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PHILIP D. REED

Philip D. Reed is the benefactor of Volume 33, Book 1 of the *Fordham International Law Journal.* It is in his memory that we dedicate this issue. Philip Dunham Reed graduated from the Fordham University School of Law in 1924. Over the course of his career, he became a leading industrialist and the Chairman of General Electric. For further information regarding the life and accomplishments of Philip D. Reed, please see the Memorial included in 14 FORDHAM INT'L L.J. vii (1990).

ARTICLES

ANTITRUST IN A GLOBALIZED ECONOMY: THE UNIQUE ENFORCEMENT CHALLENGES FACED BY SMALL AND DEVELOPING JURISDICTIONS

Michal S. Gal[*]

INTRODUCTION

While, in the past, antitrust issues were largely contained within national borders, justifying doctrines based on the assumption that the law stops at a nation's shore, antitrust issues have become increasingly international.[1] Countries face an increasing prospect that their economies will be harmed by anticompetitive conduct that takes place, in whole or in part, in another jurisdiction. Moreover, every country has an interest in the choices that other countries make about the adoption and enforcement of their competition laws in cases with cross-border effects.[2] To paraphrase a well-known quote, no country is an island, entire of itself.[3] Accordingly, one of the main challenges

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1. *See generally* INT'L COMPETITION POLICY ADVISORY COMM., U.S. DEPT. OF JUSTICE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST (2000), *available at* http://www.justice.gov/atr/icpac/finalreport.htm.

2. For an analysis of such effects, see, for example, Michal S. Gal & Jorge Padilla, *The Follower Effect*, 76 ANTITRUST L.J. (forthcoming 2010).

3. Part of a sermon by the seventeenth century English author and clergyman John Donne. *See* JOHN DONNE, DEVOTIONS VPON EMERGENT OCCASIONS AND SEVERALL STEPS IN MY SICKNESSE MEDITATION XVII at 162 (British Libr. 1638).

of this decade in the antitrust arena is the creation of some form of a cooperative international antitrust regime.

The potential benefits of increased international trade and cooperative competition policies to all countries involved are enormous. Yet to determine whether such benefits could be realized, and whether some countries are likely to benefit more than others, one needs to analyze the array of tools at each country's disposal to deal with antitrust issues arising from globalized trade as well as the current and foreseeable steps towards cooperation.[4]

This Article analyzes this issue from the point of view of small and developing jurisdictions.[5] While much has been written on international antitrust, not much scholarship has focused on the unique antitrust enforcement challenges facing these jurisdictions in a globalized world, their causes, or how these challenges shape coordination efforts.[6] Moreover, while scholars often assume low enforcement levels on international antitrust issues in such jurisdictions,[7] this assumption was never proven.

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4. For the seminal works on this issue see Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142 (2001) [hereinafter Guzman, *Federalism*]; Andrew T. Guzman, *Is International Antitrust Possible?,* 73 N.Y.U. L. REV. 1501 (1998) [hereinafter Guzman, *International Antitrust*]. *See also* Edward M. Graham, *Economic Considerations in Merger Review, in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 57 (Simon J. Evenett et al. eds., 2001); Daniel Sokol, *Monopolies Without Borders,* 4 BERKELEY BUS. L.J. 37 (2007). These models, however, do not account for all the intricacies of international antitrust that this Article identifies.

5. A small jurisdiction is defined as an independent, sovereign jurisdiction with a small population size. It differs from a "small economy" which is defined as "an independent, sovereign jurisdiction that can support only a limited number of firms in most of its industries" and in which population dispersion and openness to trade also affect the definition. *See* MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 13-45 (2003). The focus of this Article is on population size since it is the main driver of the extent of local demand, which is relevant to the current analysis. The definition also includes countries that, although autonomous, have constitutional ties to other jurisdictions (such as the Faroe Islands, Jersey, and Greenland). *See* Charles Webb, *Multum in Parvo: Competition Law in Small Economies Compared*, 10 JERSEY L. REV. 351, 352 (2006). As defined by the World Bank, developing economies include low and middle-income jurisdictions with gross national income per capita of less than US$9,206. *See* World Bank, Country Classification, http://go.worldbank.org/K2CKM78CC0 (definition used up through 2008). Many developing countries are also small, and vice versa.

6. For some exceptions, see Guzman, *Federalism*, *supra* note 4; Guzman, *International Antitrust*, *supra* note 4; Sokol, *supra* note 4.

7. *See, e.g.*, Guzman, *Federalism*, *supra* note 4; Guzman, *International Antitrust*, *supra* note 4; Margaret Levenstein & Valerie Suslow, *Contemporary International Cartels and*

This Article takes on this challenge. The analysis is both theoretical and empirical. It reports on a unique dataset that is comprised of case studies of forty-eight jurisdictions.[8] It is also based on the analysis of the actions and dynamics of the International Competition Network ("ICN"),[9] which currently epitomizes international efforts to cooperate on cross-border antitrust issues.[10] As international cooperation on antitrust has already begun to take shape, this Article is timely.

As the Article shows, even when they possess the *legal* tools to tackle international antitrust issues, small jurisdictions and developing economies often suffer from serious *practical* and *motivational* deficiencies. Most importantly, they frequently cannot create a credible threat to enforce their laws against large, multinational firms that engage in anticompetitive conduct that harms their economy. Moreover, they also often have limited resources and incentives to deal with international anticompetitive conduct. As a result, despite the potentially severe effects of anticompetitive conduct on their markets, these jurisdictions are habitually passive bearers of the effects of international anticompetitive conduct rather than proactive confronters of it. Consequently, their interests are routinely overlooked both by international firms and by other jurisdictions. Obviously, such enforcement and behavioral patterns have significant, negative effects on their domestic welfare.

Developing Countries: Economic Effects and Implications for Competition Policy, 71 ANTITRUST L. J. 801 (2004).

8. The study involves more than half of the jurisdictions with operational antitrust regimes in the relevant period. Professor John Connor has created an important dataset on international cartels. *See* John Connor & Gustav Helmers, *Statistics on Modern Private International Cartels* (Purdue Univ. Dept. of Agric. Econ., Working Paper #06-11, 2006), *available at* http://purl.umn.edu/28650. The dataset reported in this Article differs in three important respects: (1) it includes not only cartels, but also cases of abuse and merger review; (2) it provides country-specific information rather than aggregated regional data; and (3) it allows one to analyze the enforcement decisions of different jurisdictions with regard to cartels that affect other jurisdictions as well, since cartels are defined as those which affect more than one jurisdiction rather than cartels which involve at least one foreign-owned firm.

9. *See generally* Int'l Competition Network [ICN]: Home, http://www.internationalcompetitionnetwork.org (last visited Nov. 2, 2009). The author has served as a nongovernmental advisor to the International Competition Network ("ICN") since its inception.

10. *See* Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network,* 43 INT'L LAW. 151 (2009).

These findings also have important implications for cooperative international antitrust. As elaborated below, most current cooperative efforts are unlikely to provide an efficient solution to the enforcement challenges of small and developing jurisdictions. To be sure, jurisdictional overlap in international antitrust issues has created dependencies among different countries, which, in turn, enhances the need for coordinating antitrust policies between jurisdictions based on negotiation and persuasion rather than hierarchical mechanisms of control. Yet due to their limited bargaining power resulting from, inter alia, the enforcement patterns identified in this Article, a negotiated outcome is unlikely to grant small and developing jurisdictions a piece of the total welfare pie that is proportional to their size or their contribution to global welfare. Nor is it likely to solve many of the global welfare issues that arise from existing enforcement patterns.

This Article is organized as follows. Part I sets the stage by suggesting a typology of the challenges created by globalization. This Part also focuses on the legal tools at the disposal of antitrust authorities. Part II analyzes the current international antitrust regime from a wider perspective that incorporates the enforcement challenges faced by small and by developing jurisdictions. Part III builds upon these findings and analyzes their implications for international antitrust. It also suggests some tools that small and developing jurisdictions can employ in order to play a more effective role in the international antitrust arena.

It is noteworthy that although this Article focuses on antitrust, some of its conclusions have implications that go well beyond this field of law. In fact, the analysis of the unique enforcement challenges faced by small and developing jurisdictions in a predominantly unilateral enforcement regime, and the implications that these challenges have for the creation of an international regime, may well carry over to other legal fields in which globalization creates domestic issues.

I. *CURRENT ANTITRUST REGIME IN A GLOBALIZED ECONOMY*

A. *The Challenges of Globalization*

This Part sets the stage for the analysis of the tools employed to tackle antitrust issues arising from the globalization of trade. It does so by suggesting a typology of anticompetitive conduct with international dimensions.[11]

Most antitrust issues are domestic in nature and affect only, or predominantly, domestic welfare. For example, a cartel among domestic firms in an industry in which imports and exports play a limited role, or a merger among such firms, raises no issues for international antitrust. Such a situation should continue to be dealt with by the relevant domestic antitrust enforcement agencies.

Yet, at an increasing rate, antitrust issues contain an international dimension and affect more than one jurisdiction.[12] Such antitrust issues can be divided into four broad categories in accordance with the location of their welfare effects.[13]

In the first type of cases, the conduct of market players enhances or has a neutral effect on the welfare of all the jurisdictions in which they trade. That will be the case, for example, should the merging firms face strong competition in all markets in which they trade. In the second type of cases, the

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11. This typology was first suggested in the merger context in GAL, *supra* note 5, at 241. A formalization of a similar approach can be found in Abigail Tay & Gerald Willmann, *Why (No) Global Competition Policy Is a Tough Choice*, 45 Q. REV. OF ECON. & FIN. 312 (2005).

12. *See, e.g.*, Alan O. Sykes, *Panel II: International Law and Federalism: What is the Reach of Regulation? Externalities in Open Economy Antitrust and Their Implications for International Competition Policy*, 23 HARV. J.L. & PUB. POL'Y 89, 93 (1999). A study conducted by Connor and Helmers estimated that global cartels created more than half of the harm created by all cartels discovered anywhere around the world from 1990 to 2005; their total overcharge was more than US$250 billion. *See* Connor & Helmers, *supra* note 8, at 3. International cartels are generally larger, longer lasting, and more injurious than domestic cartels. *Id.*

13. Welfare is used in this Article in a wide sense to include both static and dynamic welfare considerations. The categories identified below are based on a simple model that is meant to identify and categorize the effects of the conduct of international market players on different jurisdictions. Real life, of course, offers more complicated situations. However, the model can easily be extended to capture them. For example, the model can be extended to more than two countries by adding up those jurisdictions with aligned interests.

conduct of international market players reduces the welfare of all the jurisdictions in which they trade. To illustrate, the "Vitamins" cartel negatively affected all the countries in which vitamins were sold.[14] If the relevant market is truly global, conduct will generally fall within one of these two categories.

The third type of case creates mixed effects: the conduct creates positive or neutral welfare effects on the domestic jurisdiction (possibly on some foreign jurisdictions also) and negative welfare effects on one or more foreign jurisdictions.[15] This may occur, for example, when parties to a joint venture face strong competition in some markets, but face limited competition in others due to high entry barriers. This category also includes export cartels and cases in which a domestic firm abuses its power in foreign markets.[16] To concretize this type of cases, consider European and U.S. food producers merger of Unilever and Best Foods. The European Union ("EU") and the United States approved the merger, since it did not raise anticompetitive concerns in their markets.[17] Yet it substantially

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14. For an analysis of the self-nicknamed "Vitamins, Inc." cartel see, for example, John M. Connor, *The Great Global Vitamins Conspiracy, 1989–1999*, *in* GLOBAL PRICE FIXING (Heidelberg: Springer Verlag 2008) [hereinafter Connor, *Vitamins*]. The study estimates that the international vitamins cartel affected over US$34 billion of commerce, measured by the sales revenues derived from the products during the price-fixing period. For more information on the impact of international cartels see, for example, Org. for Econ. Co-Operation and Dev. [OECD], *Report On The Nature And Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws* (2002), *available at* http://www.oecd.org/dataoecd/16/20/2081831.pdf.

15. For an economic exposition of this possibility, see Janusz A. Ordover & Alan O. Sykes, *The Antitrust Guidelines for International Operations: An Economic Critique*, *in* ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: NORTH AMERICAN AND COMMON MARKET ANTITRUST AND TRADE LAWS 4-1 (Barry Hawk ed., 1988). Of course, when firms are global, it might be difficult to differentiate their domestic and foreign markets. In such instances, type three and type four cases merge.

16. No case can affect only foreign welfare if total welfare considerations are taken into account. The reason is quite simple: even a pure export cartel, which does not affect consumer welfare in the jurisdiction from which the cartelized firms operate, has some effects on producer surplus in the exporting country. For example, raising the profits of the exporting firm would raise the taxes it pays. This is demonstrated by the strong resistance of many exporting jurisdictions to regulate the conduct of their export cartels.

17. *See* Commission Decision No. COMP/M.1990, 2000 O.J. C 311/6 [hereinafter Unilever–Best Foods] (approval of European Union); *see also* Commission Press Release, IP/00/1076 (Sept. 29, 2000). The merger went forward under U.S. antitrust law because the statutory review period after filing notice with the Federal Trade Commission elapsed without issue. *See* Press Release, Unilever, Unilever/Bestfoods Merger H-S-R

lessened competition in some Israeli markets, given that each of the merging entities had previously merged with a dominant player in some Israeli food market.[18]

The fourth type is characterized by opposite mixed effects: it creates negative welfare effects in the domestic jurisdiction (possibly on some additional jurisdictions as well) and positive effects in one or more foreign jurisdictions. This may be the case when high trade barriers in the home jurisdiction prevent the entry of foreign firms that compete effectively with a domestic one in other markets.

Figure 1 represents the four cases visually, in a two-country setting, which can be extended to a multi-country one.[19] The horizontal axis represents the welfare effects on Jurisdiction A, while the vertical axis represents the welfare effects on Jurisdiction B. Accordingly, the right-slanted area represents the cases that are harmful to the Jurisdiction A, while the left-slanted area represents the cases that are harmful to the Jurisdiction B.

As Figure 1 clearly indicates, the first two types are easy cases, in the sense that the interests of all countries involved are aligned. The decision of Jurisdiction A will generally coincide with the interest of Jurisdiction B. Yet even in these cases, issues of coordination and cooperation arise. For one, cooperation may be necessary for gathering the information needed to prosecute anticompetitive conduct, evaluating its effects, or enforcing remedies effectively.[20] Coordination is also needed if antitrust regulation requires *ex ante* clearance of a transaction, as for mergers. If a merger must be approved by multiple agencies and

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Review Period Expires (Sept. 11, 2000), *available at* http://www.unilever.com/mediacentre/pressreleases/2000/best12.aspx.

18. *See* Dir. of Isr. Competition Auth., Conditioned Approval of the Merger between Tozeret Mazon Israelit Baam and Unilever N.V., case M/4006 (Sept. 27, 2000), *available at* http://archive.antitrust.gov.il/ANTItem.aspx?ID=1888 (previous merger involving Unilever). The previous merger between Bestfoods and another Israeli firm did not require approval of the Israeli Antitrust Authority under Israeli law because only one firm held domestic presence. *See* Restrictive Trade Practices Law §§ 1, 17, 5748–1988, 42 LSI 135, 137, 141 (1987–88) (Isr.).

19. The graph is adapted from Tay & Willmann, *supra* note 11, at 319.

20. The U.S. antitrust case against General Electric and other international companies failed because the enforcement agencies were not able to secure evidence from abroad. *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 1012 (2007); Spencer Weber Waller, *Anticartel Cooperation*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSLATLANTIC COOPERATION? 98, 98 (Simon J. Evenett et al. eds., 2000).

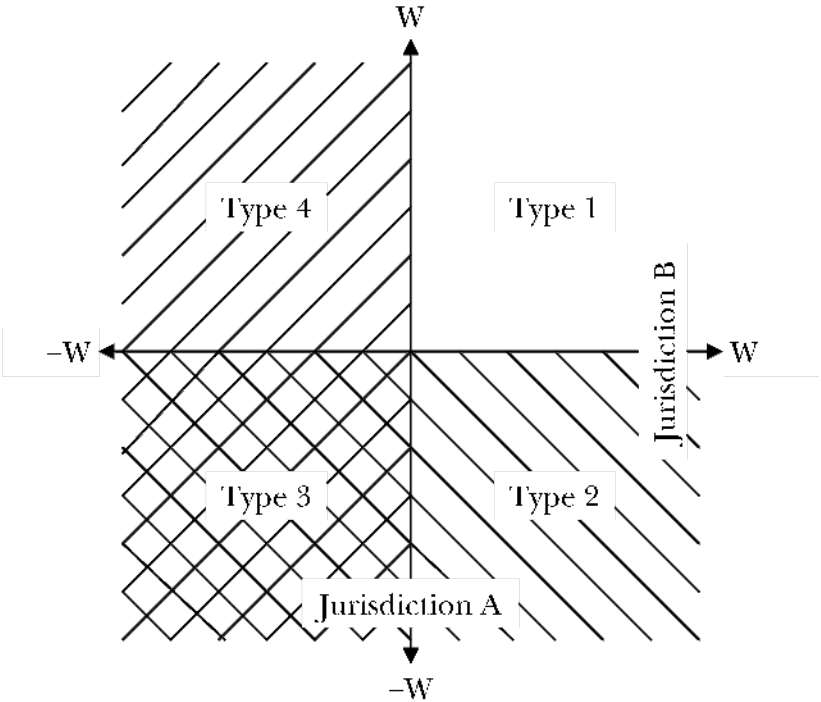

Figure 1. The typology of international anticompetitive conduct

the process is lengthy, costly, or unpredictable, the transaction costs of such a multijurisdictional review might prevent an otherwise welfare-enhancing merger from taking place, even if it would have been approved by all.[21] Ironically, such governmental barriers to trade are a direct result of the attempt to effectively regulate private barriers.

Additional cooperation issues arise with regard to the effects that limited international enforcement might have on the incentives of firms to engage in anticompetitive conduct. As will

21. *See, e.g.*, Notification and Procedures Subgroup, ICN, *Report on the Costs and Burdens of Multijurisdictional Merger Review* 4-9 (2004), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/costburd.pdf; Bus. & Indus. Advisory Comm. to the OECD & Int'l Chamber of Commerce, *Recommended Framework for Best Practices in International Merger Control Procedures* 2 (2001), *available at* http://www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf; William J. Rowley & A. Neil Campbell, *A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews*, ANTITRUST SOURCE, Sept. 2003, *available at* http://www.abanet.org/antitrust/at-source/03/09/comment.pdf.

be elaborated below, currently a limited number of jurisdictions bring international cartels to trial. Yet the sanctions imposed by the handful of jurisdictions on cartel members might not be sufficient to deter future international cartels, as the fines, private damages, and even jail time imposed by them are generally based on the harm to their domestic consumers and firms.[22] Cartel members may thus still find it profitable to engage in international anticompetitive activity so long as the benefits from cartelization are larger than the fines and damages they must incur in the few jurisdictions that enforce their laws against them.

The need for coordination also arises from the fact that sanctions against international cartels are not synchronized. This fact reduces the incentives of cartelists to report their cartels through leniency programs, since once the cartel is discovered the party that reported the cartel might still be subject to sanctions in other jurisdictions in which it does not enjoy leniency. In fact, this situation strengthens international cartels relative to domestic ones, as cheating on them by way of reporting produces lower rewards.[23] It is thus important to devise ways to solve these incentive problems.[24]

The third and fourth types of extraterritorial cases raise even more difficult issues for cooperation as different jurisdictions may reach conflicting decisions and have divergent interests.[25] For example, if the firms of one jurisdiction have monopoly power in world markets, that jurisdiction might have limited incentives to stop their anticompetitive activity, thereby increasing national wealth at the expense of foreigners. A good

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22. Such arguments were recognized by the U.S. Supreme Court as early as 1978. *See* Pfizer v. India, 434 U.S. 308, 315 (1978); *see also* OECD, *Hard Core Cartels-Recent Progress and Challenges Ahead* 38 (2000); Dennis W. Carlton, *Using Economics to Improve Antitrust Policy*, 2004 Colum. Bus. L. Rev. 283, 307 (2004). These arguments were also argued before the Supreme Court in *Empagran*. *See* Brief for Economists Joseph E. Stiglitz & Peter R. Orszag as Amici Curiae Supporting Respondents, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724); Brief for Certain Professors of Economics as Amici Curiae Supporting Respondents, *Empagran*, 542 U.S. 155 (No. 03-724).

23. *See* Simon J. Evenett et al., *International Cartel Enforcement: Lessons from the 1990s*, 24 WORLD ECON. 1221, 1221 (2001).

24. Of course, the fact that only a handful of jurisdictions bring international cartels to trial reduces this incentive problem.

25. *See, e.g.*, Sykes, *supra* note 12, at 92.

illustration involves the reluctance of the South African government to place limitations on the diamond cartel that operated from within its borders. Moreover, as Figure 1 indicates, such cases may create over-enforcement relative to a worldwide total welfare standard, if the negative welfare effects on all countries affected are smaller than their positive welfare effects.[26]

With this mapping of international antitrust issues, let us now analyze the legal tools that small and developing jurisdictions posses to deal with antitrust issues that fall into each of the four categories identified, as well as the practical obstacles to their application.

B. *The Current International Antitrust Regime: Legal Tools*

The current international antitrust system is largely based on unilateral enforcement whereby each jurisdiction deals, on its own, with antitrust issues surfacing at its borders.[27] As elaborated in the next section, the unilateral enforcement regime is also the main source of the enforcement problems of small and of developing jurisdictions.

Efforts to increase cooperation and coordination of antitrust enforcement also take place at the international level. Current attempts focus mainly on the ICN. The ICN is a voluntary body, comprised of almost all the competition authorities in the world, and also non-governmental advisors, for the enhancement of international cooperation and the reduction of trade barriers.[28] It operates as a mechanism for soft harmonization by creating guiding principles and best practices agreed upon by all members rather than binding agreements. Thus, it holds little promise for solving most type 3 and 4 issues. Most importantly for this Article, as will be elaborated below, it does not solve many of the enforcement challenges faced by small or developing jurisdictions.

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26. *See* ELHAUGE & GERADIN, *supra* note 20, at 1012-13; Guzman, *International Antitrust*, *supra* note 4, at 1524; Tay & Willmann, *supra* note 11, at 319.

27. Many jurisdictions adopt doctrines that allow them to apply their laws extraterritorially to conduct that significantly and directly affects their markets. *See, e.g.*, CHRISTOPHER L. BLAKESLEY ET AL., THE INTERNATIONAL LEGAL SYSTEM 166-71 (5th ed. 2001).

28. *See* ICN: Home, http://www.internationalcompetitionnetwork.org (last visited Nov. 2, 2009).

Additional international bodies also take actions which are designed to motivate solutions to international antitrust problems and to enhance unilateral enforcement. The Organization for Economic Co-operation and Development ("OECD"), for example, publishes recommendations for effective action against hard-core cartels and often reviews the suitability of sanctions imposed by jurisdictions in order to deter international cartels.[29] It also regularly publishes country-specific reports on antitrust enforcement and organizes round-table discussions on antitrust issues, designed to create better antitrust enforcement.[30]

Likewise, the United Nations Conference on Trade and Development ("UNCTAD") undertakes projects designed to increase enforcement and cooperation.[31] For example, it promotes the creation of regional agreements on antitrust enforcement among developing jurisdictions.[32] Additional international organizations, including the World Bank, also sometimes engage in technical assistance programs on competition issues.[33] Yet these actions, while commendable, are

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29. *See, e.g.*, Competition Comm., OECD, *Hard Core Cartels: Third Report On The Implementation of the 1998 Council Recommendation* (2005), *available at* http://www.oecd.org/dataoecd/58/1/35863307.pdf; Competition Comm., OECD, *Report On the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, OECD Doc. DAFFE/COMP(2002)7 (2002), *available at* http://www.oecd.org/dataoecd/16/20/2081831.pdf; OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, OECD Doc. C(98)35/FINAL (1998), *available at* http://www.oecd.org/dataoecd/39/4/2350130.pdf.

30. *See, e.g.*, Jay C. Shaffer, OECD, *Competition Law and Policy in Ukraine: An OECD Peer Review*, OECD Doc. 00(2008)1N/3P1 (2008), *available at* http://www.oecd.org/dataoecd/44/26/41165857.pdf; Comm. on Consumer Policy, OECD, *Roundtable on Demand-Side Economics for Consumer Policy: Summary Report*, OECD Doc. DSTI/CP(2006)3/FINAL (2006), http://www.oecd.org/dataoecd/31/46/36581073.pdf. For a sampling of the OECD's publications, see OECD, Publications & Documents, http://www.oecd.org/publications (last visited Nov. 2, 2009).

31. *See* U.N. Conference on Trade & Dev. [UNCTAD], Main Activities, http://www.unctad.org/Templates/Page.asp?intItemID=3359&lang=1 (last visited Nov. 2, 2009).

32. For a U.N. Conference on Trade & Dev. ("UNCTAD") study of the effects of regional agreements on antitrust enforcement, see *Competition Provisions in Regional Agreements: How to Assure Development Gains*, U.N. Doc. No. UNCTAD/DITC/CLP/2005/1 (Phillipe Brusick et al. eds., 2005).

33. *See, e.g.*, Shyam Khemani, Senior Competition Advisor, World Bank, Comments at the Conference on Charting the Future Course of International Technical Assistance 144 (Feb. 6, 2008) (transcript *available at* http://www.justice.gov/atr/public/workshops/techassist2008/236894.pdf).

relatively limited in their effect on solving international antitrust problems. This is because in most cases unilateral action still remains the main tool for enforcement and the resulting cooperation is limited in the ways suggested in this section. The World Trade Organization ("WTO") has considered the inclusion of some antitrust prohibitions in its provisions.[34] However, this option is currently off the table.[35]

III. *THE ENFORCEMENT CHALLENGES OF SMALL AND OF DEVELOPING JURISDICTIONS*

How do small and developing jurisdictions deal with antitrust cases with an international dimension that negatively affect their jurisdictions and what drives their enforcement patterns? This is the focus of this Part.

Before practical obstacles are analyzed, let us first say a few words with regard to the legal tools at the disposal of such jurisdictions. The current international antitrust system is largely based on unilateral enforcement and national vision whereby each jurisdiction deals, on its own, with antitrust issues surfacing at its borders through the lens of the effect the conduct will have on its own welfare.[36] The unilateral approach is based on the assumption that extraterritorial conduct that significantly affects one's domestic market can generally be addressed at the national level through national antitrust laws. As this section shows, this proposition does not hold true for small or developing economies, as they face severe challenges to effective prosecution.

These regimes are sometimes combined with bilateral and multilateral cooperation agreements. Such agreements attempt to solve, at least to some degree, issues of mutual concern that

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34. *See* World Trade Org. [WTO], *Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), *available at* http://www.wto.org/english/thewto_E/minist_e/min01_e/mindecl_e.pdf (suggesting the start of negotiations on modalities of cooperation towards the creation of a multilateral framework on antitrust issues).

35. The issue of antitrust was dropped from the World Trade Organization's ("WTO") agenda in 2004. *See* General Council Decision, *Doha Work Programme*, § 1(g), WT/L/579 (Aug. 2, 2004), *available at* http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf.

36. *See* BLAKESLEY ET AL., *supra* note 27, at 131-66. As noted above, many jurisdictions adopt doctrines that allow them to apply their laws extraterritorially. *See id.*

generally fall within the first two types of cases described in the typology above.[37] Agreements usually include a wide range of cooperation standards.[38] They often include provisions with regard to the sharing of information. This enables cooperative unilateralism: with cooperative input from other interested jurisdictions, the antitrust authority reviews and, as appropriate, remedies situations that come within its laws.[39]

Many agreements also adopt the positive comity principle, which is designed to ensure nondiscrimination.[40] Pursuant to this principle, foreign nations and persons adversely affected by anticompetitive activities occurring in the territory of another party, and contrary to the latter's antitrust laws, may request that territory to investigate and, if warranted, to remedy these activities in accordance with its laws.[41] Positive comity is thus met when each nation implements its own national antitrust law in a credible, nondiscriminatory, clear, and understandable way.[42]

Such principles create vehicles to root out a common evil where there is a preexisting disposition to cooperate and to overcome the problem of non-enforcement or discriminatory

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37. *See id.* at 186–91.

38. *See generally* REGULATION AND COMPETITION IN THE GLOBAL ECONOMY: COOPERATION, COMITY, AND COMPETITION POLICY (Andrew T. Guzman, ed., forthcoming 2010).

39. *See* Edward M. Graham & J. David Richardson, *Competition Policies for the Global Economy*, 51 POLICY ANALYSES IN INTERNATIONAL ECONOMIES 49 (1997) (defining concept of cooperative unilateralism).

40. *See* Mario Monti, Eur. Comm'r for Competition Policy, Remarks at the American Bar Association Antitrust Section Forty Ninth Annual Spring Meeting: The EU Views on Global Competition Forum (Mar. 29, 2001) (transcript *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/147&format=PDF; *see also*, Comm. on Competition Law & Policy, OECD, *Report: Making International Markets More Efficient Through 'Positive Comity' in Competition Law Enforcement*, at 2, EC Reference No. SPEECH/01/147 (1999) [hereinafter *Positive Comity*], *available at* http://www.oecd.org/dataoecd/40/3/2752161.pdf.

41. *See Positive Comity, supra* note 40.

42. *See, e.g.*, Agreement Between the European Community and the Government of Japan Concerning Cooperation on Anti-Competitive Activities, art. 5, 2003 O.J. L 183/12, at 14; Agreement Between the European Communities and the Government of Canada Regarding the Application of Their Competition Laws, §5, 1999 O.J. L 175/50, at 52; Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws, art. 5, 1995 O.J. L 95/47, at 49; *see also* Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, art. 3, 1998 O.J. L 173/28, at 29.

enforcement by foreign jurisdictions. Accordingly, they solve some of the problems in type one and type two cases. Yet they have limited effect where the antitrust principles adopted by the cooperating jurisdictions differ significantly or where the application of antitrust principles leads to different factual conclusions, resulting from the fact that the effects of the proposed conduct on foreign jurisdictions is not taken into account.[43] Accordingly, comity principles offer no solution to enforcement problems in type 3 and type 4 cases.

On this background, we now turn to the practical obstacles faced by small and developing jurisdictions in applying these tools in practice. Part III.A introduces the results of an empirical study that reveals the enforcement patterns of small and developing jurisdictions in international antitrust matters. Part III.B analyzes the causes of the enforcement patterns found. Part III.C discusses current solutions and their limitations. Part III.D raises the issue of whether large jurisdictions can be perceived as "enforcers for the world."

A. *Empirical Findings*

The empirical study depicted below analyzes the enforcement patterns of small and of developing jurisdictions in international antitrust matters. It was conducted on forty-seven countries.[44] Twenty of these forty-seven classify as small jurisdictions (Armenia, Barbados, Cyprus, El Salvador, the Faroe Islands, Fiji, Finland, Greenland, Israel, Jamaica, Jersey, Jordan, Lithuania, Luxemburg, Malta, New Zealand, Norway, Panama, Singapore, and Sweden) and twenty-nine are classified as developing economies, some of which are also small (Argentina, Armenia, Barbados, Benin, Brazil, Burkina Faso, Chile, Colombia, Cote D'Ivoire, Egypt, El Salvador, Fiji, Guinea-Bissau, Hungary, India, Jamaica, Jordan, Kenya, Lithuania, Mali, Mexico, Niger, Panama, the Philippines, Senegal (both before and after it entered the West African Economic and Monetary Union ("WAEMU")), Tanzania, Togo, Zambia, and Zimbabwe). The

43. *See, e.g.*, INT'L COMPETITION POLICY ADVISORY COMM., *supra* note 1, at 235 ("[W]hile it is apparent that government representatives will maintain visible support for positive comity, the emphasis now has shifted to the limited role it can achieve in international cooperation.").

44. For a full listing of these countries, see Table 1, *infra*.

remaining six jurisdictions (Canada, the European Union, Germany, Italy, Spain, and the United States) served, to some extent, as a comparison group. The study involved an analysis of all cases with an international dimension over a period of five years.[45] The data is based on answers to a questionnaire sent to the competition authority of each jurisdiction,[46] interviews with top officials in many of these countries, and research through other channels such as annual reports issued by these authorities.

The results of the study are reported in Table 1. Jurisdictions were asked to provide data with regard to the number of international cartels (defined as cartels that affected more than one jurisdiction), monopolization (abuse of dominance) cases, and international mergers (defined as mergers that involved at least one foreign firm) that they investigated in the past five years.[47] Jurisdictions were also asked to specify which mergers were likely to affect other jurisdictions as well, but this information was difficult to obtain since most jurisdictions do not consider the effects of the merger on other jurisdictions and thus do not classify them accordingly. Instead, a case-by-case analysis was conducted, when possible, to gather such information. Due to this difficulty, the table might overstate the enforcement activities with regard to international mergers.[48] Countries were also asked to provide the number of domestic cases in each category in order to indicate general enforcement levels. However, only several jurisdictions responded to this request as is apparent from the table.

The study clearly indicates that small and developing

45. As indicated in Table 1, *infra*, not all agencies were established five or more years ago. Thus, for some, the period is shorter.

46. The questionnaire was sent to all jurisdictions that adopted a competition law. Fifty-six responses to the questionnaire were received (more than half of the jurisdictions with operational competition agencies at the relevant time). Several jurisdictions indicated that they could not provide the requested data or provided data that was not useful. When the data was not useful, follow-up questions were sent, which sometimes helped clarify the relevance of the data.

47. Due to problems in collecting data, the periods to which the data relate do not always overlap. The periods covered a range from 1999 to 2008. Also, jurisdictions with relatively new competition laws only covered the periods after the laws came into force.

48. The data might also understate the number of abuse and cartel investigations, since it does not capture the possibility that the antitrust agency might choose to informally reach an agreement with the relevant firms to change their conduct.

Table 1. Results of an Empirical Study on Enforcement Levels in International Antitrust Issues (Small Countries and Developing Countries)

Country	Population (millions)[a]	Year of Agency Establishment[b]	Stage of Development[c]	International Cartel Cases[d]	Cases of Abuse by International Firm[e]	International Mergers Investigated
			Small Countries			
Armenia	3.23	2001[f]	dg	0 (no authority)	1 (local subsidiary)	0
Barbados	0.27	2003[g]	dd	0	0	1 (local subsidiary)
Cyprus	0.79	1990[h]	dd	0 (no authority)	2 (local subsidiaries)	9 (8 approved, 1 conditional)
El Salvador	7.22	2006[i]	dg	1	*no data*	*no data*

a. Population figures are compiled from U.N. world statistics data. *See* U.N. Dept. for Econ. And Soc. Affairs, U.N. Statistics Div., 61 *Population and Vital Statistics Report: Series A (No. 2)*, tbl. 2, U.N. Doc. ST/ESA/STAT/SER.A/250-251 (July 1, 2009), *available at* http://unstats.un.org/unsd/demographic/products/vitstats/Sets/SeriesA_July2009_complete.pdf (population number taken from most recent estimate, if available).

b. The date that the competition agency was established was chosen over the date when the law was adopted, because the agency enforces the law, which is the focus of this Essay.

c. For a discussion of stages, see *supra* note 5 and accompanying text. For purposes of Table 1, "dd" represents developed and "dg" represents developing.

d. Where the information was available, the entries will also list the number of total cartel cases in the relevant jurisdiction.

e. Where the information was available, the entries will also list the number of total abuse cases in the relevant jurisdiction.

f. *See* State Commission for the Protection of Economic Competition of the Republic of Armenia, History, http://www.competition.am/index.php?menu=137&lng=2 (last visited Nov. 2, 2009).

g. *See* Fair Trading Commission Barbados, FAQs, http://www.ftc.gov.bb/index.php?option=com_content&task=blogcategory&id=29&Itemid=67 (last visited Nov. 2, 2009).

h. *See* Commission for the Protection of Competition, About Us, http://www.competition.gov.cy/competition/competition.nsf/aboutcpc_en/aboutcpc_en?OpenDocument (last visited Nov. 2, 2009).

Country	Population (millions)[a]	Year of Agency Establishment[b]	Stage of Development[c]	International Cartel Cases[d]	Cases of Abuse by International Firm[e]	International Mergers Investigated
			Small Countries			
Faroe Islands	0.05	1997[j]	dd	0	0	0 (no authority until 2008)
Fiji	0.83	2000[k]	dg	0	0	0
Finland	5.31	1988[l]	dd	0	20 (local subsidiaries)	*no data*
Greenland	0.06	1993[m]	dd	0	2 of 24[n]	0 (no authority until 2008)
Israel	7.30	1988[o]	dd	1	0	110[p] (approx.) (local subsidiaries) (all approved, some conditional)

i. *See* Global Competition Forum, North America: El Salvador, http://www.globalcompetitionforum.org/n_america.htm#El (last visited Nov. 2, 2009).

j. *See* Global Competition Forum, Europe: Faroe Island, http://www.globalcompetitionforum.org/europe.htm#Faroe (last visited Nov. 2, 2009).

k. Dismantled in 1999 and re-established in 2000. *See* Global Competition Forum, Oceania: Fiji, http://www.globalcompetitionforum.org/oceania.htm#Fiji (last visited Nov. 2, 2009).

l. *See* Finnish Competition Authority, About Us, http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=about-us&sivu=about-us.

m. *See* Konkurrencenævnet, Velkommen, http://www.unammineq.gl (last visited Nov. 2, 2009); *see also* Landstingslov nr. 28 af 30 Oktober 1992 om Konkurrence [1992 Competition Act] §1 (Green.), *available at* http://www.unammineq.gl/index.asp?lang=dk&num=223. A new Competition Act entered into force on March 1, 2008 and superseded the prior competition law. *See* Landstinglov nr. 16 af 19 November 2007 om Konkurrence [2007 Competition Act] § 35 (Green.), *available at* http://www.unammineq.gl/index.asp?lang=dk&num=257.

n. Interestingly, one of the cases was closed because the Ministry of Infrastructure and Housing awarded the monopolist the status of a protected monopolist.

o. *See* Global Competition Forum, Asia: Israel, http://www.globalcompetitionforum.org/asia.htm#Israel (last visited Nov. 2, 2009).

Country	Population (millions)[a]	Year of Agency Establishment[b]	Stage of Development[c]	International Cartel Cases[d]	Cases of Abuse by International Firm[e]	International Mergers Investigated
			Small Countries			
Jamaica	2.69	1993[q]	dg	0	2 (local subsidiaries)	0 (no authority)
Jersey	0.09	2001[r]	dd	0	0	9 (8 approved, 1 conditional)
Jordan	5.85	1998[s]	dg	0	0	1 (approved)
Lithuania	3.36	1999[t]	dg	0 of 10	3 (local subsidiaries) of 9	4 (local subsidiaries) of 307
Luxembourg	0.49	2004[u]	dd	0	0	0 (no authority)
Malta	0.41	2001[v]	dd	0 of 3 (to reach court)	0 of 11 (to reach court)	16 (all approved)[w]

p. Legal authority exists only if a local firm is involved. *See* Restrictive Trade Practices Law §§ 1, 17, 5748-1988, 42 LSI 135, 137, 141 (1987-88) (Isr.).

q. *See* The Jamaica Fair Trade Commission—Home, http://www.jftc.com (last visited Nov. 2, 2009).

r. The Jersey Competition Regulatory Authority was established by State in 2001. *See* Jersey Competition Regulatory Auth., About JCRA, http://www.jcra.je/cms3/v2/public/cmsPage.asp?pageID=1. The competition law, however, entered into force in 2005. *See* Jersey Competition Regulatory Auth., About JCRA, http://www.jcra.je/cms3/v2/public/cmspage.asp?pageID=1022 (last visited Nov. 2, 2009).

s. *See* The Ministry of Industry and Trade, The Ministry, http://www.mit.gov.jo/default.aspx?tabid=357 (last visited Nov. 2, 2009).

t. *See* Competition Council of the Republic of Lithuania, The Structure of the Competition Council, http://www.konkuren.lt/en/index.php?show=contacts&con_meniu=structure (last visited Nov. 2, 2009).

u. *See* Global Competition Forum, Europe: Luxembourg, http://www.globalcompetitionforum.org/europe.htm#Luxembourg (last visited Nov. 2, 2009).

v. *See* Global Competition Forum, Europe: Malta, http://www.globalcompetitionforum.org/europe.htm#Malta (last visited Nov. 2, 2009).

Country	Population (millions)[a]	Year of Agency Establishment[b]	Stage of Development[c]	International Cartel Cases[d]	Cases of Abuse by International Firm[e]	International Mergers Investigated
			Small Countries			
New Zealand	4.27	1986[x]	dd	5	*no data*	20 (15 approved)
Norway	4.77	1993[y]	dd	*no data*	1	0 of 26
Panama	3.34	1996[z]	dg	0	0	1 (approved)
Singapore	4.84	2005[aa]	dd	0	0	4 of 5 (all approved)
Sweden	9.22	1991[bb]	dd	2	0	0 prohibitions
			Additional Developing Countries			
Argentina	39.75	1980[cc]	dg	3 of 7	0 of 5	*no data*
Brazil	192.00	1994[dd]	dg	10 of 45 (convictions)	*no data*	*no data*

w. Before 2007, the Maltese merger regulation caught any merger, whether domestic or international, which had a turnover rate above a predefined threshold. The law in Malta was changed, and now requires a minimal turnover. *See* Competition Act § 21, Laws of Malta, ch. 379 (Malta), *available at* http://docs.justice.gov.mt/lom/legislation/english/leg/vol_10/chapt379.pdf.

x. *See* N.Z. Commerce Comm'n, Overview, http://www.comcom.govt.nz/TheCommission/Overview.aspx (last visited Nov. 2, 2009).

y. *See* Konkurransetilsynet Norweigan Competition Authority, The Competition Act of 1993 (Repealed), http://www.konkurransetilsynet.no/en/legislation/The-Competition-Act-of-1993/.

z. *See* Global Competition Forum, North America: Panama, http://www.globalcompetitionforum.org/n_america.htm#panama (last visited Nov. 2, 2009).

aa. The Competition Commission of Singapore was established by statute in 2005. *See* Competition Comm'n of Sing., Mission & Vision, http://www.ccs.gov.sg/AboutUs/Mission/index.html. The competition law has been in force since 2006 and merger provisions entered into force in 2007. *See* Competition Commission of Singapore, Competition Act, http://www.ccs.gov.sg/Legislation/CompetitionAct/.

bb. *See* Konkurrensverket Swedish Competition Authority, About Us, http://www.konkurrensverket.se/t/SectionStartPage____219.aspx (last visited Nov. 2, 2009).

cc. *See* OECD, *Competition Law and Policy in Argentina* 8 (2006), *available at* http://www.oecd.org/dataoecd/36/57/37970045.pdf. The first competition law dates to 1923, but it was rarely enforced. *Id.*

Country	Population (millions)[a]	Year of Agency Establishment[b]	Stage of Development[c]	International Cartel Cases[d]	Cases of Abuse by International Firm[e]	International Mergers Investigated
			Additional Developing Countries			
Chile	16.76	1973[cc]	dg	2 of 10	*no data*	*no data*
Colombia	44.45	1959[ff]	dg	1	*no data*	*no data*
Egypt	79.10	2005[gg]	dg	0	0	*no data*
Hungary	10.04	1991[hh]	dg	4 (local subsidiaries)	9 (local subsidiaries)	128 (local subsidiaries) (all approved)
India	1,150.20	1969[ii]	dg	2[jj]	0	0 (no authority until 2007)

dd. *See* Conselho Administrativo de Defesa Econômica, O Que é Cade?, http://www.cade.gov.br/Default.aspx?8dad6eb2799799b187. The Conselho Administrativo de Defesa Econômica [Administrative Council for Economic Defense] was first created with limited authority by statute in 1962 but reorganized under 1994 reform laws. OECD, *Competition Law and Policy in Brazil* 13 (2005), *available at* www.oecd.org/dataoecd/62/35/35415135.pdf.

ee. *See* Fiscalía Nacional Económica, Sistema de Deensa de Libre Competencia, http://fne.cl/?content=antimonopolio (last visited Nov. 2, 2009); *see also* Global Competition Forum, South America: Chile, http://www.globalcompetitionforum.org/s_america.htm#chile (last visited Nov. 2, 2009).

ff. *See* Superintendencia de Industria y Comercio, Historia, http://www.sic.gov.co/index.php?modulo=La_Superintendencia/Presentacion/Historia (last visited Nov. 2, 2009)

gg. *See* The Egyptian Authority for the Protection of Competition and the Prohibition of Monopolistic Practices, FAQ, http://www.eca.org.eg/EgyptianCompetitionAuthority/Static/FAQ.aspx?MainNav=Press&SubNav=FAQ#Link1 (last visited Nov. 2, 2009) (follow "English" hyperlink for translation).

hh. *See* Gazdasági Versenyhivatal, The Responsibilities of the Authority, http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=99&m5_doc=2349&m171_act=1 (last visited Nov. 2, 2009).

ii. The former competition agency of India was dissolved and replaced by the Competition Commission of India under a 2002 Act of Parliament. *See* Competition Comm'n of India, About Us, http://www.cci.gov.in/index.php?option=com_content&task=view&exp=0&id=12 (last visited Nov. 2, 2009); Press Release, Ministry of Law & Justice, The Competition Commission Notified (Oct. 23, 2003) *available at*

Country	Population (millions)[a]	Year of Agency Establishment[b]	Stage of Development[c]	International Cartel Cases[d]	Cases of Abuse by International Firm[e]	International Mergers Investigated
			Additional Developing Countries			
Kenya	37.18	1989[kk]	dg	0	9 (local subsidiaries)	0
Mexico	106.68	1993[ll]	dg	3 of 20	*no data*	*no data*
Philippines	90.46	1947[mm]	dg	0	0	0
Senegal	11.34	1981[nn]–2003[oo]	dg	0 of 3 (cases)	1	0 (no merger policy)
Tanzania	40.60	2003[pp]	dg	0	0	0

http://pib.nic.in/archieve/Ireleng/lyr2003/roct2003/23102003/r231020035.html; *see also* Competition Act, 2002 No. 12 of 2003, Acts of Parliament, 2003 (India), *available at* http://www.cci.gov.in/images/media/competition_act/act2002.pdf.

jj. Both cases were overturned by the Indian Supreme Court for want of extraterritorial jurisdiction. India finally adopted the "effects doctrine" in 2007. *See* Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, 4 J. COMPETITION L. & ECON. 609, 622-23, 627 (2008).

kk. *See* OECD, *Competition Policy and the Informal Economy in Kenya* 2, OECD Doc. DAF/COMP/GF/WD((2009)9 (2002) (submitted by Kenya), *available at* http://www.oecd.org/dataoecd/34/39/41959787.pdf.

ll. *See* Comisión Federal de Competencia México, ¿Quiénes Somos?, http://www.cfc.gob.mx/index.php?option=com_content&view=article&id=71&Itemid=5&lang=es.

mm. *See* Dep't of Trade & Indus Phil., Mandate and History, http://www.dti.gov.ph/dti/index.php?p=155 (last visited Nov. 2, 2009).

nn. *See* Ministère du Commerce, Historique, http://www.commerce.gouv.sn/article.php3?id_article=44 (last visited Nov. 2, 2009).

oo. After this date, the West African Economic and Monetary Union ("WAEMU") came into effect. *See infra*, note qq.

pp. *See* OECD, *Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition: Contribution from Tanzania* ¶ 2, OECD Doc. CCNM/GF/COMP/WD(2004)12 (2004), *available at* www.oecd.org/dataoecd/18/63/23733551.pdf (submitted by Tanzania). Previous law from 1994 was rarely enforced. Authority reached a critical mass in 2007. *See id.* ¶¶ 4-12.

Country	Population (millions)[a]	Year of Agency Establishment[b]	Stage of Development[c]	International Cartel Cases[d]	Cases of Abuse by International Firm[e]	International Mergers Investigated
			Additional Developing Countries			
WAEMU members		2003[qq]		0	0	0 (part of abuse prohibitions)
Benin	8.05		dg			
Burkina Faso	14.73		dg			
Cote D'Ivoire	20.81		dg			
Guinea-Bissau	1.39		dg			
Mali	12.38		dg			
Niger	14.30		dg			
Senegal	11.34		dg			
Togo	5.60		dg			
Zambia	12.53	1995[rr]	dg	0 of 6 (investigations)	54 (local subsidiaries) of 152	89 of 128 (77 approved, 10 conditional)
Zimbabwe	11.63	1998[ss]	dg	0	0	0

qq. Since the WAEMU regulations entered into force in 2003, the Commission has exclusive competence for the enforcement of competition rules. National competition authorities are deprived of all decision making power even for cases involving only national companies. *See* Int'l Monetary Fund, *West African Economic and Monetary Union: Recent Economic Developments and Regional Policy Issues; and Public Information Notice on the Executive Board Discussion*, at 19–22, IMF Country Report No. 03/70 (2003), *available at* http://www.imf.org/external/pubs/ft/scr/2003/cr0370.pdf.

rr. *See* Welcome - Zambia Competition Commission, http://www.zcc.com.zm/index.php (last visited Nov. 2, 2009).

Country	Population (millions)[a]	Year of Agency Establishment[b]	Stage of Development[c]	International Cartel Cases[d]	Cases of Abuse by International Firm[e]	International Mergers Investigated
			Other Jurisdictions			
Canada	32.98	1889[tt]	dd	29 of 62 (investigations)	0 (with no local subsidiary)	*no data*
European Union	490.00	1957[uu]	dd	27 (plus 120 cases in all member states)	*no data*	*no data*
Germany	82.13	1958[vv]	dd	3	2	*no data*
Italy	58.83	1990[ww]	dd	7 (local subsidiaries) of 18	0	3 (2 others referred to EU)

ss. *See* Alexander J. Kububa, Chief Executive Officer of the Competition & Tariff Comm'n of Zimb., Overview of Competition Law in Zimbabwe 1 (Sept. 3, 2009), *available at* http://www.compcom.co.za/events/3rdconference/03Sept_2009/Paralell 1A/Alex Kububa_Competition Policy & Policy & Law in Zimbabwe.doc.

tt. Canada was the first country to adopt a comprehensive competition law in 1889. *See* An Act for the Prevention and Suppression of Combinations in Restraint of Trade, 1889 S.C. ch. 41. Enforcement, however, was left to provincial attorneys general until a competition authority was established by statute in 1919. *See* P.K. Gorecki & W.T. Stanbury, *The Administration and Enforcement of Competition Policy in Canada, 1889 to 1952*, *in* HISTORICAL PERSPECTIVES ON CANADIAN COMPETITION POLICY 53, 57–79 (R.S. Khemani & W.T. Stanbury, eds., 1991); *see also* Board of Commerce Act, 1919 S.C., ch. 37 (Can.). The current competition law of Canada is the Competition Act, R.S.C. ch. C 34 (1985) (Can.).

uu. *See* Global Competition Forum, Europe: European Union, http://www.globalcompetitionforum.org/europe.htm#europeu (last visited Nov. 2, 2009); *see also* Consolidated Version of the Treaty Establishing the European Community arts. 81-86, 2006 O.J. C 321 E/37, at 73-76.

vv. *See* BundesKartellamt, How Can We Ensure That Competition Works?, http://www.bundeskartellamt.de/wEnglisch/GeneralInformation/GeneralInformation_2.php (last visited Nov. 2, 2009); *see also* Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints of Competition], July 27, 1957, BGBl. I at 1081 (F.R.G.).

ww. *See* Autorità Garante della Concorrenza e del Mercato, What the Antitrust Authority Is, http://www.agcm.it/eng/A12.htm (last visited Nov. 2, 2009); *see also* Norme per la Tutela della Concorrenza e del Mercato [Competition and Fair Trading Act], Law No. 287, Oct. 10, 1990, Gazz. Uff. No.240 (Oct. 13, 1990) (Italy).

Country	Population (millions)[a]	Year of Agency Establishment[b]	Stage of Development[c]	International Cartel Cases[d]	Cases of Abuse by International Firm[e]	International Mergers Investigated
Spain	46.00	1989[xx]	dd	1 of 79	0 of 43	6 of 42 (local subsidiaries)
United States	301.62	1890[yy]	dd	54	*no data*	*no data*

xx. *See* Global Competition Forum, Europe: Spain, http://www.globalcompetitionforum.org/europe.htm#spain (last visited Nov. 2, 2009). The former competition agency of Spain was dissolved and replaced by the Comisión Nacional de La Competencia in 2007. *See* Ley 15/2007, de 3 de Julio, de Defensa de la Competencia, art. 12 (B.O.E. 2007, 28848).

yy. *See* Sherman Act, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)); *see also* Federal Trade Commission Act § 5(a), 38 Stat. 717, 719-21 (1914) (codified as amended at 15 U.S.C. §§ 41(a)(1) (2006)); Clayton Act § 7, 38 Stat. 730, 731-32 (1914) (codified as amended at 15 U.S.C. § 18 (2006)).

countries rarely tackle international antitrust issues.[49] It also shows that other parameters also have some effect on enforcement levels: the maturity of the agency (approximated by the number of years since its establishment) as well as being part of an operational regional enforcement alliance (such as the EU).

The empirical evidence demonstrates low enforcement levels of monopolization prohibitions against foreign firms. An interesting observation is that small and developing jurisdictions generally do not bring suits in monopolization cases in which the conduct affects many jurisdictions (like the cases against Microsoft, Intel, or Rambus). Nonetheless, they sometimes bring such cases against subsidiaries of large companies when the conduct is specific to their markets.[50]

Figure 2 portrays graphically the limited number of cases brought by small and developing countries against foreign firms on monopolization charges. As can be clearly seen, sixty-nine percent of small and developing jurisdictions in the study brought no such cases, nineteen percent brought three or fewer case, and only eleven percent brought more than three cases over a course of five years (Zambia is an outlier with fifty-four cases, due to the fact that its modus operandi is based on receiving concessions from dominant firms to reduce their prices or otherwise change their trading conditions;[51] the same is true

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49. A host of additional factors affect the ability and incentives of jurisdictions to enforce their antitrust laws on international antitrust matters. These might include, for example, political considerations and the size, level of expertise, and funding of the antitrust authority. It should be noted, however, that these factors are oftentimes connected to size and economic development the jurisdiction. Developing jurisdictions are generally characterized by less expertise, funding, and political influence. *See, e.g.*, Michal S. Gal, *The Ecology of Antitrust: Preconditions for Antitrust Enforcement in Developing Countries*, *in* COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES 22, 22–52 (Phillipe Brusick et al. eds., 2004). Small jurisdictions often have low funding, in absolute terms, and small agencies.

50. For example, the Jamaican Fair Trading Commission brought suit against the local subsidiaries of cable and wireless providers for abusing their market power in the Jamaican market. *See* Barbara Lee, Executive Dir. of the Caribbean Community Competition Comm'n, Presentation at a Workshop Hosted by the Ministry of Trade & Industry of Trinidad & Tobago with the U.N. Conference on Trade and Development 5–6 (June 12-13, 2007), *available at* http://www.jftc.com/newpdf/ Jamaica's Experience in Competition Law Enforcement[1]. A Snapshot.pdf.

51. *See* Response to Questionnaire, Zambia Competition Comm'n (2008) (on file with author) ("The Zambia Competition Commission's approach to cases of abuse of dominance has largely been an administrative 'cease and desist' approach to the parties

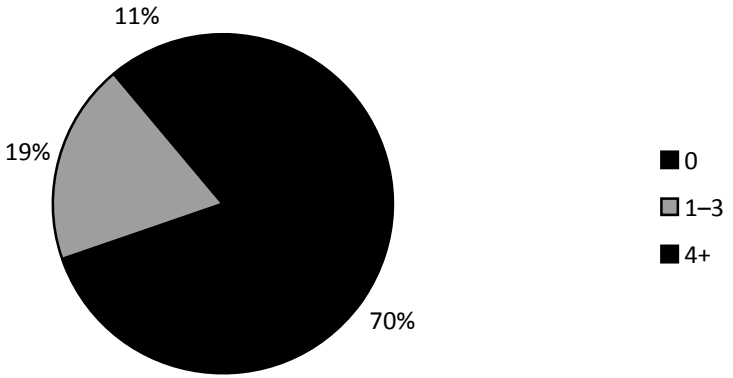

Figure 2. Number of monopolization cases brought by small and developing jurisdictions against foreign firms.

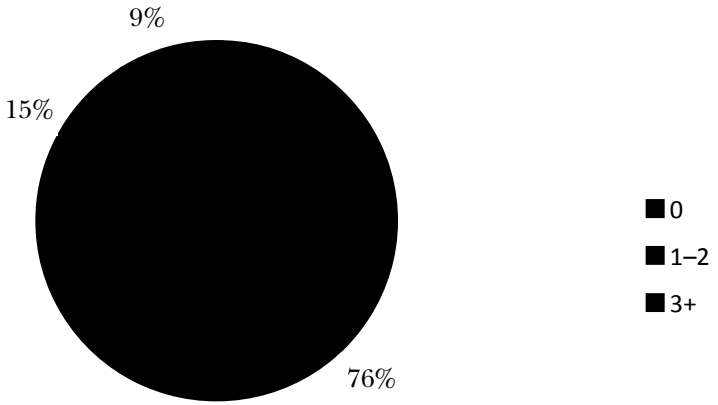

Figure 3. Number of international cartel cases brought by small and developing jurisdictions against foreign firms.

involved. For this reason, there has been no firm, domestic or foreign, that has been prosecuted for abuse of dominant position and market power. Further, due to limited financial resources and a judiciary perceived not to be 'competition law' competent, all the cases have been resolved administratively, thus sending no 'deterrent effect' message to business.").

of Kenya and explains the nine cases that it brought).[52] Many of these cases were brought against local subsidiaries of international firms and all involved local abuse issues rather than abuses that affected international markets. Yet it is noteworthy that in general the number of monopolization cases, whether against domestic or against international firms, is generally low in most jurisdictions, regardless of size or the level of development.

Similarly, only four of the twenty small jurisdictions surveyed, three of which had mature and sophisticated antitrust authorities (New Zealand, Sweden, and Israel), brought cases against international cartels, and two of these four brought only one such case. Interestingly, those international cartels that were tackled significantly affected only small jurisdictions. For example, the only international cartel that Israel dealt with in the relevant period was a cartel between an Israeli and a Cypriot company that agreed to limit competition on salt products in both jurisdictions. This cartel had no effect on other jurisdictions. Moreover, the administrative declaration of the existence of the cartel issued by the Israeli Competition Authority only applied to the Israeli firm.[53]

Similarly, only seven out of the twenty-nine developing jurisdictions brought cases against international cartels. The majority of these jurisdictions brought three cases or fewer over a period of five years. This occurred despite the fact that international cartels often significantly affected their domestic

52. *See* Conversation with Hassan Qaqaya, Head, Competition Law and Consumer Policies Branch, UNCTAD, in Munich, Germany (Jan. 30, 2009); Response to Questionnaire, Kenya Dep't of Treasury (2008) (on file with author) ("Abuse of dominance complaints against foreign firms over the same period was intermittent (about 10 in number). Most of these were reported in the beverages sector. Others were in the shipping lines, cigarette manufacturing and international money transfer services. We brought up varying orders to streamline the competition process. One involved ordering the concerned parties to delete anti competitive clauses contained in their agency contracts, to conform to the requirements of the Competition Law.").

53. *See* Director, Isr. Antitrust Authority, Finding Under Section 43(a)(1) of the Antitrust Law, Israel Salt Industries Group, Ltd.—Party to Restrictive Arrangement with MP Theodorou (Salt Industry) & Co., Ltd., and Its Owner 1 (Apr. 2, 2006), *available at* http://eng-archive.antitrust.gov.il/files/46/Israel Salt Industries.pdf. This case is analyzed in Michal S. Gal, *Extra-territorial Application of Antitrust—The Case of a Small Economy (Israel), in* REGULATION AND COMPETITION IN THE GLOBAL ECONOMY, *supra* note 38 (forthcoming 2010).

markets[54] and that many international cartels exist. One study indicated, for example, that at least eighty international cartels that affected Latin America and were prosecuted elsewhere by non-Latin American agencies.[55]

Figure 3 illustrates the results graphically. As can be seen, the percentage of small and developing jurisdictions that brought international cartel cases is very small.

Contrast these findings with comparable figures in large, established jurisdictions. The United States investigated fifty-four international cartels over the course of the five-year period. Canada, whose market is smaller than that of many developing jurisdictions, opened twenty-nine investigations over a period of five years.[56] The EU brought twenty-seven cases against international cartels over the relevant period. The differences between these three jurisdictions and small or developing ones are, undoubtedly, significant.[57] The role of large economies as "enforcers for the world" is analyzed below.

Interestingly, the research also revealed that several firms headquartered in small or developing jurisdictions set aside funds for the payment of potential damages or fines to large jurisdictions, indicating their perceived risk of a finding that they participated in an international cartel that potentially affected

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54. Of course, one may argue that low levels of enforcement may result from successful enforcement, since the stronger the deterrent effect of the legal prohibitions, the lower the number of cartels that would be formed—and thus detected—in the first place. As noted, however, the available data suggests otherwise. *See* Connor & Helmers, *supra* note 8, at 1.

55. *See* John M. Connor, *Latin America and the Control of International Cartels, in* COMPETITION LAW AND POLICY IN LATIN AMERICA 29, 314-151 (Eleanor M. Fox & D. Daniel Sokol eds., 2009) [hereinafter John M. Connor, *Latin America*].

56. Greater Canadian enforcement might be explained by cooperation between Canadian and U.S. antitrust agencies due to the similar impact of antitrust cases on their economies.

57. A study conducted by Connor indicates that out of the US$9.352 million imposed as fines on global cartels between 1990-2007, the United States imposed US$3.736 million (40.0%); the EU Commission, US$5.124 million (54.8%); European countries, US$318.6 million (3.4%); Canada, US$155.4 million (1.7%); Asian countries, US$10.4 million (0.001%); Oceania, US$7 million (0.00075%); Latin America, US$0.2 million (0.002%); and that African countries did not impose any fines. *See* John M. Connor, *The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals* 92 tbl.2 (American Antitrust Inst., Working Paper No. 08-02, 2008), *available at* http://www.antitrustinstitute.org/archives/files/Cartel Report Working Paper08-02_071320081905.pdf [hereinafter Connor, *Appraisal & Proposals*].

the domestic market also.[58] Despite this precaution, the authorities in these jurisdictions chose not to initiate domestic investigations.

Turning to merger review, the data collected indicates that while the antitrust authorities of small or developing countries often review international mergers, they seldom attempt to prohibit a merger between international firms.[59] Indeed, despite the high number of international mergers reviewed, in only a small percentage were mergers prohibited or conditional. As elaborated below, conditions focus on limiting the direct consequences of a merger within the respective jurisdiction. Those rare instances in which small or developing jurisdictions prohibited a merger with international dimensions occurred where the merging entities mainly operated in the small or developing jurisdiction and at least one of the merging parties was of domestic nationality.[60] One prominent example is the Air New Zealand–Qantas merger that was blocked by the New Zealand Commerce Commission.[61] The merger mainly affected New Zealand and Australian consumers, although it did

58. The two cases involve the international freight cartel in which the Israeli firm of El Al Israel Airlines Ltd., set aside US$20 million in anticipation of a possible settlement with the U.S. Department of Justice and the Chilean firm of LAN Cargo set aside US$25 million in anticipation of possible fines in the EU. *See* LAN Airlines S.A., Report of Foreign Private Issuer (Form 6-K), at 5 (Jan. 29, 2009) ("The Company has decided to maintain the US$25 million reserve accounted for in its fourth quarter 2007 results. This reserve is a precautionary estimate . . . in connection with the ongoing European Commission investigation."); Tova Cohen, *Israel's El Al to Make $20 Million Provision*, REUTERS, http://www.reuters.com/article/AIRLIN/idUSL2624175320080526.

59. Several jurisdictions have opted for a voluntary notification procedure. These include, *inter alia*, Panama, Peru, Venezuela and Chile. *See* Inter-Am. Dev. Bank & OECD, *Merger Control Laws and Procedures in Latin America and the Caribbean* 14 (2005), *available at* http://www.oecd.org/dataoecd/41/57/38835612.pdf.

60. Some small jurisdictions are, however, quite aggressive in applying their merger notice requirements. Jersey, for instance, fined three international firms for failing to notify authorities of the merger, even though it did not have a significant negative impact on its economy. Jersey Competition Regulatory Auth., Decision C332/08 (Aug. 1, 2009), *available at* http://www.jcra.je/pdf/091027 Lufthansa Decision final public.pdf; Jersey Competition Regulatory Auth., Decision M170/08 (Jan. 24, 2008), *available at* http://www.jcra.je/pdf/080205 Decision re TUI AG.pdf; Jersey Competition Regulatory Auth., Decision M152/08 (Dec. 13, 2007), *available at* http://www.jcra.je/pdf/071220 Decision re Autogrill.pdf.

61. *See* N.Z. Commerce Comm'n, Final Determination in the Matter Involving Air New Zealand Ltd. and Qantas Airways Ltd., No. J5633 (Oct. 23, 2003), *available at* http://www.comcom.govt.nz/BusinessCompetition/Anti-competitivePractices/Applications/ContentFiles/Documents/FinalDetermination.pdf.

marginally impact other jurisdictions as well.[62] It is noteworthy that some small and developing countries simply relinquish their power to block mergers between international firms that do not have local subsidiaries because of their inability to discipline the parties to such mergers.[63]

Quite ironically, enforcement levels are at their highest in the area of antitrust enforcement in which lower levels would have generally benefited total global welfare. Indeed, the parallel review by different jurisdictions has created an obstacle for pro-competitive or neutral international mergers due to the sheer number of jurisdictions which require filings. However, because merger notification procedures place the onus on the merging entities to submit the necessary documents, small size or low development does not affect enforcement levels. This over-deterrent effect is strengthened by the fact that, as noted above, only a handful of these jurisdictions actually regulate international mergers that harm their jurisdictions.

Finally, it is important to note that the results also indicated that operational regional antitrust agreements also affected the level of enforcement. More specifically, EU Member States enjoy enforcement by the EU, which has the authority to investigate any anticompetitive conduct having effect on trade among its members.[64] Accordingly, the EU dealt with most international antitrust issues. Thus, the size of a member state or its level of development had much less significance on enforcement levels. Unfortunately, most regional antitrust agreements among small or developing jurisdictions are yet in their first stages of operation.[65]

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62. This is an outcome of the fact that most routes operated by Air New Zealand were within New Zealand and within it and Australia. *See* Cross Submission on Behalf of Qantas & Air New Zealand, Steven A. Morrison & Clifford Winston, The Qantas-Air New Zealand Proposed Alliance: A Conceptual and Empirical Assessment 1 (2003), *available at* http://www.comcom.govt.nz/BusinessCompetition/Anti-competitivePractices/Applications/ContentFiles/Documents/airnzqantasmorrisonwinston.pdf.

63. *See, e.g.*, Restrictive Trade Practices Law § 17, 5748–1988, 42 LSI 135 (1987–88) (Isr.); 1992 Competition Law § 2 (Green.), *repealed by* 2007 Competition Law (Green.).

64. *See* EC Treaty arts. 81-82, 2006 O.J. C 321 E/37, at 73-75.

65. *See, e.g.*, UNCTAD, *Restrictive Business Practices That Have an Effect in More Than One Country, in Particular Developing and Other Countries, With Overall Conclusions Regarding the Issues Raised by These Cases*, at 16, U.N. Doc. TD/RBP/CONF.4/6 (Sept. 4, 1995); *see also* Michal S. Gal, *Regional Agreements: An Important Step in International*

B. *The Causes of Limited Enforcement*

Are small and developing jurisdictions acting irrationally, especially since international antitrust issues can create significant negative effects on them?[66] I suggest not. As this part elaborates, low enforcement levels are driven by practical obstacles coupled with pure economic considerations based on the costs of enforcement relative to its benefits.[67]

Let me start with practical enforcement problems. Small jurisdictions can rarely make a credible threat to prohibit the conduct of a foreign firm. Consider an example of an international merger that has no negative welfare effects on the large jurisdictions.[68] If trade in the small state is only a small part of the foreign firm's total world operation, the gains from trade within it are limited. Accordingly, the firm would most likely choose to exit the small country and trade in other jurisdictions if the small jurisdiction imposed significant restrictions. The foreign firm will choose to do so if the loss of revenues from terminating its trade in the small country and the possible increase in overall production costs, if the firm faces scale economies over the whole range of production, are smaller than the increase of revenues it anticipates achieving as a result of the merger elsewhere.

In practice, however, this type of exit will rarely occur. This is because the negative welfare effects on the small country from the exit of the foreign firm may well be greater than the negative

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Antitrust (forthcoming 2010) (on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1505543 [hereinafter Gal, *Regional Agreements*].

66. *See, e.g.*, Aditya Bhattacharjea, *Export Cartels—A Developing Country Perspective* 38 J. WORLD TRADE 331, 335 (2004); Levenstein & Suslow, *supra* note 7, at 802.

67. Of course, low levels of enforcement may not necessarily indicate that welfare is harmed. For one, it might be the case that small and developing jurisdictions do not suffer from anticompetitive conduct. While this proposition is theoretically valid, it is most likely unrealistic, given the strong economic motivations of firms to engage in anticompetitive conduct, especially where such conduct is rarely prohibited. *See, e.g.*, Frédéric Jenny, *Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence*, 29 WORLD COMPETITION 109 (2006). Second, enforcement might be welfare reducing where conduct is erroneously prevented, even though it does not have anticompetitive effects (type two errors). In such cases, less enforcement is better than more. But absent indications that many or most enforcement actions of small and developing jurisdictions suffer from this error, it may be assumed that low levels of enforcement against international firms are below optimal.

68. This part is based, in part, on GAL, *supra* note 5, 240–49. It shall be assumed that the large jurisdiction is also a developed one unless otherwise noted.

effects from its continued operation within its borders. Therefore, a small country usually has limited incentives to prevent the merged entity from trading within its borders even if it engaged in a harmful merger.[69] The foreign firm, acknowledging this effect, will not take into account the effect that a merger will have on the small country. Instead, it will only consider the effects of the merger on its own profits in that market.[70]

In essence, small jurisdictions act as if they were applying a world-wide total welfare standard, since the large jurisdictions that have approved the merger represent a much larger share of consumers than they do. Such limited and often non-existent veto power implies that the incentives of small countries are not represented in the merger review equation. This can have significant consequences on their domestic markets, as exemplified by Unilever-Best Foods merger.[71] Even if the increase in market power resulting from the merger is accompanied by increased efficiencies, these will rarely be realized by the small jurisdiction because the production facilities are located outside its borders and more often than not markets in the small jurisdiction are highly concentrated and thus more prone to the realization of market power.[72]

A similar analysis applies in many cartel and monopolization cases. Indeed, the research indicated that large foreign importers sometimes use an explicit or an implicit threat of exit, once the small or developing jurisdiction attempts to impose upon them limitations which they may agree to if imposed by a large economy.[73] Microsoft, for example, has refused to sign an

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69. *See id.*, at 243.

70. As elaborated below, the small country might, however, impose some localized conditions that attempt to reduce at least part of the negative welfare effects of the merger upon their jurisdiction. *See infra* text accompanying note 105.

71. *See supra*, note 17.

72. *See* GAL, *supra* note 5, at 19.

73. In some cases this is true also for larger economies. For example, when the Korean Fair Trade Commission ("KFTC") started an investigation of Microsoft for bundling its media player into its operating system, Microsoft publicly announced that "If the KFTC enters an order requiring Microsoft to remove code or redesign Windows uniquely for the Korean market, it might be necessary to withdraw Windows from the Korean market or delay offering new versions in Korea unless the remedial order is stayed or overturned on appeal." Microsoft Corp., Quarterly Report (Form 10-Q), at 33 (Oct. 27, 2005).

agreement limiting its conduct in Israel,[74] even though the conditions were necessary in order to address the unique characteristics of the Israeli market and the terms were similar to those included in the agreement that it reached with the EU.[75] The implied threat of exit meant that the market for Hebrew-supported operating systems would not be developed.

Developing jurisdictions also often suffer from an inability to create a credible threat of antitrust enforcement, much like small ones, although to a somewhat more limited extent. The fact that developing economies often represent a large number of consumers may limit this risk relative to small jurisdictions, yet it is still significant in specific product markets which are small or do not carry high profits due to the low level of development. To the extent that the development of their industries depends upon the importation of raw materials, intermediate components, and capital goods from foreign firms, such risks carry much weight.

Political obstacles might also stand in the way of a small or developing country attempting to prevent a merger or joint venture among foreign firms, or even to take a strong stance against an export cartel or a foreign dominant firm. If the effects of such conduct are positive in the home jurisdiction or in other jurisdictions (higher taxes, lower unemployment, lower production costs), the small or developing country might encounter political resistance to its decision from the home jurisdiction. This consideration is based on a presumption that the country's size or level of development is positively correlated with its political power.

In addition, small and developing jurisdictions often have limited resources to combat anticompetitive conduct,[76] and in turn have a limited ability to take on international conduct that

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74. *See See* Interview with Dror Strum, former Dir., Israeli Antitrust Auth., in Jerusalem, Isr. (2007); *see also* Gal, *supra* note 53, at 16.

75. *See* Commission Press Release, IP/07/1567 (Oct. 22, 2007).

76. Antitrust authorities in developing jurisdictions often have very little financial and human endowments. Small economies have small endowments in absolute terms, although their endowment might be similar to those of large economies in relative terms, when analyzed as a percentage of their total budges or per capita. *See* Gal, *supra* note 53, at 17.

negatively affects their jurisdiction.[77] In general, the size or the level of development of a jurisdiction does not affect the "fixed" costs of conducting an antitrust inquiry. Fixed costs are incurred regardless of the size of the economy, because the analytical steps of the analysis are similar in markets of all sizes. A smaller endowment therefore naturally enables the authority to deal with fewer cases. This problem is even more pronounced in international antitrust cases because the international dimension generally increases the costs of bringing a suit. First, evidence might need to be gathered from myriad and sometimes foreign sources, an exercise which is costly and time consuming. The fact that firms from developing and small countries rarely participate in such cartels[78] further implies that the gathering of evidence and enforcement of remedies is even more difficult. Secondly, these jurisdictions often do not enjoy voluntary cooperation from foreign witnesses, a fact that necessitates engagement in additional costly procedures. Third, challenging a foreign firm usually generates a high level of legal defense. It is often difficult for an agency with limited financial and human resources to match such expertise and resources, even if it has a sound case against a foreign firm. Small and developing jurisdictions will have limited ability to pursue such cases.

This effect is underscored by the fact that the benefits of enforcement are generally small for these jurisdictions, compared to the high costs. As elaborated below, the enforcement activities of large jurisdictions usually prevent the continuation of the cartel. The additional deterrent effect of the small and developing jurisdictions is often marginal. This is because in many jurisdictions fines are quite low, as they are often based on turnover levels in the jurisdiction. In addition, if the relevant executives serve jail time in another (generally large) jurisdiction, the small or developing state would generally not impose additional jail sentences. From the perspective of the small or developing jurisdiction, the decision to forego

77. Many developing economies treat antitrust laws with ambivalence. Some believe, for example, that it is not always in their best interest to limit the cartelistic or monopolistic activities of their domestic firms. *See* Frederick Michael Scherer, *Competition Policy, Domestic and International* 401 (2000). Such an analysis is, however, beyond the scope of this Article.

78. *See* Connor & Helmers, *supra* note 8, at 34.

prosecution of international cartels that are prosecuted elsewhere is thus generally rational. Moreover, these jurisdictions must use their scarce resources to investigate and prosecute purely domestic anticompetitive issues. Nonetheless, as elaborated below, the cumulative effect of these decisions is harmful to international welfare.

In some cases, however, low enforcement levels result from the inability of small and developing jurisdictions to obtain the relevant information.[79] Oftentimes such authorities cannot receive the relevant factual information from those authorities that have prosecuted the firms because of secrecy issues. For example, the New Zealand Competition Authority considered bringing a case against the Vitamins cartel after it was prosecuted elsewhere.[80] However, it could not obtain the pertinent information because the U.S. Department of Justice was prevented, under its plea bargain agreement with the relevant firms, from disclosing the relevant information.[81] In this case, the U.S. authority made a strategic decision to limit the number of possible world-wide prosecutions against the cartel in order to ensure that it be brought to trial in the United States.[82] Even from a global welfare point of view, taking into account sub-optimal levels of deterrence, this may well have been a sound decision.

The level of maturity of the agency also affects its ability to deal with international antitrust issues. This point, which is especially relevant to developing countries, can be best illustrated through a real-world example. Several U.S. manufacturers engaged in a sophisticated cartel agreement in the form of territorial restraints in Latin America.[83] In order to reduce the transparency of their conduct, they devised a scheme under

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79. *See* Response to Questionnaire, Geoff Thorn, Gen. Manager, N.Z. Commerce Comm'n (2007) (on file with author).

80. *See* Connor, *Vitamins, supra* note 14; Interview with Attorney for U.S. plaintiffs in Vitamins class action lawsuit (2008). While researching this Article, the author interviewed numerous individuals involved with international antitrust cases. Certain individuals requested that the author withhold their identities and the dates and locations of the interviews in order to preserve their anonymity.

81. *See* Interview with Attorney for U.S. plaintiffs in Vitamins class action lawsuit, *supra* note 80.

82. *See id.*

83. *See id.*

which each firm committed to sell only a predetermined quantity in each state in which the cartel operated.[84] They also agreed to vary the quantities of each firm every year, while keeping the overall profitability of each firm stable.[85] Although allegations of cartelistic conduct were brought to the attention of several Latin American antitrust authorities, they did not find any restraint on trade.[86] The authorities relied, inter alia, on the fluctuation of trade levels in their jurisdiction as an indication of competition to reach this conclusion.[87] Institutional issues might also play a factor. For example, heads of competition authorities which have a relatively weak position within the administration and expect to serve only a short period in their role might prefer quick, high-impact cases rather than ones that are expected to take a long time and create some political resistance due to the ties of the foreign firm with the political and business elite.[88]

An additional factor that often plays a role in low enforcement levels of developing jurisdictions involves a lack of competition culture that often leads to primacy of immediate industrial policy considerations over competitive concerns. In some cases antitrust enforcement against foreign firms is regarded as an obstacle to foreign investment, which is considered an important element in a country's development. Another factor involves political influences that are difficult for relatively weak antitrust authorities to counter.[89] Indeed, large,

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84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. Some countries, however, take an opposite view. Many Chinese view the new antitrust law as a tool for mainly regulating the conduct of foreign firms. *See, e.g.*, *China Adopts Anti-Monopoly Law*, CHINA DAILY, Aug. 30, 2007, *available at* http://www.chinadaily.com.cn//-08//_6069209.htm. China is, however, a unique and exceptional case, due to the size of its markets and its high rate of development, which make it easier for it to create a credible threat of enforcement.

89. *See, e.g.*, Gal, *supra* note 49, 31-33. In Zambia, for example, a large foreign financial entity attempted to discredit the decision of the authority by soliciting government intervention based on what it perceived as its important contribution to the Zambian economy. *See* Interview with Zambian antitrust official (2008) (The identity of this speaker and the date and location of the interview have been withheld in order to preserve the anonymity of the representative). In Colombia the director of the antitrust agency is appointed by the President and can be removed at any time by him. It was rumored that one of the directors was removed from office due, in part, to a case he brought against foreign-owned credit card companies. *See* Interview with Columbian

multinational firms often have strong ties with the political and business elite in small and developing jurisdictions.[90] These ties sometimes translate into political pressure not to enforce the laws in international antitrust cases. To further complicate matters, the local firm that participates in an international cartel might be regarded as a local hero rather than a villain.

The foregoing analysis leads to the following conclusion: Extraterritoriality is an efficient tool for large jurisdictions that possess sufficient power over foreign firms to command obedience, but small or developing jurisdictions often lack the requisite power and resources to discipline foreign entities that harm them. Their existing policy choices can generally be summarized as ineffective extraterritoriality.

Yet, at least in the case of developing countries, the causes for limited unilateral enforcement may change significantly. Indeed, as countries develop a competent antitrust authority and a competition culture and their markets become more competitive, unilateral enforcement in international antitrust cases may increase dramatically. Small jurisdictions, on the other hand, can generally solve their enforcement problems only by joining forces with other jurisdictions or by regulating some types of conduct as elaborated in the following section.

C. *Current Solutions and their Limitations*

As the analysis above indicates, small and developing countries often treat international anticompetitive conduct as given.[91] Some nevertheless attempt to regulate the conduct that directly affects their local markets, although their tools are generally more costly and less effective than prohibiting the conduct from occurring.

One option is the imposition of structural and behavioral conditions on merging parties that apply only to their operation

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antitrust official (2008) (The identity of this speaker and the date and location of the interview have been withheld in order to preserve the anonymity of the representative).

90. *See* Gal, *supra* note 49, at 32. For small economies see, e.g., GAL, *supra* note 5, at 49. For developing jurisdictions see, e.g., POLITICS TRIUMPHS ECONOMICS?: POLITICAL ECONOMY AND THE IMPLEMENTATION OF COMPETITION LAW AND REGULATION IN DEVELOPING COUNTRIES (VOLUME II) (Pradeep S. Mehta & Simon J. Evenett, eds., 2009), *available at* http://www.circ.in/pdf/PoliticsTriumphsEconomics-Vol2.pdf.

91. *See supra* text accompanying notes 70-73.

within the small or developing jurisdiction. The Jersey case of *Ferryspeed–ChannelExpress* provides an interesting example of a structural divestiture remedy.[92] The Jersey Competition Regulatory Authority decided that the merger would significantly limit competition in the market for seaborne temperature-controlled freight services between Jersey and the United Kingdom. A central factor to the case was that the merger would create a further concentration of suitable warehouse space in Jersey's harbor, which created a significant barrier for competition. The Authority thus refused to approve the merger. In response, the parties restructured their agreement and sold a warehouse to a third party freight operator. The Authority concluded that the restructuring substantially addressed the competitive concerns, as it provided a new entrant with a key asset necessary to compete in the market. The Authority, accordingly, approved the merger in its new form.

More commonly, competition authorities in small or developing jurisdictions choose to apply behavioral remedies. An interesting example is the Israeli case of *Unilever*.[93] Unilever's proposed acquisition of Ben & Jerry's raised concerns regarding competition in the Israeli ice cream market.[94] The Competition Authority did not prohibit the merger. It did, however, condition approval on Ben & Jerry's use of an independent distributor in Israel with freedom to determine prices charged for the products. The Authority also required that all new products would be made available to the distributor. These are limited remedies because they cannot totally mitigate the fact that both firms are now controlled by the same entity that determines their strategic decisions. At the same time, this arrangement enabled reliance on the fact that an international firm will not change its strategic decisions (such as Ben & Jerry's introduction of new products elsewhere) only to reduce competition in the small jurisdiction.

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92. Jersey Competition Regulatory Auth., Decision M005/05 (July 3, 2006), *available at* http://www.jcra.je/pdf/060711 final public version decision ferryspeed.pdf.

93. *See* Dror Strum, Dir. of Israeli Competition Auth., Conditions for the Approval of a Merger Between Ben & Jerry's Homemade Inc. and Unilever N.V (Dec. 16, 2001) (Isr.) [hereinafter Unilever–Ben & Jerry's (Isr.)].

94. The merger was subject to approval because both firms were part of large food conglomerates that also controlled the major players in the Israeli ice-cream market.

Another possible solution is the creation of regional competition authorities that aggregate the power and resources of several jurisdictions to create a credible threat to foreign firms that reduce welfare within member states.[95] If, for example, a sufficient number of jurisdictions join forces to prevent a foreign merger, then this might create sufficient economic incentives for foreign firms to abandon their attempts to merge. For such an action to pose a credible threat, the threat of limited access to such jurisdictions must have a significant effect on the merged entities' profitability in order to offset the gains from the proposed merger in other jurisdictions.[96] All jurisdictions also must be prepared to block the entry of the merged entity into their markets in the event that the merger does go through. The fact that the welfare effects on one jurisdiction do not generally coincide with the welfare effects on another (in economic terms, there is no zero-sum game) eliminates some of the coordination problems that are present in other forms of collective action. Such regional agreements might also create an enforcement power that might countervail the domination of international antitrust issues by the large jurisdictions. Indeed, a growing number of small and developing jurisdictions are entering into regional agreements, yet most have not tackled international antitrust issues as of yet.[97]

In addition, many developing jurisdictions have agreements for technical assistance with large jurisdictions.[98] These agreements are mainly designed to alleviate type 1 cases by increasing unilateral enforcement by the developing jurisdiction.[99] Yet the data makes it debatable whether technical assistance programs have, as of yet, significantly enhanced the ability of developing jurisdictions to apply their laws unilaterally to international firms.

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95. *See* George Lipimile & Elizabeth Gachuiri, *Allocation of Competences Between National and Regional Competition Authorities: The Case of COMESA*, *in* COMPETITION PROVISIONS IN REGIONAL AGREEMENTS, *supra* note 32, at 361, 380–81; *see also* Gal, *Regional Agreements*, *supra* note 65 (manuscript at 7).

96. *See supra* discussion accompanying note 68.

97. *See, e.g.*, Gal, *Regional Agreements*, *supra* note 65 (manuscript at 2).

98. *See, e.g.*, Michael W. Nicholson, D. Daniel Sokol & Kyle W. Stiegert, *Assessing the Efficiency of Antitrust/Competition Policy Technical Assistance Programs* (Paper prepared for the 2006 ICN Cape Town Conference, Working Subgroup on Technical Assistance Implementation).

99. *Id.* at 4–5.

Finally, let me suggest a novel solution that holds the potential to solve at least some of the problems faced by small and developing jurisdictions when applying their laws to international antitrust issues.. As noted above, one of the main obstacles that small and developing jurisdictions face when applying their laws extraterritorially is the high cost involved in bringing a case.[100] A possible partial solution to this problem involves legal reliance of small and developing jurisdictions on the determinations of foreign courts with regard to the existence of international cartels. This would significantly reduce the level of resources needed and would enable the authority to focus solely on the cartel's domestic effects. Of course, this type of reliance would have to be based on the final rulings from a jurisdiction with a comparable burden of proof and with a reliable and well-functioning court system. It is comparable, to some extent, to the reliance of different jurisdictions on decisions regarding the fulfillment of conditions regarding the issuance of a patent in other jurisdictions. This solution is fraught with political issues, but it holds some promise for enabling small and developing jurisdictions to enforce their antitrust laws against foreign firms, thereby increasing the deterrent effect against international cartels and international abuses of dominance.[101]

D. *Large Economies as Enforcers for the World?*

Small and developing countries often "free ride" on the enforcement efforts of other jurisdictions in the international arena. As noted above, large jurisdictions have brought a significant number of cases against international firms since the mid-1990s.[102]

Indeed, in type 2 cases, which negatively affect all jurisdictions concerned, such enforcement often has direct and immediate positive spillover effects on other jurisdictions. The prohibitions against the *Vitamins Cartel*, for example, prevented

100. *See supra* text accompanying notes 76–79.

101. This solution is elaborated in Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance* 9–17 (N.Y. Univ. Law and Econ. Working Papers, Paper No. 154, 2008), *available at* http://ssrn.com/abstract=1291844.

102. *See* Connor, *Appraisal and Proposals*, *supra* note 57, at 92.

the continuation of the cartel worldwide.[103] Likewise, the *United States v. Microsoft* antitrust case effected worldwide markets for personal computer operating systems.[104]

Moreover, the type of evidence gathered and the economic and legal analysis may be common to all countries, large and small, developed and developing. This might save resources for small and developing countries wishing to bring cases and provide a better prospect for reaching a similar legal outcome. In addition, a multinational company might be more willing to agree to limit its anticompetitive activity in a small or developing country, if such limits mirror or parallel conditions imposed by a large one. Compliance might be motivated by both psychological and political motivations. Coca Cola, for example, agreed to restrain its conduct in several small countries in the same fashion that was required by a consent decree in the EU.[105] Yet, as noted above, this is not always the case.[106]

Significantly, some of the choices that large jurisdictions make in applying their antitrust laws have positive externalities on foreign jurisdictions. For example, adopting a consumer welfare test, rather than a total welfare test as in the United States and the EU, reduces the number of cases that will be approved which are welfare-reducing on foreign jurisdictions. This is because efficiencies to domestic producers are given less weight.[107]

It is far from obvious, however, that the prevention of anticompetitive conduct by a large jurisdiction also benefits small and developing jurisdictions. For one, enforcement efforts by

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103. *See generally* Connor, *Vitamins*, *supra* note 14 (discussing the *Vitamins Cartel* case).

104. *See* United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000), *aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam), *cert. denied*, 534 U.S. 952 (2001). For the findings of fact, see *Microsoft*, 84 F. Supp. 2d 9, 12 (D.D.C. 1999) and for the conclusions of law, see *Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000).

105. *See* Commission Notice, 2004 O.J. C 289/10. For the precise text of the proposed restrictions see Coca-Cola, Inc., Undertaking, Case COMP/39.116/B-2—Coca-Cola (Oct. 19, 2004), *available at* http://ec.europa.eu/competition/antitrust/cases/decisions/39116/tccc_final_undertaking_041019.pdf; *see, e.g.*, Dir. Gen. of the Isr. Antitrust Auth., Directions for a Monopolist: The Central Company for Production of Soft Drinks, Inc. (May 10, 1998), *available at* http://archive.antitrust.gov.il/ANTItem.aspx?ID=1406&FromSubject=&FromYear=2009&FromPage=0.

106. *See supra* text accompanying note 75.

107. For an interesting discussion of this point see ELHAUGE & GERADIN, *supra* note 20, at 1013–14.

large jurisdictions against worldwide cartels do not necessarily prevent their operation beyond their borders. Empirical evidence suggests that some cartels are set up in a way that reduces or prevents negative welfare effects on jurisdictions with strong anti-cartel enforcement, relative to other jurisdictions.[108] Likewise, prevention of abusive practices in one jurisdiction often does not prevent the continuation of those practices in other jurisdictions, unless the firm cannot separate its modes of operation around the world. This latter point can be illustrated by the EU investigation of Intercontinental Marketing Services ("IMS"), the world leader in collecting data on prescriptions and sales of pharmaceutical products. IMS is present in more than one hundred countries worldwide.[109] The EU investigated tying and loyalty discount practices that were not based on objective criteria, which made entry and viability by new competitors difficult in the EU.[110] The investigation was terminated after IMS changed its practices within the EU.[111] However, this does not prevent IMS from adopting similar practices in other jurisdictions that would need to prove similar anticompetitive effects within their markets.

More importantly, as noted above, the level of the monetary sanctions imposed by large jurisdictions on international cartels often creates under-deterrence.[112] The fines and damages currently imposed are disproportionate relative to the profits obtained elsewhere because they are based on harm to the domestic jurisdiction imposing them and are only pursued by a handful of jurisdictions. One study indicated that only sixty-one percent of global cartel profits were disgorged.[113] And if the probability of detection is somewhere between thirteen to

108. *See, e.g.*, Julian L. Clarke & Simon Evenett, *The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel*, 48 ANTITRUST BULL. 689, 692 (2003).

109. *See*, Intercontinental Mktg. Servs., Locations, http://www.imshealth.com (follow "Company Information" hyperlink; then follow "Locations" hyperlink) (last visited Nov. 2, 2009).

110. *See* Commission Press Release, IP/00/1207 (Oct. 24, 2000) (announcing the initiation of a formal investigation).

111. *See* Commission Press Release, IP/02/1430 (Oct. 4, 2002) (announcing the termination of the investigation).

112. *See* John M. Connor, *Effectiveness of Antitrust Sanctions on Modern International Cartels*, 6 No. 3-4 J. INDUS. COMPETITION & TRADE 195, 213 (2006).

113. John M. Connor, *Latin America*, supra note 55, at 320-21.

seventeen percent, as some scholars believe, then ex ante deterrence is far below the optimum.[114] Nonetheless, individual criminal sanctions imposed by the United States,[115] especially imprisonment, might serve to reduce these shortcomings if they create a sufficient deterrent relative to the cartel's worldwide profits. U.S. criminal enforcement against individuals can thus be regarded, to some extent, as enforcement for the world.[116]

Large countries might also choose to not spend resources on anticompetitive conduct that has limited or positive effects on their jurisdictions but significant harmful effects elsewhere (type three cases). As a result, large countries, taking into account only their own interests, might create negative externalities on other countries, for example by tolerating its own export cartels or by imposing a remedy which creates such externalities.

Furthermore, conduct prohibited by a large country may, in fact, have positive effects on the small or developing country (type four cases). Finally, a non-cooperative exercise of extraterritorial powers leads to an inefficiently strict policy outcome, even in type two cases.[117] Free riding on the enforcement actions of large jurisdictions therefore generates sub-optimal effects.

Finally, the low maturity level of antitrust enforcement in many developing countries also affects their ability to enjoy the positive externalities generated by decisions from other jurisdictions. The *French/West African Shipowners' Committees* case serves as a good example.[118] In that case, the European Commission initiated an investigation against cartels and liner conferences with dominant positions in the maritime traffic between Europe and several African states. In its decision, which had pro-competitive effects on all countries concerned, the

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114. *See, e.g. id.*; *see also* Connor & Helmers, *supra* note 8, at 89.

115. *See* Connor, *Appraisal & Proposals*, *supra* note 57, at 7-9. A handful of other jurisdictions also impose criminal sanctions in cartel cases, including the United Kingdom, Ireland, South Korea and Israel. However, the United Kingdom is the only jurisdiction yet to impose these sanctions against a member of an international cartel.

116. *Id.* at 48-53. This form of deterrence is limited by the fact that some jurisdictions decline extradition requests of their citizens by the United States for purposes of imprisonment, due to differing views of the social severity of anticompetitive conduct.

117. *See* Tay & Willmann, *supra* note 11, at 320.

118. Commission Decision No. 92/262/EEC, 1992 O.J. L 134/1 (French-West African Shipowners' Committees).

commission indicated that it was ready to enter into talks with the authorities of these countries with a view to helping their carriers secure a greater share of the traffic generated by their external trade.[119] However, the shipping authorities of the relevant African countries instead authorized the cargo reservations by their shipping companies. This case is interesting for another reason as well: the European decision prohibited only the part of the cartel that affected trade between Europe and Africa. The European Commission declined to prohibit the additional parts of the cartel that affected trade exclusively between African countries, despite attempts by international bodies such as the UNCTAD to do so and thus assist those African countries in their attempts to prevent restrictive cartels. This is a direct result of the unilateral enforcement norms that currently dominate antitrust: the commission argued that prohibiting the parts of the cartel that did not affect its own citizens was outside the scope of its authority.

As this Part clearly indicates, small and developing countries currently are very limited in their ability to prevent anticompetitive conduct by foreign firms. The large proportion of imported products that are traded in these countries implies that the anticompetitive conduct of foreign importers will have a strong negative effect on them without significant offsetting benefit. Yet, current solutions in the form of either self-help, reliance on the enforcement actions of large economies, or joining forces with other small or developing jurisdictions, are ineffective at solving their international antitrust enforcement problems, although the latter might hold some future promise. Analysis of the causes of low enforcement indicate that the enforcement challenges of small jurisdictions are unlikely to disappear with time, whereas those of developing jurisdictions can disappear if their level of development significantly increases.

These current enforcement patterns generally have negative implications for total welfare. As noted, low enforcement levels

119. *See* Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, Switz., Nov. 13-21, 1995, *Restrictive Business Practices that have an Effect in More Than One Country, In Particular Developing and Other Countries, With Overall Conclusions Regarding the Issues Raised by These Cases*, U.N. Doc. TD/RBP/CONF.4/6 (Sept. 4, 1995).

against international cartels and abuse by international firms that affect many jurisdictions in the same way, create under-deterrence. At the same time, merger notification procedures—especially when they are not used as a basis for remedying the effects of the merger on the jurisdiction—create over-deterrence. The following section seeks to explore the implications of these conclusions for international cooperative efforts on antitrust.

IV. *SOME IMPLICATIONS FOR INTERNATIONAL ANTITRUST EFFORTS*

The past decade has seen an upsurge in attempts to reach international cooperative solutions. This part explores whether these efforts provide a possible solution to the enforcement problems faced by small and developing jurisdictions. As argued below, the analysis of enforcement patterns in the previous Part has important implications for international antitrust, as it uncovers some of the incentive structures that result from the asymmetric levels of enforcement that were identified.

As the number of new players that affect a jurisdiction has grown significantly, whether international firms or foreign antitrust authorities, complex new patterns of overlap and spillover effects begin to emerge which have brought many jurisdictions to the realization that some form of coordination and harmonization are required on a global level. These efforts are largely concentrated in the ICN.[120] The ICN shares many of the characteristics of other recent international bodies; it is a voluntary, quasi-private association of public actors that is based on persuasion and common agreements rather than on coercion and hierarchical mechanisms of control.[121]

Because the ICN is based on a persuasive model where the quality of argument and analysis takes a front seat in determining

120. *See* Michal S. Gal, *The 'Cut and Paste' of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, 9 EUR. J. OF LAW REFORM 467, 479 (2007) [hereinafter Gal, *Article 82*]. As noted above, other organizations such as the OECD, UNCTAD and the WTO also play an important role in creating voluntary or suggested rules for international antitrust.

121. *See* Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction,* 57 EMORY L.J. 1, 5 (2007). The ICN is unique in the sense that non-governmental advisors often have effect on its deliberations and recommendations.

the regulatory outcome,[122] and there exists a high level of dependence among jurisdictions, the network creates a potentially strong platform for solving the problems of international antitrust for all parties involved. If each jurisdiction is dependent on the regulatory outcomes of other jurisdictions, then they all have an incentive to reach a common agreement, in which negative spillovers are minimized.

Yet a more in-depth analysis, which takes into account the existing dynamics of unilateral enforcement developed in the previous section, suggests a more qualified conclusion. Rather than assuming that dependency aligns the relative power and the different interests of each jurisdiction,[123] it is suggested that diverse unilateral enforcement levels create different degrees of dependency that, in turn, create a pattern of power which affects the discussions. This is because large jurisdictions have a limited motivation to consent to changes in their antitrust policy which move them closer to the global optimum but might reduce their jurisdiction-specific welfare.[124] Put differently, the current patterns of enforcement do not motivate large jurisdictions to bargain away their benefits from current patterns of power. This does not imply that representatives of jurisdictions are motivated solely by a simple cost-benefit analysis pertaining to their own jurisdiction. Indeed, many operate out of other motivations, such as the wish to assist other jurisdictions in developing their competition laws.[125] However, fundamental motivations are limited where there is a direct clash of important economic interests. The following analysis elaborates on this point. It starts with the benefits for small and developing countries that are likely to emerge from coordination and harmonization and then analyzes the limitations of a cooperative system to small and developing jurisdictions and its contribution to total welfare.

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122. *See* ICN: Home, http://www.internationalcompetitionnetwork.org (last visited Nov. 2, 2009); *see also* Fox, *supra* note 10.

123. *See* Ahdieh, *supra* note 121, at 24.

124. Moreover, all large jurisdictions must agree on the change. Indeed, the ICN has largely agreed on procedural issues that generally harm no jurisdiction rather than on changes in substantive rules. *See* Ariel Ezrachi, *Merger Control and Cross-Border Transactions, in* HANDBOOK OF RESEARCH IN TRANS-ATLANTIC ANTITRUST 622, 627 (Phillip Marsden ed., 2006); Guzman, *International Antitrust*, *supra* note 4, at 1526-27.

125. For analysis on this topic see, for example, Yochai Benkler, *Law, Policy and Cooperation*, *in* GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION (E. Balleisen & D. Moss eds., Cambridge Univ. Press, forthcoming 2009).

Undoubtedly, small and developing jurisdictions stand to benefit from international cooperation and coordination. Even if no mechanism is put forward to solve type 3 and 4 cases, coordination efforts create general positive effects that may reduce problems arising in type 1 cases. Harmonization might even be more important for small and developing jurisdictions than to large, developed ones. For small and developing jurisdictions, harmonizing laws generally reduces the transaction costs to importers that might otherwise find it uneconomical to invest in learning and complying with the laws of these jurisdictions.[126] Small economic size or a low level of development usually implies that there are limited profits available. Accordingly, the lower the costs of trade in these countries—including the costs of learning and complying with domestic antitrust laws—the higher the incentives of foreign firms to enter these markets and make a profit.[127] Likewise, conforming laws may reduce the export costs of domestic firms.[128] Both effects strengthen one of the most important tools for overcoming the limits created by a small economy or underdevelopment: expanding the size of the market through exportation and importation.[129]

The creation of global antitrust standards can also assist reform advocates in advancing the adoption of welfare-based competition rules. Indeed, it is more difficult for interest groups to advance a cohesive set of rules that significantly diverge from the recommendations of an influential international body. Moreover, collective promotion of welfare-based rules is especially important for small and developing countries, where political economy issues are prevalent due to the close relationship between business and governmental elites.[130]

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126. An exception to this general understanding arises when the harmonized law is costly to follow, such as the case where merger regulation requires the merging firms to file numerous documents that are costly to produce. *See* Gal, *Article 82*, *supra* note 120.

127. Of course, foreign trade is not without its problems. For example, it exposes vulnerable economies to the fluctuations in worldwide demand levels. *See, e.g.*, Lino Briguglio, *Small Island Developing States and Their Economic Vulnerabilities*, 23 WORLD DEV. 1615 (1995); *see also* JOHN P. ATKINS ET AL., A COMMONWEALTH VULNERABILITY INDEX FOR DEVELOPING COUNTRIES: THE POSITION OF SMALL STATES (1985).

128. *See supra* note 120.

129. *See* GAL, *supra* note 5, at 40–41.

130. *Id.*

Moreover, joining forces to prevent anticompetitive worldwide cartels, mergers, and joint ventures (type 2 cases) will benefit all jurisdictions both directly and indirectly, by creating stronger deterrence. Cooperation can also reduce problems in type 1 cases through reducing the pre-merger notification costs by ensuring proper nexus requirements.

Furthermore, some of the working groups of the ICN have focused on issues that are special to small and developing jurisdictions. A special working group was created to study the effectiveness of external technical assistance programs to developing jurisdictions out of a desire to better assist those jurisdictions in effectively applying their antitrust laws.[131] In addition, the 2009 ICN meeting included a special panel on antitrust in small economies that attempted to shed light on some of the unique antitrust challenges faced by these jurisdictions.[132] These actions are indicative that small and developing jurisdictions face different antitrust challenges and other jurisdictions wish to assist them in overcoming these obstacles.

Yet the limited ability of small and developing jurisdictions to tackle international antitrust issues undoubtedly affects their bargaining position in reaching international cooperative solutions, especially issues that clash with the interests of large jurisdictions. As Guzman argues, voluntary cooperative efforts are liable to generate regulatory outcomes that do not maximize total welfare.[133]

This is especially true with regard to current ICN cooperation efforts. While no jurisdiction controls the agenda or the final choice,[134] the dynamics of the organization inevitably lead to an outcome that does not significantly change current

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131. *See* ICN, The Effectiveness of Technical Assistance, http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/competition-policy-implementation/the-effectiveness-of-technical-assistance (last visited Nov. 2, 2009).

132. *See* ICN, *Summary of ICN Work Product, Presented at the 8th Annual ICN Conference* 22 (2009), *available at* http://www.icn-zurich.org/Downloads/Materials/ICN_Executive_Summary_of_ICN_Work_Product_June2009_Final_090522.pdf.

133. *See* Guzman, *International Antitrust*, *supra* note 4, at 1528 (arguing international agreements are greatly impacted the bargaining positions of each country).

134. *See, e.g.*, Sokol, *supra* note 4, at 106–07.

enforcement patterns. Since agreements are voluntary, any rule which changes the current status-quo should make all better off.[135] Large jurisdictions clearly would not agree to concessions that reduce their benefits from the current situation. This outcome is enhanced by the fact that negotiations are generally area-by-area and even rule-by-rule, because "trading" on benefits in different areas cannot be achieved.[136] Moreover, large or developed jurisdictions generally head the working groups that prepare the recommendations because they can spare the resources to take an active part in the ICN. Thus, there is not always a correlation between inter-governmental coordination and total welfare-enhancing normative policy choices.[137] Indeed, the ICN maintains the focus of each jurisdiction on its own domestic welfare, thereby maintaining the existing patterns of enforcement. While international cooperation efforts should not be disparaged, I suggest a more realistic approach to their potential.

To start, it seems that no consensus can be reached under the current cooperative efforts on prohibiting export cartels. The incentive of each jurisdiction to agree to export cartel regulation depends on the balance between the revenues that domestic firms gain in foreign markets through cartelistic conduct and the harm that foreign export cartels create for domestic consumers.[138] Foreign antitrust enforcement levels play an important role. For large jurisdictions, the equation tilts toward maintaining the status quo. On one hand, many export cartels involve their domestic firms. These cartels are not effectively combated in many foreign states in which they trade therefore allowing them to enjoy high profits. On the other hand, large jurisdictions can effectively combat most export cartels that affect their own jurisdictions. For small and developing jurisdictions,

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135. At least it should make the strongest negotiators better off.

136. *See* Guzman, *International Antitrust*, *supra* note 4, at 1545 (comparing single topic with wide ranging negotiations).

137. For a similar conclusion see Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 87-88 (2007) (concluding that cooperation does not necessarily produce "socially desirable processes or outcomes" and that such outcomes do not have a normative aspect to social ordering).

138. *See* Alvin K. Klevorick & Alan O. Sykes, *United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on Empagran* 3 J. OF COMPETITION L. & ECON. 309, 326–31 (2007).

the equation tilts the other way. The incentives of different jurisdictions to create some form of an international competition regime to regulate monopolistic practices are often similar to those of export cartels.[139]

Turning to mergers, most jurisdictions share an incentive to reduce procedural and substantive barriers that result from over-regulation by ensuring that the pre-merger notification procedures are triggered only in jurisdictions with strong nexus to the merger and that they are applied in a transparent, timely, and cost effective manner.[140] Incentives are strongest in large jurisdictions because most international mergers involve U.S. or EU firms. Indeed, one of the most significant international antitrust problems currently facing large jurisdictions is the cost imposed by a multijurisdictional merger review on one of their firms.

This does not imply, however, that large jurisdictions will agree to the creation of a supranational reviewing authority that will apply a global welfare test that most small and developing jurisdictions would find agreeable. Negotiations are currently focused on an attempt to create principles of proper nexus, transparency, nondiscrimination and efficiency in merger review that will reduce the costs of multijurisdictional process.[141]

This option is preferred, from the point of view of large jurisdictions, over the creation of a supranational reviewing authority, for two main reasons. First, as shown above, a good number of jurisdictions have adopted merger review procedures

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139. *See* Eleanor M. Fox, *Antitrust Law on a Global Scale: Races Up, Down and Sideways*, *in* REGULATORY COMPETITION AND ECONOMIC INTERACTION: COMPARATIVE PERSPECTIVES 348, 355–56 (Daniel C. Esty & Damien Gerdin eds., 2001). This does not imply, however, that large jurisdictions do not have incentives to reach agreements with other large jurisdictions that affect their firms. The recent decision of the European Commission in the Microsoft case exemplifies this point. *See supra* text accompanying note 75.

140. *See* Fox, *supra* note 139, at 358, 362 (noting that national competition laws are simultaneously divergent, redundant, as well as self-serving; further, a country unlikely to be impacted significantly by a merger can obstruct a transnational merger that "twenty or thirty other jurisdictions" have approved). The same set of incentives might not be shared by the few jurisdictions that use the filing fees of foreign firms as a major source of revenue for their agency.

141. ICN, Mergers Working Group, *Recommended Practices for Merger Notification Procedures* (2002), *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf.

that are wide enough to catch many global mergers,[142] but not many go beyond the pre-merger notification stage to prohibit the merger on substantive grounds. Thus, only large jurisdictions and a handful of others exercise de facto veto power over international mergers.[143] Indeed, as Tay and Willmann have shown, powerful countries stand to lose from the institution of a global authority, relative to a non-cooperative regime of extra-territorial enforcement, unless unrealistic side-payments are made.[144]

Secondly, this form of collective action could prevent large jurisdictions from enjoying the locational advantages they currently enjoy. Under the current system of limited national vision and unilateral enforcement, large jurisdictions enjoy a significant advantage over their smaller or less developed counterparts in attracting international firms to locate their headquarters within their borders. The reason is that if only national welfare considerations are taken into account in antitrust enforcement and large jurisdictions are almost the only enforcers of substantive antitrust rules in international cases, there is a far greater likelihood that a merger or a joint venture will be approved if the parties are domestic firms. Productive and dynamic efficiencies realized by firms trading in the global system will only count, in practice, if they serve to benefit large jurisdictions. Consider the following case: the production facilities of firm A and firm B are located in country X. Both firms are major players in X (a large jurisdiction) and in Y (a small jurisdiction). A and B wish to engage in a joint venture for joint export. The joint venture will increase the productive efficiency of both firms. However, it will also raise the market power of the joint entity in Y and raise prices for consumers. Now consider the decisions of each jurisdiction, which are based on their national vision: the joint venture will be approved by

142. *See supra* text accompanying note 140; *see also* John J. Parisi, *International Regulation of Mergers: More Convergence, Less Conflict*, 61 N.Y.U. ANN. SURV. AM. L. 509, 525–26 (2005).

143. The research of Head and Reis showed that merger approval does not depend on its overall welfare effects, but rather on its effects on the jurisdictions that can veto it. Keith Head & John Reis, *International Mergers and Welfare Under a Decentralized Competition Policy* 30 CAN. J. ECON. 1104, 1121–22 (1997).

144. Tay & Willmann, *supra* note 11, at 323.

country X.[145] Y has a strong economic and legal justification to prevent the export joint venture. However, it will have limited power to veto it and will therefore most likely accommodate the deal. While it might apply localized remedies, these will generally be limited in scope, as elaborated above. Now assume a reverse situation: A and B are located in country Y. Country X will exercise its power to stop the export joint venture and terminate the deal. A comparable analysis can be applied in a merger case. Indeed, *Boeing-McDonnell Douglas* is often described as a merger that would have come out differently if the merging parties not U.S. firms.[146] Thus, there exists an "antitrust enforcement level effect" that increases the motivation of international firms to locate in large jurisdictions. Obviously, this effect should not be overstated, because the locational choices of firms are affected by a host of other considerations, including taxation, production costs, the strength of property rights, and proximity to consumers.

This power balance is reflected in the ICN's activities. In its formative years, deliberations mainly focused on the reduction of procedural barriers to effective merger review and on creating a stronger basis for national competition authorities in small or developing jurisdictions.[147] Both items have been a main concern for large jurisdictions because poor enforcement in other jurisdictions created access problems into markets.[148] The ICN deliberations do not deal, however, with the issue of export cartels that significantly hurt small and developing jurisdictions.[149] On a related note, the ICN working group on

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145. Unless, of course, it creates significant negative spillovers in country X. *See* Klevorick & Sykes, *supra* note 138, at 327.

146. *See* Commission Decision 97/816/EC, 1997 O.J. L 336/16 (Boeing-McDonnell Douglas); Press Release, Fed. Trade Comm'n, Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III & Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation (July 1, 1997), *available at* http://www.ftc.gov/opa/1997/07/boeingsta.shtm.

147. U.S. Mission to the EU, Justice Dep't., *FTC on International Antitrust Initiative* (Oct. 26, 2001), *available at* http://useu.usmission.gov/article.asp?ID=AAA525F8-4E04-4908-A8B9-B7E02C058AEF.

148. *See* INT'L COMPETITION POLICY ADVISORY COMM., *supra* note 1, at 206. Of course, this does not imply that small and developing jurisdictions will not benefit from procedural rules. More efficient nexus rules might, for example, reduce the number of mergers notified in them and thus reduce their enforcement costs.

149. *See* ICN, *Cartels Working Group Subgroup One, Co-operation Between Competition Agencies In Cartel Investigations* (2006), *available at*

unilateral conduct chose not to create a working group on the subject of buyer power as a counterforce to significant market power. The subject was opened in a special panel in the ICN meeting in Japan, based on the host country's prerogative to suggest a panel, but was not pursued further despite requests from representatives from several developing jurisdictions. The ICN, furthermore, does not offer solutions to the enforcement problems of small and developing jurisdictions that go beyond increased unilateral enforcement.

Moreover, some of the guidelines, while oftentimes exhibiting a high level of economic and legal analysis, are not geared towards the special needs of small and developing jurisdictions. A suggestive example is the use of market shares as indicators of market power in abuse cases. Given the high costs involved in a full-fledged market analysis, small and developing economies regularly use market share indicators to provide an estimate of total market power.[150] However, the ICN working group on unilateral conduct, which is mostly comprised of agency representatives and non-governmental advisors from the United States and the EU, recommended that market shares should be given little, if any, weight. In fact, at one point suggestions were made to recommend that they not be used at all.[151] To be sure, market shares are imperfect indicators of market power. But requiring the use of much more complicated indicators may lead small and developing jurisdictions to bring less cases of abuse due to the prohibitively high costs of proof. While ICN deliberations are based on voluntary participation and

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http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICN-private-enforcement-final-version.pdf.

150. *See, e.g.*, GAL, *supra* note 5, at 63–68 (arguing market shares are a better indicator of market power in small economies).

151. This suggestion was raised in the discussions between members of the working group, in which the author took part. The final document represents a less extreme view, as a result of resistance from several representatives of small economies. *See* ICN, *Unilateral Conduct Working Group, Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws, Recommended Practices* 3–4 (2008), *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf. The author is a non-governmental advisor of the working group on unilateral conduct. At the insistence of several representatives and non-governmental advisors from small jurisdictions, it was also recognized that, although the dominance analysis is similar, small size might affect the economic assessment of dominance.

discursive democracy, small and developing jurisdictions are in practice, once again, rule takers rather than rule makers.

Small and developing jurisdictions do have, however, a strong card up their sleeve, should they join forces: their pre-merger notification procedures. This tool is significant not because it is used to remedy the problems of each jurisdiction—the empirical analysis indicates that it is rarely used for such matters—but rather because of the sheer number of small and developing jurisdictions that already have merger notification requirements in place. As noted, these procedures impose high transaction costs on firms wishing to merge that operate in global markets. Thus, small and developing jurisdictions can potentially "trade in" this card for concessions in other antitrust fields, such as a joint action against export cartels and abusive conduct by international firms.[152] Indeed, the creation of a more efficacious and harmonized merger regime was a strong motivation of large jurisdictions to create the ICN in the first place.[153]

Finally, the enforcement problems of small and developing jurisdictions explored in this Article can also explain, at least partially, the reluctance of developing jurisdictions to adopt an international agreement on antitrust enforcement through the WTO, which many find surprising.[154] One of the main suggestions in the negotiations involved a requirement that each country enforce its own laws to prevent cartels occurring from within its jurisdiction that affect international trade. As Elhauge and Geradin suggest, although discussions also involved technical assistance to developing jurisdictions in enforcing their own laws, they may have feared that such assistance would not actually materialize.[155] It might well be that given the many obstacles faced by developing jurisdictions in applying their antitrust laws

152. For a general idea of mutual payoffs see Guzman, *International Antitrust*, *supra* note 4, at 1532–38 (discussing concessions as a form of payment during negotiations).

153. ICN, History, http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/history (last visited Nov. 2, 2009). It is also the area in which the most harmonization seems to be apparent. *See* ICN, *Report on the Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures* 4 (2005), *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/050505Merger_NP_ImplementationRpt.pdf ("As of April 2005, 46% of ICN Member jurisdictions with merger laws have made or have proposed changes that bring their merger regimes into closer conformity with Recommended Practices . . . .")

154. *See, e.g.*, Fox, *supra* note 10, at 156–57.

155. ELHAUGE & GERADIN, *supra* note 20, at 1108.

in international matters that they were concerned that they would not be able to meet this requirement and then be sanctioned by the WTO.

CONCLUSION

Anticompetitive conduct by private firms is becoming the Achilles heel of international trade. It is now apparent that antitrust should apply beyond one's borders and that some form of international cooperation is necessary in order to tackle current problems in the global antitrust regime. Indeed, coordination may be an important way to restore at least some degree of one's control over international issues. The purpose of this Article was to inject some realism into the analysis of the current international antitrust practice and into the steps towards a more cooperative one.

To do so, the Article analyzed the unique enforcement challenges faced by small and developing jurisdictions, their causes and their impact on their ability to regulate international antitrust issues with domestic implications, as well as their ability to reach better solutions through cooperative channels. The analysis demonstrates the several enforcement problems faced by small and developing jurisdictions in applying the unilateral non-cooperative and cooperative enforcement approaches that currently dominate antitrust. The theoretical analysis was substantiated by an empirical study of the enforcement activities of these jurisdictions. The study clearly indicated that antitrust laws are rarely used by small and developing jurisdictions to deal with international antitrust problems arising within their territories. It also indicated that the causes of current enforcement patterns are not transitional in small jurisdictions and are likely to plague developing ones until their level of development significantly increases. In light of these limitations, the conduct of small and developing jurisdictions is often rational from their point of view, despite the fact that they often appreciably suffer from the anticompetitive conduct of foreign firms. In addition, this Article showed that enforcement activities by other jurisdictions do not solve many of these enforcement problems.

The Article also analyzed the complex economic and political factors at work that are likely to shape attempts to

coordinate and harmonize antitrust enforcement activities on a global level. Current attempts to coordinate activity are motivated by the blurring of jurisdictional lines as a result from economic globalization and the appearance of multiple, overlapping antitrust authorities. As the dichotomy between domestic and international issues is constantly challenged, new international antitrust governance mechanisms have appeared. The analysis attempted to provide a realistic understanding of the limitations of the current system in creating effective solutions to welfare issues. Most importantly, it demonstrates that modern institutions do not offer the potential for solving many of the enforcement problems of small and developing jurisdictions due to heterogeneous preferences and embedded power relationships that result from different levels of extraterritorial enforcement of antitrust laws. Although current international efforts do not serve as a panacea to the unique challenges faced by small and developing jurisdictions, they do hold some promise for solving some international antitrust issues. The analysis also serves as a possible explanation of the reluctance of developing jurisdictions to negotiate multilateral rules on antitrust within the framework of the WTO.

Fortunately, the most workable solutions to the enforcement problems of small and developing jurisdictions may lie within their reach: joining forces in order to create regional antitrust enforcement agreements; and investing more in creating a mature competition culture and sophisticated enforcement agencies in developing jurisdictions. Realization of these options and their importance for solving international antitrust enforcement problems is thus crucial. This is an important venue for future work.