School of Law, Boalt Hall

U.C. Berkeley Law and Economics

Working Paper Series

Working Paper 2000 - 20

INTERNATIONAL ANTITRUST AND THE WTO: THE LESSON FROM INTELLECTUAL PROPERTY

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International Antitrust and the WTO:
The Lesson from Intellectual Property

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11/07/2000

* Assistant Professor of Law, University of California at Berkeley School of Law. I owe thanks to Stephen Choi, Mark Lemley, Howard Shelanski, Daniel Tarullo, and Spencer Weber Waller for comments and discussions on earlier drafts. Special thanks to Jeannie Sears and Nicholas James. Ryan Waterman provided excellent research assistance. I am grateful to the John M. Olin Faculty Fellowship for financial assistance.

Abstract

International antitrust issues have become important in current debates regarding international trade and international regulation. This Article addresses one of the central questions about international antitrust – the appropriate forum for negotiations. The Article argues that the combination of domestic antitrust policy and international trade makes a substantive multilateral agreement unlikely unless transfers are made from states that gain from such a deal to those that lose. The Article advocates bringing the issue of international antitrust within the WTO because that forum is the best suited to accommodate such transfers. The experience of efforts to negotiate an agreement in intellectual property (IP) is offered as a demonstration of the advantages offered by the WTO. Like antitrust, the realities of IP made an agreement without transfers virtually impossible. In the case of IP, the difficulty was that developing countries had little to gain from such an agreement. Once negotiations were brought within the WTO, however, an agreement was reached because developing countries were granted trade concessions in exchange for accepting the Trade Related Aspects of Intellectual Property (TRIPs) agreement. Like international IP, international antitrust needs to be negotiated in a forum that allows for transfers, making the WTO the best available forum.

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INTRODUCTION

Antitrust law and policy have outgrown their purely domestic focus to become major international legal issues. This development is evident in both policy circles -- competition policy was among the agenda items for the 3rd WTO Ministerial Conference, held in Seattle from November 30 to December 3, 1999 -- and academic debates.[1] The growing interest in international antitrust results from the increased importance of international trade and the dramatic fall in international tariffs over the last fifty years. The success of the General Agreement on Tariffs and Trade (GATT) (now the World Trade Organization (WTO)) in reducing tariffs has shifted the focus of trade discussions to non-tariff barriers, which have

[1] In academic circles, for example, international antitrust has generated a flurry of articles in recent years. See, e.g., Eleanor Fox, International Antitrust: Cosmopolitan Principles for an Open World, Annual Proceedings of the Fordham Corp. L. Inst. 1998 (1999); Eleanor Fox, Toward World Antitrust and Market Access, 91 Am. J. Int'l L. 1 (1997); Ernst-Ulrich Petersmann, International Competition Rules for the GATT-WTO World Trade and Legal System, 27 J. World Trade 35 (1993); Andrew T. Guzman, Is International Antitrust Possible?, 73 N.Y.U. L. Rev. 1501 (1998); Daniel K. Tarullo, Competition Policy for Global Markets, 2 J. Int'l Econ. L. 445 (1999); Russell J. Weintraub, Globalization's Effect on Antitrust Law, 34 New England L. Rev. 27 (1999); Diane Wood, Is Cooperation Possible?, 34 New England L. Rev. 103 (1999); Spencer Webber Waller, An International Common Law of Antitrust, 34 New England L. Rev. 163 (1999).

become a more significant impediment to world trade as tariffs have fallen. Antitrust, the focus of this Essay, represents one of the important new trade-related topics.[2]

Although there is widespread consensus regarding the importance of international antitrust and a recognition of the fact that the issue is ripe for discussion at the international level, there is no agreement on how to go about establishing a more successful international antitrust regime. Even the proper forum in which to discuss antitrust regulation is the subject of controversy. European Union officials, along with Canada, Korea, and Japan have supported negotiation within the WTO while American officials have argued instead for increased bilateral cooperation among administrative agencies.[3] Among academics, there is similar disagreement.[4] At stake in this debate is much more than a mundane detail of location. As discussed in this Essay, the forum in which international antitrust is discussed is likely to determine whether a substantive international agreement is possible. If the negotiations are held within the WTO, such an agreement remains a potential outcome. If they are held in a stand-alone forum, an agreement is highly unlikely.

Because a certain measure of cooperation has been achieved in the area of international intellectual property (IP) -- in the form of the Trade Related Aspects of Intellectual Property (TRIPs) agreement -- that area offers a case study from which one can draw lessons for international antitrust. In fact, the lessons from IP are especially powerful because IP and antitrust have very similar strategic implications for countries' domestic laws

[2] Other important topics that have attracted significant interest on the world stage are environmental, labor, and intellectual property issues.

[3] See Daniel K. Tarullo, Competition for Global Markets, 2 J. Int'l Econ. L. 445, 445 (1999); Eleanor Fox, Antitrust Law on a Global Scale – Races Up, Down and Sideways, N.Y.U. Public Law and Legal Theory Working Paper Series, Working Paper 3, December 15, 1999, at 24.

and negotiating positions. In addition, negotiations over IP took place in both a stand-alone forum and within the GATT/WTO system.

For many years, international IP issues were negotiated within the World Intellectual Property Organization (WIPO), which deals exclusively with IP issues. And for many years WIPO failed to produce a substantial international agreement on IP.[5] During the Uruguay Round, IP was included among the topics to be discussed. A few years later, the TRIPs agreement was reached, and the world had a substantive agreement covering international IP. The failure of WIPO and success of TRIPs offers a warning against efforts to negotiate an international antitrust agreement outside of the WTO framework, and a demonstration of the potential benefits of inclusion within the WTO. This Essay presents the lessons of the IP experience for international antitrust.

I. THE EFFECT OF TRADE ON ANTITRUST POLICY

The goal of achieving an international antitrust regime is an ambitious one that presents several substantial obstacles. These include, but are not limited to the following three challenges. First, negotiators must overcome the lack of agreement regarding the optimal content of antitrust policy even in a closed economy. Some countries view antitrust policy as a tool to pursue economic efficiency and little else, while others also seek to protect small or medium sized business, and still others believe that it should also be used to protect

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[4] This Essay advocates negotiation of antitrust within the WTO. Professors Eleanor Fox and Daniel Tarullo, for example, argue against the inclusion of antitrust within the WTO. See Part III.

[55] There have been significant agreements dealing with international IP prior to TRIPs, of course. The two most prominent are the Paris Convention of 1883, see supra note 26, and the Berne Convention of 1886, see infra note 28. Nor has WIPO been a complete failure. It has produced agreements such as the 1989 Treaty on

employment.[6] Second, achieving compliance with an agreement will be challenging because the enforcement practices of countries are difficult to monitor and it is even more difficult to compel a country to change them. Finally, consensus on the substantive content of an agreement is difficult to achieve because systematic trade imbalances in imperfectly competitive markets can affect the substantive laws adopted by a country, moving it away from the rules it believes to be optimal for a closed economy, and at times moving it away from what other countries are willing to accept.

Although these are daunting challenges for negotiators, some solace can be taken from the fact that prior to the Uruguay Round of trade talks, IP featured precisely the same obstacles, and an agreement was reached in that field. One of the lessons that should be drawn from the IP experience is that the choice of negotiating forum has a large impact on the likelihood of success. This is especially true with respect to the third item on the above list – the strategic implications of imbalanced trade in imperfectly competitive markets. To understand the regulation of either international intellectual property or international antitrust, it is necessary to consider the strategic position of the countries involved, and how trade is likely to affect the substantive rules adopted by domestic governments.

To carry out an analysis of international antitrust and IP, we assume that governments and regulators favor their own constituents over foreigners in the sense that they seek to

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Intellectual Property in Respect of Integrated Circuits, but none that approaches the scope and importance of TRIPs.

[6] *See* W.S. Comanor et. al., Competition Policy in Europe and North America: Economic Issues and Institutions (1990); Eleanor M. Fox, The End of Antitrust Isolationism: The Vision of One World, 1992 U. Chi. Legal F. 221, 223 (1992); Joseph P. Griffin, EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business, L. & Pol'y Int'l Bus., June 22, 1993, at 51; Nina Hachigian, Essential Mutual Assistance in International Antitrust Enforcement, 29 Int'l Law. 117, 123-25 (1995); Diane P. Wood, The Impossible Dream: Real International Antitrust, 1992 CHI. LEGAL F. 277, 304.

promote the welfare of local residents, even at the expense of foreigners. This assumption is quite standard, and is acceptable whether one views government as acting in the public interest, in which case it is the domestic public interest that it seeks to promote, or one believes that government responds to well organized and well funded local constituents, in which case it is primarily the well organized and funded domestic constituents whose interests will prevail.[7] To keep the analysis simple, it is assumed that government does not care at all about foreigners – it only cares about local residents. This assumption is stronger than merely assuming that governments care more about locals than foreigners, and is made only for convenience. It does not affect the results of the analysis.

Assuming that governments favor their own constituents is equivalent to an assumption that governments seek to externalize the costs of their policies. For example, in adopting a pollution policy, a government is not concerned with any harm imposed on foreigners. If 40% of the harm from locally produced pollution is felt outside the country, government policy will only take into account the 60% that affects locals. Similarly, government will ignore the benefits enjoyed by foreigners. If, for example, an environmental policy provides benefits to both local residents and foreigners in nearby countries, the

[7] There can, of course, be exceptions to the policy of favoring locals over foreigners. It is imaginable, for example, that foreign funded lobbies could influence policy. The large amount of money spent by foreign interests in an attempt to lobby the American government attests to this potential. In virtually every important policy context, however, domestic concerns and domestic interest groups have a substantial advantage over foreign interests, and the assumption that policy makers favor locals is reasonable. See Alan O. Sykes, Externalities in Open Economy Antitrust and Their Implications for International Competition Policy, 23 Harv. J.L. & Pub. Pol'y 89, 92 (1999) ("[F]rom a positive perspective, it is exceptionally unlikely that the welfare of foreign citizens will be weighted equally with the welfare of domestic citizens in the domestic political process. Foreign citizens do not vote in domestic elections, they cannot be taxed, they generally do not donate money to foreign politicians, and so on.").

government, in evaluating the policy, will consider only those benefits enjoyed by its own constituents.

A bias in favor of locals affects policy in at least two ways. First, it provides an incentive to create exceptions to local laws when the harm from a particular conduct is only (or overwhelmingly) felt abroad. Thus, government will permit domestic parties to engage in activities that benefit them but that harm foreign parties, even when the same government would prevent such activities if they were wholly domestic in nature. Antitrust laws provide a dramatic example of this type of policy. In virtually every country with antitrust laws there is an exemption of some sort for export cartels. In the United States, that exemption is contained in the Webb-Pomerene Act,[8] the Export Trading Company Act of 1982,[9] and the Foreign Trade Antitrust Improvements Act.[10] Under the Act, even actions that are in clear violation of American antitrust laws are permitted if they are carried out by firms that meet the statutory definition of being engaged exclusively in export activity. The exemption exists because the harm from those actions is only felt abroad. In economic terms, local exporting firms are permitted to extract whatever monopoly rents they can because the dead-weight loss associated with monopolistic conduct is borne by foreigners.

The incentive to discriminate against foreigners can also lead to a policy of selective prosecution. The antitrust laws of most countries, with the United States being the most prominent exception, are enforced only by government agencies. The prosecutorial discretion

[8] 15 U.S.C. §§ 61 - 66 (1994).
[9] 15 U.S.C. §§ 4011-4021 (1994).
[10] 15 U.S.C. . § 6a (1994). For a more detailed discussion of this exemption in the United States Act, see McDermid, The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment, 37 Wash. &

enjoyed by such agencies can be used to target foreign firms and activities more aggressively than local firms and activities.

Favoring locals also produces a second, subtler, form of bias that affects the substantive laws of a country. To illustrate this second bias, assume for the moment that every industry in a country satisfies the definition of an export cartel, meaning that it does not sell any of its product locally. Under these conditions, there is no reason for the local government to adopt any form of competition policy. If every producer is an export cartel, it makes sense to "exempt" all producers, just as it makes sense for the United States to exempt its export cartels under the Webb-Pomerene Act. An exemption for every firm, of course, is equivalent to simply having no competition law at all.[11]

Now relax the assumption that all locally produced goods are exported and assume instead that a small fraction of local goods – say 5% -- are sold domestically and the rest are exported. The optimal policy from the perspective of the local government is to provide an exemption for all exports, while subjecting local sales to whatever antitrust laws are deemed appropriate for domestic activity. If possible, therefore, the government will adopt a Webb-Pomerene type exemption. If the firms that sell locally are the same as those that export, however, it is impossible to adopt this sort of exemption because the antitrust laws apply to the activities of the firm, not individual goods. For example, if a firm wishes to merge with a competitor, it is generally not possible to block that merger with respect to local production

Lee L. Rev. (1980). See also United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968); FTC, Webb-Pomerene Associations: Ten Years Later 15 (Staff Analysis, Nov. 1978).

[11] Strictly speaking, a country may wish to exempt every firm and still have a competition law because that law could be applied against foreign firms whose products are being imported. To make the above discussion completely accurate we must, therefore, assume that the country does not import any goods in

while permitting it with respect to foreign production. Thus, if every firm sells 5% of it production locally, there is no way to adopt a Webb-Pomerene style exemption that would affect only exports.

An inability to enact a Webb-Pomerene type exemption, however, does not mean that the country is without recourse. Assuming that this sort of exemption is unavailable, consider the policies that a country might adopt in its effort to provide the maximum possible benefit to its own firms.[12] One option is simply to adopt the same competition policy that the country would adopt in the absence of international trade (the "closed economy policy"). This closed economy policy, however, protects not only local consumers, who represent 5% of sales, but also foreign consumers who are responsible for 95% of worldwide sales by local firms. In other words, large numbers of foreign consumers are being protected through regulation that imposes costs on local exporting firms.

Instead of adopting its closed economy policy, the country could choose to have no competition policy, mimicking the policy it would adopt if all domestic production were exported. This policy, however, fails to protect local consumers and leads to a deadweight loss that is, in part, borne by those local consumers. As the share of local production that is consumed locally increases, so does the share of the total loss from anti-competitive conduct that is borne by locals.

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imperfectly competitive markets. The Essay considers the impact of imports on country behavior below, see TAN 15.

[12] I assume here that a country cannot explicitly favor local firms in their substantive law. if they could do so, of course, a country's optimal strategy would be to adopt stricter rules for foreign firms than for local firms. It may well be that the United States, through its enforcement practices, is engaged is just this sort of discrimination against foreign activity. In the last few years, for example, almost all of the fines levied in criminal enforcement actions have been against international cartels. See U.S. Department of Justice Antitrust

In fact, the best policy from the perspective of a government that cares only about its own residents is a middle ground between the two above options. Assuming that the government cares about both local consumers and local producers, it should adopt a competition policy that, though extremely lenient compared to its closed economy policy, nevertheless prevents certain conduct.[13] A lenient policy allows local firms to extract significant rents from consumers, most of whom are abroad. Although local consumers will bear some of the loss, the bulk of it is borne by foreigners. If the loss is sufficiently large, however, the government prefers to regulate in order to protect its own consumers. It is for precisely this situation that the government wants a policy that restricts firm behavior – even if it only does so in extreme cases. Through a lenient antitrust policy, the government can permit activities up to the point at which the actions of local firms impose such large total loses that the 5% of those loses felt by local residents outweighs the benefits enjoyed by the firms as a result of their actions. In other words, extreme anti-competitive behavior that leads to large global deadweight loses is regulated while less extreme actions are not.[14]

As the percentage of production sold domestically increases, locals feel a larger share of the global deadweight loss from the monopolistic activity of local firms. If all production is sold locally, of course, the best policy is simply the closed economy policy. If any production is exported, however, some of the loss from anti-competitive conduct is felt abroad

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Division Annual Report FY 1999, The Criminal Enforcement Program (stating that the Department of Justice has adopted a strategy of concentrating its criminal prosecution resources on international activity).

[13] If the government cares only about local producers, of course, it should not adopt a competition policy, even in the absence of international trade.

[14] For example, if the government weighs the interests of local consumers and local producers equally, it will allow monopolistic activity as long as the additional profits enjoyed by local firms exceed the loss felt by local consumers. If, despite the fact that local consumers feel only 5% of the global loss, that loss exceeds the gain to local firms, the transaction will be regulated.

and the government incentive to regulate is reduced. As long as there is international trade, therefore, the export of local production gives the government an incentive to adopt a policy that is weaker than the closed-economy policy.

Up to this point the discussion has considered only exports. The presence of imports has an analogous effect on government policy and can be analyzed in the same way as exports. Suppose that all locally consumed goods are imported. In this environment, the government's preferred policy is stricter than the closed economy policy.[15] This is so because in a closed economy the government takes into account both the profits gained by firms when they behave monopolistically and the loss felt by consumers as a result of the monopolistic conduct. In a country that has no producers of its own, however, the gains felt by firms are excluded from the calculus. In fact, in the absence of local firms, the country's best policy is simply to prevent any activity that reduces the well being of local consumers. This is far from the closed economy policy which might permit activities that reduce consumer well-being if producers are made sufficiently better off.

If instead of assuming that all consumption is imported, it is assumed that a small fraction is produced locally – say 5% – then the local government takes that 5% of profits into account in formulating its preferred policy. The result is a policy that is slightly less strict than is the case if 100% of consumption is imported. This is so because a small fraction of profits enjoyed by producers is taken into account by the government. An activity that imposes a small net loss on consumers will be approved by the government's preferred policy

[15] We assume here that the country is able to regulate the activities of foreign firms. If it cannot do so, the country will only consider its own firms when regulating and, as the discussion of exports shows, will adopt a policy that is weaker than its closed economy policy.

if the benefit to producers is so large that the benefit enjoyed by local producers (who only produce 5% of local consumption) exceeds the loss to consumers. This same transaction would be prevented if all production were imported. As the share of consumption produced locally increases, the preferred government policy becomes less strict. Notice that it is only when 0% of consumption is imported – meaning all local consumption is produced locally – that the optimal policy is the closed economy policy. Thus, the presence of imports always leads the country toward a stricter competition policy.

Combining the above discussion of imports and exports demonstrates how international trade affects the substantive policies of a country.[16] In particular, we can predict how a country's policy will change relative to its closed economy policy.[17] Notice first that if a country's share of global production is the same as its share of global consumption, then the country's optimal strategy is its closed economy policy.[18] For example, if the country is responsible for 15% of worldwide production, and also consumes 15% of that global production, the closed economy policy will be adopted.[19] This is so because the country takes into account only 15% of the impact of firm behavior on consumers, creating pressure toward less regulation relative to the closed economy policy. On the production side, on the other

[16] For simplicity it is assumed that all gains and losses are distributed proportionally around the world. Thus, for example, if a country has 40% of the world's firms, those firms enjoy 40% of global profits; and if a country has 20% of the world's consumers, those consumers bear 20% of any global loss to consumers. This assumption is not necessary, but makes the presentation clearer.

[17] If we assume that governments pursue the well-being of their citizens, deviations from the closed economy policy represent efforts on the part of governments to impose costs on foreigners even if it is believed that those costs exceed the benefits felt domestically.

[18] Recall that references to imports and exports are actually references to trade in imperfectly competitive markets, where antitrust policy is relevant. The above result assumes for simplicity that every country consumes the same proportion of the production of every other country. Thus, if a country consumes 50% of worldwide production, it consumes 50% of the production from each country. This is obviously an unrealistic assumption, but it is helpful to illustrate how a country's preferred policy is affected by trade.

[19] This is so assuming that the country can apply its laws extraterritorially.

hand, the country takes into account only 15% of profits earned by firms producing for local consumption, creating pressure toward greater regulation relative to the closed economy policy. These forces offset one another, leaving the country with its closed economy policy.[20]

As the share of global production increases relative to the share of global consumption, the optimal domestic policy grows weaker relative to the closed economy policy. Thus, for example, if the country accounts for 45% of world production, but only 20% of world consumption, the optimal domestic policy is weaker than the closed economy policy. And if the country produces 20% of world production, but accounts for 45% of consumption, the optimal domestic policy is stricter than the closed economy policy. The flow of international trade, therefore, affects the substantive antitrust policy adopted by a country. Countries that are net importers of goods whose markets are imperfectly competitive will adopt antitrust laws that are more stringent, all else equal, than countries that are net exporters of such goods.[21]

Because international trade causes national policies to deviate in a systematic way from the closed economy policy, if one knows a country's pattern of trade it is possible to predict how that country's policy is affected. For example, developing countries as a group are typically net exporters of primary products, whose markets tend to be competitive, and net importers of goods and services sold in imperfectly competitive markets, such as

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[20] The assumption is that import and export industries are equally competitive. If this is not so, it is necessary to adjust the above result. The intuition, however, remains the same.

[21] The competition policy adopted by countries also differs for reasons other than those presented. See Guzman, supra note 1, at 1538-41; Eleanor M. Fox, The End of Antitrust Isolationism: The Vision of One World, 1992 U. Chi. Legal F. 221, 223 (1992); Joseph P. Griffin, EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business, L. & Pol'y Int'l Bus., June 22, 1993, at 51; Wood, Impossible Dream, supra note 6, at 304.

pharmaceuticals, software, and so on.[22] The theory predicts, therefore, that they will prefer an antitrust policy that is stricter than their closed economy policy. Net exporters of these goods, developed countries in particular, prefer weaker international antitrust in order to favor their exporting domestic firms.

One more issue must be included to complete the analysis of national incentives. Although not explicitly stated, the above discussion assumes that countries are able to regulate conduct that takes place abroad but that has a domestic impact. That is, they are able to regulate extraterritorially. If countries are unable (or unwilling) to regulate extraterritorially, their incentives are affected. In particular, they have little incentive to adopt strict regulations in response to a high level of imports. In the absence of extraterritorial laws, a country cannot affect the behavior of foreign firms and strict rules fail to protect local consumers from foreign conduct. In this situation, only local firms are affected by local regulation and the analysis of how trade affects the substantive rules is very much like the case in which there are exports but no imports – implying that the laws tend to be weaker than the closed economy policy.

The above analysis has important implications for the prospect of a negotiated solution to the problem international competition policy. It suggests that net importers and net exporters will have difficulty reaching an agreement on international antitrust. To see why

[22] Although the analysis often simply refers to "goods" as the relevant unit of analysis, goods sold in competitive markets are not a concern for competition policy and can be disregarded. Producers of agricultural goods and other primary products are generally operating in fairly competitive markets. It is therefore, reasonable to categorize developing countries as net importers of goods from imperfectly competitive markets.

this is the case, imagine two countries with the same closed economy policy.[23] Assume that one country is a net exporter, and the other is a net importer, of goods produced in imperfectly competitive markets.

Because neither country is compelled to accept a negotiated solution, an agreement requires the consent of both. Consider each country's preferred form of international antitrust. The net importer wants a policy that is stricter than its closed economy policy because the country fails to take into account the profits of foreign firms whose product is sold locally. Among the activities that the country would like to prevent are those that reduce the overall well being of locals (producers and consumers) – even when those activities cause an increase in the profits of foreign firms that more than offsets the net loss to locals. Thus, the net importer wants to block some activities that yield an overall increase in well-being.[24] If the country can regulate the activities of foreign firms, it can simply adopt the strict rule that it prefers.

The net exporter, on the other hand, wants a policy that is weaker than its closed economy policy because it does not take into account the loss to foreign consumers as a result of monopolistic practices. Among the activities that the net exporter would like to permit are activities that yield increased profits to local firms, but that reduce the welfare of foreign

[23] Assuming the same closed economy policy makes the analysis simpler. If this assumption is relaxed, it is even less likely that an agreement can be reached because difference in closed economy policies represent an additional potential source of disagreement.

[24] If the government does not weigh the interests of consumers and producers equally – say, by favoring producers interests over consumer interests – it remains true that the importer will adopt a stricter rule than it would if all activity were domestic. The impact of the change on efficiency, however, can only be identified if one makes additional assumptions about how the government weighs consumer and producer interests. See Andrew T. Guzman, Is International Antitrust Possible?, 73 N.Y.U. L.R. 1501 (1998).

consumers by more than the gains to local firms. The net exporter, therefore, wants to allow some activities that lead to an overall loss of welfare.

The two countries, therefore, want very different policies to be adopted at the international level, making an agreement on international antitrust difficult. If both countries regulate extraterritorially, the net importer's law – which is stricter than its closed economy policy – will be the relevant rule. As it is able, unilaterally, to regulate all transactions that it cares about, the net importer has no reason to support any international antitrust agreement, and certainly no agreement that leads to a weaker substantive law. Absent some form of transfer payment, therefore, the net importer prefers to maintain the status quo rather than support an international agreement.

If neither country acts extraterritorially, on the other hand, both countries will have relatively weak rules, and the net exporter will be pleased with the status quo. The net exporter prefers weak rules because such rules give its firms greater freedom and a greater ability to capture profits. An international agreement, therefore, will not get the support of the net exporter unless it implements similarly weak rules (in which case it will fail to satisfy the net importer). In the presence of international trade, therefore, even countries that agree on the appropriate closed economy policy will be unable to agree on an international antitrust regime if their trading patterns differ.

In some circumstances, of course, two or more countries may want the same international antitrust policy. For example, countries with balanced trade in imperfectly competitive goods markets will want their closed economy policy adopted internationally. Thus, countries will have a common view of international antitrust if (i) they have the same closed economy policies; and (ii) they have the same trade balance in imperfectly competitive markets (net importer or exporter). With this in mind, it is possible, though by no means certain, that developed countries are sufficiently similar in their trade flows that agreement on international antitrust is possible. When considering North-South negotiations, however, it is difficult to imagine that there can be agreement. As already mentioned, developed countries tend to export goods in imperfectly competitive markets while developing countries tend to import those goods. Thus, even if all countries could agree on an optimal closed economy policy, they would not agree on an optimal international antitrust policy. Developed countries would be opposed to an international agreement because they prefer a relatively weak set of international antitrust rules. Developing countries, on the other hand, prefer the adoption of international antitrust policies that are relatively strict. In fact, developing countries have an even greater desire for an agreement because they typically do not apply their laws extraterritorially.

The divergent interests of developed and developing countries make a negotiated agreement highly unlikely in the absence of some form of transfers from those who stand to benefit from an agreement to those who stand to lose. If transfers are possible, however, an agreement is once again possible. The next section explains that the TRIPs agreement was possible because transfer payments were made in the form of trade concessions by developed countries.

II. THE LESSON FROM IP

The previous section demonstrates that there is tension between the preferred international antitrust policies of developed and developing countries. If negotiation of an international competition policy agreement is to succeed, this tension must be overcome. Fortunately, a very similar strategic relationship among countries existed in IP until an agreement was reached during the Uruguay Round of GATT/WTO talks. The IP case study offers a valuable lesson about how competition policy negotiations should proceed.

The negotiating posture of countries in IP is similar to that in competition policy, though it is better understood in the former than in the latter. Countries that are engaged in a large amount of research and development or who otherwise produce a great deal of intellectual property prefer a system of rigorous protection and enforcement of intellectual property rights around the world because they take into account the profits enjoyed by their local producers of IP and ignore the benefits that a weaker regime might offer foreign consumers in the form of faster and cheaper access to innovation. These net exporters of intellectual property, therefore, prefer an international regime in which intellectual property rights are relatively expansive and strictly enforced. Just as a desire to protect the interests of local firms leads to a preference for weak antitrust rules, it also leads to a preference for strong IP protections.

Net importers of IP, on the other hand, prefer a relatively low level of protection for IP because they ignore the interests of foreign producers of IP.[25] A relatively weak international IP regime gives their residents better access to new technologies. This is analogous to net importers of imperfectly competitive goods who prefer a strict international antitrust regime in order to protect local consumers.

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[25] Importers have an interest in providing some level of IP protection if doing so encourages innovation because their own consumers benefit from that innovation. Because they ignore the profits enjoyed by innovators, however, they prefer a policy that is weaker than their closed economy policy.

Prior to the TRIPs agreement, the negotiating posture of developed and developing countries was precisely that predicted by above theory. Developed countries in general and the United States in particular, which are net exporters of IP, sought an international regime with strong protections for IP and reliable enforcement worldwide. Developing countries, which are net importers of IP, on the other hand, argued for a weaker system of protection and refused to accept any agreement that increased the protection afforded innovation.

The problem of international IP, therefore, is quite similar to the problem of international antitrust. The one major difference between the IP case and the antitrust case is that an international agreement was achieved in IP. No comparable deal has ever been reached with respect to antitrust. Examining the case of IP reveals that it was the decision to bring IP within the WTO framework that opened the door to the TRIPs agreement. The lesson is that unless negotiations regarding international antitrust are brought within the WTO or some other mechanism is found to facilitate transfers among states, a substantive agreement is unlikely. The remainder of this section examines the history of international intellectual property and explains how the TRIPs agreement ultimately came about.

Prior to the TRIPs agreement, the most important international IP agreements were the Paris Convention of 1883,[26] which addressed industrial property,[27] and the Berne Convention of 1886,[28] which dealt with copyright. The primary contribution of these conventions was to streamline the process of registering IP in many countries simultaneously and to adopt the

[26] Paris Convention for the Protection of Industrial Property, March 20, 1883, 21 U.N.T.S. 305.

[27] The term industrial property includes "patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source of appellations of origin, and the repression of unfair competition." Paris Conv. art. 1(2).

[28] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221.

national treatment principle.[29] National treatment prohibits discrimination against foreign holders of IP rights, and represented an impressive accomplishment at the time the Paris and Berne Conventions were negotiated. In addition, both conventions established certain minimum standards of IP protection.

The requirement of national treatment in both the Paris and Berne Conventions represented an important step toward cooperation in international IP because it eliminated the ability to explicitly discriminate against foreign IP holders. National treatment, however, does nothing to harmonize the protections offered by the many different domestic IP regimes. A country that has weak protections for its own citizens will also have weak protections for imported works. Ultimately, the lack of substantive international harmonization in IP led to complaints about the Paris and Berne Conventions,[30] and efforts to reach a new agreement.

TRIPs was the product of the removal of IP negotiations from the World Intellectual Property Organization (WIPO), a specialized organization focused exclusively on IP, and the incorporation of them within the WTO framework.[31] Prior to the Uruguay Round, international IP issues were negotiated either on a bilateral and regional basis or within

[29] Paris Conv. art. 2(1); Berne Conv. art. 1.

[30] See Robert J. Gutowski, The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven?, 47 Buff. L. Rev. 713, 724 (1999); Sam Ricketson, The Future of Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights, 26 Int'l Rev. Indus. Prop. & Copyright L. 872, 881 (1995).

[31] Moving the agreement into the WTO not only increased the likelihood of an agreement, as discussed below in the text, it also increased the number of affected countries. For example, Singapore and Taiwan are not signatories to the Paris and Berne Conventions but are members of the WTO. *See* Frank Emmert, Intellectual Property in the Uruguay Round: Negotiating Strategies of the Western Industrialized Countries, 11 Mich. J. Int'l L. 1317, 1339 (1990).

WIPO. Despite efforts over many years, WIPO failed to generate a multilateral agreement on IP that imposed substantive obligations on all participating countries.[32]

More than any of its predecessors, the TRIPs agreement represents an attempt to establish meaningful cooperation and harmonization of domestic IP rules. The agreement both establishes a set of universal substantive norms and provides an enforcement mechanism through which injured states can sanction states that violate the agreement.[33] The presence of an enforcement mechanism is important because it opens the door to negotiations intended to resolve prisoner's dilemma style problems.[34] In the absence of an enforcement mechanism, international agreements are limited to resolving coordination problems.[35] The Paris and Berne Conventions were able to resolve the question of how to permit efficient filing of intellectual property rights in many countries at the same time, which is primarily a matter of coordination. The TRIPs agreement, on the other hand, imposes substantive standards that might be ignored if there were no system of dispute resolution and sanctions behind those standards. Incorporating TRIPs within the WTO makes the dispute settlement procedures of that organization available to complaining countries and, therefore, makes commitments with respect to IP credible. A failure to honor one's commitments triggers the dispute settlement process and, if the offending country does not correct its behavior, sanctions. This is

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[32] As previously noted, WIPO has succeeded in establishing a variety of treaties. See http://www.wipo.org/eng/iplex/index.htm for a list.

[33] The TRIPs agreement establishes new minimum standards for patents, copyrights, trademarks, trade secrets, industrial design, integrated circuit designs, and other intellectual property and incorporates the Paris and Berne Conventions. See Sam Ricketson, The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights, 26 Int'l Rev. Indus. Prop. & Copyright L. 872, 885-91 (1995) (providing a summary of the TRIPs agreement).

[34] In contrast to the TRIPs agreement, the Paris and Berne Conventions had no enforcement provisions.

important to developed countries who want to ensure that developing countries honor their commitments, but it is also important to developing countries because they cannot offer their compliance with IP rules in exchange for other concessions unless their promise to provide enforceable IP rights is credible.

TRIPs increases the rights of IP holders by making infringement of those rights more difficult. In particular, it ensures that countries that prefer weaker IP protections nevertheless provide the specified minimum level. Understanding that the agreement seeks to prevent developing countries from allowing what in developed countries would be viewed as violations of intellectual property rights raises the question of why developing countries would agree to TRIPs in the first place. These countries have little incentive to accept a stricter international IP regime and yet they signed the TRIPS agreement. It also raises the related question of why it took so long. Why was the agreement only possible within the WTO and during Uruguay Round? Why did the agreement not emerge out of bilateral and regional negotiations or out of WIPO?

The agreement did not come about prior to its negotiation within the WTO precisely because developing countries prefer a weak international IP regime. These countries tend to be consumers of new technologies rather than producers of it, and they therefore benefit from a regime that allows the copying of new technologies and their rapid and inexpensive distribution. In other words, developing countries are worse off under TRIPs, at least in the

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[35] Resolving a prisoner's dilemma requires some form of enforcement mechanism because each party has an incentive to "cheat" rather than comply with an international agreement. In a coordination game, on the other hand, all parties are better off complying with the agreement.

short run, and until the Uruguay Round they refused to consent to any similar agreement for that reason.[36]

The ultimate decision by developing countries to consent to TRIPs was not motivated by a belief that greater protection for IP was in the interest of those countries but rather by a desire to obtain concessions in other areas that were being negotiated at the Uruguay Round.[37] In particular, developing countries wanted and received trade concessions on agricultural subsidies, market access for their own agricultural goods, and protection against unilateral sanctions by developed countries, especially the United States.[38] The decision to place the negotiations within the Uruguay Round, therefore, proved critical.[39] Had IP negotiations remained within WIPO, negotiators would have been unable to exchange IP concessions by developing countries for trade concessions by developed countries.

The lesson for competition policy should be clear. Like international IP, an agreement on international antitrust is unlikely in the absence of an effective mechanism through which countries are able to make transfer payments.[40] The most promising way for those transfers to take place is through concessions in other areas.[41] The WTO is an ideal forum for discussions

[36] See, e.g., Gutowski, supra note 30, at 752 ("TRIPs will produce a rent transfer from developing to developed nations in the short-term.").

[37] Developing countries also received some concessions in the TRIPs agreement itself. Most notably, transition periods were built into the agreement to delay the entry into force of most obligations for developing countries. See TRIPs Agreement, art. 65:1-4., 66:1

[38] See Frederick M. Abbott, Commentary: The International Intellectual Property Order Enters the 21st Century, 29 Vand. J. Transnat'l L. 471, 472 (1996); Frederick M. Abbott, The WTO Agreement and Global Economic Development, 72 Chi.-Kent L. Rev. 385, 388 (1996).

[39] See Marco C.E.J. Bronkers, Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO, 2 J. Int'l E. L. 547, 548-49 (1999).

[40] This argument is advanced in greater detail in Andrew T. Guzman, Is International Antitrust Possible?, 73 N.Y.U. L. Rev. 1501 (1998).

[41] In theory, of course, transfer payments could take any number of forms, including cash payments, political support, military or economic aid, and so on. In practice, however, such transfers are much easier to

of such transfers because each round of negotiations implicates a wide range of subjects, allowing countries to make concessions in one area in order to achieve their own objectives in another area. In simple economic terms, the WTO provides a forum for negotiation in which transaction costs are relatively low, making it more likely that value increasing agreements will be reached.

The presence of a dispute resolution system is an additional reason to focus international antitrust negotiations in the WTO, as it allows countries to make credible commitments.[42] It is difficult to sanction states for a failure to comply with international obligations, yet such sanctions are especially important in the antitrust context because countries prefer to ignore those portions of an agreement that harm their own residents. Although the WTO does not provide a complete solution to this problem, the dispute resolution mechanism at least increases the cost of violating commitments because it opens the door for legal sanctions and increases the reputational cost of a violation.

III. THE ARGUMENTS FOR A NON-WTO APPROACH

Although it is beyond the scope of this Essay to undertake a complete discussion and analysis of the arguments made in support of either the status quo or a stand-alone competition policy forum, this section provides a brief review of those arguments and explains why they are not persuasive.

negotiate, not to mention politically more palatable, when they take the form of concessions in contemporaneous negotiations.

[42] It is worth noting that the WTO also has the advantage of being the closest thing in existence to an international forum for antitrust because the WTO Working Group on the Interaction between Trade and Competition Policy is already studying the antitrust question. See Frederick M. Abbott, The Future of the Multilateral Trading System in the Context of TRIPs, 20 Hastings Int'l & Comp. L. Rev. 661, 664-65 (1997).

The United States has adopted the position that international competition policy should continue to be negotiated through bilateral and regional agreements rather than through the WTO.[43] One argument in support of this position might point to the fact that there is already international cooperation in antitrust, and that this cooperation has been achieved in large part through the sort of bilateral and regional cooperation that the United States has in mind. Greater cooperation, it might be argued, can be achieved by continuing down the same path.

Although it is true that there is a certain level of cooperation among antitrust authorities today, what currently exists does not rise above procedural cooperation intended to assist local authorities in the prosecution of their own domestic laws. It does not represent a serious move toward cooperation in terms of substantive rules. The difference between minimal cooperative efforts of this sort and the type of substantive cooperation that is often envisioned by scholars and sought by policy makers is enormous. The former is most easily explained as an effort on the part of national regulators to ensure the efficacy of their own local rules. As business becomes more international, domestic antitrust authorities encounter more cases with an international component. Without a certain level of procedural cooperation among regimes, private parties could use national barriers as a shield against prosecution. For example, incriminating documents could be stored in a foreign country, beyond the reach of domestic discovery rules. Similarly, conduct that might evidence a violation of local antitrust rules could be carried out abroad – where witnesses are not subject to subpoena. The cooperation we currently see is primarily intended to address these issues.

[43] See International Competition Policy Advisory Committee final report (available at

It seeks to encourage the sharing of information among national regulators, to permit the use of discovery procedures abroad, and to minimize the extent to which conflicts arise between the national regulators of two or more countries as they seek to enforce their domestic rules.

Other arguments in favor of a non-WTO approach are advanced by Professor Eleanor Fox, the most prominent critic of the inclusion of antitrust within the WTO. Professor Fox argues that with the exception of private market access restraints,[44] international antitrust issues should be addressed in an independent forum, apart from the WTO.[45] Professor Fox focuses on the question of whether or not competition law issues are appropriately considered "trade" issues. Although she does not provide an explanation or justification, her view appears to be that the WTO should be used exclusively for trade issues.[46] If one adopts this perspective, of course, the conclusion must be that antitrust issues should be dealt with in some other forum. Professor Fox recognizes, however, that some antitrust issues are closely related to trade issues, and concedes that these issues should be handled in the same manner as other trade issues. Specifically, she believes that competition laws designed to open markets play the same basic role as liberal trade laws and should be placed within the WTO. For those market access issues, the substantive content of her proposal includes a choice of law rule under which the law of the excluding nation (i.e., the importer) applies to a competition law case. This remedy, of course, ignores the strategic questions raised earlier in

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http://www.usdoj.gov/atr/icpac/finalreport.htm).

[44] Professor Fox identifies three types of market access restraints. They are "(1) abuse of dominance: exclusions by monopoly or dominant firms, (2) cartels with boycotts, and (3) vertical restraints such as exclusive dealing by the few leading firms in high barrier, concentrated markets." Eleanor M. Fox, Competition Law and the Millennium Round, 2 J. Int'l Econ. L. 665, 671 (1999).

[45] See Eleanor M. Fox, Competition Law and the Millennium Round, 2 J. Int'l Econ. L. 665, 665 (1999); Fox, supra note 3, at 25-27.

this Essay. A system under which the excluding nation's law applies is a system of extraterritoriality. Where countries apply their laws extraterritorially, net importers have an incentive to over-regulate because their consumers receive all of the benefits of the regulation while the costs are borne (at least in part) by foreign producers.[47] These overly strict rules will be the de facto international antitrust regime because extraterritoriality allows a net importer them to reach any conduct that affects it.

More important than her proposal regarding market access, however, is the argument that competition policy rules that do not address market access should be left outside the WTO framework. Her proposal of a stand alone "World Competition Forum" would simply create a WIPO-style organization for competition policy. Such an organization would have no practical way to orchestrate transfer payments, and no established dispute resolution procedure. The creation of such a forum would represent a repeat of the mistake made with WIPO. Where the interests of countries are at odds, negations must take place within a forum that allows transfers.

Professor Fox offers three objections to placing international antitrust talks within the WTO.[48] None is compelling. First, negotiations within the WTO would have to include both trade and competition representatives which, she fears, may impede progress on competition issues. Contrary to Professor Fox' concern, the presence of both sets of negotiators is part of

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[46] "These issues are at the heart of *competition* law, not trade law, and they deserve to be placed on 'competition' ground." Fox, Millennium Round, supra note 45, at 675.

[47] There is also a political economy problem that may prevent local officials from implementing optimal rules. The beneficiaries from a policy of open markets are consumers, a group that that is diffuse and poorly organized. Local firms that prefer to prevent the entry of foreign firms, however, can organize more easily and have more at stake – making them a more effective interest group. As a result, one would expect local rules to be overly restrictive.

[48] Fox, Millenium Round, supra note 45, at 677 n.37.

the advantage of keeping the talks within the WTO. With both sets of negotiators present it is easier to negotiate trade-offs in one area in order to get benefits in others, just as the presence of both IP and trade negotiators allowed TRIPs to come about.

Second, because WTO agreements typically include dispute resolution, Professor Fox expresses concern that some countries may be unwilling to participate if dispute resolution is part of the agreement. While it is true that some countries – most notably the United States – may prefer to avoid an agreement that includes dispute resolution, it is also true that an agreement is of limited use if it cannot be enforced in some fashion. International competition policy is difficult in part because it requires countries to make commitments that, while globally desirable, are harmful to their own welfare. Such commitments are much more credible in the presence of a dispute resolution procedure. Without dispute resolution, an agreement is much less valuable. The resistance to dispute resolution should be overcome through negotiations. If it is the case that substantive and credible international antitrust is desirable from a global perspective, those who stand to benefit from it can offer transfers to those that stand to lose such that everybody is better off with an agreement.

Finally, Professor Fox expresses a concern that the WTO may not be able to incorporate the many other issues that are being considered, such as labor issues, environmental issues and so on. Although incorporation of competition policy issues should be done with care, there is no evidence that the WTO is losing its ability to deal with its traditional trade concerns or its more recent obligations toward intellectual property, leaving us with no sign that the organization cannot handle competition policy as well. The wisdom of incorporating the other issues that might be considered for inclusion such as environmental and labor issues, is beyond the scope of this paper. They should be considered on their own merit, independently of the international antitrust issue.

Professor Tarullo has also spoken in opposition to the inclusion of antitrust within the WTO.[49] He argues that the inclusion of antitrust within the WTO would be ill-advised because the WTO operates in an overly adversarial manner, and that this environment is poorly suited to "the cooperation among states that will be necessary to address some types of problems concerning antitrust policy."[50] The essence of his argument appears to be the WTO is fundamentally a trade organization, and that the resulting norms of the organization cannot properly accommodate competition policy.[51]

This institutionalist concern regarding the WTO is founded on at least in part on the view that the WTO as currently structured is ill-suited to manage a competition policy agreement. It is argued that the organization is suited to deal with trade issues because these are more adversarial in nature,[52] and it is poorly suited to handle international regulatory problems.[53]

This perspective is problematic for at least three reasons. First, it does not adequately consider the potential for change within the WTO. The WTO has been dominated by officials

[49] See Daniel K. Tarullo, Norms and Institutions in Global Competition Policy, 94 Amer. J. Int'l L. 478 (2000).

[50] Tarullo, supra note 1 at 479.

[51] Id. ("Housing a competition agreement in the WTO would inevitably favor the trade norms where the two conflict. Accordingly, forcing the square peg of competition policy not the round hole of trade policy will change the shape of the peg.").

[52] Id. at 479 ("[T]he rather adversarial character of the WTO system makes it an unpromising vehicle for fostering the cooperation among states that will be necessary to address some types of problems concerning international competition policy.")

[53] See id. at 489 ("The WTO is not designed to help governments act more effectively to address a shared regulatory problem. The objective of the trade ministries that dominate WTO activities is the elimination of certain government practices, not their coordination.").

with interests in trade because until the Uruguay Round the GATT was almost exclusively a trade organization. If it is true that the culture of trade is fundamentally different from regulatory issues such as competition policy, it is no surprise that a trade organization should feature that culture. Bringing competition policy with the WTO would obviously required institutional changes, including the presence of people with expertise in that area. There is no question that an institutional change of this sort presents challenges, but on the other hand, there is little reason to think that it cannot be done.

Second, claims that the WTO cannot successfully incorporate regulatory issues is contradicted by the fact that it has already done so with the TRIPs agreement. As discussed above, national incentives in IP are quite similar to those in antitrust. The success of TRIPs, therefore, suggests that there is hope for an antitrust agreement as well.

Finally, there is no reason to think that the pursuit of international antitrust is somehow less adversarial than the pursuit of free trade. In both cases national delegations can be expected to represent the interests of their own governments, and in both cases concessions in one area are often needed in order to get agreement in another. If anything, negotiations over international antitrust may be more adversarial than trade negotiations because at least in the case of trade we know that free trade increases the welfare of all countries and that resistance to free trade is primarily the result of the political economy of trade. In contrast, the analysis in this Essay has shown that an antitrust agreement will impose costs on some countries.

A decision to include antitrust issues in a future round of WTO negotiations leaves open the question of what should be included in an international agreement. This important question is beyond the scope of this short Essay, but it is worth noting a few points. First, a national treatment principle would be an important early step toward ensuring sound competition policies. Although a national treatment requirement would not address the strategic choice of domestic law by trading nations, it would prevent the most explicit attempts to favor locals over foreigners such as exemptions for export cartels. Second, private rights of action should be encouraged. Competition policy often suffers from political involvement and interference, and the existence of a private right of action would, like the national treatment principle, promote the equal treatment of all affected parties.[54] Additional obligations would obviously have to be added to an antitrust agreement, including rules to ensure transparency and minimum substantive standards. These are left to another day.

IV. CONCLUSION

This Essay has not attempted to identify or address all important questions in the international antitrust debate. Its limited aim has been to advance the case for the inclusion of competition policy within the WTO, rather than in a stand-alone forum. The basic structure of the argument is simple. Multilateral agreement on international antitrust is unlikely in the absence of transfer payments paid from those countries that stand to benefit from such an agreement to those countries that stand to lose. The WTO provides a ready-made system through which transfer payments can be made. The potential payoff from inclusion in the WTO is demonstrated by the history of intellectual property. After many years of failure,

[54] In other writings I have argued for both national treatment and private rights of action in a more generalized context that would also apply to antitrust. See Andrew T. Guzman, Choice of Law: New Foundations, mimeo (2000).

international cooperation was achieved, in the form of the TRIPs agreement, only when negotiations were incorporated into the WTO.

Support for a WTO solution to international competition policy concerns should not be mistaken for a rejection of other approaches. For example, national authorities should continue to seek bilateral cooperation on issues that are amenable to bilateral efforts. In the end, however, it seems unlikely that large scale progress on international antitrust can come about without some form of transfers of the type made possible within the WTO.