The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses

Lucio Lanucara
Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the Antitrust and Trade Regulation Commons, and the International Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ijgls/vol9/iss2/4

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Global Legal Studies by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses

LUCIO LANUCARA *

INTRODUCTION

In the age of the global village, economic fluctuations are increasingly reaching beyond national borders, and so too is antitrust sensitive conduct by multinational and transnational entities. In the last two decades, this has caused increasing pressure on the limited resources of enforcement agencies, and has made the unilateral exercise of sovereignty an inadequate means of policing competition while avoiding trade wars and diplomatic friction.

Responses to the unresolved antitrust enforcement issues resulting from globalization have developed on different governance and legal levels. A conflict has developed between bilateral and multilateral approaches to international antitrust enforcement, with antagonism both between and within countries. A greater degree of convergence has emerged only with the new millennium.

The United States and European Union (EU) models of antitrust law contend with each other for dominance in the global arena. The United States and the EU also spread their models in other jurisdictions through bilateral and multilateral approaches to enforcement issues. The flourishing of bilateral cooperation between antitrust agencies and the increased attention to government-led multilateral approaches also highlight conflicts between different modes of exercising sovereignty. How the increasing economic pressure for satisfactory international solutions and the resulting governance and legal issues combine will determine the shape of international antitrust enforcement in the future.

In this paper, I will discuss the domestic reorganization of relationships between central governments and autonomous enforcement authorities. Next, I

* Freshfields Bruckhaus Deringer, Brussels. LL.M., Indiana University School of Law, Bloomington (1999); Postgraduate Degree (Specializzazione) in European Law and Economics, University of Rome La Sapienza (1998); J.D., University of Rome La Sapienza (1995). I wish to thank Professor David P. Fidler, Indiana University School of Law—Bloomington, for his invaluable advice and support for the drafting of this paper. E-mail: lucio.lanucara@freshfields.com.
will outline the increasingly sophisticated degree of transgovernmental cooperation that has resulted from the globalization of economies. I will then analyze outstanding political issues related to international antitrust enforcement. I will conclude by considering the proposal for a multilateral agreement from the World Trade Organization (WTO), the most promising development in recent years for a multilateral approach to international antitrust enforcement.

In order to reach these goals I will first describe, in Section I, the historical and juridical background of antitrust transgovernmental cooperation. In subsection I.a, I will consider the economic and political problems that have brought most developed nation states to gradually embrace a transgovernmental approach to certain antitrust issues. In subsections I.b and I.c, I will describe the consequent spread of bilateral cooperation agreements and the initial failures of multilateral approaches.

Section II will consist of a description of international antitrust enforcement in light of recent developments in the modes of sovereignty exercised by states. After describing general trends in the exercise of sovereignty in subsection II.a, I will consider in subsection II.b the domestic exercise of antitrust authority, trans-governmental cooperation and the discussion within the WTO in light of the tension between centralization and decentralized enforcement.

Section III will include a closer analysis of the domestic and international political struggles influencing bilateral and multilateral approaches to international antitrust enforcement. From the domestic point of view, I will consider how the tension between the centralized and decentralized exercise of sovereignty can produce inconsistent positions. From the international point of view, I will analyze the rivalry between the U.S. and the EU antitrust models for global dominance.

In Section IV, I will conclude by considering the merits of the proposal for a multilateral agreement from the WTO, as recently discussed at the WTO Ministerial Conference in Doha.
I. HISTORICAL INTRODUCTION TO THE VARIOUS APPROACHES TO INTERNATIONAL ANTITRUST ENFORCEMENT

A. Development of Unilateral Approaches to International Antitrust Enforcement

Until the 1980s, antitrust enforcement was perceived as an almost exclusively domestic issue. For many years, the United States was the only country with antitrust legislation and specialized authorities enforcing it. Emerging from the Second World War, Germany and Japan were forced to adopt antitrust legislation. The winning alliance found it necessary to disaggregate the concentration of economic powers that had supported extremist nationalism in these two countries, leading to war. It was not until 1957 that a general competition system was introduced in Europe, with the Treaty of Rome instituting the European Economic Community (EEC). While EEC antitrust legislation was inspired by the American experience, the main rationale for the adoption of competition rules was to favor integration and harmonized development within the Common Market. Therefore, for a long time the focus of European antitrust was not on external issues, but rather on supporting the architecture of the Treaty of Rome.

As for the United States, the rare cases of antitrust issues trespassing across national borders were dealt with by relying on the extraterritorial reach of domestic legislation. The basis for such extraterritorial reach of U.S. law is reflected in section 402 of the Restatement (Third) of Foreign Relations Law, which applies the effects principle by including among the activities over which a state has jurisdiction to prescribe "conduct outside its territory that has or is intended to have substantial effect within its territory."
However infrequent, the extraterritorial exercise of sovereignty by U.S. authorities, sanctioned by U.S. courts, was met by resistance from European partners, especially France and the United Kingdom (U.K.). This resulted initially in diplomatic protests and eventually in the adoption of blocking statutes, the most relevant being the U.K. Protection of Trading Interests Act 1980, and in counteraction by foreign courts. Eventually, the growing pressure exercised by diplomatic protests and the counter effects of blocking statutes and foreign court action made a response necessary. Thus, the U.S. courts, in the 1970s, began limiting the scope of extraterritorial application of U.S. antitrust law through the consideration of “comity” factors.

During this time, third world countries lamenting unfair exploitation from multinational companies and Western governments raised the international relevance of anticompetitive practices. However, the lack of consensus even on the definition of antitrust issues and the political weakness of third world countries did not allow the adoption of any effective measures.

During the 1980s, European economies underwent consolidation through the implementation of the Common Market. This created the means for the extraterritorial extension of European antitrust enforcement through 1) the adoption of the Merger Regulation (Council Regulation 4064/89), and 2) the


6. Comity, in the field of international law, can be defined as a general principle “aiming at balancing the exercise of extraterritorial jurisdiction with a readiness on behalf of the country enforcing its competition laws to take into account the important interests of another country.” Georgios Kiriazis, Positive Comity in EU/US Cooperation in Competition Matters, COMPETITION POL’Y NEWSL. (No. 3), Oct. 1998, at 11. Section 403 of Restatement of Foreign Relations Law states, “[e]ven when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403.


8. Council Regulation 4064/89, 1989 O.J. (L 395) 1; Corrigendum, 1990 O.J. (L 257) 13. The extraterritorial reach of the Merger Regulation showed its full potentials in the review by the Commission over the Boeing/McDonnell Douglass merger, with Boeing being forced to pervasive undertakings to clear the concentration.
development of extra-jurisdictional anticartel enforcement by the European Court of Justice.\(^9\)

The Merger Regulation contemplated for the Commission an analysis based on the effects of a concentration within the Community, independently of the location of the seat of the companies concerned. The extraterritorial reach of the Merger Regulation has been aggressively implemented by the Commission, leading to denial of clearance in some cases of great international relevance, such as Gencor (in 1996, confirmed by the Court of First Instance in 1999),\(^10\) MCI WorldCom/Sprint (in 2000),\(^11\) and GE-Honeywell (in 2001).\(^12\)

As for anti-cartel enforcement, jurisdiction over international cartels was clearly established in Woodpulp,\(^13\) in which the European Court of Justice held that jurisdiction under Article 85 [now article 81] exists over non-European firms outside the European Community if they implement an anticompetitive agreement reached outside the European Community by selling their products to purchasers inside the European Community. The Commission had found in that case that various Scandinavian bleached sulfate woodpulp producers had engaged in a cartel sale of their products in the European Community. Shipments to the European Community effected by the cartel amounted to two-thirds of total shipment of the product to the European Community and sixty percent of EC consumption. The case, based on an "implementation doctrine," rather than on an "effects doctrine," left doubts as to whether—absent any marketing organization within the EC—foreign cartels selling directly to EC customers would fall within EC jurisdiction.\(^14\) However, the applicability of a

---

9. This possibility was first developed with the decision by the European Court of Justice (ECJ) in 1988 in the Woodpulp case. Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, Ahlström Osakeyhtiö & Others v. Commission, 1988 E.C.R. 5193 [hereinafter Woodpulp].


13. Woodpulp, supra, note 9. Before Woodpulp, a first step toward application of European competition law to international cartels had been set with the adoption of the "group economic unit" doctrine, in Case 48/69, Imperial Chemical Industries Ltd. v. Commission, 1972 E.C.R. 619, where it was decided that the conduct of a subsidiary active in the EC is attributed for antitrust purposes to the parent company seated outside the EC but exercising its corporate control on the subsidiary.

pure "effects doctrine" to cartel cases under EU law has recently been affirmed by the EU Court of First Instance in the Gencor case.\textsuperscript{15} The Court, while upholding application of the "implementation doctrine" by the Commission under the Merger Regulation, also specified that "According to Woodpulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant."\textsuperscript{16}

B. Reasons for the Increasing Importance of International Antitrust Enforcement

During the last twenty years, international antitrust enforcement has become a more important element in the efficient policing of markets and international trade. Three factors have been particularly important: the globalization of economies, the proliferation of new antitrust legislation, and the liberalization of trade.

Globalization has been defined in many ways. Most scholars agree that it is characterized by an economic process that increasingly made action by single states insufficient to address development of economies. This process grew rapidly during the 1980s and dominated the international scene by the 1990s.\textsuperscript{17} This resulted in an increase in the number and dimension of transnational practices by multinational corporations, making the limitations of traditional approaches more evident.\textsuperscript{18} The proliferation of antitrust legislation has increased the probability that the practices of major corporations will fall under

---

\textsuperscript{15} Gencor, supra note 10.

\textsuperscript{16} Id., at para. 87.

\textsuperscript{17} Globalization causes severe tensions to traditional nation states. Mainly, it has caused upward pressures toward macro-markets and downward pressure toward micro-ethnicity. Technology is the dominant factor in this process, as it determined deeper interdependence between countries and a dramatic growth of international operations by large corporations. See P. S. Mistry, REGIONAL INTEGRATION ARRANGEMENTS IN ECONOMIC DEVELOPMENT—PANACEA OR PITFALL? 12 (1996); "Who Is Us?"—National Interest in an Age of Global Industry: Hearings Before the Joint Economic Committee, 101st Cong. 72-85 (1990) (statement of Gerald P. Dinneen, Foreign Secretary, National Academy of Engineering).

\textsuperscript{18} As recently noticed in A. Douglas Melamed, International Antitrust in an Age of International Deregulation, 6 GEO. MASON L. REV. 437, 438 (1998), while economies have become global, the same has not been possible for the states. Thus, neither a binding international antitrust code or an international set of jurisdictional and procedural rules have been developed. The only means to address antitrust issues internationally, according to Mr. Melamed, remain either unilateral approaches or bilateral agreements of voluntary cooperation.
the scrutiny of several antitrust authorities. The possibility of conflicting decisions and of greater costs for both corporations and public authorities is therefore on the rise. The development and liberalization of international trade achieved by lowering tariffs and prohibiting other means of excluding foreign competitors has greatly increased the relevance of international activities. Finally, the adoption of regional trade agreements (RTAs) has further encouraged transnational transactions.

As a result of these developments, many transactions and mergers have a substantial transnational effect even when they are conducted by subjects whose seat is in a single market. Such activities could become objects of scrutiny by two or more competition authorities. The multiple and possibly contrasting reviews by antitrust authorities, the impracticality of purely unilateral approaches, and the limitation on international trade caused by distorted applications of antitrust principles have caused a shift in interest in the domains of antitrust enforcement.

19. This problem is particularly evident for merger control cases, as several authorities need to be notified for even minor operations. For instance, in my practice at Freshfields Bruckhaus Deringer, I recently dealt with an acquisition, in a side market to mobile telecommunications services. The transaction required, for an acquired activity with a worldwide turnover of less than $50 million, notifications to the antitrust authorities of the United States, Brazil, Italy, Germany, and Greece. For larger transactions, dozens of antitrust authorities might have jurisdiction.


21. The level of tariffs, after diminishing from an average of 52% in 1934 to an average of 12.8% in 1952, continued diminishing in the following rounds of negotiations. In the Uruguay Rounds, tariffs diminished by a further 38% in developed countries and 24% in developing countries. Moreover, GATT tariff agreements presently cover 98% of goods in developed countries.

22. NAFTA in North America and Mercosur in South America are the most successful recent RTAs. However, since the early 1990s, the spur of RTAs have been robust, with 33 RTAs created in the period 1990-1994. See Jeffrey A. Frankel, REGIONAL TRADING BLOCKS IN THE WORLD ECONOMIC SYSTEM 4 (Inst. for Int'l Econ. 1997). According to informal WTO sources, 50 more RTAs have been sent to the GATT/WTO as of August 1998. Most of those agreements, unlike the RTAs adopted in the early independence of the former European colonies, are based on development of trade, efficiency, and foreign investment and normally are part of strategies of trade liberalization from individual countries. Therefore, they contribute to the increase of transnational commercial operations. See A. S. Bhalla & P. Bhalla, REGIONAL BLOCKS 17 (1997).
toward bilateral and multilateral approaches to international antitrust issues. A strictly unilateral approach is neither economically or politically viable in the present political, economic, and social environment.

C. Alternatives to the Unilateral Approach to International Antitrust Enforcement

The above-described conditions made it necessary to limit friction over extraterritoriality issues and to improve efficient and timely international enforcement of antitrust laws. This situation favored the adoption of bilateral cooperation agreements in the 1980s and 1990s. While a cooperation agreement between the United States and Germany was entered into as early as 1976, new arrangements were added with the U.S.-Australia agreement of 1982, the U.S.-Canada agreements of 1984, and the Australia-New Zealand Closer Economic Relations Agreement of 1983.

During the 1990s, international approaches to antitrust intensified and developed in two directions: the bilateral and the multilateral approach. The bilateral approach was strengthened with the adoption of new agreements, beginning with the EU-U.S. agreement of 1991. The latter inspired the agreements between the United States and Canada (1995), the United States and Australia (1997), The European Union and the United States (1998, adopting positive comity), the United States and Israel (1999), EU and Canada (1999), the United States and Japan (1999), the United States and Brazil (1999), and the United States and Mexico (2000). In 2001, Denmark, Iceland, and Norway also entered into an antitrust cooperation agreement.

The main items that characterize the recent wave of antitrust cooperation agreements are consultation and cooperation, the exchange of nonconfidential information, traditional comity, and positive comity. The procedures and

23. The adoption of such an early agreement should be linked to the effort, after the Second World War, to induce adoption of antitrust principles in Germany as a measure to prevent the recurrence of the powerful cartels that supported the militarisation of Germany in the first half of the century.


content for cooperation and consultation have been clearly defined since the 1991 EU-U.S. agreement, while rules for the exchange of non-confidential information were introduced in the 1976 U.S.-Germany agreement. While traditional comity developed in other areas of law as well, the most distinctive feature of recent antitrust cooperation agreements is positive comity, which was first introduced in the 1991 EU-U.S. agreement. Positive comity allows one party to require the other party to take action against behaviors enacted in the territory of the requested party that violate the important interests of the requesting country, as well as the competition law of the requested party.

While bilateral cooperation flourished, few or no results were achieved by multilateral approaches to antitrust law enforcement. The interaction between trade and antitrust has been an object of study and research by the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Economic Cooperation and Development (OECD) since the late 1970s. In 1980, UNCTAD, after lengthy negotiations between developed and developing countries, approved a Code of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. However, the Code, for various political reasons and because it is a nonbinding recommendation, had no relevant impact on the development of antitrust laws and policies for many years.

27. Consultation and cooperation are at the core of the agreements. Since the EU-U.S. agreement of 1991, it has clearly defined in regard to notification, exchange of information, and actual enforcement activities. Today, it is widely recognized that cooperation fostered by the existing bilateral agreements has produced positive results.

28. Since the 1976 U.S.-Germany Agreement, exchange of general information has always been present in cooperation agreement. All agreements routinely include annual or biannual informative meetings.

29. Traditional comity procedures requested the authorities of one party to take into account the important interests of the other party when exercising their jurisdiction. This practice, after having developed in various areas of law, particularly in common law countries, has been considerably limited by the decision of the U.S. Supreme Court in Hartford Fire v. California, 509 U.S. 764 (1993), that established very strict boundaries for the application of comity principles in the United States. For a detailed discussion of the environment determined by this decision, see Spencer Weber Waller, From the Ashes of Hartford Fire: The Unanswered Questions of Comity, in ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 33, 39-51 (1998).

30. The agreement between Iceland, Norway, and Denmark, which was developed independent of the EU-U.S. experience, does not include a specific positive comity clause.

31. Positive comity has been praised in both U.S. and EU reports on cooperation in antitrust enforcement as essential for any further development of bilateral cooperation.

32. See SELL, supra note 7. From the political point of view, one of the main reasons for the practical failure of the Code was the disagreement between developed and developing countries over the relevance of freedom of markets for the development of welfare. It is worth noting, however, that this document already mentioned the aim that restrictive business practices "do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those
The OECD produced its first significant document in 1978. In the 1984 report, *Competition and Trade Policy—Their Interaction*, both anticompetitive practices that affect international trade and competition-related trade issues were thoroughly analyzed for the first time. In the 1990s, the OECD intensified its study and promotion of antitrust harmonization. The most relevant documents, which frame the international discussion of such issues, are: the *Recommendation of the Council for Cooperation between Member Countries in Areas of Potential Conflicts between Competition and Trade Policies*, adopted in 1986 and revised in 1995, and the 1998 *Recommendation of the Council Concerning Effective Action Against Hard Cartels*. Finally, the OECD also furthered the understanding of such complex issues through the publication of collections of studies by independent scholars.

The work produced by the OECD since the 1970s modeled international views of those issues. Therefore, it is not surprising that the activity of the WTO Working Group on Interaction between Trade and Competition Policy is now widely inspired by many of the positions developed by the OECD in the past two decades.


34. OECD COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES (CLP), *COMPETITION AND TRADE POLICIES—THEIR INTERACTION* (1984), available at http://www1.oecd.org/daf/clp/Publications/COMPTRA.pdf. The report stressed that further action was needed to improve international cooperation on such issues and indicated an intention to further develop policy approaches and recommendations, particularly in those areas where conflicts are more likely between trade and competition policies and practices of Member States.


36. See C(86)65(Final); C(95)130/Final.

37. C(98)35/Final. The OECD also aims at furthering the effects of the 1998 Recommendation by inviting non-OECD Member States to associate themselves with the recommendation and to implement it. See *Statement on the Association by Non-members with the OECD Council Recommendation on Effective Action Against Hard Core Cartels*, http://www.oecd.org/pdf/M00018000/M00018615.pdf (last visited May 1, 2002).

38. See Working Group on the Interaction between Trade and Competition Policy, *Communication From OECD*, Doc. WT/WGTCP/W/21, at http://docsonline.wto.org/gen_viewerwindow.asp?d:/ddfdocuments/t/wt/wgtp/w21.wpf.htm. The areas of study by the OECD that have been particularly relevant for the activity of the WTO Working Group regard: (1). the definition of the field of application and effective application of antitrust law, the possibility of finding common principles and of implementing convergence of different antitrust laws; (2). market contestability at the international level and cooperation in
The WTO Working Group was established in 1996 as a result of a proposal by the European Commission. After a preliminary report in 1997, the Working Group continued analyzing interaction between trade and competition policies. Also, as a consequence of the Working Group's reports, the discussion of antitrust issues has become part of the platform for the next round of WTO negotiations.39

II. ANTITRUST COOPERATION IN THE FRAMEWORK OF INTERNATIONAL RELATIONS

A. Recent Trends in the Modes of Sovereignty Exercised by States

As discussed in the previous section of this paper, due to fast economic transformations, international approaches to antitrust have accelerated greatly in the last decade. This made the inefficiency of the traditional national approaches to antitrust enforcement more evident. However, globalization also had a wider impact on the organization of states. The limitations of centralized exercise of sovereignty in dealing with an economic scenario in continuous transformation have become increasingly evident. Some scholars have concluded that, due to the internationalization of economic and social activity, the traditional concept of sovereignty based on exclusive territorial jurisdiction is no longer functional.40 A reaction by states has been to decentralize the exercise of sovereignty, particularly in fields such as antitrust, in which the complex economic environment is coupled with peculiarities that require the involvement of specifically qualified officers and agencies. Sol Picciotto has interpreted this as a process of "fragmentation" of states.41 What is certain is

the application of antitrust laws; and (3). more specific issues, such as international cartels, multi-jurisdictional mergers in the automotive industry, and the reform of regulations.


40. See John Ruggie, Territoriality and Beyond: Problematizing Modernity in International Relations, 47 INT'L ORG. 139, 174 (1993).

41. See S. Picciotto, The Regulatory Criss-cross: Interaction Between Jurisdictions and the Construction of Global Regulatory Networks, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION:
that the traditional organization and hierarchies of public power have been under pressure both externally, through the institution and implementation of inter-governmental organizations, and internally, through the development of decentralized networks and the cooperative exercise of sovereignty.

From the point of view of intergovernmental organizations, efforts have steadily increased, following the Second World War, to create and expand the power of regional or global supranational organizations. The United Nations, the Council of Europe, the European Community, and the World Trade Organization are such examples. From the point of view of internal modes of exercising sovereignty, there have been pressures to delegate sovereignty. These pressures have been interpreted as a force driving the shift of power from hierarchies to networks and from centralized compulsion to voluntary association.

Intergovernmental approaches to sovereignty have not significantly affected the exercise of sovereignty. The main reason is that organizations like the United Nations cannot work effectively independent of their member governments, and governments are not willing to cede their power and sovereignty to an international institution without exercising close control over it. Even in cases of apparent success with a new form of sovereignty, such as the European Union, the outcome is rather a reorganization and reaggregation, at a federalist level, of the traditional concept of sovereignty of nation states.

The internal exercise of sovereignty in most developed countries has undergone dynamic developments. As noted by Jessica T. Mathews, a number of centers of power—both sub-state and non-state actors—have emerged or

---

42. See J. H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 278-88 (1995). The foundation of the present international regulation of economic relations consists of a group of institutions and multilateral international agreements known as the Bretton Woods System. The main institutions comprising this system are: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the WTO/GATT organization.

43. See Anne-Marie Slaughter, The Real New World Order, 76 FOREIGN AFF. 183, 184 (1997).

44. See id. at 191.

45. Jayasuriya disagrees with those scholars that consider the European Union the most evident success of a new "fragmented" model of sovereignty. See Kanishka Jayasuriya, Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance, 6 IND. J. GLOBAL LEGAL STUD. 425 (1999) (citing Neil McCormik, Beyond the Sovereign State, 56 MOD. L. REV. 1, 8 (1993)). The European Union should not be considered the result of a new form of sovereignty, but rather a new process to reach a "classical" result (federalism). This process will be proven by the many fields, including the economic policy and, soon, the military organization, in which the European Union is adopting a centralized system in line with federalist models.
have strengthened their position. Non-state actors have gained power in the new scenario, as is shown by the rise and gradual recognition of non-governmental organizations (NGOs). More interesting for the scope of this paper is the role of sub-state actors, particularly independent authorities. The development of decentralized and multiform centers, favored within states as a response to the insufficiencies of centralized actions, has determined the internationalization of a number of agencies operating in complex and highly specialized areas of law and economics. The interaction between those internationalized agencies has taken the form of what Anne-Marie Slaughter has called "regulatory webs." Such "webs" operate at a somewhat different level than traditional international law. In international law, states formally assume their obligations through treaties that oblige them to modify their internal legislation. In Slaughter's view, this kind of international legislation tends not to directly overlap with domestic legislation because national legislatures do not usually seek to regulate global common issues and interstate relations. On the other hand, transgovernmental relations within regulatory webs affect issues already regulated internally by each state. Issues such as crime, securities fraud, anticompetitive practices, and pollution are addressed through national agencies entering arrangements contained generally in informal, nonbinding memoranda of understandings or agreements.

46. Mathews interprets these processes as sovereignty transformations driven by information technology, with the radically expanded communications capacity empowering individuals and groups and diminishing traditional authority. See Jessica T. Mathews, Power Shift, 76 FOREIGN AFF. 50 (1997).

47. NGOs have been able to produce a particularly relevant impact thanks to the globalization of technology and information. In fact, both access to information and organization and sharing of information and actions have become independent from major structures. The most relevant success of NGOs have been realized with the events related to the Multilateral Agreement on Investment (MAI), which the OECD had discussed for a long time before entering a stalemate. During negotiations for MAI, it was mainly the criticism and actions from NGOs, combined with worries of trade unions, intellectuals, and political representatives, that caused France to withdraw from negotiations, thereby "killing" the agreement. For some of the criticisms to MAI by NGOs, see William Crane, Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment, 9 COLO. J. INT’L ENVTL. L. & POL’Y 429 (1998). For a description of events in France related to MAI, see C. De Brie, Vers une Mondialisation de la Résistance, LE MONDE DIPLOMATIQUE, Dec. 21, 1998; J. C. Lefort & J. P. Page, Double Jeu Autour de l’AMI, LE MONDE DIPLOMATIQUE, Oct. 12, 1998.

48. Anne-Marie Slaughter remarked, “The densest area of trans-governmental activity is among national regulators. Bureaucrats charged with the administration of antitrust policy, securities regulation, environmental policy, criminal law enforcement, banking and insurance supervision—in short, all the agents of the modern regulatory state—regularly collaborate with their foreign counterparts.” Slaughter, supra note 43, at 190.

49. Id. at 191.

50. Memoranda and agreements are widely used in the field of antitrust. In the banking field, the most relevant means of cooperation is the Basle Committee on Banking Supervision (Committee), an organization
Jayasuriya considers this procedure to be a result of globalization. She notes that progress in technology and transportation, which favors globalization, has also made it harder to enforce national law; the pace of transformation is too fast to allow legislatures to effectively tackle new problems. Innovative and more flexible approaches are thus necessary.\(^{51}\)

The interpretation of the decentralized actions by public authorities has been varied. The scholars who support a “new medievalist”\(^{52}\) approach consider the international action of domestic agencies to be part of a wider process of power shifting from hierarchies to networks. The rise of these networks would result in global governance being controlled by private interests and nongovernmental bodies, and in the substantive death of the nation state.\(^{53}\)

A more recent interpretation has been that, while the central role of globalization through technology has deeply affected the structure of sovereignty, this has not caused a disaggregation of the traditional sovereignty of nation states in favor of networks and individuals. Instead, a reorganization and fragmentation of the centers of exercise of state sovereignty has occurred.\(^{54}\) According to this interpretation, the real revolution would consist not of a loss of the concept of sovereignty, but of a replacement of the traditional centralization of power, which has been the dominant model since the Eighteenth Century, with polycentric modes of power, still within a traditional state-oriented model of sovereignty.

composed of 12 central bank governors. The Committee was created as a result of an agreement among the governors themselves. It meets 4 times a year and follows its own rules. Although its decisions are unanimous and not formally binding, they are actually implemented so that action by the governors within the Committee might be considered an effective form of exercise of sovereignty. \(^{id}\) at 190.

51. As previously mentioned, current technological and economic development is such that, in order to overcome the incongruity of the centralized state and solve internationalized problems, agencies must develop a high degree of autonomy and independence within the state. At the same time, states must provide those agencies with wide autonomy in order to operate effectively in an internationalized scenario. According to some scholars, this condition creates a necessary fragmentation of the domestic organization of the state. See, e.g., Jayasuriya, supra note 45, at 438-40. Agencies use their independence to create international practices, while still operating only formally within a framework of national regulations. See \(^{id}\).

52. Matthews, supra note 46. Other commentators have, to differing degrees followed similar interpretations of the new form of exercise of sovereignty as a process of crisis, rather than transformation of state sovereignty.

53. \(^{id}\). Other commentators have, to different degrees followed a similar interpretation of the new form of exercise of sovereignty as a process of crisis, rather than transformation of state sovereignty.

54. Globalization is constantly transforming the traditional concepts of sovereignty, so much that many individuals today believe that the traditional concept of sovereignty, identified by exclusive territorial jurisdiction is no longer serviceable given the new economic and social scenarios. See Ruggie, supra note 40, at 174.
Scholars following this view generally conclude by noting that the global
governance of the economy imposed by technology requires the
internationalization of state agencies and institutions, and that this result can be
achieved only by granting to those institutions a degree of autonomy from other
state institutions. Thus, the fragmentation of the state is seen as a form in
which state sovereignty has developed in order to deal with a global economy.\footnote{See Jayasuriya, supra note 45, at 439.}

While these analyses usefully highlight certain political and institutional
developments, it might be excessive, at least at this stage, to talk about an actual
fragmentation of states. Agencies remain accountable directly or indirectly to
governments that appoint their chiefs (and often can remove them at any time)
and to parliaments with whose laws they must abide. While agencies operate in
an increasingly autonomous mode, central governments and parliaments
maintain their hierarchical power and can regain possession of or redistribute
competences with respect to the exercise of sovereignty. The survival of a
traditional set of hierarchies can be demonstrated both in the EU and in the
United States. In the EU, the cooperation agreement entered in 1990 with U.S.
antitrust agencies was initially struck down by the European Court of Justice
based on the fact that it was signed only by the European Commission, thus
usurping the powers of the Council, i.e. of the Member States governments that
form it.\footnote{Case C-327/91, French Republic v. Comm’n of the European Communities, 1994 E.C.R. I-3641. For a
comment on the decision, see Christine Kaddous, L’arrêt France C. Commission de 1994 (Accord
Concurrence) et le Contrôle de la “Légalité” des Accords Externes en Vertu de l’art 173 CE: La Difficile Réconciliation de L’orthodoxie Communautaire avec L’orthodoxie Internationale, 5-6 CAHIERS DE DROIT EUROPEEN 613, 617 (1996).} This demonstrates that the final decision-making power remains
firmly in the hands of governments, no matter how much autonomy the
European Commission is allowed in its action. In the United States, in order to
allow deeper cooperation with foreign antitrust authorities, it was necessary to
adopt the 1994 International Antitrust Enforcement Act. The Act authorized
antitrust agencies to enter directly into cooperation agreements derogating from
domestic laws in fields including the exchange of confidential information.
Thus, absent an explicit delegation of powers by the Government or the
Congress, U.S. antitrust agencies cannot independently extend their action
beyond specified limits.

Even with these limitations, the power delegated to agencies is being
exercised in an increasingly independent fashion. Thus, the more such bodies
are conferred a degree of autonomy from the political powers, the more their
action and policy can diverge from the political guidance of the country and, in some circumstances, might come to shape the foreign policy. This can be the case when the expansion of the action from sub-government bodies is a result of loopholes or the nonexercise of function by other traditional powers.  

B. The Case of Antitrust Enforcement

Whether the present modes of exercise of sovereignty through specialized agencies constitute a disaggregation, a fragmentation, or a simple decentralization of sovereignty, the adoption and implementation of bilateral antitrust cooperation at the international level are best understood if one considers the question in light of governance issues. It is not surprising that decentralization and internationalization have been relevant in highly specialized areas of law, such as antitrust, in which the specialized enforcement agencies are normally the only bodies equipped with the necessary knowledge and contacts to deal efficiently with issues of global governance. In antitrust enforcement, the necessity to utilize new tools for enforcement has been further heightened by the well-recognized insufficiencies of the previous unilateral approaches and by the growing possibility of jurisdictional conflicts and confusion. The adoption of bilateral cooperation agreements should thus be seen as an example of the general reorganization of sovereignty undertaken by states in order to cope with new economic, juridical, and political pressures. Antitrust agencies have led the way in resolving international antitrust issues, providing an answer to the inadequacy of national antitrust laws as applied directly to transnational issues.

Since the second half of the 1990s, an alternative approach arose from discussion within the WTO that might allow the traditional model of centralized sovereignty to regain its predominant position. Based on an initiative of the European Commission, a Study Group was established in

57. One example was the action of state antitrust regulators in the United States during the Reagan administration, when the DOJ and the Federal Trade Commission (FTC) de facto relinquished the exercise of their powers in full application of neo-liberalist theories. Likewise, in the early 1990s in Italy, the action of the Judiciary branch (which in Italy is fully independent from the political process) substantially wiped out a corrupt generation of political leaders and, for some time, acquired a de facto political function and investiture from the people.

58. Cfr. supra Part I.

1996 to investigate the interplay between antitrust and international trade. Since the establishment of this Group, it has been clear that the aim of the proposal is to promote the adoption of rules on antitrust laws and procedures in the WTO arena. Finally, WTO members recently agreed at Doha to begin negotiations for a multilateral framework of antitrust rules in 2003. In light of the fact that the WTO is an organization of governments, requiring consensus in order to adopt any rules, it is clear that this new scenario will permit governments to regain direct control over the exercise of jurisdiction in international antitrust matters.

As a result of these developments, and considering the continued expansion of cooperation agreements, international antitrust is now being addressed both at a bilateral and at a multilateral level. This highlights potential conflicts between different visions and modes of sovereignty.

Once the inadequacy of unilateral solutions became evident, the approach to international antitrust was based on bilateral agreements regulating substate level relations between specialized agencies. This approach is in line with the general reorganization of the modes of exercising sovereignty within states. The adoption of nonbinding bilateral agreements has the primary function of formally recognizing a practice that has been developing through a network of relationships and cooperation for a long time. However, the action of agencies is increasingly being balanced by the direct action of governments. The initiative within the WTO will enhance government actions, after the unfruitful attempts of the past. New WTO rules will be directly negotiated by the

approved and the Working Group began its work the following year. The aim of the Working Group was to study the interaction between trade and antitrust and propose its conclusions and recommendations to the WTO.

60. The European Commission, in its press releases after the adoption of the proposal and in its Commissioners' subsequent speeches, has always mentioned that the work of the Working Group is exploratory and should prepare the ground for negotiations on a binding framework of rules. Id.

61. The main areas for negotiations will be: Core principles, such as transparency, non-discrimination and procedural fairness, and provisions on hard-core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through skills building. For the text of the Doha Declaration, see Doha Declaration, supra note 39.

62. As noted earlier in this paper, the DOJ and the FTC entered agreements with Israel, Japan, and Brazil in 1999, and Mexico in 2000, while the EU entered into an agreement with Canada and is discussing further cooperation with Japan. In 2001, Iceland, Norway, and Denmark also entered into a cooperation agreement.

63. UNCTAD and the OECD have been studying and conducting research on the interaction between trade and antitrust since the late 1970s, some time before the subject became a central issue of discussion within the WTO. In 1980, UNCTAD, after lengthy negotiations between developed and developing countries, approved the Code of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. See UNCTAD, Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980), available at
governments and, when implemented, will lead to changes in state regulation, thus allowing governments to regain full control of the development of international antitrust enforcement in a way that would limit both the delegation of sovereignty to independent authorities and the diplomatic difficulties of the past. From the juridical point of view, while bilateral agreements are aimed at formalizing a system of voluntary cooperation among agencies, the aim of the WTO negotiations is to adopt a system of binding rules that the states would then implement in their legal systems. Since sub-governmental bodies expand their action in the absence of efficient state action, a retreat from the concrete exercise of sovereignty by national antitrust authorities should be expected as an effect of a WTO action.

III. INTERNATIONAL AND DOMESTIC POLITICAL ISSUES UNDERLYING THE BILATERAL AND THE MULTILATERAL APPROACHES

A. Complementarity between the Bilateral and the Multilateral Approaches

Bilateral cooperation of independent agencies and the adoption of multilateral rules by states are complementary. Their combination can allow states to tackle both short- and long-term problems in international antitrust enforcement. In the long term, a solely multilateral approach has more potential successfully to address multijurisdictional issues. In the present, increasingly globalized environment, competition policies of several countries

http://www.unctad.org/en/subsites/cpolicy/docs/CPSets/cpsets4.htm [hereinafter Code]. The document, for a series of political reasons and because it is a non-binding document, for many years did not have any relevant impact on the development of antitrust law and policy. See SELL, supra note 7. It is noteworthy, however, how even at that earlier time, the provisions of the code were aimed at ensuring that restrictive business practices did “not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries.” Working Group on the Interaction between Trade and Competition Policy, Communication from UNCTAD, Doc. WT/WGTCP/W/17 (July 4, 1997).

64. According to the European Commission, the establishment of a WTO framework on competition should focus on the development of core principles and rules on domestic competition law and its enforcement. In the vision of the Commission, particular attention should be dedicated to the principles of competition law and policy that have a more relevant impact on the international trading environment, while fully recognizing the peculiarity of each domestic legal and institutional framework. The WTO principles of transparency and non-discrimination would provide key foundations for the development of such core principles and rules. For a more specific outline of the Commission’s position, see Communication between the EC and Its Member States: A WTO Competition Agreement and Development (2001), http://europa.eu.int/comtrade/pdf/wto_comp07.pdf.
are ever more likely to be involved; thus, bilateral approaches can rapidly become obsolete. Therefore, avoiding incoherence between different systems might become harder if those systems are not harmonized. \(^6\) At this point in time, however, multilateral solutions might be either ineffective, like the 1980 Code, \(^6\) or very complex and therefore only long-term solutions, like the WTO approach or the proposals for a world competition authority. \(^6\) These solutions will take time before producing appreciable effects and thus should continue to coexist with the already workable bilateral and regional solutions. For this reason, bilateral cooperation agreements still represent a necessary element of international antitrust enforcement.

The ideal solution is a parallel development of both approaches. However, for many years the policies publicly followed by the two main players, the EU and the United States, and within them by different authorities, have diverged. In the early 1990s, the United States and the EU, through the initiative of the 1991 cooperation agreement, had placed the issue of antitrust cooperation at the center of the international scene. Conversely, in the second half of the 1990s, the European Commission and its American counterparts (the Department of Justice (DOJ) and the Federal Trade Commission (FTC)) diverged in their views regarding the next step of antitrust cooperation. The Antitrust Division of the DOJ, in particular, repeatedly expressed the view that it was useless or even harmful to adopt general international antitrust principles, \(^6\) while it was

\(^{65}\) The case of the Boeing/McDonnell Douglas merger provided a clear example of how different antitrust philosophies can cause friction, particularly when coupled with the reciprocal suspect of following the so-called policy of the "national champion." In the recent GE-Honeywell case, the sharply differing outcome of the merger review in the U.S. and in the EU (with the Commission blocking the merger) caused tension and suspicions that national interests were being pursued against foreign companies through extraterritorial application of competition law.

\(^{66}\) Code, supra note 63; see SELL, supra note 7.

\(^{67}\) A number of scholars have advocated the institution of a world competition authority. Generally, they have followed three approaches: (1) the comprehensive approach, which includes the adoption of an internationally binding set of rules and possibly an international authority; (2) the targeted approach, which is based on a building-block theory and is aimed at developing international antitrust law by specific intervention and gradual expansion, including bilateral and regional agreements; and (3) the solely national approach, which has showed its obsolescence. See Elinore M. Fox, Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade, 4 PAC. RIM L. & POL'Y J. 1, 34 (1995).

\(^{68}\) See A. Douglas Melamed, Antitrust Enforcement in a Global Economy, Address Before the Fordham Corporate Law Institute 25th Annual Conference on International Antitrust Law and Policy (Oct. 22, 1998), at http://www.usdoj.gov/atr/public/speeches/2043.htm (at the time of the speech Mr. Melamed was the Principal Deputy Assistant Attorney General, Antitrust Division for the DOJ). Recently, after release of the final report by the International Competition Policy Advisory Committee in February 2000, the DOJ demonstrated an increased interest in the multilateral approach.
necessary to further improve bilateral agreements. Consistent with this view was the adoption of the International Antitrust Enforcement Act of 1994, which broadened U.S. antitrust authorities’ power to enter agreements with foreign authorities. This included the power to agree on exchange of confidential information. The European Commission expressed reservations about the idea of adopting more substantive bilateral agreements, while strongly advocating discussion within the WTO. United States authorities, after the release of the final report from International Competition Policy Advisory Committee (ICPAC) to the Attorney General in 2000, demonstrated increased interest in a multilateral approach. At the same time, the wave of new bilateral agreements between the United States and foreign antitrust authorities stopped. At the end of 2001, the first concrete multilateral result was achieved with the launching of the Global Forum within the OECD. Consensus was finally reached at Doha, in November 2001, on negotiating a framework for competition rules within the WTO after the next Ministerial Conference in 2003.

B. The U.S. and the EU Models of Antitrust Law

In order to understand the evolution of the U.S. and EU positions on international antitrust enforcement, it is necessary to analyze the political and historical background of the debate. The United States’ prolonged skepticism may have stemmed from doubts about the efficiency of the WTO in addressing competition-related issues, particularly after the outcome of the WTO litigation between the United States and Japan in the so-called Kodak-Fuji disputes.

69. Melamed, see id., in his speech noted that, while the attempt to adopt international binding principles would have been harmful, bilateral cooperation had demonstrated very useful and thus the DOJ would have continued to have made negotiation of new, appropriately-tailored bilateral cooperation agreements a priority.

70. See Karel Van Miert, Transatlantic Relations and Competition Policy, 2 EC COMPETITION POL'Y NEWSL., Autumn 1996 (Speech Given at the American Chamber of Commerce in Belgium, Nov. 26, 1996), available at http://europa.eu.int/comm/competition/speeches/text/sp1996_060_en.html. The current European Commissioner for Competition Policy, Mario Monti, while confirming support for a WTO approach, has also demonstrated appreciation for the recent U.S. proposal to adopt a Global Competition Forum, calling it “[a] tool that will help [competition authorities] provide a response to requests for more coherence, more coordination, more governance in international competition policy.” Mario Monti, The EU Views on Global Competition Forum (Speech Given at ABA Meetings, Mar. 29, 2001), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/14700RAPID&lg=EN.

71. The WTO Panel, in the Kodak-Fuji case, confirmed the principle that WTO rules apply solely to measures adopted by governments. The case established that private anticompetitive practices would only be relevant in those rare cases in which a causal link can be established between such practices and measures actually adopted by the governments. Moreover, WTO members are under no commitment to adopt or enforce competition laws. See WTO, The Relevance of WTO Principles of National Treatment, Transparency and Most-favored Nation Treatment to Competition Policy and Vice-versa, WT/WGTCP/W/115 (Apr. 12,
that case, the U.S. Government was unable to obtain a favorable panel report against Japan after arguing that Japan had violated WTO rules by not exercising antitrust jurisdiction against exclusionary conduct by Fuji. However, divergences between the U.S. position and that of the EU began well before the Panel report in this WTO case.72

Thus, more convincing reasons can be found in an analysis of the legal and strategic international scenario. The United States and the EU are not only the main economic players, but also the bearers of the two leading models of antitrust law. These models present a number of differences related to economic and historical elements. Some differences in the structure of the relationships between central authorities (the European Commission and the DOJ and FTC, respectively) and local authorities (national and state antitrust laws, respectively) are determined mainly by the different forms of federalism present in the United States and in the European Union. In addition, a number of substantive differences exist as a result of jurisprudential decisions and legislative developments.

A first major difference between the United States and the European Union is the variety of subjects involved in antitrust enforcement. Private litigation accounts for the majority of U.S. antitrust cases73 and, even when the antitrust authorities are involved, they intervene as parties in a trial directed by an impartial judge. When the agencies challenge a merger, they still have to obtain a court decision blocking the merger, while in the European Union the Commission decision is already binding, and the parties can subsequently appeal it to the Courts. In the latter case, the time necessary for a decision is such that the deal is abandoned anyway In the European Union, the Commission has centralized power to initiate and conduct investigations. Its decisions can be appealed to the Court of First Instance and, subsequently, to the European Court of Justice.74 Although private entities can invoke EU...
antitrust violations in civil litigation in front of national judges, most of the cases are prosecuted by the Commission or by national antitrust authorities.\(^7\)

The remedies available in the two jurisdictions also differ. In the United States, antitrust cases are not only heard by an impartial judge, but they can also involve criminal sanctions and they are characterized by incentives to private action, such as the treble damages rule and class actions. In the European Union, antitrust proceedings are administrative proceedings conducted by the Commission or the antitrust authorities, and lead to restraint orders and fines.\(^7\)

Private parties can only forward their complaints to the Commission, which maintains discretionary power on whether to start a proceeding.

Even the methods of analysis and the characterization of certain practices differ significantly. The dichotomy in the United States between the *per se* analysis and the *rule of reason* analysis is well known. In the European Union, adoption of the *de minimis* principle\(^7\) has demonstrated a preference for an analysis closer to the rule of reason approach. U.S. antitrust enforcement traditionally has been less hostile to certain practices, such as vertical agreements.\(^7\)

Also, the notion of monopolization forbidden by the Sherman

---

\(^7\) The Commission, in furthering of its goal of concentrating on the cases most harmful to the Common Market and consumers, has recently advocated the necessity to further develop private enforcement of antitrust rules in Europe. *See* Mario Monti, *Effective Private Enforcement of EC Antitrust Law*, (Speech Given at Sixth EU Competition Law and Policy Workshop, June 1, 2001), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxtgt&doc=S-PEECH/01/258101RAPID&Ig=EN.

\(^7\) If appealing from the antitrust authority's final decision, investigated parties have the opportunity for a hearing in front of an impartial judge.


\(^7\) In the United States, vertical agreements were forbidden only when considered unreasonable from the economic point of view. *See* Continental T.V., Inc. v. GTE Silvanya Inc., 433 U.S. 36 (1977). However, traditionally in Europe vertical agreements were almost systematically forbidden when reaching EU relevance. *See* Green Paper, The Vertical Restraints in EU Competition Policy, http://europa.eu.int/en/record/green/gp9701/vertical.htm. The main reason behind this difference was that the
Act differs from the abuse of dominant position forbidden by article 82 [former article 86] of the Treaty of Rome.79

Finally, differences also exist with regard to merger control in the United States and the European Union, both as to the kind of mergers that trigger the notification obligations and the ways in which the relevant authorities proceed in their analyses. The thresholds, the tests for clearance, the treatment of foreign mergers, and certain procedural differences differentiate the two regulatory regimes.80

C. The Global Influence of the U.S. and the EU Models of Antitrust Law

The influence of the U.S. and EU models of antitrust law expanded differently in the last decade. The EU influences the area surrounding its borders, including those countries that might directly or indirectly enter its economic area through access to a larger Free Trade Area, to the Economic Community, or to the Union itself.81 For instance, for the former communist
countries of Eastern Europe, the adoption of legislation based on EU antitrust law has been determined not only by the need to update the internal legal system to the new market economies, but by the fact that such adoption was a prerequisite for their application to membership.  

The U.S. model has a more global reach. Germany and Japan were forced to adopt U.S.-like antitrust laws after the Second World War to eliminate the concentration of powers that had supported military expansion in these two countries. American experts are routinely hired, particularly in Asia and Latin America, by countries wishing to adopt new antitrust legislation. Because of their background, those experts normally propose legislation strongly influenced by the American model. The United States, like the EU, also exercises a strong influence on contiguous countries, thus inducing them to develop compatible antitrust legislation. Finally, the United States, because of its economic dominance, is normally in a position of strength when dealing bilaterally with other countries. As a result, it is often able, by diplomatic action and economic pressure, to impose its own juridical and economic models or at least to heavily influence pre-existing models.

Strategic interests might motivate the different approaches to international antitrust enforcement pursued in the 1990s by the EU and the United States. The EU might have been interested in early negotiation in the WTO forum, where the economic and cultural predominance of the United States could be diluted and balanced. On the other hand, in the years preceding WTO negotiations, the United States might have opted for taking strategic advantage of its overwhelming dominance through bilateral dealings, in which it could

---


83. A discussion about the export of U.S. antitrust law worldwide and related issues can be found in J. Thomas Rosch et al., 60 Minutes with the Honorable James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 60 ANTITRUST L. J. 217 (1991).

more easily impose its models and interests, only entering the multilateral arena when the environment had been already altered in favor of U.S. models.\textsuperscript{85}

Divergent positions on international antitrust enforcement are also found within states. The most prominent example is provided by the United States, where in the late 1990s the interest of the Clinton administration in WTO negotiations on common antitrust principles contrasted with the extremely skeptical approach of the DOJ.\textsuperscript{86} It is plausible to interpret such divergence as an attempt by the relevant antitrust authority not only to favor the national interest, but also to retain the concrete exercise of sovereignty that the adoption of principles and procedures within the WTO might return to the central power of governments. Conversely, the fact that in Europe the approach to international antitrust enforcement has been univocal derives from the circumstance that the application of competition law and the exercise of governing functions are to a large extent concentrated in the same institution, thus creating no alternative centers of power in this regard. As a matter of fact, EU national governments tend to completely delegate governance over international competition issues to EU institutions.\textsuperscript{87}

IV. CONCLUSION: REASONS FOR SUPPORTING THE ADOPTION OF A MULTILATERAL ANTITRUST AGREEMENT FROM THE WTO

In the course of this paper, governance issues and legal responses for international antitrust enforcement have been outlined. This has permitted a better understanding of the interests relevant to the bilateral and multilateral approaches to international antitrust enforcement. Attention has been paid to exposing why the interaction between the legal, structural, and political levels have at times resulted in friction and divergent positions between and within countries. This final section will consider the merits of pursuing a multilateral agreement within the WTO, as discussed by governments at Doha.

\textsuperscript{85} Similar strategies have already proven successful, as seen in the process that resulted in the adoption of the TRIPs side agreement to the WTO.

\textsuperscript{86} Joel Klein, former Assistant US Attorney General, stated at a June 1999 OECD conference in Paris that if adopted within the WTO "antitrust rules would be useless, pernicious, or both, and would serve only to politicize the long-term future of international antitrust enforcement, including through the intrusion of trade disputes disguised as antitrust problems." \textit{See} EUROPEAN REPORT, July 7, 1999.

\textsuperscript{87} Such circumstance, which is evident in everyday practice and chronicles was confirmed in the Annual Conference on International Antitrust Law and Policy (Fordham University, 1998) (presented by the President of a European national antitrust authority).
While some success has been achieved through bilateral agreements, the increasing globalization and proliferation of antitrust laws make the adoption of multilateral rules necessary. The WTO is particularly well equipped for reaching this goal. The WTO has already developed the expertise necessary to perform this task, and it has an effective enforcement mechanism to ensure that states comply with a treaty on antitrust rules.

From the point of view of sovereignty structures, while antitrust authorities exercise their functions autonomously, this does not mean that governments and parliaments are being deprived of their sovereignty. An increasing degree of autonomy was necessary to address the challenges of antitrust enforcement in a globalized world. However, governments and parliaments retain their sovereignty and can at any time re-centralize enforcement activities. With the adoption of general WTO rules, the executive branches would frame the principles of antitrust control, leaving implementation of these principles to national authorities, which are more competent and better equipped. If the WTO approach is abandoned, a lack of clarity will persist, due to international issues being left to the discretionary action of antitrust authorities. This could compromise the effectiveness of public antitrust enforcement by leading to contradictions between and within systems.

Conversely, a multilateral framework of rules developed by governments within the WTO would allow governments to regain leadership in shaping international antitrust policies. Governments have a broader view than antitrust authorities, which institutionally should be concerned only with antitrust enforcement, and can thus better understand the limits and utility of the adoption of common principles and procedures. Moreover, a multilateral agreement could include provisions on cooperation, thus laying the groundwork for further cooperation between national antitrust authorities.

With the new millennium, rivalry between the U.S. and the EU models of antitrust law has apparently diminished, in favor of a movement toward harmonization or coordination. The EU reform of competition law increases the emphasis on economic analysis. Even in an area of major divergence such as vertical agreements, the two systems are more consistent after the adoption of the 1999 block exemption on vertical restraints by the European Commission. Following issuance of the ICPAC report in 2000, the United States has increased its interest in multilateral approaches, proposing the

institution of a new forum for coordination within a wider global initiative. Finally, consensus was reached on taking the issue into the WTO. The adoption of a WTO agreement will allow the U.S. and the EU antitrust models to achieve more common ground, and will facilitate a balanced approach to multijurisdictional cases. A supranational set of rules will also discourage any temptation to unfairly assist—directly or through interaction—domestic players when enforcing antitrust laws.

In brief, adoption of a framework of competition rules from the WTO is highly desirable. The range of solutions developed in such an arena could vary from the adoption of general “cosmopolitan” principles, to the adoption of a set of basic substantive rules, binding for all WTO members. The main areas outlined in the 2001 Doha Declaration include a set of core principles, such as transparency, non-discrimination, procedural fairness, and rules on hard-core cartels. These are complemented by modalities for voluntary cooperation and support for progressive reinforcement of competition institutions in developing countries through skills building. The EU proposal also to consider general rules for cooperation has been incorporated into the Declaration. The adoption of a framework of rules agreed to by governments would both expand the scope for cooperation and increase clarity in the exercise of sovereignty. The approach pursued within the WTO has the potential to benefit both the multilateral and the bilateral approaches to international antitrust enforcement, thus allowing states to cope at different levels with the challenges posed by the globalization of antitrust enforcement.

89. This proposal was advanced in Eleanor M. Fox, International Antitrust: Against Minimum Rules for Cosmopolitan Principles, ANTITRUST BULL., Mar. 22, 1998. Fox criticizes both the feasibility and the convenience of an attempt to introduce homogeneous substantive rules through the WTO.

90. Many commentators believe that a set of rules could include provisions on hard-core cartels and strengthen compliance with the WTO principles of transparency and non-discrimination in the field of antitrust. Taking those issues in the WTO forum was also considered a viable option in INT’L COMPETITION POL’Y ADVISORY COMM. TO THE ATT’Y GEN. & ASST. ATT’Y GEN. FOR ANTITRUST (ICPAC), FINAL REPORT (Feb. 2000), available at http://www.usdoj.gov/atr/icpac/cover.pdf.

91. See Doha Declaration, supra note 39, at paras. 23-25.
