborate on certain arenas or "modes" through which such competitive behavior is pursued. With the multiplication of antitrust jurisdictions around the world, which may act simultaneously as both "sellers" and "buyers," new competitive opportunities may likewise emerge. While the article has not dwelled upon the normative desirability of global "yardstick" competition among rival agencies, the alternative would promise little if any

---

198. See *id.* at 243 (describing intrusions by a senior official of the South African Department of Trade and Industry).

199. See e.g., Mel Marquis, *Abuse of Administrative Power to Restrict Competition in China: Four Reflections, Two Ideas and a Thought*, in THE CHINESE ANTI-MONOPOLY LAW 73, 87-88 (Michael Faure & Xinzhu Zhang eds., 2013) (discussing the concept of the socialist market economy).

200. Recently and encouragingly, some efforts have been made at the level of the central government to rein in the habitual interference with the judicial process by local officials. See e.g., Keith Zhai, *Courts See Less Cadre Meddling in Judgments*, SOUTH CHINA MORNING POST, December 13, 2013, at A6. However, judicial independence in China is bound to remain merely relative in nature. There is little doubt that the judicial process will remain subject to intervention in politically sensitive disputes, whether the intervention is surreptitious and unapproved by the political hierarchy or whether it is done by order from above.

dynamism, adaptability or motivation for innovation and agency self-improvement.