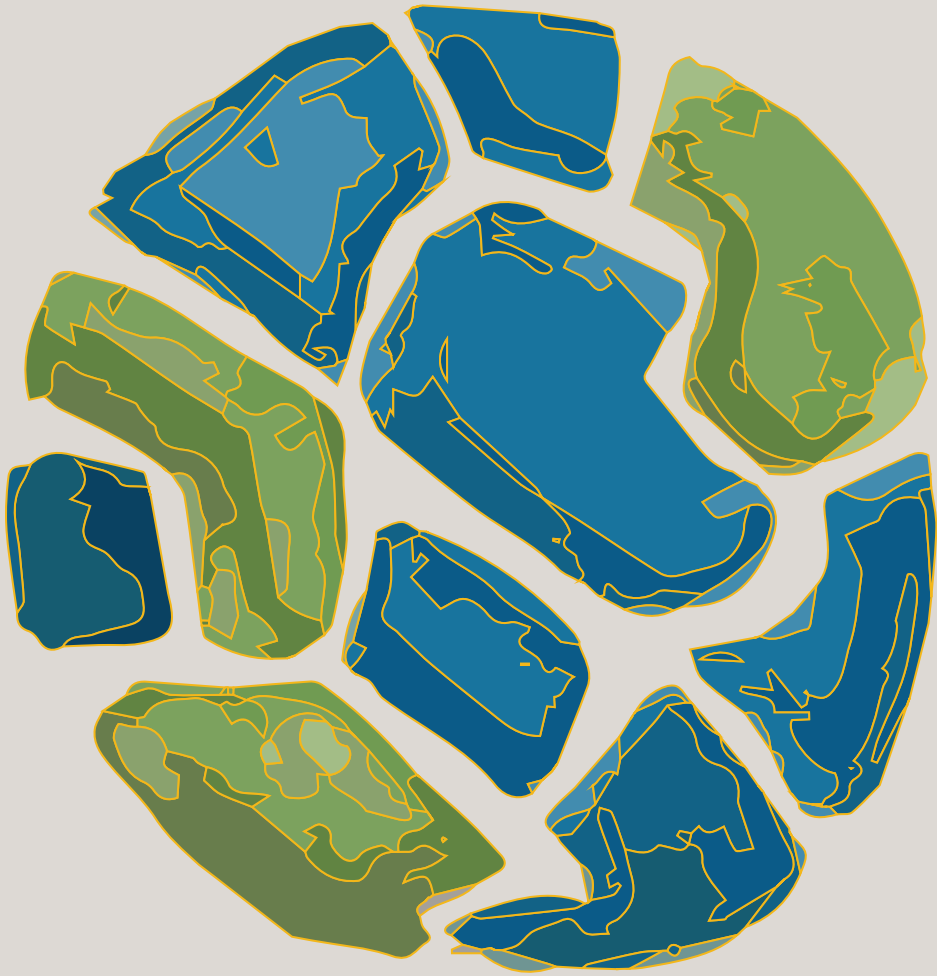




UNIVERSITY
OF TURKU



INTERNATIONAL ANTITRUST

Toward upgrading coordination and
enforcement

Michael Ristaniemi



UNIVERSITY
OF TURKU

INTERNATIONAL ANTITRUST

Toward upgrading coordination and enforcement

Michael Ristaniemi

University of Turku

Faculty of Law
Commercial law
Doctoral programme in Law

Supervised by

Professor Jukka Mähönen
University of Oslo

Professor Antti Aine
University of Turku

Reviewed by

Professor Petri Kuoppamäki
Aalto University

Assistant Professor Katri Havu
University of Helsinki

Opponent

Professor Petri Kuoppamäki
Aalto University

The originality of this publication has been checked in accordance with the University of Turku quality assurance system using the Turnitin OriginalityCheck service.

Cover Image: Irene Dea

ISBN 978-951-29-8173-1 (PRINT)
ISBN 978-951-29-8174-8 (PDF)
ISSN 0082-6987 (Print)
ISSN 2343-3191 (Online)
Painosalama Oy Turku, Finland 2020

UNIVERSITY OF TURKU

Faculty of Law

Commercial law

MICHAEL RISTANIEMI: International antitrust – toward upgrading coordination and enforcement

Doctoral Dissertation, 183 pp.

Doctoral Programme in Law

October 2020

ABSTRACT

What is this book?

This is an article-based doctoral dissertation in law, which forms a part of the University of Turku Doctoral Programme in Law. Its theme concerns the international and cross-border dimensions of competition law and policy – referred to as international antitrust. The articles on which the book is based have been published between 2014 and 2020.

What is international antitrust?

International antitrust refers to the collection of national competition legislation and related legal and enforcement praxis. This is complemented by the norms and standards of regional arrangements of the EU and others, and by soft law developed within international organizations, such as in the International Competition Network (ICN) or the Competition Division of the Organization for Cooperation and Economic Development (OECD).

Why is the international antitrust world order so problematic?

The problems of international antitrust stem from its complexity and fragmentation. There is no supranational legislator, nor are there clear intergovernmental binding agreements. Instead, there are more than 130 sets of national competition legislation, complemented by bilateral trade agreement chapters on competition and non-binding soft law. This results in significant overlaps and gaps, which create inefficiencies. In addition to general negative externalities and inefficiencies, the problems of international antitrust are often most suffered by smaller and less developed nations.

What are the main reasons for not having a more coherent system?

Competition law does not have a universally agreed goal or objective. This, in itself, leads to difficulties in creating a harmonious international system of competition law. Behind this formalistic reason are the differing needs of nations. Some nations are net exporters, while some are not. Some might have well-functioning markets, while others do not. Whether or not part of competition law, public interest considerations nevertheless also play a role. Other reasons exist, too: major economic powers are reluctant to compromise, and intergovernmental trust

still needs to be improved. Hence, the most typical manifestation of cooperation is non-binding in nature and takes place via transgovernmental networks.

How could international antitrust be developed?

International antitrust could benefit from improved inter-agency coordination and by reducing the disparity in the quality of enforcement across agencies. The ICN and other fora are integral in fostering the trust and dialogue needed to improve such coordination. Codified competition law currently exists quite broadly around the world. However, in terms of enforcement, there is an enormous disparity between those competition authorities with greater experience and resources and those with less of both.

A realistic idea to mitigate this disparity would be to better understand the potential of private firms to act as partners of officials in competition enforcement. Inducing firms to take steps toward more efficient self-enforcement could improve both the functioning of markets and competition enforcement. Such shared governance could be possible, should policymakers better utilize tools to incentivize firms to take their compliance work seriously. This would *de facto* extend the reach of enforcement, as firms would self-enforce with more rigor.

Further, a renewed interest in multilateral, structured resolutions should be encouraged. The realities of international antitrust have changed since the past true attempt in the early 2000s. In particular, the number of competition authorities has increased drastically, as has the amount of competition law they enforce. Also, many more nations nowadays possess substantial experience in international cooperation in competition matters than ever before, which has led to an arguably higher level of trust. The time may be right to consider multilateral initiatives with a stronger level of commitment than those based purely on voluntary cooperation, an example of which is a so-called “opt-in” model. Initiatives aiming at streamlining procedural matters and preventing cross-border anticompetitive conduct could and should be considered – ones that would, however, not result in a transfer of nations’ sovereignty over their domestic markets.

KEYWORDS: competition law, international law, compliance, international cooperation, competition policy, positive incentives

TURUN YLIOPISTO

Oikeustieteellinen tiedekunta

Kauppaoikeus

MICHAEL RISTANIEMI: Kansainvälinen kilpailuoikeus – kohti paranneltua koordinaatiota ja kilpailuvalvontaa

Väitöskirja, 183 s.

Oikeustieteen tohtoriohjelma

Lokakuu 2020

TIIVISTELMÄ

Mikä on tämä kirja?

Tämä on artikkelipohjainen väitöskirja sekä opinnäyte osana Turun oikeustieteellisen tohtoriohjelman. Väitöskirjan teemana on kilpailuoikeuden ja –politiikan kansainvälinen ja rajat ylittävä ulottuvuus, jota väitöskirjassa kutsutaan kansainväliseksi kilpailuoikeudeksi. Artikkelit, jotka muodostavat väitöskirjan ytimen, on julkaistu vuosien 2014 ja 2020 välisenä aikana.

Mitä on kansainvälinen kilpailuoikeus?

Kansainvälinen kilpailuoikeus käsitteenä viittaa kansallisvaltioiden kollektiiviseen kilpailuoikeuslainsäädännön kokoelmaan ja siihen liittyvään oikeuskäytäntöön sekä sitä valvovien viranomaisten käytäntöihin ja päätöksiin. Näitä täydentävät EU:ssa ja muualla toteutettu alueellinen kilpailuoikeusyhteistyö ja sen pohjalta syntynyt normisto sekä kansainvälisten järjestöjen, kuten International Competition Network (ICN) ja Organization for Cooperation and Economic Development (OECD), tuottamat suositukset ja ohjeistukset.

Mikä tekee kansainvälisen kilpailuoikeuden nykytilasta niin ongelmallisen?

Kansainvälinen kilpailuoikeus on epäjohdonmukaista ja pirstaleista. Millään yksittäisellä taholla ei ole ylikansallista lainsäädäntövaltaa, eikä ole olemassa selkeitä valtioiden välisiä sitovia kilpailuoikeuden yleissopimuksia. Sen sijaan on yli sata erillistä kansallisen kilpailuoikeuden järjestelmää, joita täydentävät kahdenvälisen kauppasopimusten kilpailuoikeutta koskettavat kappaleet sekä ei-sitovia ohjeistuksia ja suosituksia. Tämä johtaa olennaisiin sekä päällekkäisyyksiin että aukkoihin, minkä vuoksi talouden vaikuttavuus on heikompi kuin sen tarvitsisi olla. Yleisten kielteisten vaikutustensa lisäksi on huomattava, että kansainvälisen kilpailuoikeuden ongelmista kärsivät usein eniten pienemmät ja vähemmän kehittyneet valtiot.

Mistä johtuu, ettei yhtenäisempää järjestelmää ole olemassa?

Kilpailuoikeudella ei ole yhtä maailmanlaajuisesti hyväksyttyä tavoitetta tai päämäärää. Tämä itsessään johtaa hankaluuksiin pyrkiessä luomaan yhtenäistä kansainvälisen kilpailuoikeuden järjestelmää. Mainitun muodollisen syyn takana ovat kuitenkin kansallisvaltioiden eriävät tarpeet. Eräät valtiot ovat nettoviejiä, kun taas joillain vaihtotase on alijäämäistä. Joillain saattaa olla olennaisesti paremmin

toimivat kotimarkkinat kuin joillain muilla valtioilla. Kansainvälisen kilpailuoikeuden kehittämiseen vaikuttavat väkisin myös valtion kansalaisten laajemmat intressit. Muitakin syitä on – maailman talousmahdit eivät mielellään tee myönnytyksiä, ja valtioiden välinen keskinäinen luottamus kaipaa kohennusta. Tämän vuoksi verkostomainen, vapaaehtoisuuteen perustuva yhteistyö on sen tyypillisin ilmentymä.

Miten kansainvälisen kilpailuoikeuden tilaa voisi parantaa?

Kansainvälisen kilpailuoikeuden kehitystä voisi edesauttaa parempi kilpailuviranomaisten välinen koordinaatio sekä kaventamalla eroa, joka eri kilpailuviranomaisten kilpailuvalvonnan laadun välillä on. ICN ja muut, kansainvälistä yhteistyötä edesauttavat järjestöt ovat keskeisiä keskinäisen luottamuksen ja keskusteluyhteyden vaalimisessa, mikä on tarpeen mainitun koordinaation kehittämiseksi. Kilpailuoikeutta on jo varsin laajalti ympäri maailman. Mitä tulee kilpailuvalvontaan, niin eri kilpailuviranomaisten välillä on nykyisellään valtava ero, joka johtuu vaihtelevista resursseista ja kokemuksesta.

Realistinen idea tasata mainittua eroa olisi paremmin ymmärtää yritysten potentiaali toimia ikään kuin viranomaisten kumppaneina kilpailuoikeusvalvonnassa. Yritysten ohjaaminen kohti tehokkaampaa itsevalvontaa voisi edistää markkinoiden toimivuutta ja parantaa kilpailuvalvontaa. Mainittu, eräänlainen osittain delegoitu hallintovalta voisi olla mahdollista, jos lainsäätäjä hyödyntää monipuolisemmin itselleen kuuluvia työkaluja yrityskäyttäytymisen ohjaamiseen, mukaan lukien erinäisillä kannustimilla.

Olisi syytä kannustaa uudistuneeseen kiinnostukseen monenvälistä, jäseneltyä yhteistyötä kohtaan. Kansainvälisen kilpailuoikeuden taustalla vaikuttavat olosuhteet ovat muuttuneet 2000-luvun alkuvuosina olleen edellisen todellisen yrityksen jälkeen. Kilpailuviranomaisten lukumäärä on globaalisti olennaisesti noussut, kuten on myös heidän valvomansa kilpailusääntely. Lisäksi, aiempaa useammalla maalla on nykyään kokemusta kansainvälisestä yhteistyöstä kilpailuasioissa, mikä lienee myös johtanut kasvaneeseen keskinäiseen luottamukseen. Aika voisi olla otollinen harkita sellaisia monenvälisiä aloitteita, joilla on suurempi ohjausvaikutus kuin puhtaasti vapaaehtoisuuteen perustuva yhteistyö, mistä esimerkin tarjoaa ”opt-in” -malli. Monenväliset yhteistyöjärjestelyt paitsi virtaviivaistaisivat hallinnollisia käytänteitä, niin myös vähentäisivät yritysten rajat ylittävää, kilpailun kannalta haitallista käyttäytymistä. Aloitteiden ei kuitenkaan tulisi johtaa liiallisiin suvereniteetin siirtoihin, vaan maiden tulisi jatkossakin kyetä vastaamaan sisämarkkinoistaan.

AVAINSANAT: kilpailuoikeus, kansainvälinen oikeus, compliance, kansainväliset suhteet, kilpailupolitiikka, kannustimet.

Acknowledgements

What a journey. I had never planned on completing a doctoral dissertation, but I am glad I did. It has allowed me to get to know amazing people and become a bit more aware of the world.

This also marks the end of an even longer journey – one that began already in 2005, namely studying at the University of Turku. This University and the town in which it is located has given me so much. Starting as a first-year law student and finishing with a doctorate. Thanks to the flexible and accommodating Faculty of Law, I was able to work on the dissertation at my own convenience. Such flexibility should become even more available – it could be a useful way to bridge the gap between those working fully in academia and those who are not.

Inspiration for the dissertation's theme came during the preparation of my Master's Thesis on the competition law treatment of international airline alliances. It was during this time that I realized the difficulty in reconciling law, politics, and globalization. It dawned upon me that this fragmented and incoherent area might be interesting to dig deeper into.

I undertook three research visits along the way. The first one was eastward, to the China-EU School of Law at the China University of Political Science and Law, in Beijing. In addition to seriously improving our kung fu skills, I got some important insights into the Chinese perspectives relative to my research. Second, I had the honor of spending an academic year at the School of Law at UC Berkeley. Never have I experienced such a concentration of combined intelligence and joy of life as I saw there. Their Visiting Scholar Area and wealth of academic resources were conducive to improved research. During this time, I also learned how to sail and made it onto the United States Men's Floorball National Team. That is, the period was useful on many fronts. Last, I was happy to deepen my EU knowledge, while visiting the Institute for European Studies at the Free University of Brussels – an institute with exemplary open office spaces, inviting interaction with colleagues.

I owe my gratitude to those who have supported me on this journey. First, sincere thanks to Dr. Petri Kuoppamäki and Dr. Katri Havu for having acted as reviewers of this dissertation. Thank you Dr. Antti Aine, Dr. Jukka Mähönen, and

Dr. Olli Norros for introducing me to the world of legal research and providing support on the numerous occasions when it was needed. Fellow doctoral candidates – Juho Saloranta, Dr. Klaudia Majcher, Dr. Isabelle Schneider, among others – have been invaluable in getting through the daily work that is not always glamorous. Thanks are due to my local hosts, Dr. Clemens Richter, Dr. Aaron Edlin, and Dr. Harri Kalimo for the mentioned research visits. I am grateful to my friend, Irene Dea for the illustrative cover art. Damon Tringham, Albane Guyot, and Geoffroy Barthet have provided linguistic support along the way. Also, I appreciate Miika Arola, Juhani Pitkänen, and other colleagues at Metsä Group for their flexibility in accommodating my academic pursuits. Last, but not least, Saara – I could not have climbed this mountain without you by my side.

Financial support along the years has been provided by a number of sources. Many thanks to the Ella and Georg Ehrnrooth Foundation, the Turku University Foundation, Finlandia Foundation, the Education Fund of Finland, The Association of Finnish Lawyers, and the Finnish Lawyers' Association.

Finally, a few words about the Töölö library in Helsinki, whose sleek design and views to the adjacent Topelius park were a source of inspiration. It is designed by one of Finland's most famous architects – Aarne Ervi – and its modernist space served as a both pleasant and productive research base for the majority of the time that I worked on the dissertation while in Finland.

I dedicate this to my parents – Pentti and Aldonna Ristaniemi. Words cannot describe the appreciation I have for their encouragement and support, a constant from childhood onwards.

In Helsinki on 14 September 2020,
Michael Ristaniemi

Table of contents

Acknowledgements	V
List of Original Publications	X
1 Introduction	1
1.1 General	1
1.2 Research questions.....	5
1.3 Motivation for study and research gap.....	7
1.4 Structure	9
2 Research Background.....	11
2.1 The concept of law in international antitrust.....	11
2.2 History of international antitrust	13
2.3 Status quo.....	18
2.4 Overview of literature and existing debate.....	24
3 Methodological Framework.....	33
3.1 Research methods	33
3.2 Assumptions and limitations	36
3.3 Sources.....	38
4 Summary of Articles	40
4.1 What Extraterritorial Application of Competition Law Means for MNCs	40
4.2 Export Cartels and the Case for Global Welfare	43
4.3 Convergence, divergence or disturbance – How major economic powers approach international antitrust.....	45
4.4 The Public Role of Private Firms in Competition Enforcement and How to Incentivise It	50
5 The Regime Complex of International Antitrust and Its Potential.....	54
5.1 Trends in global law and governance	54
5.2 Limits of global law and governance.....	57
5.3 Where antitrust fits in.....	59
6 Conclusions of the Dissertation	63
6.1 General conclusions.....	63
6.2 Key contributions of this dissertation	66

6.3 Future research is needed	69
Laws and Abbreviations	72
Bibliography	74
Original Publications.....	83

Figures

Figure 1.	Composition of international antitrust.....	11
Figure 2.	Approximating international antitrust cooperation potential.....	23

List of Original Publications

This dissertation is based on the following original publications:

- I Michael Ristaniemi. What Extraterritorial Application of Competition Law Means for MNCs. *International In-house Counsel Journal*, 2014; 7(28), 1.
- II Michael Ristaniemi. Export Cartels and the Case for Global Welfare. *Global Antitrust Review*, 2018; Issue 10, 173.
- III Michael Ristaniemi. Convergence, divergence or disturbance – How major economic powers approach international antitrust. *Concurrences Review*, 2018; N° 3-2018, Art. N° 87243.
- IV Michael Ristaniemi. The Public Role of Private Firms in Competition Enforcement and How to Incentivise It. *Liikejuridiikka*, 2020; 1/2020.

The original publications have been reproduced with the permission of the copyright holders.

1 Introduction

1.1 General

‘Efforts to develop competition law on a global level...are central to global governance, because the competitive process is itself at the center of global economic relations.’

David Gerber¹

Competition law, also known as antitrust, is largely based on the legislation of nation-states,² the European Union (EU) being an exception where EU Member States have transferred part of their sovereignty to the supranational EU level. Competition law systems are thus largely national. This way of structuring jurisdictions based on territory or citizenship is common in other regulatory areas, too. However, an important distinction is that competition law regulates markets, and markets are about trade, which today flows in every direction—irrespective of national frontiers. Cross-border trade is the catalyst for the need for understanding and developing international antitrust.

Achieving the relative freedom of global trade that we currently enjoy is not automatic, though. Instead, it is a great example of the international community³ coming together to cooperate in ways that benefit everyone.⁴ This concerns direct barriers to trade, such as high tariffs for imports, but also what are known as non-tariff boundaries, such as standards that may arbitrarily differ in an attempt to mask protectionism. The existence of the ‘international community’ referred to above is actually not automatic either, but a coming together of nation-states with markedly

¹ Gerber (2010) p. 345.

² This dissertation uses antitrust as a broader term, so as to include policy in addition to mere law. When the term ‘competition law’ is used, this is in reference to both hard and soft law, but not a broader policy framework.

³ See e.g. Koskeniemi (2007) for further discussion on the concept of the ‘international community’ in relation to international law.

⁴ Although arguably everyone has not benefited equally. See e.g. Bourguignon & Thomas (2015).

differing backgrounds and interests. It has manifested itself on numerous occasions, which is a remarkable achievement in itself.

Much convergence and harmonization has taken place in areas that are ancillary to cross-border trade. These include the work under the auspices of the World Trade Organization (WTO), concerning both tariffs, subsidies, and intellectual property (TRIPs⁵), as well as standardization under the International Standardisation Organisation (ISO). It may, thus, be surprising to realize that no truly broad multilateral system exists concerning rules that govern and protect competition – the very heart and engine of a market-based economy. This is a severe deficiency and is the impetus for this dissertation.

To be clear, international antitrust does exist. It is, however, incoherent and fragmented, with both gaps and overlaps.⁶ It is largely based on national legislation and case law. To be specific, most nations today do have codified competition law, most of which do contain many common elements, albeit as a result of uncoordinated efforts. National legislation is complemented by international soft law guidelines and ‘best practices’ recommendations created by organizations, such as the Organisation for Economic Coordination and Development (OECD) and the International Competition Network (ICN).⁷

Within international antitrust, the degree of substantive consensus varies greatly. The detrimental effect of cartels is broadly recognized.⁸ However, treatment of abusive conduct in a dominant position, merger control, and vertical restraints are areas in which substantive differences exist.⁹ These differences are partly due to the differing goals of competition policy. For the EU, for example, protecting the functioning of its internal market is critical and stringent treatment of vertical restraints is partially used as a tool to do so. Even more differences exist with regard to state subsidies that may distort competition. Managing and limiting such state aid is a key policy area for the EU – to help secure the functioning of its internal market – but not for most of its trading partners. Subsidies are internationally primarily governed by WTO rules on subsidies.¹⁰

⁵ The Agreement on Trade-Related Aspects of Intellectual Property Rights

⁶ See, e.g., Ristaniemi (2014) and Ristaniemi (2017).

⁷ *Inter alia* ICN Guiding Principles documents, ICN Recommended Practices documents, and ICN Frameworks, as well as OECD Recommendations and Best Practices on Competition Law and Policy concerning various themes.

⁸ Gerber (2010), p. 311; R. Whish at the 2015 International In-House Counsel Journal Competition Law Conference.

⁹ Gerber (2010), p. 299.

¹⁰ See, e.g., Singh (2017) for an analysis of the WTO’s treatment subsidies and related implications for nations at various levels of development.

National legislation is naturally enacted with national interests in mind, which is not problematic in situations where the reach of jurisdictions enforcing such legislation remain within the relevant territory. The international nature of trade seems to stretch beyond this limitation. One might thus wonder whether a grouping of national systems constituting an international system is an optimal way to structure such a system. In short, it is not.

Contemporary international antitrust is, however, not merely a theoretical conception. It is *de facto* constantly present, since competition law enforcement transcends national borders.¹¹ As trade becomes ever more globalized and national competition authorities (NCAs) gain in experience, the need for a better understanding of the international dimensions of antitrust is bound to increase. This prediction is underscored by a drastic increase in the number of competition authorities and amount of international trade that has taken place in the past decades.¹²

Further, as a result of this mosaic of law, combined with a few decades of *de facto* convergence, one can deduce specific norms and standards that are sufficiently similar in many jurisdictions to be truly considered to have transcended beyond their national origin. Such norms include substantive ones, such as a near universal ban on hard-core cartels,¹³ but also procedural ones. *Fox & Trebilcock* have studied procedural norms applied to competition cases in various jurisdictions by synthesizing nine different studies with the aim of understanding whether global norms exist.¹⁴ Their findings indicate that indeed there is a “remarkable degree of consensus on the basic procedural requirements and institutional performance norms of competition law institutions”.¹⁵ Another example of such a norm concerns the need for *ex ante* merger control, in order to prevent excessive concentration, a procedure that is varied in its details across jurisdictions, but whose underlying idea is widely accepted.

International antitrust is complex. It is a mixture of considerations that emanate from varying national interests. Some nations have much to export, while some have to live with a trade deficit – importing more than they export. Some have large but inefficient domestic markets, while others have small but nonetheless functioning ones. And everything in between. This leads consideration involving

¹¹ This occurs particularly via the effects doctrine. See Ristaniemi (2014) for how extraterritorial application of the effects doctrine in competition law impacts multinational corporations.

¹² See *supra* pp. 13–14.

¹³ *Supra* 8.

¹⁴ Fox & Trebilcock (2012).

¹⁵ *Ibid.*, p. 8.

international antitrust to be about more than mere administrative exercises to iron out trading inefficiencies – it easily enters the realm of politics.

General international law is also complex – to a large extent based on differing and fluctuating national political interests. This starts with even finding a proper definition for ‘law’ in the context of international law. *Guzman* argues that ‘*any international obligation that has a substantial influence on national incentives is considered to be law.*’¹⁶ *Bradford* and *Posner* further argue that ‘*international law is best understood as the result of overlapping consensus*’ of the otherwise conflicting views of major powers, at the core of which nations consider themselves bound, that such consensus is a fluid concept and is subject to change at the whim of each major power.¹⁷

The current state of international law is one characterized by both pluralism and polycentricism. The era of constructing supranational regimes appears a thing of the past and its monumental emblems, such as the United Nations (UN) and the World Trade Organization (WTO), are struggling. Focus on intergovernmental multilateralism has shifted to a dualist reality of intergovernmental bilateralism that is complemented by multinational and transgovernmental networks.¹⁸ In a fragmented system, the importance of cooperation is highlighted. And whenever cooperation is not feasible, coordination should be still ensured. Coordinating practices and enforcement by-and-large require an upgrade from the current status.

All in all, international antitrust is important. We live in a world where market economies form the engine that keep our societies going. Since markets often extend beyond national frontiers, it is crucial that the functioning of markets is not compromised by their existence. Uncertainty to business, unnecessary procedural delay and cost all represent the kind of friction that should be systematically minimized. International antitrust is not only international law and policy, nor is it only national law and policy, but a *mélange* of the two. Finding the right balance is the key.

As will be described in following chapters, trends in international law are rather analogously relevant for international antitrust. Recognizing this is useful, as it is often considered a regime *sui generis*. Regardless, there is potential for reflection and learning from the fluctuations in adjacent international regimes.

¹⁶ Guzman (2001), p. 72.

¹⁷ Bradford & Posner (2011), pp. 5–6.

¹⁸ Slaughter (2005), pp. 5–20.

1.2 Research questions

The main purpose of this dissertation is to synthesize international antitrust as it is now and to consider realistic and pragmatic ways in which it could be improved.¹⁹ The dissertation establishes and approaches said niche in two principle ways.

First, it attempts to grasp what international antitrust is today, while also seeking to shed light on what international antitrust is not. This includes rules, practices, as well as the reasoning for them, and also the inconsistency consisting of gaps and overlaps. The interrelation between colliding national legislation and enforcement thereof as well as transgovernmentally prepared soft law is particularly interesting in this respect. Also, differences in political interests are perhaps more present in the international dimensions of antitrust – in a complicating way – than when considering only a single nation's regime without comparison to others, given that there is no single supranational parliament or other institution capable of decision-making unilaterally. In particular, the dissertation aims to understand how international antitrust has evolved since the breakdown of the WTO negotiations and the related last major literary wave describing it, both in the early 2000s.

Second, the dissertation analyzes where there may be realistic possibilities for improvement. In this regard, the focus is on measures available to policymakers and enforcers. The current level of international cooperation seems to be less efficient and ambitious than it could be, by which I mean that while the status quo is arguably not optimal, there is no strong push for transformative change. The dissertation undertakes the challenging task of proposing novel, but pragmatic ways to improve the current state of affairs, while still bearing in mind the inevitable limitations on what is within the realm of possibility. This does not necessarily mean deeper substantive harmonization, although this would – in itself – likely reduce inconsistency.

Another question is whether coherence or consistency are *per se* worth pursuing and if yes, then to what extent. In other words, at issue is whether incoherence or inconsistency inevitably and inherently leads to inefficiency or not. This is not obvious. In the context of international antitrust, this raises the question of whether to be content with a highly pluralist and also increasingly polycentric system that exists today. For example, convergence may result in reduced policy experimentation.²⁰ Oftentimes, initiatives by jurisdictions are closely followed by others and a degree of cross-fertilization may occur as a result. Through less

¹⁹ By this, I refer to a system that is more efficient as a whole, i.e. not from the perspective of a single nation-state.

²⁰ De Burca et al. (2014); Lianos (2016) p. 43.

experimentation, there is less information to be shared, and thus less knowledge to be learned.

Whatever the optimal path for international antitrust, the current state is far from optimal: wrongdoers are only sometimes caught, fines seldom cover the overcharges of international cartels, all the while multinational businesses face undue burden and unpredictability.²¹ Pragmatism is brought to the dissertation by respecting the influence of major economic powers in the development (or lack thereof) of international antitrust. Working within this framework, the dissertation aims at providing up-to-date proposals and ideas that could improve the currently suboptimal reality of international antitrust.

The first two articles shed light on the legal issues that arise from the patchy order of international antitrust. Namely, what is the legitimacy for such inconsistency that results, *inter alia*, from extraterritorial application of competition law, and how detrimental or problematic actually are related gaps, such as the treatment of export cartels. Both are examples of inefficiencies²² in the global trading system that result from the inconsistency of international antitrust. Extraterritorial application of competition law creates severe challenges for multinational firms, which may face potentially conflicting competition enforcement from a multitude of jurisdictions simultaneously. Export cartels, on the other hand, often contain elements that would be deemed illegal hard-core cartels in domestic settings, but legal treatment differs because of their cross-border nature.

The dissertation seeks to answer the following question: If (and when) these are problematic and detrimental issues, why are they not resolved. The two topics addressed in the articles represent a broader group of problems in international antitrust, which were chosen for two particular reasons. First, I have had prior exposure to both these themes. Second, and more importantly, they link to the very core of the global trading system and are not novel issues – analyzing export cartels and the related extraterritorial application of competition law illustrates a fundamental conflict between competition policy and trade policy. Many inefficiencies of international antitrust can – I believe – be overcome, should we be able to address this conflict.

The third article turns its attention to the potential, the future of ‘what could be’. It acknowledges the importance of major global economic powers – the EU,

²¹ Connor & Helmers (2008); Gal (2010), p. 57; Levenstein & Suslow (2014); Ristaniemi (2014).

²² By ‘efficient’, I refer to an action being able to reach its maximum potential, unless otherwise mentioned. That is, I take the liberty of using the term broadly, beyond its definition in economics.

the United States (US), and the People's Republic of China (China) – in molding the future of international cooperation in antitrust. It is difficult to think of a form of cooperation being effective without the support of such major powers. The main research question here being to understand how each of the selected major powers approach international cooperation in antitrust matters and the reasoning behind it. The findings provide an appropriate framework and context for considering the feasibility of a proposal in areas where further international cooperation might be plausible. Without giving a definitive answer, such understanding could reveal potential avenues for how to improve international antitrust.

Finally, given that it appears that only incremental improvements to conventional international competition cooperation are plausible, the dissertation analyses potential unconventional paths that could yield more transformative improvements, in particular, by extending the capacity of enforcement agencies by promoting soft enforcement conducted by firms. This approach would incentivize firms to self-enforce with more rigor, through the desire to obtain certain positive rewards. Such a complementary approach could be interesting in as much it could improve prevention of anticompetitive conduct, that is to help ensure markets work as they should. Concurrently, it would help even out the significant enforcement-related disparities across antitrust enforcement regimes globally.

As a collective, the articles form a narrative of snapshots that illustrate both the current state of international antitrust and what it has the potential to become. The upcoming chapters of the dissertation help fill the inevitable gaps and provide a fuller image of the paradigm in question. This is done also by linking international antitrust to the discourse in international law and governance, in attempt to find analogies and useful hints.

1.3 Motivation for study and research gap

The main motivation towards the topic of international antitrust is based on a general interest towards the interaction of politics, trade and law. These three areas make up the perfect storm that is international antitrust.

My inspiration originates from the theme of my master's thesis, which discussed the intersection of airline alliances and competition law. The airline industry is one with a particularly international market and a strong political backdrop. It was dazzling to the law student who then still assumed that laws and legal systems were generally coherent and comprehensive, both domestically and beyond. The 'messiness' that results from the interplay of logic and structure with political interests was interesting to the extent that it invited a deeper dive into the realm of international antitrust.

There has been much study about international antitrust. This has been particularly pronounced at times when a multilateral arrangement has been subject to intergovernmental negotiation, such as during the WTO Cancún round. A typical focus area has been the study of the then-current ways of cooperating – particularly the discussion about whether binding or voluntary based rules would be better in the context of antitrust. Both approaches have their proponents. Some have drawn on the WTO agreement on intellectual property – TRIPs – as an example of what should perhaps be mimicked in the realm of antitrust.²³ Others emphasize the differing interests of developing countries as a key reason for why no uniform rules should even be desirable.²⁴ Whatever the reasons, international antitrust has received considerably less attention in the past decade, yet the problems of the current system have been and still are numerous

While most previous attempts to improve harmony have failed, this does not necessarily indicate a destiny of perpetual failure. Actually, conditions for improving international antitrust are today arguably particularly favorable in at least two ways.

First, most nations today largely accept the beneficial nature of market-based competition. This is apparent by the drastic increase of nations with codified competition law and the understanding that comes with it – an imperative for a sensible multilateral dialogue to even be able to take place. Second, there is increased trust in and a somewhat changed attitude towards international competition cooperation that has taken place in the past few decades.²⁵ The ICN, in particular, is exemplary in the amount of information-sharing and other operative-level cooperation that it has facilitated between competition authorities of all parts of the world.²⁶ This work has surely contributed to the said improved trust and the foundation it has helped build.

I believe in finding resolutions, and international antitrust seems like a topic that is in need of a novel resolution. Both current international cooperation and the research work surrounding it seems to be in a state of stagnation of sorts. A current trend in modern society is about moving towards positive rewards in guiding an actor's conduct, instead of only threatening with punishment.²⁷ However, relatively little has been said about how positive incentives, that is rewards, could aid the goals of competition law. Further, a trend in public policy seems to favor systems

²³ See e.g. Guzman (2000).

²⁴ See e.g. Stiglitz (2017); and Fox (2012).

²⁵ Gerber (2010), p. 335.

²⁶ A personal bias to be disclosed is that I act as a DG Comp Non-Governmental Advisor regarding its ICN-related work and as such, I do support their cause.

²⁷ De Geest, & Dari-Mattiacci (2013), pp. 344–345.

of shared governance, where firms and other non-state actors are given a more pronounced role. Also, international governance has been moving towards regime-specific networks from the traditional intergovernmental dialogue. All in all, harnessing the public role of private firms has arguably been under-utilized in the competition enforcement space, including in an international context.

My previous working experience as an in-house legal counsel for large multinational corporations concerning compliance, anti-bribery and corporate responsibility, in particular, has particularly helped appreciate the perspective of the firm as well as the curious disparity between how competition law both treats and concurrently undervalues preventive compliance work in comparison with that of other regulatory areas. There is surprisingly little research on the potential of competition compliance from the perspective of society, particularly such that draws from other disciplines, such as behavioral economics or psychology. The role of firms as partners and even extensions of competition agencies presents potential that has relevance for international antitrust, in the form of improving both deterrence regarding competition law breaches as well as the consistency of international antitrust. It is interesting to consider what is required to bring this about – and represents a material research gap.

1.4 Structure

This is an article-based dissertation. It is based on a collection of articles, each of which has been separately published. The articles are republished as a part of this dissertation with permission from the journals in which they have each originally been published. They provide snapshots of chosen focus areas and attempt to form a rough narrative. The sections of this dissertation allow for providing a broader image and a discussion of the broader context.

This introductory chapter intends to provide a general image of the dissertation project as a whole and an understanding of why such research is both necessary and relevant. It is also an appropriate prelude for Chapter 2, which introduces the dissertation theme in more substantive terms, thus giving an overview of the background and framework that will allow readers to put my research questions into context. Chapter 3 focuses on the analytical framework and research methods that have been employed in this dissertation. This includes describing certain assumptions that have been made, as well as the limits on what it has been possible to cover within the scope chosen. Chapter 4 consists of summaries of each of the published articles – these articles collectively form the backbone of this dissertation. The full-length versions of the said articles are found at the very end of this dissertation. Chapter 5 and Chapter 6 attempt to provide additional context, first by elaborating on contemporary discourse in general international law and

governance and what international antitrust could learn from it in Chapter 5, and – finally – by concluding in Chapter 6 by providing ideas for future research and describing how this dissertation contributes to the wider discussion on international antitrust and thus what its value and contribution is likely to be.

2 Research Background

2.1 The concept of law in international antitrust

Law never exists in a vacuum. It exists as a part of society and as a result of it. This is especially true of any international legal order, which is rarely governed by a single supranational actor. As mentioned in the Introduction above, international antitrust is a messy normative system – one which could use further defining. Its foundation is built upon and its existence is dependent upon the realities and fluctuations in politics, law, and trade.²⁸ Below is a related illustration followed by a concise explanation in an attempt to provide an overview of the underlying concept.²⁹

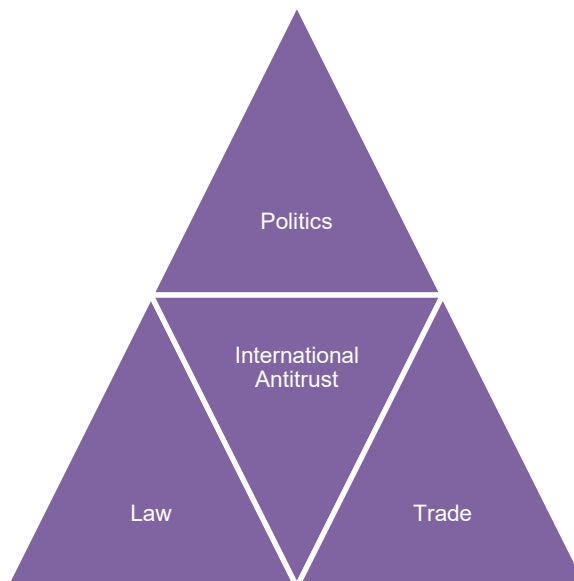


Figure 1. Composition of international antitrust.

²⁸ Aine (2011), pp. 41–55.

²⁹ Aine (2001), p. 270.

In broad terms, politics relates to governing and law-making, but also influencing the preceding two activities. *Aristotle* has described lawmaking as the most important task of the politician.³⁰ Indeed, a feature of nation-states is the authority to enact legislation that it also enforces. Internationally, the lack of a supranational authority and legislator poses its own additional considerations. Establishing international norms is, instead, based on cooperation and negotiation. Such interaction is usually led either by politicians or by expert officials. At its core – currently at least – international law is also heavily reliant on technical experts to uphold and develop it. This is also largely the case within international antitrust where officials and other experts have a pronounced role. *Koskenniemi* actually calls for a re-emergence of politics into international law, in order to combat managerialism and pluralism and to be able to return to the (political) project of a truly cosmopolitan community.³¹

If politics is about lawmaking and influencing the process, then law is the outcome. However, defining the concept of law within an international context is challenging. Apart from formally binding intergovernmental treaties, most transnational or global law is inevitably and inherently ambiguous for several reasons, including not only the absence of a controlled process by which a resulting norm is enacted, but also the lack of clear enforcement.³² States are not the only actors when it comes to the creation of international norms and standards. Consequently, many resulting international norms and standards resemble a type of 21st century *lex mercatoria*.³³ In international antitrust, operative officials, as well as other non-state actors are highly involved in establishing norms and standards – particularly within transgovernmental networks.

Commercial markets are the driving force of any competition legislation and policy. Market economy is a liberal concept in which individuals and the companies they create have freedom to operate and profit from such operations. As commerce extends beyond and across national frontiers, ensuring efficient competition requires the same. In any case, a key component in understanding international antitrust is trade and related policy. While competition legislation aims at ensuring functioning markets, trade policy is a different kind of animal. While competition legislation is agnostic about non-domestic markets, it is open-minded domestically by aiming at ensuring opportunities for entrants offering

³⁰ Stanford Encyclopedia of Philosophy on Aristotle's Political Theory in *Nicomachean Ethics* VI.8.

³¹ *Koskenniemi* (2007); see also Kant (1784), pp. 41–53 to look back closer to the source of this thought.

³² *Husa* (2018), pp. 33–37.

³³ *Ibid.*, pp. 77–85.

innovation and lower prices. Trade policy, on the other hand, is more reserved domestically by aiming at protecting domestic players – for instance via anti-dumping legislation – while externally aiming to be a trailblazer by opening up new markets for exports. The two have some similarities but concurrently also material points of divergence – what is clear is that trade is a core part of defining international antitrust.³⁴

Law, politics, and trade interlink in ways that enable an idea of international antitrust. Although separate, they are not diffused. Politics and trade can be seen as having a clear relationship, particularly concerning the functioning of the market economy and the impact of the political process on it.³⁵ In general, law seeks to manage the said relationship and this can also be said of international antitrust.³⁶

International antitrust has already received significant attention for many decades. The following section will elaborate on its history before proceeding to its present state.

2.2 History of international antitrust

Creating comprehensive multilateral arrangements in competition law has failed time and time again; however, this is not due to a lack of trying.

The need for some kind of coordination has been realized at least since the times of the League of Nations. Perhaps surprisingly – already in 1927, its Industrial Committee on the World Economic Conference voted on a proposal to establish a harmonized and coherent international antitrust system.³⁷ It would have included supranational statutes and related supranational enforcement. However, at that time, there was considerable diversity in how anticompetitive conduct was viewed – an example of which is that industrial cartels were seen as beneficial to society and thus partially favored. Given the lack of a common foundation, the proposal was bound to fail, and fail it did.³⁸

Since then, a number of other attempts have been undertaken. The closest to having jointly agreed multilateral competition rules was in the late 1940s, when a chapter on anticompetitive business conduct was negotiated into the draft charter of the envisaged United Nations (UN) agency, the International Trade Organisation

³⁴ See e.g. Sweeney (2004), pp. 413–416.

³⁵ Aine (2001), p. 271.

³⁶ Ibid.

³⁷ League Of Nations (1927).

³⁸ Gerber (2010), pp. 19–55; and Lianos (2009), p. 5.

(ITO).³⁹ The charter was never ratified and the ITO eventually never became a reality, although this was due to reasons unrelated to said competition chapter.⁴⁰

The latest true multilateral attempt to reach an agreement took place in the early 2000s. International antitrust was the subject of both discussion and negotiation within the UN and the WTO, as a part of the so-called Doha Development Round.⁴¹ However, competition policy was dropped from the list of items to be further negotiated during its Fifth Ministerial Conference in Cancún, Mexico, in September 2003.⁴² To this day, competition matters are yet to return to the agenda. That being said, the Doha Development Round is still ongoing and this stagnated state of affairs is not limited to how competition matters are seen, as such, but is also part of a broader paralysis of the WTO.⁴³

There were clear reasons for dropping competition matters from the WTO negotiation agenda. Among them were irreconcilable differences between the contracting parties, both substantive and practical. Developing countries were particularly wary of subjecting themselves to the WTO dispute resolution mechanism, given their generally low level of experience in competition policy issues, coupled with scarce resources, limiting then-foreseeable capacity building.⁴⁴ In addition, there was an arguably low level of mutual trust and a number of states were worried that agreeing to formalized international competition rules would limit their alternatives concerning domestic economic policies, which could, in turn, result in an undesired loss of sovereignty.⁴⁵

Harmonizing competition law has proved to be a considerable feat and one that has not gained true traction outside the EU and the Andean Community.⁴⁶ The incongruity is best illustrated by recognizing that, as of today, it has not even been possible to have a single generally accepted purpose for competition law

³⁹ Restrictive Business Practices chapter (Chapter V), whose objective was to prevent business practices that restrain competition and adversely affect international trade.

⁴⁰ See e.g. Toye (2012).

⁴¹ The ITO charter was signed in Havana in 1948 during a UN Conference on Trade and Employment, but faced problems with its ratification. Ultimately, it was blocked by the US Congress and the ITO never became what it was envisioned to be.

⁴² Officially decided by the WTO General Council in August 2004. WTO (2004).

⁴³ Hoekman (2011).

⁴⁴ Bhattacharjea (2006), p. 297.

⁴⁵ *Ibid.*, pp. 296–297.

⁴⁶ The Andean Community consists of Bolivia, Colombia, Ecuador and Peru and its Commission Decision 608 regulates free competition within the territory of one or more members by prohibiting and sanctioning restraints in competition affecting the region.

recognized, but rather several exist, spanning from protecting consumers to furthering foreign policy in the arena of international politics.⁴⁷

A traditional explanation may be found in the doctrinal difference across the Atlantic Ocean, where on the one hand the American Chicago School has advocated for a narrow way to measure consumer welfare mainly on price increases only, while the EU tends to incorporate internal market goals as well as elements of fairness in its review in ensuring functioning markets.⁴⁸ Today, in a more pluralist existence of international antitrust, one could refer to there being ‘too many cooks in the kitchen’, given that over 130 nations have enacted competition law.⁴⁹ Also, *Bradford* argues that most younger competition regimes have adopted EU-style competition legislation and by doing so, have allowed for a broader mandate for their agencies – all of which leads to divergence.⁵⁰ This is a fair argument – particularly in comparison with US antitrust, since EU competition law’s praxis does more commonly consider a broader set of ways to ensure competitive markets, some of which could perhaps be excessively extended to address non-competition concerns.

The past decade has been paradoxical. Save for the COVID-19 pandemic, global trade continues to increase, reaching new heights in terms of trade volume, but also in terms of trade agreements entered into.⁵¹ Most of these trade agreements are agreed bilaterally between two nations. Concurrently, serious efforts to bring about international competition rules have not been undertaken. Instead, the focus has been on incremental convergence through voluntary information sharing and creating trust.⁵² The ICN has been (and still is) the main forum in which said advances have taken place. Perhaps harmonized competition rules are not even desirable.⁵³ However, one might wonder if the current trend of modest developments results from a consideration that this is the optimal way forward or due to it having been the only conceivable alternative for any change at all. As early as 2010, *Sweeney* was already arguing against voluntary convergence as a viable long-term avenue, but rather a more interim compromise, although differing views also exist.⁵⁴

Historically, a key challenge for harmonization has been the US and the EU being unwilling to compromise on their own positions – *inter alia* in WTO

⁴⁷ See e.g. Dabbah 2010, pp. 36–44.

⁴⁸ See e.g. Bradford et al. (2019), p. 7–11.

⁴⁹ Supra 62

⁵⁰ Ibid, p. 32–33.

⁵¹ WTO (2019).

⁵² Gerber (2010), p. 111; Ristaniemi (2018).

⁵³ See e.g. Bradford (2010).

⁵⁴ Sweeney (2010), pp. 9–11.

negotiations.⁵⁵ This is perhaps partly due to the assumption of being more advanced in competition law and policy, but also owing to leverage they have had in influencing their trading partners on bilateral and extraterritorial bases. Their reluctance to find common ground with other nations can be seen to have led ‘developing countries’ to form a bloc that acted as a counterweight in said WTO negotiations.⁵⁶ This dichotomy became entrenched where mutual trust was at low levels.

Comity provisions provide a fitting example of the multi-faceted past of initiatives attempting to improve international antitrust cooperation. It is a general principle of international law, the aim of which is that the jurisdiction with enforcement capabilities will take another jurisdiction’s interests into consideration. In international antitrust, the most common variant is negative comity, which is limited to avoiding actively harming the said other jurisdiction’s important interests in its enforcement.⁵⁷ Only positive comity arrangements entail that a nation could request another to enforce suspected anticompetitive conduct on its behalf. Positive comity is rare, but not nonexistent.⁵⁸ Export cartels are a notorious example of difficulties in extraterritorially enforcing one’s competition law, and the current comity arrangements are not sufficient to bridge this gap.

A more encouraging example concerns waivers of confidentiality. This is a useful tool for competition agencies, in particular, but also often for firms – at least in merger cases. The ability for agencies to share information shortens their review time and allows for greater consistency across jurisdictions, while maintaining the confidentiality of the material received. Confidentiality waivers are used by many competition agencies, particularly in merger cases, but also in cartel infringement cases.⁵⁹ Encouragement of confidentiality waivers as well as the development of globally standardized, yet not inflexible, templates for such waivers has been stated in soft law documents of the ICN, the ECN, and the OECD alike.⁶⁰ As such, they are an active tool within international antitrust. This example shows that difficulties in cooperating are not necessarily intransigent or all-encompassing.

An important point to bear in mind is that until rather recently very few nations have had actual, codified, competition law. Historically, international antitrust was largely the extraterritorial application of US antitrust, with a bit of EU and

⁵⁵ Gerber (2010), p. 103–106.

⁵⁶ Bhattacharjea (2006).

⁵⁷ OECD (2015).

⁵⁸ See e.g. US – European Communities 1998 Agreement on applying positive comity principles in the enforcement of their competition laws.

⁵⁹ ICN (2005), p. 2; ICN (2007), p. 11.

⁶⁰ OECD (2014B), Chapter VII; ICN (2016), X. A. Comment 2; and ECN (2011), p. 6.

Japanese competition law involved, on occasion.⁶¹ In 1990, only 16 jurisdictions globally had a competition authority.⁶² This has since significantly changed. Along with spreading international trade liberalization, competition law and its inherent welfare-enhancing benefits are ever more widely recognized. Today, over 130 nations have some form of competition legislation and an authority enforcing it.⁶³

There are likely several reasons for this increase. First, it has become common to include a chapter on competition matters in bilateral trade agreements.⁶⁴ Said chapters are usually not subject to the agreed dispute resolution mechanism, but arguably still have some effect in signaling the expectations of the contracting nations – thus invoking action.⁶⁵ Second, it is likely that mutual understanding and trust between more mature competition jurisdictions and younger ones has improved.⁶⁶ The ICN has been instrumental in enabling the sharing of best practices. Its key benefit is that it focuses on the operative level: its main participants are officials of competition authorities, thus leaving politics at the door. Also, although having originally been an initiative of the US, Canada, and the EU, said regimes do not dominate discussion or other ICN activities. Finally, the preference of major powers inevitably has an impact. *Aydin* argues that simply the coercion of major economic powers – the EU and the US specifically – might actually be the single most significant factor that has led to the increase.⁶⁷

The increase in competition legislation and enforcers alters the *status quo* by adding complexity – in turn elevating the problems resulting from the fragmentation and inconsistency of international antitrust. Particularly for firms operating international businesses, navigating the current landscape is challenging due to the administrative burden of having to consider a multitude of varying jurisdictions and enduring the added risk of potential conflicts in competition authorities' decisions.⁶⁸

Dialogue within international antitrust has often been surprisingly detached from more general trends and discourse in international law. Antitrust literature appears to operate within its own realm or, at most, borrows thinking from neighboring fields, such as intellectual property or trade law more generally. This detachment is however not uncommon within international law, which is notoriously fragmented into so-called expert regimes, as will be further discussed

⁶¹ Gerber (2010), pp. 205–208.

⁶² OECD (2014A), pp. 22–23.

⁶³ *Ibid.*

⁶⁴ Sokol (2008A).

⁶⁵ *Ibid.*

⁶⁶ Coppola et. al. (2020).

⁶⁷ *Aydin* (2010).

⁶⁸ See e.g. Ristaniemi (2014).

in Chapter 5.⁶⁹ The following section will build on this historical account by elaborating on what the current state of affairs is.

2.3 Status quo

The convergence of national competition law and enforcement appears to continue to be the primary goal of international competition cooperation.⁷⁰ This is done, in particular, under the auspices of various organizations facilitating voluntary cooperation, including the ICN, the OECD, and the United Nations Conference on Trade and Development (UNCTAD). Secondly, increased inter-agency dialogue and coordination is also encouraged, in order to reduce procedural overlaps and other inefficiencies.⁷¹ The preference for voluntary cooperation is likely due to the desire to avoid discussions about the potential sovereignty-reducing effects of a more binding way of cooperating.

There are weak signals of voluntary cooperation reaching new heights, particularly within the ICN. While the current – now established – ways of working continue, the ICN has begun to produce so-called Framework instruments, which operate based on an opt-in basis.⁷² While still non-binding even for those who have opted in, the impact of the mechanism is arguably stronger than ordinary voluntary cooperation. This type of approach may help steer development and convergence in a certain direction. Stakeholder reactions appear to be positive – *inter alia*, organizations such as the Association of Corporate Counsel, the International Chamber of Commerce, the Association of In-House Competition Lawyers, and the U.S. Council for International Business all support the ICN’s latest Framework on due process.⁷³

Despite the success of voluntary cooperation, the *status quo* is, however, not without problems. On the contrary, due to increasing international trade, there is more business taking place that simultaneously affects several jurisdictions. This trend is underscored by the significant global influence of digital platforms and the underlying digital economy that transcends national frontiers.⁷⁴ Further, the prevalence of competition laws and authorities means that there are also ever more jurisdictions whose competition laws may simultaneously apply and whose laws may be enforced simultaneously, including extraterritorially.

⁶⁹ Koskenniemi & Leino (2002), p. 553; and Koskenniemi (2007).

⁷⁰ *Supra* 52.

⁷¹ *Ibid.*

⁷² ICN (2019).

⁷³ United States Council for International Business (2019).

⁷⁴ See e.g. Nuccio & Guerzoni (2019).

The increase in jurisdictions with competition law and enforcers is – in itself – a positive development, but not unconditionally. International antitrust has traditionally been dominated by American and European voices. This traditional dichotomy is already becoming broader, with regimes such as Brazil and Canada making interesting and relevant contributions.⁷⁵ However, along with this increase in regimes with active views on antitrust increases in the complexity and difficulty for the primary market actor, the firm, to operate. The *status quo* is thus one of both substantial and procedural inconsistency, which leads to unpredictability for businesses as well as economic inefficiency in general.

Examples of problematic gaps and overlaps are numerous and diverse. One could highlight definition issues, such as those concerning joint ventures. Some jurisdictions differentiate joint ventures with a more independent nature (also known as “full-function”)⁷⁶ from other cooperation relationships, while other jurisdictions do not.⁷⁷ Also, expected firm conduct varies, as is clear from the diverging views on how to enforce conduct in a very strong market position. Some jurisdictions impose significant obligations to avoid exploiting its stakeholders,⁷⁸ while others do not.⁷⁹ Further, most jurisdictions allow export cartels as well as grant state aid either without restriction or even with the express purpose of improving their firms’ foreign business.⁸⁰ These last two points where competition law is effectively excluded represent major gaps. All of this – both collectively and individually – creates true harm to business, which in turn hinders the efficiency of the international trading system.

Extraterritorial application of national competition law is a crude way of unilaterally trying to patch the gap created by allowing export cartels. Such an approach creates collateral damage by creating problems of its own, exacerbated by the drastic increase in competition regimes, which oftentimes adopt similar

⁷⁵ E.g. Both the Brazilian competition authority (CADE) and the Canadian Competition Bureau won in the Most Innovative Soft Law category at the Concurrences Antitrust Writing awards in both 2018 and 2017. See Concurrences Review at <<https://www.concurrences.com>>.

⁷⁶ EU Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

⁷⁷ Wang et al. (2018) Chapter 4 para 143.

⁷⁸ See e.g. EU Commission cases against Google no. 39740, 40099, and no. 40411.

⁷⁹ See e.g. the US Supreme Court position in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* 540 U.S. 398 (2004)

⁸⁰ See e.g. The EU Commission and China’s NDRC Memorandum of Understanding on a dialogue in the area of the State aid control regime and the Fair Competition Review System (2017); and Section 51(2)(g) of the Australian Competition and Consumer Act (2010).

approaches. The *status quo* represents a significant coordination problem and calls for an update on the systemic and international level.

The growing influence of China, in particular, is noteworthy. Quite the newcomer to competition law – and to market economy more generally – China has the potential to alter the traditional power balance of international antitrust cooperation. Particularly China’s insistence of retaining strong reservations for considering its industry policy is a point of divergence, compared to the other major economic powers: the EU and the US.⁸¹ Ng argues that an underlying reason for this lies in its markedly more state-centered approach in comparison with most competition regimes that are consumer-centered.⁸² Should it so desire, China could leverage its influence to improve the legitimacy for such reservations. This would likely see support in a number of developing countries, which could create a significant counterweight.⁸³

Despite the shortcomings in the current state of affairs, there does not, however, seem to be much appetite for change. Convergence is taking place through information sharing and national competition authorities are gaining experience and capacity, but the developments and plans of major powers and the main international organizations going forward appear largely incremental and technical in nature.⁸⁴ Nothing transformational is in sight.

There are likely several reasons for this. One of them is a dearth of sufficient data. The assumed negative effects associated with export cartels provides an example where competing doctrinal research arguing the opposite leads to a stalemate in the absence of convincing empirical data.⁸⁵ Perhaps the most crucial reason, however, is that none of the three major economic powers – the EU, the US, and China – seem to be pushing for true improvement in international antitrust cooperation.

Also, the US does not currently favor multilateral cooperation – as a general policy approach – and is instead more inward-looking and in favor of bilateralism in its foreign affairs.⁸⁶ China’s competition law and related agencies only celebrated ten years of existence in 2018 and have focused more on capacity building than international cooperation, which has thus far mostly been reactive. Last, the EU is clearly open to – even deep – multilateral cooperation, but is not

⁸¹ See Chinese Anti-Monopoly Law. Note that China is not alone in mixing industrial policy with competition policy. Sokol (2015).

⁸² Ng (2019).

⁸³ Gerber (2010), p. 236.

⁸⁴ Finch (2018); Gerber (2010), p. 111; Ristaniemi (2018).

⁸⁵ Sokol (2008B); and Sweeney (2010), p. 71.

⁸⁶ Weissmann (2017).

forceful about it, which may be a pragmatic strategic choice – perhaps due to a lack of sufficient support from its member states.

As mentioned in the Introduction, the international antitrust system is fragmented. Its individual fragments consist of national competition law regimes which are complemented by soft law – guidelines and ‘best practice’ recommendations. Soft law can be defined as “nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.”⁸⁷ International law easily overlooks soft law – the focus instead tends to be on treaties and customary law (such as the *lex mercatoria*).⁸⁸ However, as *Guzman* argues, soft law can have meaning.

Using a rational actor model as the underlying premise in a reputational model of international law, *Guzman’s* research describes how nations value their international reputation to help them achieve a variety of policy objectives, which *de facto* leads them to put effort into compliance with international soft law – even if it is *de jure* voluntary – in order to uphold this reputation.⁸⁹ “By developing and preserving a good reputation, states are able to extract greater concessions for their promises in the future.”⁹⁰ Said impact is, however, not evenly distributed, but rather likely greatly depends on the subject matter in question. *Guzman* further argues that compliance can be particularly pronounced in economic and regulatory matters, in comparison with matters more fundamental to a nation.⁹¹ That is, within the realm of international antitrust, soft law can have true significance.

Interestingly, competition law may actually be less controversial at an international level than domestically. *Gerber* argues about an inherent domestic conflict between constitutional law and competition law. While the former aims to preserve a certain state of affairs, the latter aims at ensuring market conditions allow for disruption and improvements – that is change. This conflict is absent in the international context and sheds light on an interesting benefit within antitrust at the international level.⁹²

In any case, a baseline of the desirability of international cooperation within antitrust can be established, given the level of active participation both in the relevant multilateral organizations – the ICN, the OECD, and UNCTAD – as well as bilaterally, as mentioned in Chapter 1 (Introduction). International cooperation

⁸⁷ Guzman & Meyer (2011), p. 5.

⁸⁸ Guzman (2008).

⁸⁹ Guzman & Meyer (2011), pp. 195–196; and Guzman (2008).

⁹⁰ Guzman (2001), p. 72.

⁹¹ Krisch (2014); and Guzman (2001), pp. 29–31.

⁹² Gerber (2010), p. 343.

is, as such, arguably beneficial for society at large, as long as distributional and allocation issues can be addressed. The extreme alternative to cooperation would lead to the same inefficiencies and non-tariff boundaries that have widely been discussed within a trade context. That said, total harmonization easily restricts a nation's sovereignty and is an insensitive approach towards nations' differing economic situations.

Cooperation does not necessarily need to lead to harmonization, nor to coherence, but it should increase the consistency of international antitrust. There is much discourse about coherence in law.⁹³ Normative coherence in law can be defined as the consistency and logic at a deep level of legal principles, objectives, and related underlying values.⁹⁴ At a more superficial level, consistency in law can be seen to refer to the absence of conflicts between legal rules and norms.⁹⁵ While total coherence – that of an entire legal system – is rarely considered possible in modern times, local coherence – coherence of or within a legal regime, such as antitrust – might be worth pursuing, albeit challenging to achieve.⁹⁶

In the case of international antitrust, coherence might even constitute a paradox. Inherent internal conflict is unavoidable in such a system of diverse sovereign nations combined with competing international organizations – a regime complex as discussed in Chapter 5 – and with differing underlying goals and values. *Wilhelmsson* argues that a prerequisite for normative coherence is a belief in common values.⁹⁷ This is clearly lacking in international antitrust. However, this is not to say that local coherence within international antitrust is not worth pursuing. In fact, the convergence of international antitrust in recent decades represents an increase in *de facto* local coherence.

It is relevant to consider what the aim of cooperation should be, and future endeavors would be wise to base cooperation on an appreciation of a pluralist and increasingly polycentric world and to build on it, rather than disregard it. The challenge and opportunity is to optimize cooperation, both in terms of substance and structure, at its different levels. In this regard, it is worth specifying the main dimension in which cooperation takes place, as illustrated below.

⁹³ See e.g. Tuori (2014); Wilhelmsson (2014); Sargentich (2018); Sauter (2016); Dworkin (1986); and Rawls (1971).

⁹⁴ Tuori (2014), p. 1200; and Sauter (2016), p. 12.

⁹⁵ Tuori (2014), p. 1200; and Sargentich (2018), pp. 93–96.

⁹⁶ Wilhelmsson (2014) pp. 203–207 & 211; and Tuori (2014) pp. 1221–1224.

⁹⁷ Wilhelmsson (2014), p. 210–211.

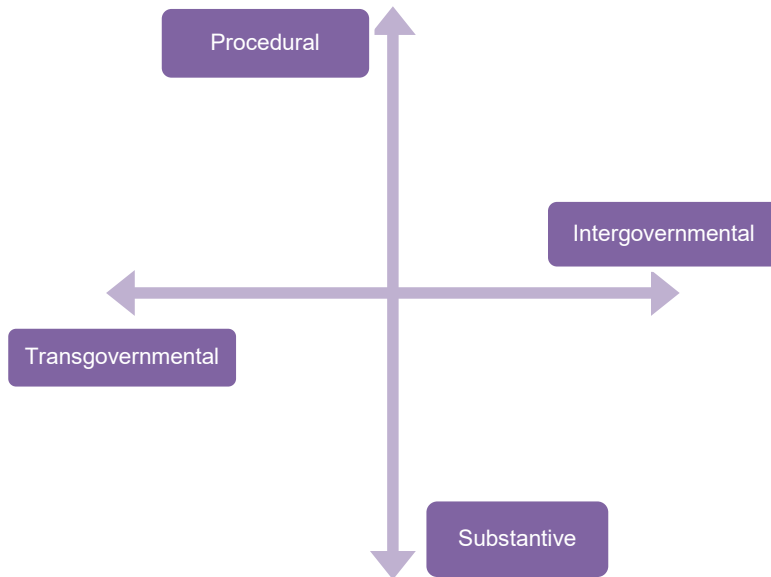


Figure 2. Approximating international antitrust cooperation potential.

Cooperation in international antitrust is often of a normative nature. Both intergovernmental and transgovernmental cooperation leads to the creation of norms and standards, whether explicitly or more implicitly. Historically, harmonization attempts have arguably emphasized substantive questions – mostly intergovernmentally. This route has faced challenges, as described above in Section 2.2, thus leading to transgovernmental network-based cooperation. Now that trust and mutual understanding have increased, as has the number of nations with competition regimes, the time might be right to begin shifting the emphasis towards more structured coordination, which has particular potential concerning procedural issues.

A key challenge of antitrust is efficient enforcement, especially in cross-border relations. This is exacerbated by the inherent characteristics of the digital economy with which competition law enforcement struggles more broadly.⁹⁸ The digital economy and the platforms that dominate it are particularly international in nature. This demands more cooperation from NCAs but also concurrently presents an opportunity for a reform of international antitrust. Such reform could well harness technological tools, such as those that some enforcers have implemented or are

⁹⁸ OECD (2018); Capobianco & Nyeso (2018); UNCTAD (2019A).

planning to implement,⁹⁹ but also could unlock potential through increased transgovernmental coordination and cooperation.

2.4 Overview of literature and existing debate

Competition law and policy is commonly a domestic affair. It is framed around the economic activity occurring within the territory of nation-states, with the notable exception of the EU. This notwithstanding, international antitrust – in some shape or form – has been around for as long as international trade. Most antitrust literature concerns the functioning of domestic regulation or its enforcement. Nevertheless, much has also been written about international antitrust.

In general, scholarship on international antitrust tends to focus on rather narrow areas. There are a few authors with a more comprehensive view. Particularly valuable contributions aiding synthesizing international antitrust have been made by *Eleanor M. Fox*, *David J. Gerber*, *Andrew T. Guzman*, *Daniel D. Sokol*, and *Brendan J. Sweeney*.

History and tradition in antitrust provide an interesting viewpoint. *Gerber* studies the impact of the US and the EU competition law traditions and their effects on international antitrust. *Gerber* is – in comparison with his peers – particularly vocal about the lack of historical understanding of those participating in or advising on international antitrust development.¹⁰⁰ He puts forth the argument that enhancing this understanding could – in turn – improve the quality of the efforts exerted towards creating a better antitrust world order.¹⁰¹ This is an interesting and valuable point.

Gerber examines two prominent strategies of international antitrust: extending a nation's sovereignty, and convergence. Historically, extending the reach of one's competition law has been the primary manifestation of international antitrust.¹⁰² This concerned the US, in particular, and was the *modus operandi* at a point in time when most nations lacked competition law.¹⁰³ Extraterritorial application of competition law both further empowered its own domestic enforcement as well as helped avoid an antitrust 'race to the bottom'. The US was, in a way and to a degree, the global enforcement agency and US antitrust law was global antitrust law.¹⁰⁴ Against this backdrop, it is clear that reaching a multilateral binding

⁹⁹ European Commission (2020); Enterprise and Regulatory Reform Act 2013, Chapter 2.

¹⁰⁰ Gerber (2010), pp. 340–341

¹⁰¹ Ibid.

¹⁰² Ibid., pp. 60–68.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

agreement on substantive matters – inevitably also involving compromises for the US – has been a challenge.

During the past decades, literary activity seems to have coincided with WTO activity. Accordingly, the last burst of publications was in the early 2000s when competition matters were still on the WTO's negotiation agenda. Unsurprisingly, much of the commentary is linked to the proposals brought forth there and concerning the appropriate structuring of multilateral international antitrust.

In absence of being able to agree on *de jure* binding international antitrust obligations, *de facto* voluntary convergence became the new strategy. This can be seen as a beneficial, if only interim, resolution, as added mutual understanding and trust likely provide the most utility as a path towards something more instead of being an end in themselves, as *Sweeney* notes.¹⁰⁵ A proponent of the creation of a multilaterally set system of hard competition law is *Guzman*. His research argues that the WTO is the most appropriate forum, particularly given its pre-existing history of multilateral agreements (such as TRIPs) and the established dispute resolution mechanism.¹⁰⁶

Gerber argues that a broad multilateral agreement consisting of binding obligations is desirable, but that would require first finding a normative consensus on both the goals and the means to reach them.¹⁰⁷ Concerning enforcement, *Stephan* argues that any international organization commissioned to enforce or resolve disputes of an international antitrust system would inevitably result in high agency costs, given that its principals – the member nations of said organization – are themselves in conflict about the substance of optimal competition policy and would thus be unable to provide a sufficiently clear mandate.¹⁰⁸

Norms and standards within international antitrust, however, do exist. *Fox and Trebilcock* have synthesized nine different studies with the aim of understanding whether there are global competition-related norms, particularly procedural ones.¹⁰⁹ This focus is important, as research on convergence may easily excessively emphasize substantive questions only, while leaving procedural convergence as a secondary priority. Their findings indicate that there is a “remarkable degree of consensus on the basic procedural requirements and institutional performance norms of competition law institutions”.¹¹⁰ This promising observation should warrant greater effort on multilateral agreements concerning procedural matters

¹⁰⁵ *Supra* 54.

¹⁰⁶ *Guzman* (2000), pp. 16–23.

¹⁰⁷ *Gerber* (2010), pp. 295–302.

¹⁰⁸ *Stephan* (2005), pp. 196–206.

¹⁰⁹ *Fox & Trebilcock* (2012).

¹¹⁰ *Ibid.*, p. 8.

specifically. Also, looking at the perspective of major economic powers – the EU, the US, and China – it seems that procedural developments are more plausible than substantive ones.¹¹¹

Voluntary cooperation has its proponents. *Fox* favors cooperation based on networks as the primary way forward. While she does not forego the idea of a multilateral agreement, she argues that many matters of incoherence in international antitrust can be resolved by easier means.¹¹² The principle of subsidiarity – meaning that competence should be delegated to international or supranational levels only where it is beneficial and not by default – is key in this respect. It is one of the core tenets in the EU,¹¹³ but also useful as a principle elsewhere. However, *Fox* argues that competition distortions either by nations or condoned by them, such as export cartels, do require a supranational resolution in order to be minimized.¹¹⁴

Bradford prefers voluntary cooperation, not as a second-best alternative, but as the *de facto* most effective way to bring about convergence and coherence.¹¹⁵ This approach seems rooted in pragmatism – given the plethora of well-documented reasons for why prior attempts towards harmonized substantive competition law and enforcement have failed,¹¹⁶ it would seem reasonable to propose creating a common foundation on a non-binding basis. This has indeed also been and continues to be the main path for most of the 2000s. However, as the dissertation has described above, today's circumstances have changed.¹¹⁷ A multilateral agreement would not necessarily need to concern setting uniform substantive competition provisions, as these are largely similar in most parts of the world. Instead, a treaty could bring benefits in reducing enforcement problems – whether due to overlaps, gaps, or coordination issues.

The merits for deepening international antitrust generally and employing a primary strategy of *de facto* convergence for doing so can, however, be debated. First, what should be considered an 'improvement'. This was already discussed in Chapter 1.2 and – as mentioned – convergence may lead to less policy experimentation,¹¹⁸ and the current hegemony of EU-inspired competition law worldwide may falsely promote legitimizing the taking of non-competition issues

¹¹¹ Ristaniemi (2018).

¹¹² Fox (2015), p. 8.

¹¹³ European Parliament (2018).

¹¹⁴ Fox (2015), pp. 5 & 8.

¹¹⁵ Bradford (2010).

¹¹⁶ See *supra* Section 2.1.

¹¹⁷ See *supra* pp. 15–16 & 18–19.

¹¹⁸ *Supra* 20.

into consideration in competition law.¹¹⁹ Further, as mentioned in Chapter 2, convergence may face limits in an increasingly polycentric world of antitrust, given the increasing influence of other nations than the transatlantic duo of the US and the EU.

Gerber presents five questions that are central to the advancement of international antitrust:

- How to design a strategy that minimizes harm to global competition, when the landscape is partially different and more complex than national jurisdictions.
- How to harness the wealth of American competition law experience and its community without having to adopt American approaches, as such.
- The value of the European experience in creating national competition laws and reconciling them with supranational regulation.
- Understanding the relationships between nation-states, international organizations and global governance networks.
- Ensuring that global competition is allowed in ways that benefit all, and not only some, participants.¹²⁰

The main legal problems causing inefficiencies, such as extraterritorial application of competition law, overlapping multiple procedural filing requirements, and exempting export cartels from competition law, are not novel. Foundational issues concern establishing legitimacy under international law on the one hand, and the practical enforcement challenges on the other. In terms of the former, unilateral extraterritorial application is linked to the ‘territoriality principle’ inasmuch as a certain act affects a certain territory, although opposition does exist.¹²¹

A nation has an innate desire to protect the economic wellbeing of its citizens, which can be seen to create needed legitimacy in the eyes of a state’s legislator to enact law allowing such extraterritorialism.¹²² Allowing the extraterritorial application of a nation’s competition law is often a response to export cartel activity – conduct that is generally not prohibited in the nation in which it originates, in the absence of domestic detrimental effects. Export cartels are a prime example of the sub-optimal state of international antitrust on several levels.

¹¹⁹ Bradford et al. (2019).

¹²⁰ Gerber (2010), vii–x.

¹²¹ Kaczorowska (2000), p. 122.

¹²² Sweeney (2010), pp. 221–222

A key unresolved issue with regard to export cartels is, however, the gravity of their harmful effects, which is difficult to quantify exactly.¹²³

Extraterritorial enforcement generally requires the cooperation of another nation – and comity arrangements exist for seeking such support – however, procuring such cooperation is challenging in practice. Positive comity arrangements have been developed – in part – to help mitigate this, but they are not as widespread as their negative variant and their *de facto* impact is dubious.¹²⁴ The question of how to either improve the enforcement of the extraterritorial application of competition law or – alternatively – reduce the need for said application is unresolved and is linked to the general variety of views on how international antitrust should be organized.

National economies differ significantly and often perspectives emphasize the reality of wealthy nations. Certain authors have published excellent pieces to help understand the interests of developing countries and how this influences competition policy and its international dimensions. These include *Bhattacharjea*, who sheds light on the position of developing countries when participating in the international stage of trade and competition.¹²⁵ Their interests may be radically contrasting to those of the US-EU duo in particular. *Fox* has also made important contributions in this area. Her work has highlighted the legitimacy of said differing interests from the perspective of developing countries.¹²⁶ *Stiglitz* elaborates on the utility of ‘public interest’ considerations as a part of competition policy, particularly concerning lesser developed nations, and recognizes that such concerns are well justified on occasion.¹²⁷ Further, *Lianos* describes the role of the United Nations, above all the UNCTAD, in helping such nations get on the path of competition policy and related law.¹²⁸ Indeed, UNCTAD’s impact is arguably particularly pronounced concerning less-developed regimes – certainly a complementary function for those nations excluded from the OECD.

As can be seen in the above literature review, the general approach that legal scholars have taken with regard to international antitrust leaves room for further research. An idealist and formalist approach might emphasize resolving gaps and overlaps of the current fragmented system by creating some kind of internationally uniform legal order that is enforced by some kind of supranational enforcer. On the other hand, a more pragmatic and incremental approach would acknowledge

¹²³ *Supra* 85.

¹²⁴ *Supra* 58.

¹²⁵ Bhattacharjea (2006).

¹²⁶ See e.g. Fox (2012).

¹²⁷ Stiglitz (2017), pp. 14–16.

¹²⁸ Lianos (2009).

certain practical limitations and instead might continue to rely on voluntary cooperation to do what it can to reduce friction. Looking at existing literature, perhaps its main focus was a necessary first step, commenting on the need to improve the *status quo*, and one that helps lead to more nuanced and indirect proposals, such as those elaborated as a part of this dissertation.

It can be argued that much has changed since the last wave of scholarly literature in the field in the early 2000s. First, the amount of hard competition law in this world has drastically increased: today over 130 nations have enacted domestic competition law, compared to 16 as recently as 1990, as mentioned in Section 2.2. Second, the amount of soft competition law has also drastically increased, in two particular ways: competition chapters are now commonplace in bilateral trade agreements, and *de facto* international cooperation has significantly increased – particularly within the ICN, the International Chamber of Commerce (ICC), the OECD, and also UNCTAD – which has resulted in an increased number of documents listing and describing various recommended practices.

A key question in deepening cooperation to include binding obligations is ensuring that the system is fair and sensible to those involved. All in all, trust has arguably increased. However, *Stephan* argues that any meaningful wealth redistribution as a part of an international antitrust system – a mechanism often referenced as necessary to achieve it – is doomed to fail.¹²⁹ If *Hans Rosling* and the United Nations statistics he cites are correct, the economic divide between so-called developing and developed countries is not as wide as it once was.¹³⁰ The problem is no longer a dearth of competition law to regulate international business or how the EU and the US can ‘educate’ developing nations to think as they do. It is rather how to improve coherence in ways that both respect the sovereignty and national preferences of all nations and concurrently help minimize negative externalities. This is also the niche that this dissertation seeks to address.

Efforts to promote compliance have become increasingly important in the current paradigm. The editorial work of *Paha* in *Competition Law Compliance Programmes: An Interdisciplinary Approach*, which explores the theme in a very interdisciplinary fashion, is important in this field.¹³¹ *Sokol* has also contributed several key articles on the topic.¹³² Also, *Finell* has assessed how to affect corporate compliance conduct in relation to the telecommunications market in her

¹²⁹ Stephan (2005), pp. 196–206.

¹³⁰ Rosling et al. (2018)

¹³¹ See Paha (2016).

¹³² See e.g. Riley & Sokol (2015); Abrantes-Metz & Sokol (2014); Sokol (2013); Sokol (2012).

doctoral dissertation.¹³³ Competition compliance literature taps into general literature about compliance and creating cultures of compliance. In this respect, the work of *Langevoort* has been particularly useful.¹³⁴ More generally, works in the fields of behavioral economics, such as *Kahnemann* and *Tversky*¹³⁵, and in psychology, such as *Paruzel et al.*¹³⁶, are significant in understanding how to affect and influence conduct.

It is also useful to look beyond competition law and into approaches employed in other areas of law and policy that operate in a similarly international environment. Areas such as environmental law and human rights norms are particularly worth exploring, since, first, our planet's environment is one we share irrespective of nation-state nationality and, second – if not otherwise, human rights questions often tie into global value chains, whose effects span several jurisdictions. While no silver bullet, they might have the potential to inspire initiatives within international antitrust.

In combating climate change, a common challenge affecting us all, a key multilateral effort has manifested itself through treaties, the latest of which being the Paris Accord.¹³⁷ These efforts have been taken under the auspices of the UN Framework Convention on Climate Change (UNFCCC) that entered into force in 1994. In other words, embracing the traditional treaty-based approach of international relations requiring intergovernmental consensus and, consequently given the plurality of views, one with a weak enforcement mechanism. Despite its shortcomings, the UNFCCC has created a foundation upon which further cooperation may be built and also has been built. Nothing similarly fundamental exists in the realm of competition or antitrust.

For a mostly different, but similarly fundamental example, one can turn to the UN Global Compact. It is a non-hierarchical corporate responsibility initiative which attempts to improve environment and human rights matters by way of creating voluntary global standards for firms. Its core consists of ten broad, but also quite vague, principles. Although administered by the United Nations, the main actors in the Global Compact are firms, which – if participating in the initiative – are required to publicly advocate for the Global Compact and annually report on how its principles have been implemented.¹³⁸ And firms truly are participating – around ten thousand firms have signed up from over 160 nations since its launch in

¹³³ Finell (2017).

¹³⁴ See, *inter alia*, Langevoort (2017).

¹³⁵ Tversky & Kahnemann (1974).

¹³⁶ Paruzel, et al. (2016), pp. 229–230.

¹³⁷ Savaresi (2016) pp. 16–26.

¹³⁸ Rasche (2009), p. 517.

2000, since then producing over sixty four thousand reports.¹³⁹ Although criticism of inefficiency exists,¹⁴⁰ it has incrementally increased the importance of corporate responsibility matters in firms by giving added impetus to implement such measures and a path in which to direct focus. In the absence of binding obligations, the power of the Global Compact is in its transparency as well as in the trickle-down effect of buy-in by leading multinational firms who then have often required their suppliers follow suit.¹⁴¹

In general, it appears that two trends in public governance jointly form a particularly pronounced shift from the prior *status quo* – also in the antitrust universe. The first being that domestic policymakers have begun to better accommodate other stakeholders through models of shared governance.¹⁴² This is a departure from the traditional ‘governing by government’ and ‘command-and-control’ models. Second, the proliferation of interaction and cooperation specifically at the transgovernmental level, in addition to and – at times – also instead of intergovernmental cooperation.¹⁴³ This is evident within international antitrust by looking at the activity of organizations such as the ICN, which primarily consists of officials of competition agencies. These trends and theories shall be addressed in further detail in Chapter 5 in order to deduce what they could contribute towards international antitrust.

A third noteworthy trend is that of sustainability and its impact on both public policy and international cooperation. As the climate crisis accelerates, discussion is ongoing in many areas concerning whether planetary boundaries can be better respected. Various angles are being brought up to mitigate the danger, including repositioning the market economy and the role of firms in ways that better encourage sustainability.¹⁴⁴ Antitrust, as the guardian of functioning markets, and its role in the battle for improved sustainability is a hot topic. Examples include the fact that it has been recognized that fierce competition may not lead to sustainable products and services, and that restrictions on horizontal cooperation may hinder the ability of industries to agree on more sustainable, albeit more costly practices or raw materials.¹⁴⁵ The key question is how to include non-price parameters, such as planetary boundaries and sustainability, into a consumer welfare test and how to quantify the negative externalities of unsustainable practices. What is clear is that

¹³⁹ See UN Global Compact.

¹⁴⁰ Lau et al. (2017).

¹⁴¹ See UN Global Compact LEAD at <https://www.unglobalcompact.org/take-action/leadership/gc-lead>.

¹⁴² Kooiman (2003) & Kooiman (1993).

¹⁴³ Slaughter & Zaring (2007), p. 218.

¹⁴⁴ Steffen et.al. (2015); Gadinis & Miazad (2019); Financial Times (2019).

¹⁴⁵ See Murray, (2019); Vestager (2019); and Stucke & Ezrachi (2020).

there is international momentum for finding a more sustainable equilibrium for the role of business in society and one which is likely to affect contemporary antitrust – as well as the market economy by-and-large.

In the light of previous literature, the topic of creating a harmonized international antitrust system is quite well covered. It seems dubious, at best, whether a broad substantive harmonization of competition norms would serve a beneficial purpose in practice. However, that is not to say that the current state of affairs is optimal or even satisfactory. Nor does it mean that further cooperation and approximation is undesirable. As mentioned above, the paradigm has changed, which calls for a reevaluation of the appropriate means for improving international antitrust. This dissertation both identifies and analyzes existing problems and the challenges concerning why they continue to exist. Further, as will be further discussed in Chapter 5, opportunities exist to better formalize transnational networks as well as allowing firms a larger role in antitrust governance and enforcement that avoid the sticking points of prior attempts towards improvements.

3 Methodological Framework

3.1 Research methods

Researching international antitrust can resemble looking through a kaleidoscope. The present state and future outlook alike depend on the configuration chosen. In the context of this dissertation, the configuration refers to the chosen analytical framework and methodological choices. These effectively constitute the way in which the research is designed to answer the research questions that were posed in Section 1.2.¹⁴⁶

The dissertation and the articles that form its backbone are grounded in pragmatism. In practice, this translates into analytical eclecticism – an approach where research methods may be mixed to the extent that the research questions demand, while still preserving the integrity of the research work itself.¹⁴⁷ As an article-based work, a number of methodologies are employed and they vary depending on the article – in ways described in the following paragraphs of this Section.

While this allows flexibility, such analytical eclecticism does present a risk of incoherence within the dissertation and which has called for additional attention in the synthesizing sections to come. Nevertheless, such pluralism is generally considered a benefit within the social sciences.¹⁴⁸ Some generalizations can, however, and – for the sake of clarity – will be made. I shall present these and then elaborate further on an article by article basis.

The research of this dissertation is of a doctrinal nature. Doctrinal research can be defined as research that “aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law”.¹⁴⁹ *Hutchinson* argues that doctrinal

¹⁴⁶ Dudovskiy (2018).

¹⁴⁷ See Sil & Katzenstein (2010) for a deeper account of analytical eclecticism.

¹⁴⁸ Friedrichs & Kratochwil (2009), pp. 708–710.

¹⁴⁹ Smits (2015), p. 5.

research is about “a constant search for legal coherence”.¹⁵⁰ As such, the work attempts to both collate and bring clarity to the various strands that collectively make up the *de facto* global antitrust order.

There is animated ongoing debate about the state of doctrinal legal research.¹⁵¹ This is perhaps best exemplified by the contrasting views within the *Posner* family. *Eric Posner* has famously argued that “doctrinal legal research is dead” – a reference to the idea that legal scholars should engage in more interdisciplinary work, such as law-in-context research.¹⁵² By contrast, his father, *Judge Richard Posner*, argues that doctrinal research is “important for the vitality of the legal system and of greater value than much esoteric interdisciplinary legal scholarship”.¹⁵³ One would think that there are contributions to be made by both, and excessively appreciating narrow convictions to legal research might be the most harmful. Be this how it may, doctrinal research has been and appears to still be the generally prevailing research method of choice for legal scholars.¹⁵⁴

Indeed, the doctrinal method is relevant and suitable for the research questions of this dissertation. In the absence of a fully codified, command-and-control based system, international antitrust is not without norms. On the contrary, a plethora of norms and standards exist that can be attributed to it, some of which are mentioned as examples in Chapter 1. The resulting normative framework in its entirety is obscure and ambiguous – an invitation for dogmatic research.

A core element and function of this dissertation is that it systematizes present law (*lex lata*).¹⁵⁵ In this context, law refers to the entirety of the norms and standards that collectively form international antitrust. The chosen approach does not presuppose that such norms and standards are exclusively international in nature, but rather that some may concurrently apply in national jurisdictions domestically. The dissertation also argues that international antitrust not only exists, but fits in well with contemporary international governance discourse, as well as seeks to make sense of its composition, as is discussed further in Chapter 5.

It is said that by undertaking systematization, legal research is able to aid with the coherence of the law itself.¹⁵⁶ It is thus descriptive.¹⁵⁷ *Jeremy Bentham* has described this sort of approach as ‘expository jurisprudence’, since it sheds light on

¹⁵⁰ Hutchinson (2017), p. 10.

¹⁵¹ See e.g. van Gestel & Micklitz (2011), p. 1.

¹⁵² Eric Posner as referred by van Gestel & Micklitz (2011), p. 1.

¹⁵³ Richard Posner as referred by van Gestel & Micklitz (2011), p. 1.

¹⁵⁴ Smits (2012), p. 11.

¹⁵⁵ Smits (2015), p. 7.

¹⁵⁶ *Ibid.*

¹⁵⁷ Smits (2012), pp. 39–40.

what the law is, including its interrelations.¹⁵⁸ However, it is for the researcher to decide the manner in which such exposure is done, including what to emphasize and what angle to take.

Partially also going beyond merely systematizing, the dissertation crosses into the realm of prescriptive jurisprudence. It attempts to help develop improvements to the current system – what law ought to be like (*lege ferenda*).¹⁵⁹ Smits argues that the ‘ultimate question of legal science’ is what the law ought to be. This is explained as that the legal discipline should reflect ‘upon what it is that individuals, firms, states and other organizations ought to do or ought to refrain from doing’.¹⁶⁰ It is fitting, then, that this is the second core function of this dissertation.

More specifically, the dissertation aims to contribute to improving the substance of competition law – particularly by proposing ways to better enable a system of shared governance and advancing structured transgovernmentalism. Approaching this task is done with a ‘law in context’ angle – the dissertation is linked to competition policy analysis in that it attempts to consider the multitude of policy tools in achieving ‘what ought to be’ – not only what positive law can achieve.¹⁶¹

Each article is at least in part either about what the current state of affairs ought to be like or analyzes what possibilities there may be for law becoming what it ought to be. The aims of descriptive and prescriptive legal research are however not unrelated, but rather *de facto* quite interconnected. In order to propose reforms, significant amounts of doctrinal legal research must be undertaken to ascertain the current state of affairs. *Hutchinson* rightly states that ‘the lawyer needs to commence any legal discussion by using this method to critically determine “what the law is.”’¹⁶²

The work approaches its core functions in an argumentative manner. *Smits* argues rightly that views differ on both how to regulate societal matters and also what the content should be.¹⁶³ Thus, legal science is not about finding a solution as much as it is about ideas and the possible advances and drawbacks of such ideas.¹⁶⁴ This is combined in this dissertation with a problem-based approach,¹⁶⁵ which begins with identifying and framing issues and then moving on to identifying

¹⁵⁸ Bentham (1970), p. 21.

¹⁵⁹ Smits (2012), p. 44.

¹⁶⁰ *Ibid.*, p. 41.

¹⁶¹ Hervey et al. (2011), p. 76; Hoecke (2015).

¹⁶² Hutchinson (2017), pp. 24 & 28.

¹⁶³ Smits (2012), p. 58.

¹⁶⁴ *Ibid.*, p. 73.

¹⁶⁵ Hutchinson (2017), pp. 12–14.

alternatives for improvement and, finally, proposing an appropriate one – given the realistic possibilities.¹⁶⁶

The first and second article employ a largely problem-based approach – they are concerned with legal problems and how these are treated.¹⁶⁷ They provide examples of problems and general context about the inefficiencies of international antitrust.

An important segment of the dissertation concerns how major economic powers approach cooperation in competition matters. The third article takes on an additional element of political discourse analysis, in the form of analyzing political rhetoric from the selected major powers: the US, the EU, and China. The purpose is to ultimately identify factors that affect what kind of alternatives for improving international antitrust are possible, and – as a result – also understand what kinds of alternatives are clearly not practically possible. To analyze the dynamics that affect this requires an understanding of international politics and the balance of economic power between these powers.

The fourth article, which is on incentivizing firms to put more effort into competition compliance, benefits from work in several fields beyond legal studies. Perspectives from psychology and economics – particularly those of behavioral economics – are put to use in understanding what impacts decision-making within firms. Such understanding is critical for suggesting possible ways of improving how firms approach compliance with competition law. This added multidisciplinary dimension can be described as adding a meta-legal perspective to the dissertation.¹⁶⁸

3.2 Assumptions and limitations

As doctrinal work, this dissertation is constrained by the general absence of direct empirical data. This is a clear limitation. However, I have made efforts to anchor the dissertation in second-hand data, where possible, to mitigate this. This is particularly present in the fourth article, which discusses incentives for competition compliance, which utilizes and refers to empirical work that has previously been undertaken by others in areas of behavioral economics, anthropology and psychology, in addition to legal research. This empirical-based material has greatly complemented the otherwise doctrinal approach. All in all, this eclectic approach

¹⁶⁶ Bardach & Patashnik (2016).

¹⁶⁷ van Hoecke (2015).

¹⁶⁸ Smits (2012), pp. 32–33.

has enabled a more comprehensive and well-rounded analysis of the research questions at hand.¹⁶⁹

An element to be recognized in all research is the personal biases of the researcher. This is particularly important to acknowledge in doctrinal research, which operates without empirical data. While seeking to avoid it, I do have a personal bias of generally appreciating globalization and international cooperation. However, empirical research does show that globalization has been, by and large, significantly beneficial to both consumers and firms.¹⁷⁰ Thus, the assumption that international cooperation in trade matters is inherently desirable is not likely false. In this light, it is worth underscoring that this dissertation does not, however, attempt to put forward claims about the desirability of globalization as such.

The article on the extraterritorial application of competition law is based on the following assumptions. First, although each EU member state does have its own competition related policies and law, the article focuses on the views of the European Commission and the European Court of Justice (ECJ) in terms of European views, as the EU forms one common market outside of which extraterritorial application of its laws would occur. While the EU's judicial position is not equal to that of a sovereign nation,¹⁷¹ this choice was made nonetheless. A study of EU competition law vis-à-vis its Member States would have required an entirely separate scholarly work. Second, while various restrictions of competition may differ significantly from one another, as such, the paradigm at hand affects multinational corporations (MNCs) equally regardless of such nature: mergers and acquisitions, other agreements between legal entities as well as conduct in a dominant position may all become problematic if subjected to extraterritorial competition law application. The divergent characteristics of each mostly affect the ways to attain clearance or potential sanctions, but not the existence of the issue itself. Thus, my analysis does not differentiate between restrictions, but rather stays on a more abstract level, which is justified in this regard.

The article on export cartels assumes that an increase in international trade equally increases global welfare and while it does not explore that area as such, it nonetheless does recognize that such causation is an oversimplification. 'Welfare', as mentioned throughout this article, is meant to refer to the economic welfare of – in other words the amount of prosperity – individuals. 'Global welfare', in turn, is meant to refer to the aggregated economic welfare of individuals without regard to frontiers between nation-states. Cartels that occur purely between nations, such as

¹⁶⁹ Employing an eclectic approach to competition research has some past success, too. See *inter alia* Virtanen (1998); and Kuoppamäki (2003), pp. 242–296

¹⁷⁰ See e.g. Erixon (2018); and Tomohara & Takii (2011), pp. 511–521.

¹⁷¹ See e.g. Schilling (1996); and Weiler & Haltern (1996).

the cartel between oil-producing nations (OPEC) are excluded and instead the focus is placed on the export cartel conduct of entities that are subject to domestic competition laws. The focus of this article is export cartels exclusively, meaning that domestic cartels are not. International cartels are addressed to the extent that their conduct affects markets other than their own domestic market.

The guiding assumption of the article forecasting possible future paths for international cooperation in antitrust is that whatever actions major economic powers – the US, the EU, and China¹⁷² – decide to employ, they will significantly affect the kind of cooperation undertaken by other nations in the world in trade policy generally as well as in competition policy as a part of it. Collectively, said three regimes account for over 60 percent of the global economy and are all major economic powers.¹⁷³ This is, in part, based on the argument that an overlapping consensus of major powers of a certain area could enable the possibility of deeper cooperation in such area.

The fourth and final article provides an illustration of the key synthesis of the dissertation. It builds on the previous articles in the sense that it is focused on solutions, whereas the previous articles were more geared towards identifying issues and the limits to possible solutions. Answering its principal research question – how to better incentivize firms to comply with competition law – requires drawing from disciplines beyond legal studies. Research – a large proportion of which is empirical work – in the fields of psychology, sociology and behavioral economics, in particular, complement the otherwise largely doctrinal work. It intentionally disregards potential practical challenges associated with multilateral solutions generally, and also those associated with novel proposals. Instead, it attempts to help set a fresh course in the related contemporary discourse.

3.3 Sources

The sources are a mix of primary and secondary sources. The dissertation has an underscored emphasis on actions and inactions on a cross-border and international level. This results in national legislation and legal praxis-based sources being in a less significant role than perhaps is common in legal scholarship otherwise. Instead, the main primary sources consist of intergovernmental trade agreements and treaties, transgovernmental or supranational soft law recommendations and guidelines, and the more general norms and standards of international antitrust that one can deduct from them. An important source consists of political speeches and

¹⁷² References to ‘major powers’ are a consistent reference to these three throughout the article.

¹⁷³ The World Bank (2019).

other official press releases. The aforementioned list of sources is complemented by a broad base of relevant literature from Europe, the US, and beyond. The intention has been to keep with the general tradition of the field in question.

Finding sources pertaining to China was particularly challenging given both the short existence of Chinese competition law and policy and further complicated by language barriers. This challenge was luckily partially mitigated by an interview with a Chinese competition law expert, who was also one of the persons involved in originally drafting China's Anti-Monopoly Law.

Empirical research is referred to at several instances. While the dissertation itself is not based on empirical work, the work previously done by economists and psychologists has been instrumental in helping to grasp both the magnitude of negative externalities that the incoherence of international antitrust produces and the impact of ways to reconcile them meaningfully.

4 Summary of Articles

As a part of this dissertation, I have written a total of four articles that have each been separately published in peer-reviewed journals.

The articles participate in and contribute to the current dialogue on international antitrust. They concurrently form a sequenced entity that begins with identifying and framing the issues that trouble international antitrust, moving on to proposing reasoned alternatives for improving the *status quo*.

This chapter contains a summary of each of the articles, which is supplemented by additional reflection. Full length versions are presented at the end of this dissertation.

4.1 What Extraterritorial Application of Competition Law Means for MNCs

This article examines the legitimacy and breadth of extraterritorial application of competition law and considers its main implications for multinational corporations (MNCs).¹⁷⁴ The focus is on the extraterritorial application of competition law in those situations where a specific action, event or occurrence neither takes place within the specific territory, nor is committed by nationals of the said territory.

Several competition law regimes around the world, including the EU and the US, have enacted rules allowing their respective authorities to apply their own competition laws to activities occurring outside of their region's borders, that is extraterritorially.¹⁷⁵ MNCs are significant players in the global marketplace and are involved either directly or indirectly in a large share of the business being carried out in the world of today.¹⁷⁶ As a result of the extraterritorial application of

¹⁷⁴ A multinational company can be defined as a corporation that has its facilities and other assets in at least one country other than its home country. See: <<http://www.investopedia.com/terms/m/multinationalcorporation.asp#ixzz29vxM7ntZ>>.

¹⁷⁵ Bradford et al. (2019).

¹⁷⁶ E.g. Global value chains coordinated by MNCs account for some 80 per cent of global trade (UNCTAD 2013).

competition law, MNCs face the challenge of concurrently adhering to the rules and regulations of even more jurisdictions than otherwise.

There are a number of objectives for the extraterritorial application of competition law. First, reaching export cartels, which are generally not prohibited in the state where the export cartel takes place, unless it affects competition in the said state's market.¹⁷⁷ Second, preventing a competition policy 'race to the bottom', which translates into seeking the jurisdiction which least restricts a company's operations or projects.¹⁷⁸ Third, states with established traditions in competition legislation, such as the US and the EU are likely to prefer exporting their own competition laws and procedures in situations where multilateral options would require compromises.¹⁷⁹ Finally, gaining better access to foreign markets is likely also a goal for the extraterritorial application of competition law, although market access is arguably not (or at least should not be) a goal of competition law.¹⁸⁰

Legitimacy may be drawn from a nation's desire to protect the economic wellbeing of its citizens.¹⁸¹ In terms of legality, generally recognized international law often actually considers that such extraterritorialism is a part of the 'territoriality principle' inasmuch as a certain act affects a certain territory.

Enforcement, however, presents a practical problem. The assistance of another state is needed, since extraterritorial application of competition laws occurs, by definition, beyond the affected state's borders.¹⁸² *Sweeney* argues that nations are likely to refuse requests for cooperation.¹⁸³ Further, no relevant multilateral treaty exists to prevent refusal, which renders it quite arduous for officials to ensure efficient and consistent enforcement. *Sweeney* further suggests that the lack of information sharing is due to a lack of trust and that states may not be convinced

¹⁷⁷ In the US, cartels are traditionally prohibited *per se*, but a number of exceptions exist, one concerning export cartels under the Foreign Trade Antitrust Improvements Act. In the EU, Article 101 of the Treaty on the Functioning of the European Union (TFEU) bans cartels, but based on the effects of the cartel on the common market. A pure export cartel where effects occur mainly outside the EU would not likely be subject to this Article.

¹⁷⁸ *Sweeney* (2007), pp. 47–48.

¹⁷⁹ *Ibid.*, pp. 46–47.

¹⁸⁰ *Whish & Bailey* (2012), p. 494. An example of this may be found in the case concerning photographic paper and film in Japan, where the USA argued that Japan treated imported film and paper less favorably by enacting certain laws and regulations affecting the sale and distribution of imported photographic film and paper and requested that a panel under the WTO be established. Such a panel, called the Dispute Settlement Body did not, however, find in favor of the USA's arguments (WTO 1998).

¹⁸¹ *Sweeney* (2010), pp. 221–222.

¹⁸² *Inazumi* (2005), pp. 21–22.

¹⁸³ *Sweeney* (2007), p. 82.

that the opportunity for information sharing is worth the downside of communicating confidential information of their citizens abroad.¹⁸⁴ In any case, the current situation is far from predictable for MNCs.

Despite these enforcement challenges, the EU and the US have applied their competition regime on an extraterritorial basis on multiple occasions.¹⁸⁵ Many other nations have the possibility to do so as well, based on their current domestic competition legislation. Although most nations may not have taken advantage of the possibility, its mere existence places a great burden and a negative externality on multinational corporations and, albeit indirectly, on the global community.

Extraterritorial application of competition law leads to the competition laws of multiple nations potentially being applicable concurrently, while their substance may be conflicting.¹⁸⁶ It damages the coherence of jurisprudence by allowing competing legal doctrines to apply simultaneously within a single jurisdiction.

The main implications for MNCs are twofold: increased competition compliance cost from divergent substantive regimes as well as an additional burden from multiple notification and other divergent administrative requirements. To consumers, these will inevitably translate into higher-than-necessary prices and less investment in new markets due to the related burden and uncertainty.¹⁸⁷

Nations understandably desire a comprehensive method that allows them to be able to ensure effective competition within their territory. However, from the perspective of a single business – which creates said competition in the first place – the current arrangement is far from optimal.

This article presents a concrete problem that results from a sub-optimal state of international antitrust. The following article concerning export cartels continues by presenting a further, yet interlinked, problem, since a key justification for the existence of the extraterritorial application of competition law is in aiming to address foreign export cartels.

¹⁸⁴ *Ibid.*

¹⁸⁵ See *inter alia* Ahlström Oy and others v. European Commission (1989); Gencor Ltd. v. European Commission (1999); Hartford Fire Insurance Co. v. California (1993); and United States v. Aluminum Co. of America (1945).

¹⁸⁶ A topical, albeit non-competition-related, example is the attempt to apply US trade sanctions extraterritorially, but which the EU has countered by issuing Council Regulation (EC) No. 2271/96 of 22 November 1996 (as amended), which expressly prohibits companies of member states from complying with such US extraterritorial sanctions regulation.

¹⁸⁷ Kovacic 2003, pp. 309–310.

4.2 Export Cartels and the Case for Global Welfare

Export cartels are a trade measure whose aim is to give exporters of a certain nation an advantage in world trade by – either explicitly or implicitly – exempting conduct to the extent that its effects do not harm domestic markets. This includes cooperation that otherwise might be prohibited as a hard-core cartel if the international dimension was omitted. There is thus a gap in international antitrust rules when it comes to export cartels – at least in principle. This article’s interest lies in the question of why this issue remains unresolved while the *status quo* is still clearly less than desirable in terms of global welfare.

Originally, the intention of such export cooperation is said to have been to balance the detrimental effects of cartels then present on the buyer-side in the importing market, when competition enforcement in such an importing nation did not exist.¹⁸⁸ Problems arise, however, when many nations begin to simultaneously enforce competition legislation and still maintain exemptions for export cooperation. Also, global welfare is not a zero-sum game; thus, improved conditions for one do not inevitably mean respectively worse conditions for the other. There are a number of known export cartels, originating in a number of nations. These include *inter alia*, the vitamin C cartel in China,¹⁸⁹ the American soda ash cartel,¹⁹⁰ Ghana’s cocoa bean cartel,¹⁹¹ and the potash cartel between companies of Canadian origin.¹⁹²

The impact of export cartels is a highly debated topic. It is still somewhat unresolved, partly owing to the dearth of reliable and comprehensive empirical data, which is largely due to most nations having chosen to implicitly allow export cartel activity, which requires no official registration and thus often operates undetected.¹⁹³

It appears that the harm of an export cartel largely depends on its market power.¹⁹⁴ *Jenny* argues that cooperation in export cartels may well be partially procompetitive, but may also partially be conduct that would be classified as hard-

¹⁸⁸ See Sweeney (2010), pp. 57 & 201.

¹⁸⁹ Chinese Vitamin C manufacturers have fixed prices regarding sales into the United States, in 2013. See e.g. Barbosa (2013).

¹⁹⁰ The export cartel involving the American Natural Soda Ash Corporation (‘ANSAC’), an association formed under the Webb-Pomerene Act.

¹⁹¹ The Ghana Cocoa Board, a government-controlled institution controls the price of cocoa beans in Ghana.

¹⁹² Canpotex Limited handles the exports of the majority of the Canadian potash industry. See also Jenny (2012) for an analysis about this export cartel.

¹⁹³ See, however, Levenstein & Suslow (2007) for an interesting analysis on US export associations under the Export Trading Act.

¹⁹⁴ Sweeney (2007), p. 89; Jensen-Eriksen (2013), p. 1090.

core collusion in cases where the effects hit the domestic market instead of being directed elsewhere.¹⁹⁵ It is not likely necessary to consider that such a combination of cooperation is inevitably and inherently essential, specifically in an export context. Rather, it would make sense to treat such combined cooperation as it would be treated if the effects were to occur in the domestic market.

There are a few challenges in embracing a common solution concerning export cartels. First, a claim that the benefits of export cartels outweigh their possible negative effects and that they enable exporting entities to reach markets they would not be able to reach otherwise. This is likely most relevant in cases where the receiving nation's markets do not have an adequate level of competition law and related enforcement and, as a result, local markets are distorted to the extent that importing entities are in need of something to help countervail such distortion, such as export cartels. However, it is not at all clear that such access requires cartel-like collusion to succeed, as discussed above.¹⁹⁶

Second is protectionism, which may manifest itself in a number of ways, from favoring so-called 'national champions' to resisting any international agreements that may reduce national sovereignty and other such conduct in the name of national welfare. This encompasses several separate, yet interrelated issues. The common denominator being that there may be situations in which a nation finds itself facing a 'prisoner's dilemma' where unilaterally altering its stance towards export cartels may not make sense – particularly if the nation is a net exporter with only a few key industries.¹⁹⁷

Third, monitoring and enforcing a multilateral rule on export cartels would be challenging, since it would inevitably transfer a part of a nation's sovereignty and structuring such enforcement would be arduous. Finally, there is a general (dis)belief in a market economy model, which particularly historically has prevented further cooperation in this area.

Export cartels may be used as a way to promote a nation's important industries, in order to increase employment and to boost such a nation's economy. In order to induce nations to support change, it is likely necessary to include some countervailing benefits.

Proposed resolutions often include removing special treatment and instead advise to prohibit anticompetitive conduct of export cartels on equal grounds as would be done in cases of domestic cartels. Even total bans on export cartels have been proposed.¹⁹⁸ Further, a number of trade-related resolutions have been

¹⁹⁵ Jenny (2012), p. 101.

¹⁹⁶ *Supra* at 195.

¹⁹⁷ Sweeney (2010), pp. 70–71.

¹⁹⁸ See Messerlin (1994), pp. 2–3.

proposed, some proposing a revamp of the WTO anti-dumping rules to apply to overcharges or utilizing innovative interpretations of the GATT to encourage states to act in the collective benefit. The author feels that perhaps the simplest and the most realistic way to achieve substantive progress would be to couple export cartel restrictions with compensatory payments or tariff reductions of some form, in order to incentivize net exporting nations to act in a manner that would otherwise conflict with their nation's welfare.

Cartel conduct should not be treated in varying ways based on where the effects occur. After all, procompetitive cooperation would likely continue to be viewed as such, while 'hard-core' restraints, whose object is restraining competition, could be better minimized than today. In the case of global welfare, assumptions regarding the adverse effects of cartel conduct are valid irrespective of where the effects happen to occur.

It is noteworthy that certain types of cooperation between exporting entities may well possess procompetitive elements. Thus, a blanket ban on such cooperation would not be an improvement. Instead, a resolution would be to remove the special treatment that export cartels have thus far enjoyed. Only this would truly allow for more fair and consistent international competition policy, to the extent that the issue of export cartels is concerned. For the time being, however, reaching a comprehensive multilateral agreement seems beyond reach. This should not, however, be seen as the only available avenue towards progress.

Export cartels and the extraterritorial application of competition law are longstanding problems for which a resolution still eludes the international community. Development requires conscious effort and any true global improvement needs the support of major economic powers.

4.3 Convergence, divergence or disturbance – How major economic powers approach international antitrust

This article attempts to understand how the driving forces of the global economy—the EU, the US, and China—view and approach international antitrust. This is done by analyzing their recent stances as well as longer trends in their actions and inactions in terms of international cooperation on competition issues. The guiding assumption being that whatever actions such major powers decide to employ, they will significantly affect the kind of cooperation undertaken by other nations in the world in trade policy generally, as well as in competition policy specifically.

Arguably, the mentioned three major powers are not the only jurisdictions that impact international trade and competition policy. Nations such as Brazil, India, and Japan have economies that are enormous in size. Also, both Australia and

Canada are nations which have significant relevance and impact internationally and whose competition regime is arguably more developed than China's. The decision to focus on China in addition to the traditional dichotomy of the EU and the US is however justified. China is on an entire different level in terms of its potential to impact international trade policy and – I argue – that potential extends to competition policy, too, should China so desire. This potential to influence competition policy would not necessarily be so much based on its refinement emanating from a mature regime, but rather from its sheer economic power and dynamic.

The goals of each of these three major powers are partly similar in relation to international cooperation and competition policy specifically: each of them has an interest in the health of their respective economy. There are differences, though. The US is the most explicit about its aim in securing the position of US corporations in foreign markets and has taken great proactive measures in furthering this goal, most recently concerning China. On the other hand, China, has traditionally been a follower in terms of international cooperation in competition policy.¹⁹⁹ Despite being a major power, it has not attempted to engage internationally to the extent of the US. However, its emphasis too has been quite strongly on trade issues, particularly on facilitating export activity from China as well as encouraging foreign investment into China.²⁰⁰ The EU has the broadest approach – its political rhetoric seems to aim to benefit not only EU corporations, but Europeans by and large. The consumer welfare element seems more direct than in the rhetoric of the US or China.²⁰¹ Also, the EU treats international cooperation in competition issues as a way of partly harnessing globalization in general. This taps into the broader scheme of the functioning of global markets that also involves positions on other related matters, such as subsidies, tax avoidance, and promoting innovation as a whole.²⁰²

The major powers begin to differ more when looking at how they attempt to reach their goals. The US is by far the most aggressive. It has several times applied its antitrust laws extraterritorially when its markets have been impacted by foreign conduct – acts which risk sparking trade friction.²⁰³ Cooperation in enforcement is today not uncommon for the US enforcers, particularly with more mature competition law regimes, and it appears to be becoming even more frequent.²⁰⁴ The

¹⁹⁹ Hao Qian (2017).

²⁰⁰ Xi Jinping (2017).

²⁰¹ Vestager (2017).

²⁰² *Ibid.*

²⁰³ E.g. *Hartford Fire Insurance Co. v. California* (1993); and *United States v. Aluminum Co. of America* (1945); See also Wagner-von Papp (2012), pp. 23–37.

²⁰⁴ US (2015).

EU is also active, but in a more cooperative sense – it is by far the most convinced about deepening international dialogue and cooperation, including both substantive and technical convergence, both bilaterally and multilaterally. China, on the other hand, tends to favor minimal international cooperation and acts more on a reactive than proactive basis. Each of the major powers has, however, generally increased its international cooperative efforts compared to previous decades, particularly at the operative level.²⁰⁵

There are a few key reasons for the above-mentioned differences: First, each of the major powers has a markedly differing past experience with competition law and policy both domestically and internationally. While the American antitrust experience is characterized by a notion of uniqueness and global leadership, China's experience has been that of a socialist closed economy, whose logic was not concerned about maximizing welfare through rigorous competition between firms.²⁰⁶ By contrast, the evolution of competition law in the EU has, in part, a strong utilitarian objective – aiding the creation of a functioning single market that transcends the borders of its Member States. Second is a sense of exceptionalism that is present in all three major powers, but in differing ways: China emphasizes its absolute sovereignty; the EU, in turn, emphasizes its social values combined with the market economy as well as its inclination for multilateral cooperation; and the US simply often views itself as the center of the antitrust universe, given its long tradition in the field.²⁰⁷ Finally, the major powers' economic logic differs. The major powers have differing views on how to structure their respective national economies. A notable diverging point is the optimal level of state intervention, with the US and China at opposite ends of the spectrum, and the EU somewhere in between.

Despite the above, the major powers do have an interest in cooperating internationally in competition issues. The EU and the US appear to desire further convergence of practices and substantive thinking. Officially, China does not appear to have a strong stance on convergence, but recent practice shows that it too has engaged in an increasing amount of dialogue on competition matters. Indeed, there is an increasing amount of cooperation in relation to investigating international cartels, referring to cartels that operate in several nations concurrently and which seek to cartelize them.²⁰⁸

Further, the competition authorities of major powers have an incentive to ensure that merger control procedures affecting mergers benefiting their respective

²⁰⁵ Gerber (2010), p. 195–196 & 334.

²⁰⁶ *Ibid.*, pp. 224–226.

²⁰⁷ *Ibid.*, pp. 100 & 331.

²⁰⁸ OECD (2012), p. 14.

regions are as internationally streamlined and coordinated as possible given the number of multinationals that originate from each of their respective territories. Nonetheless, there are a few hurdles for streamlining international merger control. First is the dichotomous leadership of the US and the EU systems, with no single leading standard to become the global standard. Second, there are clear differences in nations' scope of merger review that may arise from partially differing sets of goals should they attempt to address public interest or other non-competition related concerns concurrently with competition concerns.²⁰⁹ In any case, the aggregate cost of a fragmented system of international merger control is arguably higher than it would need to be. Improved, more structured coordination could help, as discussed further in Chapters 5 and 6 below.

Perhaps the greatest substantive difference is in terms of the treatment of unilateral conduct. This divide has been researched at length and is due to deeply rooted differences in philosophy, institutional arrangements, and procedure.²¹⁰ Unilateral conduct has also been a particularly topical theme in recent years, given the significance of the digital economy generally and the related characteristics of big data and network effects that are conducive to concentration. The EU has taken a much more interventionist approach than the American, or Chinese agencies have towards unilateral conduct of key digital platform firms, such as Amazon, Google, and WeChat, and is the only regime of the three to have found serious violations.²¹¹ It appears that there is no simple resolution in sight concerning unilateral conduct.

It is considerably easier to formalize cooperation in procedural aspects than substantive analysis, as it is a matter of streamlining administrative process instead of finding a consensus on the substantive criteria by which mergers are reviewed. Synchronizing and streamlining procedure is in the mutual interest of all involved, whereas cooperation on substantive review might well involve undesirable compromises. Coordinating timing and remedies is an ever-increasing part of inter-agency case cooperation. There is a demand for this, in trying to avoid unnecessary burden on businesses,²¹² and there does not appear to be any true opposing force within the major powers.

Discussing state-imposed restraints on competition is also relevant, since reducing these is on the agenda of international competition issues for all three major powers. The US and the EU are both concerned about discriminatory

²⁰⁹ Sokol & Blumenthal (2012), p. 329.

²¹⁰ Fox (2014); Kovacic (2008); Cambell & Rowley (2008); Gifford & Kurdle (2015), pp. 29–34.

²¹¹ Case 40462 – Amazon Marketplace; Case 40099 – Google (Android); Case 40411 – Google (AdSense); Case 39740 – Google Search (Shopping). See also Kovacic (2018; Mateus (2019); and Cao (2020).

²¹² Capobianco et al. (2015), pp. 2–4.

treatment abroad, albeit their precise emphasis is different, as discussed above.²¹³ China, too, is interested in ensuring market access for its companies in foreign markets and is a proponent of free trade and open markets in its political rhetoric.²¹⁴ The EU appears to be the most interested of the major powers, if not the only one, in a more stringent system of less subsidies than the WTO rules allow.²¹⁵ This is logical, since it has sophisticated state aid rules that serve an important internal role in ensuring the functioning of the EU's internal market, which aim at "leveling the playing field".²¹⁶ Nevertheless, by-and-large, it seems that the WTO subsidies rules will continue to be the primary framework for subsidies in the foreseeable future.²¹⁷

The major powers all appear to acknowledge that there is a need for mutual understanding, coordination and cooperation in competition matters in order to facilitate international trade. However, they seem to lack the appetite for transformative or otherwise grand developments in international antitrust. They seem rather content in primarily deepening their relationships with key trading partners instead of investing time and effort multilaterally. The difference in maturity between more developed regimes and their newer counterparts is, however, still enormous, which sets a limit on the possible forms of cooperation.²¹⁸

Deeper cooperation in procedural and technical areas, consisting of measures that allow nations to reinforce their possibilities to act extraterritorially and increase agency efficiency does show potential. Such measures could include better information sharing and coordination in investigations as well as technical assistance.²¹⁹ Most – if not all – of which cooperation would likely be on a non-binding, voluntary basis.

The article's findings allow consideration of how to improve coordination and the structure of cooperation internationally. Further structure in voluntary cooperation – *inter alia* in streamlining procedural matters – could bring added clarity and consistency. A perhaps overlooked actor in antitrust governance and

²¹³ The US is focused on ensuring that its companies are treated fairly and in a transparent manner in foreign markets, while the EU is more vocal about imposing limits on subsidies that nations grant its companies – an attempt to help avoid competitive distortions that would affect not only foreign markets, but inevitably the EU Single Market as well.

²¹⁴ Xinhua (2011).

²¹⁵ See e.g. European Commission (2017); and Blauburger & Krämer (2013).

²¹⁶ European Commission (2020B).

²¹⁷ See e.g. Singh (2017).

²¹⁸ Capobianco et al. (2015), p. 18.

²¹⁹ See Kovacic (2019).

enforcement is the firm and the potential for both added convergence and support in enforcement that multinational firms could contribute.

4.4 The Public Role of Private Firms in Competition Enforcement and How to Incentivise It

This article argues that the current approach towards antitrust enforcement is too narrow and, as a result, competition deterrence is not as efficient and effective as could be. In proposing an improvement, this article takes a broader view on the ways to improve how both the letter and the spirit of competition law is followed. Its focus is the main actor in competition law – the firm – and particularly on how to better induce firms to compete and, at the minimum, avoid anticompetitive conduct. Firms should be seen not only as potential infringers, but also as valuable partners in ensuring competitive markets.

A broader approach encouraging compliance could improve the patchy existence of international antitrust – one consisting of several gaps and overlaps. This is – in part – due to diverging competition law enforcement among NCAs. Most nations have competition laws on paper, but enforcement is often inconsistent or otherwise lacking. These enforcement gaps exacerbate the inconsistency of international antitrust and may result from a number of reasons, including a lack of resources, experience or formal jurisdiction. An improved impetus for firms to maintain robust compliance programs, self-police and to be transparent about their actions could help make up for part of the deficit.

The simplest policy approach favors the negative incentive²²⁰ of financial or criminal sanction for undesired – that is illegal – conduct. Depending on the situation, these can be either substituted by or supplemented with positive incentives – rewards that encourage the conduct that is desired by policymakers. These might be actually paid out – such as in many subsidies – or alternatively they may be reduced from a sum owed by the firm, *inter alia* in relation to taxes or fines. Finally, there are hybrid (also known as ‘carrot with stick’) incentives, such as reporting obligations. In the case of reporting obligations specifically, they are typically either on a ‘comply-or-explain’ basis – meaning that the firm explains if it deviates from the prescribed obligations – or on a ‘comply-and-explain’²²¹ basis, requiring a public explanation of the ways in which compliance is reached in addition to compliance itself.

²²⁰ Also known referred to as disincentives, referring to their deterrence function.

²²¹ Also known as ‘comply-or-explain 2.0’. See e.g. the South African King Report on Corporate Governance for an example.

Policymakers have a wealth of tools to impact a firm's conduct using incentives. The most varied examples of policymakers creatively using incentives to induce compliance can be seen in the realm of ESG issues. The following lists a few of them:

- Rewarding desired conduct, including subsidizing, granting tax reliefs, and fine reductions.²²²
- Increasing transparency through increased reporting obligations.²²³
- Emphasizing sustainability in government investing and procurement.²²⁴

While, *inter alia*, former Commissioner Almunía has emphasized the importance of fostering a culture of competition compliance,²²⁵ there has been surprisingly limited focus by NCAs and policymakers on how positive incentives could be used in the context of fulfilling the goals of competition policy. A notable exception is the near-universal protection of intellectual property – a clear reward for prospective authors and inventors in exchange for their efforts.

The question then becomes, what can and should be done to improve the current state of affairs. First, raising general awareness in society about anticompetitive conduct and its detrimental effects helps – in particular by strengthening moral condemnation towards competition law violators.²²⁶ Second, society should place more emphasis on a firm's attempts (or lack thereof) to prevent such misconduct.²²⁷ The latter becomes even more relevant considering the shift in general public governance towards so-called co-governance or interactive governance where other actors in society are given a more pronounced role, as opposed to more hierarchical, state-driven governance, as referred to within governance theory.²²⁸ The article continues by presenting and discussing two distinct examples of how positive incentives could be employed in order to improve competition law compliance.

First, it discusses the potential associated with rewarding firms for maintaining genuine compliance programs. This approach would mark a shift in emphasis from *ex post* detection of already-occurred incidents to a system which values firms' *ex ante* prevention efforts. Effective compliance programs alleviate some of the

²²² See UK Bribery Act, Chapter 7 Section 2, and US Federal Sentencing Guidelines, Chapter 8; for a deeper look into the US approach, see Fiorelli & Tracey (2007).

²²³ Sustainserv (2015).

²²⁴ Chasan (2018); and Fink (2018).

²²⁵ Almunía (2010).

²²⁶ Sokol (2012), pp. 216–220; OECD (2011) 13.

²²⁷ European Parliament (2011), para 29.

²²⁸ See e.g. Kooiman (2003) and Kooiman (1993).

burden of competition authorities and help extend the reach of enforcement. From a firm's perspective, such a reward works as an insurance policy – it will help you, should you need it. Such an approach would also constitute a shift away from a strict liability system towards a more duty-based system relying on negligence in the context of competition infringements.²²⁹ However, this should not replace the current approach but rather supplement it, since mixed (also known as composite) liability regimes have been shown to generally be more efficient than systems composed of only either of the two.²³⁰ Also, importantly, rewarding compliance programs as fine reductions would not necessarily be as costly for society as traditional positive incentives, since the payout would only occur in conjunction with infringement cases, the number of which is limited.²³¹

Challenges do exist. It is difficult to define what an effective or diligent compliance program should consist of.²³² It is equally difficult for judges to objectively ascertain whether a compliance program has been effective – especially since they will be doing so in cases of infringement. Also, it is argued that requirements for certain types of compliance programs may impose an undue burden on small and medium sized firms, whose resources are inevitably limited.²³³ Finally, there is the principle of rewarding malicious conduct that some policymakers struggle with conceding.²³⁴ However, it is difficult to assign much weight to the strength of such a principle in jurisdictions that have adopted leniency regimes. These may, after all, relieve the whistleblower entirely of fines. Further, rewards should not be seen narrowly as to benefit wrongdoers, but as a potential cost of maintaining a system that may generate – possibly substantial – increases in prevention and deterrence.

Second, the paper discusses the implications if firms were to be required to report compliance efforts, a form of a form of government 'nudging' – that is, aiming at steering firms in desired ways.²³⁵ Its purpose is to empower the firm's shareholders and general public to be able to influence the firm's efforts (or absence thereof) through dialogue, but which concurrently has the potential of improving a firm's reputation and governance practices.²³⁶ Pressure put on firms to

²²⁹ Abrantes-Metz & Sokol (2014), p. 5.

²³⁰ Arlen & Kraakman (1997), p. 717; See also Sokol (2013), pp. 820–822.

²³¹ Dari-Mattiacci & De Geest (2010), pp. 3–4.

²³² Langevoort (2002), pp. 113–114; Krawiec (2003), p. 487; Wellner (2005), pp. 497–498; and Wils (2013), pp. 19–20.

²³³ Almunía (2010).

²³⁴ See e.g. *ibid*; and Finch (2018).

²³⁵ Sunstein (2014).

²³⁶ The Financial Times Lexicon. Available at: < <http://markets.ft.com/research/Lexicon/Term?term=comply-or-explain> > (last accessed 13 March 2020).

report so-called non-financial metrics, such as sustainability and human rights issues, is increasing year after year. Recognizing that competition compliance does not exist in isolation from other compliance efforts within a firm, extending reporting obligations to competition issues would be an opportunity to help improve competition compliance.

Interestingly, firms *de facto* often seem to comply with guidelines, standards and procedures, even if they are on a comply-or-explain basis and in fact, *de jure* voluntary.²³⁷ Such adoption may lead to increased credibility externally and better comparability with peers. Added transparency could be particularly useful in situations where authorities' resources are constrained, since the public and NGOs would be empowered by having more information about firms. I would contend that this would be of particular use in jurisdictions where competition enforcement faces the most constraints, such as in most developing countries and other regimes with younger competition authorities.

Developing competition compliance incentives presents significant opportunities for improving the state and consistency of international antitrust, while leaving national sovereignty – the usual sticking point in deepening international antitrust cooperation – untouched. Structurally, a transgovernmental opt-in voluntary framework could be viable – particularly considering the recent positive experiences within the ICN.²³⁸ As long as anticompetitive conduct continues to occur, all tools that can improve the functioning of competitive markets are worth considering. A shift towards an 'enabling environment' in competition policy – appreciating the partnership role of firms – could be useful, and added focus towards incentivizing preventive measures has merit as a tool in doing so.

²³⁷ Ioannou & Serafeim (2017), pp. 4–5.

²³⁸ ICN (2019).

5 The Regime Complex of International Antitrust and Its Potential

5.1 Trends in global law and governance

To obtain a fuller image of the as-is state of international antitrust, it is worth discussing what is termed ‘global law’ and its current state. Traditional international law has relied on two core pillars: intergovernmental cooperation and supranational organizations, both organized via binding treaties. Today, in terms of treaties, bilateralism reigns supreme. This has created the so-called *spaghetti bowl effect*, coined for the *status quo*’s complexity.²³⁹

The existing multilateral treaties by which international organizations have been formed face severe challenges, too. This is due, in particular, to inherent horizontal and vertical conflicts. The former concerns the distributional issues that may cause friction between nations, while the latter concerns the agent-principal relationship of international organizations and the nations that have founded them.²⁴⁰ These conflicts intersect and are inherently challenging to fully reconcile.²⁴¹ Further, the world order is becoming markedly more polycentric than it was when most of the world’s key international organizations were created. The internal power balance may thus not reflect the reality of today, unless the relevant organizations are able to renew themselves. Indeed, there have been calls for organizations, such as the WTO and the UN, to reform.²⁴²

Global law spans beyond traditionally conceptualized international law. *Husa* argues that legal globalization refers to law of non-state governance systems, ie. those norms whose development is beyond the purview of any given state.²⁴³ Recently, there has been great interest in attempting to conceptualize a kind of

²³⁹ Bhagwati & Krueger (1995).

²⁴⁰ Bradford, et al. (2018).

²⁴¹ *Ibid.*

²⁴² European Commission (2018); UN United to Reform <https://reform.un.org/>.

²⁴³ Husa (2018), p. 33.

global governance, which is sometimes called ‘global administrative law’. It attempts to encompass principles akin to those of domestic administrative law – concerning due process, transparency, etc.

In analyzing this developing field, *Kingsbury* argues that global administrative law does not fulfill all criteria of the concept of law, as it ‘*lacks political and institutional support at global level*’.²⁴⁴ Instead, it is interconnected with specialized regimes operating internationally. In such a case, pluralism should not be defined as a set of conflicting norms, but instead as a ‘multiplicity of diverse communicative processes in a given social field’.²⁴⁵ Such a situation concerns law, but certain actions are concurrently hard to categorize under the binary dichotomy of legality and illegality.²⁴⁶

The above characterization is likely true for the broader concept of global law, as well as for international antitrust. Indeed, the concept of global law appears to include redefining basic legal categories.²⁴⁷

Pollack and Shaffer have identified three models in which such international governance takes place: intergovernmental, transgovernmental, and transnational.²⁴⁸ Intergovernmental cooperation is a manifestation of traditional diplomacy – interaction between the official positions of nations. Transgovernmental cooperation, in contrast, takes place between non-elected bureaucrats – often in voluntary networks-based settings, such as the ICN and the OECD. While mostly technocratic, such cooperation does often *de facto* play a material role in shaping international norms and standards. Lastly, transnational governance refers to interaction which welcomes the participation of a broader base of stakeholders, such as firms and non-governmental organizations. Ideas of global administrative law might arguably help improve the legitimacy of international fora from the viewpoint of their stakeholders.²⁴⁹

From this conceptualization, one can deduce a drastic shift in international cooperation from intergovernmentalism towards transgovernmentalism – that is, one that emphasizes international voluntary networks over binding treaties. Within international antitrust, this is exemplified by the failure of the WTO in its attempt to codify international norms of antitrust, while voluntary networks, such as the ICN and the OECD, have been far more successful in their approach. *Slaughter* argues that such transgovernmental networks have proliferated greatly in the past

²⁴⁴ Kingsbury (2009).

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ Husa (2018), p. 34.

²⁴⁸ Pollack & Shaffer (2010), pp. 287–306.

²⁴⁹ Krisch (2006).

few decades, not only within international antitrust, but indeed much more broadly.²⁵⁰ Such networks can be described as international institutions linking various governmental actors, whose informal and voluntary way of working has been a distinct departure from traditional intergovernmental diplomacy. Although sometimes orchestrated²⁵¹ by ‘legitimate’ actors such as states or international organizations, such networks have been criticized as lacking in democracy, as they are frequently devoid of political oversight, usually consisting of unelected officials, as well as – at times – of proper transparency.²⁵² In any case, the influence and subsequent importance of transgovernmental arrangements is noticeable.

Another trend concerns the rise specialized rules and rule-systems. The proliferation of transgovernmentalism has had repercussions on the pluralism of international law by further solidifying it. While pluralism has earlier arguably been more about the pluralism of state positions, now it is more pronounced in those of substance-related regimes.²⁵³ This can be seen as a diffusion of power – the participants of such regimes often tend to be unelected government officials, private sector firms, or non-governmental organizations. At the same time, the involved persons tend to be highly specialized experts. For instance, as *Koskenniemi* argues, very few experts likely consider themselves part of the public law tradition oriented towards an idea of global federalism.²⁵⁴

A third trend is that of increased polycentricity. Recent years have seen the relative decrease of US hegemony and the almost simultaneous rise of China, while the EU – as the world’s largest economic area – has also managed to wield its influence to significantly influence the formation of global norms and standards.²⁵⁵ The list does not end there, but rather regional powers, such as India, the Russian Federation, and Brazil appear to be increasing their relative power.²⁵⁶ The key point being that the number of rule-makers in the global space is on the rise. This can also be seen in the antitrust space with China’s growing economic power and more mature competition regimes in – inter alia – Brazil and Canada.

A key concept is that of regime complexity, a term first coined by Raustiala and Victor²⁵⁷ and which refers to ‘international political systems of global

²⁵⁰ Slaughter (2005), pp. 12–18.

²⁵¹ ‘Orchestration’, in this context, refers to being supported by or even coordinated by legitimate actors in an attempt to extend their influence. De Burca et al. (2013), Pp. 11–12

²⁵² Slaughter (2005), pp. 28–29.

²⁵³ Koskenniemi & Leino (2002).

²⁵⁴ Koskenniemi (2007), p.8.

²⁵⁵ *Supra* 82 and 119.

²⁵⁶ Katz (2017).

²⁵⁷ Raustiala & Victor (2004) pp. 278–279.

governance that emerge because of the co-existence of rule density and regime complexes'.²⁵⁸ Regime complexes are partially overlapping and non-hierarchical institutions that include a number of international agreements and authorities.²⁵⁹ A key element to them is a degree of rivalry through conflicting assertions of authority within a given regime.²⁶⁰ Further dissecting the concept, a regime in an international context can be referred to as a set of rules and norms governing a particular issue area.²⁶¹ As argued above, international law is increasingly fragmented into the pluralist reality of highly specialized regimes and their sets of rules. This is highly relevant for synthesizing international antitrust, as will be argued below in this chapter.

5.2 Limits of global law and governance

International law is arguably often based on an assumption that nations will honor their obligations based on concepts of *opinio juris* and *pacta sunt servanda*.²⁶² *Goldsmith and Posner* are however skeptical of this and instead present four categories – or situations – in which nations will be inclined to cooperate with others. First, in cases where nations' interests happen to coincide, cooperation is natural and mutually beneficial.²⁶³ Second, there are situations of coordination – where nations receive higher payoffs by engaging in symmetrical actions than in absence of such coordination.²⁶⁴ Third, cooperation takes place where nations see larger medium to long term benefits for themselves even if acting otherwise would be in their self-interest in the short term.²⁶⁵ Fourth, in situations where a nation holds significant influence over another state, coercion might be the chosen method of interaction.²⁶⁶ That is, *Goldsmith and Posner* argue that nations do not act based on a sense of obligation, but rather by furthering their self-interest in one or several of the presented methods.

A case in point is the WTO. It is an organization that aims at opening trade, facilitating intergovernmental trade negotiation, and resolving related disputes. Freer trade has arguably been beneficial, but more so for some nations than for others. The WTO divides nations into Developing, Developed, and Less-

²⁵⁸ Ibid.

²⁵⁹ Alter & Raustiala (2018).

²⁶⁰ Ibid, p. 9.

²⁶¹ De Burca et al. (2014) p. 7.

²⁶² Goldsmith & Posner (2005)

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

Developed – a categorization which affects their treatment concerning *inter alia* tariffs and subsidies.²⁶⁷ WTO rules were originally shaped for industrial economies with strong domestic markets and advanced firms, such as the US and the EU.²⁶⁸ These economies have been able to exert pressure on others to join a system that might actually be suboptimal for such other nations. Recent years have, however, seen nations with growing influence – China in particular – breaking WTO rules to their liking, while new negotiations within the WTO are stagnating – the Doha Round has been ongoing since 2001. In these almost twenty years, nations have instead concluded a vast amount of bilateral trade agreements, given the enduring need for coordination.²⁶⁹ This questioning of a commonly agreed framework can be seen as a manifestation of increasing polycentricity and the resulting diffusion of power.

When it comes to international law – it arguably presumes the absence of normative conflict and existing normative conflict is inherently a matter of diplomacy concerning how it is resolved or mitigated.²⁷⁰ The fact is that pluralism is omnipresent – both within national jurisdictions and between them. Given that global governance has shifted from political intergovernmental ways towards those more driven by technical experts through transgovernmentalism, relying on diplomacy is not a catch-all. Instead, international law needs to be responsive to inevitable norm collision.²⁷¹ *Koskenniemi* argues that the true question is not whether a kind of global constitutionalism or pluralism is desirable, but more about the idea that international law should regain its political dimension and not be relegated to mere functional governance.²⁷² This is about accountability, or the lack thereof – an ailment in much of the international cooperation of today and one to which ideas of global administrative law are another response.

The above, including the question of a preference for either political or apolitical international cooperation, is interesting for international antitrust as well. The political dimension has historically been problematic, while functional, operative level cooperation on a voluntary basis has been promoted as the primary mode for cooperating, especially since the WTO negotiations broke down. It is however worthy of consideration whether the reasoning and merit underlying this approach is still valid and whether there is instead an opening to re-engage at the political level.

²⁶⁷ See e.g. Singh (2015) for an analysis of the WTO's treatment subsidies and related implications for nations at various levels of development.

²⁶⁸ Subramanian & Wei (2007).

²⁶⁹ UNCTAD (2019B), pp. 16–19.

²⁷⁰ UN International Law Commission (2006), p. 25.

²⁷¹ *Ibid.*, p. 249.

²⁷² Koskenniemi (2007).

5.3 Where antitrust fits in

Let us put the above further into the context of international antitrust, especially since one can see several analogies. First, the success of organizations such as the ICN, the OECD, and UNCTAD largely represents the rise of transgovernmental networks, in line with *Slaughter's* argumentation,²⁷³ but it also illustrates the rise of technical experts and specialist regimes as key drivers of international law, as described by *Koskenniemi* and *Leino* above.²⁷⁴ At the same time, no multilateral, treaty-based 'constitutional' initiatives for antitrust issues have been made or advanced for almost two decades.

Second, polycentricity is on the rise. This is by virtue of China's economic power but also the relative maturity of non-EU-US competition jurisdictions, such as Canada, Brazil, and Australia. Polycentricity poses a novel challenge within international antitrust, since the models of cooperation have been created with the US and the EU in key positions, which risks creating tension when other nations gain in influence. This situation is not unique. Examples of such tension can be seen in other areas of international cooperation, such as the current 'Bretton Woods' international monetary order, which is under threat particularly by China-led competing initiatives.²⁷⁵ All in all, it is clear that the predominant form of cooperation has shifted.

International antitrust can be seen as a regime complex. As described above in the preceding subsection, a regime complex is a form of incoherent and non-hierarchical system that consists of multiple arrangements and authorities, several of which assert authority. In the context of international antitrust, one can see the relevant pieces of the puzzle – domestic enforcers and courts claim jurisdiction extraterritorially, thus creating rivalries. Organizations, such as the OECD, the ICN, UNCTAD, and the ICC are all transgovernmental networks working towards creating norms and standards but are in no hierarchical relation with each other. Also, there is a surprisingly large number of preferential trade agreements that contain chapters on competition – also concerning trade agreements in which neither North America or Europe are a part, at times referred to as south-to-south trade agreements.²⁷⁶ This finding is not without meaning, as it allows international antitrust to become more connected to the general theoretical ideas of analogous regimes. Regime complexes are challenging due to dubious accountability and

²⁷³ *Supra* 250.

²⁷⁴ *Supra* 253.

²⁷⁵ Le Maire (2019).

²⁷⁶ Sokol (2008A).

their instability, but they have also been argued to be flexible and encourage normative experimentation.²⁷⁷

In search of a viable path for international antitrust, one could turn to a development in public policy – that is, emphasizing shared governance. This refers to a model whereby either the legislator or the enforcer – or even both – allow non-state actors a more pronounced role, as opposed to more hierarchical, state-driven governance.²⁷⁸ This helps extend both the capacity and influence of state actors and their policy objectives, increasing their efficiency. Given the limitations of competition agencies of even the most mature jurisdictions, cooperation and partnerships driven by true incentives in the spirit of shared governance might show potential.

In concrete terms, a potential way forward could be that of further structured transgovernmentalism. Networks between competition agencies, particularly the ICN, arguably have substantial buy-in given their vast member base and its active participation. Government networks facilitate understanding and trust but also fulfil necessary coordination needs in a globalized world – in the absence of a ‘better’ option. This kind of cooperation works as a voluntary discussion forum to improve mutual understanding, but it also presents the potential to coordinate matters where a high level of consensus exists. The opt-in Frameworks the ICN has launched in recent years are examples of such a structure and seem to have support from both competition agencies and other stakeholders alike.

Concerning non-state actors, a key point is how to better include them in ways that are actually useful. The current organizations in international antitrust are mainly geared towards government officials, albeit some allow other competition experts to participate.²⁷⁹ Their efficacy could arguably be improved, should firms and NGOs be better embraced. The UN Global Compact has arguably been a major success in the realm of corporate responsibility in meaningfully engaging firms, as mentioned in Section 2.4. Building on both mentioned successes, perhaps an opt-in network for firms – similar to the Global Compact – could be helpful within international antitrust. Such shared governance could help ease tensions between trade policy and competition policy.

In any case, in order to function, advancing international antitrust cooperation should focus on bringing maximum coordination benefits with minimal intrusion into a nation’s domestic affairs. As discussed in Section 4.4 and in the underlying article, further harnessing MNCs to take on the societal role they have in

²⁷⁷ De Burca et al. (2013) pp. 11–14.

²⁷⁸ See e.g. Kooiman (2003) and Kooiman (1993).

²⁷⁹ Nb. The undersigned has acted as a Non-Governmental Advisor to the ICN during 2018–2020, appointed by the EU DG Competition.

preventing anticompetitive conduct could consequentially ease the capacity restraints of competition enforcers and – also – arguably bridge gaps between jurisdictions of varying antitrust maturity.

Structured cooperation, such as opt-in frameworks could be feasible, although binding commitments are likely to be difficult to agree on multilaterally. Such an approach could be particularly effective if combined with reporting obligations as is with the Global Compact – firms who have signed up must report annually on their efforts to comply in order to remain a member of the framework. Such comply-and-explain mechanisms are arguably effective, even if on a voluntary basis.²⁸⁰ Structured cooperation should focus on where sufficient common ground can be found, such as in procedural matters and concerning hard-core cartels. Other, more suitable fora exist for discussing points of divergence, such as how to treat firms in strong market positions, or how to address state aid and other industrial policy questions.

It is important for international antitrust to remain responsive. In the pluralist and polycentric environment that it is, norm collision will continue to occur. As such, fixed and binding constitutionalism is neither possible nor desirable, but rather ways should be found which preemptively coordinate the conduct of actors – competition agencies, policymakers, and firms alike – to avoid unnecessary conflict and to develop tools in which to reconcile and manage the remaining inevitable norm collision.²⁸¹

The topic of international antitrust should be elevated on national political agendas.²⁸² Choices about its development should be made – a common vision about its future should be pursued. The aim of the US and the EU towards convergence has been successful in building trust and in spreading ‘best practices’. However, the altered state of affairs as described in Section 2.3 calls for a revised aim, particularly on the part of major economic powers.

Alternatives to the above proposal should be analyzed against *Goldsmith and Posner’s* four C’s underlying and justifying international cooperation – coincidence, coordination, cooperation, and coercion – as described in Section 5.2. Nations will, arguably, generally act as best suits their own self-interest. This does not, in itself, restrict modes of cooperation, as long as nations consider their long-term interest. Current cooperation in international antitrust aims at coordination – that is, where participating nations directly receive higher payoffs by virtue of symmetrical cooperation, such as in TAs, but it is also partly coincidental. The key for improvement would be to shift the aim towards cooperation, as defined by

²⁸⁰ Ioannou & Serafeim (2017).

²⁸¹ UN International Law Commission (2006), para 493.

²⁸² Koskenniemi (2007), pp. 28–30.

*Goldsmith and Posner.*²⁸³ Committing to such an approach bases conduct on maximizing long-term payoffs even if acting otherwise would be beneficial in the short term – an approach which is essential for deeper cooperation and the functioning of current instruments too, such as positive comity.

²⁸³ Goldsmith & Posner (2005).

6 Conclusions of the Dissertation

6.1 General conclusions

Competition law is a complex field. It is arguably best suited to foster competition in a somewhat closed system and to address disruptions to and within said system. The cross-border realities of business however present material challenges to such a model. Trade does not stop at national frontiers, something that the growing influence of digitalization underscores. This will likely only continue, given the technological promises of Industry 4.0.²⁸⁴ As mentioned in Section 2.1 generally, this *status quo*, too, calls for both the political process to steer norm and standard creation in this space and for law to have a management role therein.

International antitrust exists, but it is a very fragmented existence. A unified supranational code would surely help address this. However, achieving such deep harmonization is not realistic and perhaps not even desirable. National differences and the resulting differing needs for economic regulation should be acknowledged and – even if left unacknowledged – it should be accepted that a single standard will not likely be appropriate for all nations concerned.²⁸⁵ As alluded to in Chapter 5 above, polycentricity and pluralism are not necessarily undesirable and – irrespectively – appear to be unavoidable in international antitrust. What is key is understanding how to reconcile conflicts and gaps within such a regime complex.

Literature about international antitrust does not, by and large, take two major changed circumstances into consideration. First, most of the world's nations now do have some sort of competition legislation. This is a sign of a general consensus on supporting a market-based economic model and, thus, most of said legislation does largely exhibit parallels toward many of what are normally considered to represent the most serious distortions to competition.²⁸⁶ The absence of competition law is no longer the problem it once was. Instead, regulatory overlaps and disparities in enforcement practices seem to be the major issues today. This calls for upgrading coordination. Second, the geopolitical power balance has shifted

²⁸⁴ See e.g. Popkova et al. (2019).

²⁸⁵ Stiglitz (2017), pp. 14–16; and Fox (2012), pp. 8–18.

²⁸⁶ Gerber (2010), p. 333.

during the past decades. With BRIC countries²⁸⁷ economies on the rise, their negotiating power in international economic questions – including competition related ones – has also arguably increased and the former power duo – the US and the EU – ought to accept that there are more informed and influential views on antitrust than before.

Politically, a noteworthy point of contention is the boundaries of competition law and whether it should regulate and protect so-called ‘public interest’ goals. These range from China’s ‘industrial policy’ that aims at favoring domestic firms to the EU’s heightened focus on discouraging vertical restraints, in order to safeguard its internal market project – not to mention sustainability and privacy concerns. Such priorities are unlikely to vanish and it is thus dubious what benefit or true coherence unified rules could even bring, particularly in the light of nations’ varying, but generally justified, interests and their unwillingness to relinquish their sovereignty – as described in previous sections of this dissertation.

The key is mutual understanding. Instead of trying to do away with differing policy outcomes or procedural differences, *Smits* rightly argues that “...emphasis should be on exposing the various arguments for and against particular solutions, and on exposing how these arguments work in different jurisdictions. Competition between arguments leads to progress because one can learn from experiences elsewhere.”²⁸⁸ The ICN has been a particularly useful forum for fostering this kind of understanding.

Cooperation in competition matters ties in with the trends and realities of international cooperation more broadly, including fluctuations in political climates. This can be seen particularly clearly in whether multilateral approaches are practically even viable or whether nations prefer bilateral agreements or looser networks-based cooperation. While the format of cooperation may vary, this does not reduce the importance of the substance of antitrust cooperation – ensuring that markets function, irrespective of where one’s national frontiers lie. In terms of the structure of international antitrust, voluntary cooperation has had an established role since the turn of the century, which it continues to have. Most formal international cooperation in competition law and policy has thus far been and still is conducted via bilateral and regional trade agreements (TAs), as well as more informally at operative, transgovernmental levels, such as within the ICN.

Perhaps surprisingly, nearly half of the TAs recently signed or ratified globally do contain provisions on competition policy. They typically contain assurances that each signatory will prohibit restrictive business practices, such as cartels, abuses of

²⁸⁷ Brazil, Russia, India, China.

²⁸⁸ *Smits* (2012), p. 86.

dominant positions *et cetera*, as well as assurances to enforce such prohibitions adequately. The common denominator being that said cooperation is mostly of a *de facto* non-binding nature only.²⁸⁹ This has likely facilitated such widespread appearance of these provisions in TAs. The absence of sanctions for non-compliance means that nations are more easily able to accommodate wishes for such chapters, while emphasis may instead be placed elsewhere in TA negotiations.

International antitrust cooperation needs a firmer structure. Soft law may be helpful to an extent, *inter alia* in streamlining investigations regarding potential infringements, or in mergers requiring review by several nations running in parallel. However, non-binding international cooperation has not been able to induce nations to institute more transformative improvements, such as restricting the conduct of export cartels. What is needed in addition to mere soft law, are frameworks that bind nations to action. To the extent that chapters on competition policy are included in TAs, it should be considered whether it would be beneficial for them to be made binding on the contracting parties, with appropriate dispute resolution mechanisms included.

Enforcement appears to be a more problematic area than the consistency of substantive competition law, and ways to improve this are worthy of consideration. First, in practice only a handful of national competition authorities have sufficient experience and capacity to effectively enforce compliance with their respective competition laws. Disparities in enforcement practices are, however, likely to become less radical as competition authorities mature. Second, the structure of how national competition authorities operate as a collective is ill-suited to the demands of the ever-increasing cross-border nature of business. This is exacerbated by the challenges presented by the dynamic nature of the digital economy.²⁹⁰ New ways should be considered concerning how to multilaterally support enforcement in order to bridge the current disparity between agencies.

Embracing ideas of shared governance in competition enforcement and thereby incentivizing firms towards more rigorous compliance efforts has the potential to help extend a competition agency's reach and influence, as well as mitigate the mentioned coordination problems. This could concern both encouraging soft enforcement efforts in competition law by firms, as well as including firms in discussions over norms and standards in international antitrust, as with the ICN currently, but in more impactful ways. As mentioned in Section 2.3, antitrust

²⁸⁹ Puri (2005), vii-ix; Sokol (2008A), pp. 116–118. Some TAs include binding chapters on competition policy, but these generally lack a dispute resolution provision, which means that breaches are thus actually unenforceable.

²⁹⁰ Mateus (2019), pp. 31–32.

agencies are exploring digital tools to improve enforcement.²⁹¹ If successful, such tools could also be considered as a part of international cooperation.

The world is becoming more polycentric than it has been for a long time. As the hegemony of the United States wanes, so does the relevance of the international institutions it has created. Indeed, the UN and the WTO are examples of institutions grappling for survival. While both serve arguably valid purposes, they face inevitable need for reform in order to remain current in this updated world order. This puts further emphasis on other ways in which to conduct international cooperation and coordination, such as reinforcing the work taking place within transgovernmental networks.

International antitrust could develop its voluntary approach towards more structured cooperation given the increase in competition policy maturity globally over the past few decades. This could be done *inter alia* by increasing the use of opt-in frameworks instead of *ad hoc* cooperation. There is particular potential concerning procedural questions in this regard but also concerning how to better harness firms to contribute towards soft enforcement. All in all, cooperation and relationships are worth developing.²⁹²

In search of development paths, it is also useful to also look beyond competition law and into approaches employed in other areas of law and policy that operate in a similarly international environment. Areas such as environmental law and human rights norms are particularly worthy, since, first, our planet's environment is one we share irrespective of nation-state nationality and, second – if not otherwise, human rights questions often tie into global value chains, whose effects span several jurisdictions. While no silver bullet, they might have the potential to inspire initiatives within international antitrust. As described in Chapter 2, frameworks such as the UN based Paris Accord concerning the climate, and the Global Compact on corporate responsibility both operate on an opt-in basis without formal enforcement mechanisms. The commitment to this kind of activity can be seen as lying somewhere between being fully voluntary and fully binding – normative without formally being enforceable. There is no inherent reason why international antitrust should be any different.

6.2 Key contributions of this dissertation

The dissertation makes three particular contributions towards international antitrust: it uncovers potential in co-governance via networks and incentives; it

²⁹¹ Supra 99.

²⁹² Kovacic argues that the EU-US relationship is particularly worthy of developing and deepening and describes many practical methods in which to do so. Kovacic (2019).

brings to light the changed reality and regime complexity of international antitrust and updates the related discourse accordingly; and it shows how major economic powers arguably guide the shape and form of future cooperation.

First, it proposes a novel approach to improving international antitrust – one that emphasizes the societal role of firms and employing shared governance to antitrust enforcement. All tools should be considered in ensuring functioning markets, including the complementary power of soft enforcement and positive incentives. In this context, positive incentives are not rewarding anticompetitive conduct, but rather a cost of such a preventive system, a cost that is likely manageable.

The argument in support of positive incentives is elaborated on both by providing examples of possible practical avenues to consider and by alluding to a broader framework that is worth bearing in mind when measures for improving deterrence are considered. Antitrust deterrence and related enforcement is arguably most effective as composite systems – those including both positive and negative incentives. Currently, however, positive incentives are not utilized nearly to their potential. Policymakers and competition authorities should better employ firms – the subjects of competition law – as their partners in ensuring functioning markets. Encouraging better self-enforcement by firms is an avenue that has thus far been somewhat overlooked and undervalued. Further, it would effectively extend the formal capacity of the relevant enforcement agency, since firms would put more effort into self-enforcement. The result being less anticompetitive conduct to detect and better functioning markets.

Harnessing firms to self-police would align with the general trend in public governance towards emphasizing shared governance and – as such – it would improve competition policy consistency as well as being an example of “better regulation”, a goal of the EU.²⁹³ Doing such should not be seen as support for Neo-Brandeisian thoughts about expanding the scope of antitrust, nor its European relative of ‘fairness’ in competition law. Instead, incentivizing firms to take on the societal role they could have in competition enforcement would constitute aiding the subjects (and objects) of both market economy as well as the competition law and policy that ensures its functioning to make the system work a little better.

Encouraging competition compliance with positive incentives could be a way to approach the thorny questions involved in deepening multilateral competition cooperation, but from an unconventional – and perhaps a politically less sensitive – angle. Most nations have codified competition law, but enforcement is often

²⁹³ See e.g. EU Commission <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en>.

lacking or inconsistent. Incentives to maintain effective compliance programs and to be transparent about them could help make up for part of the deficit by allowing firms to live up to their public role in competition enforcement. This, in turn, could lead to less of a need for extraterritorial application by nations with more vigorous competition enforcement. All in all, the state of international antitrust could see improvement.

Many developing countries suffer from inefficient markets and an approach that could help markets function better would inevitably benefit local economies and consumers. Not to mention that cooperating in building standards in relation to competition compliance incentives could help build both trust between the developing world and the EU and the US – the traditional leaders in competition matters – and also confidence in the advantages of market-oriented competition policy in general.

In addition to rewarding compliance efforts, other ways in which to better harness the potential of private firms as soft enforcers, in the extension of competition agencies, should be encouraged. Also, firms and other non-governmental actors could be better included in transgovernmental networks. For instance, the ICN currently allows firm legal counsels to participate in its Working Groups, but said participation tends to be rather limited, as NCAs are key actors.²⁹⁴ Ways to ensure more impactful participation should be sought in both the ICN as in other relevant organizations, such as the OECD and UNCTAD. Deeper firm engagement has the potential for deeper commitment towards reducing the inconsistency of international antitrust within the firms' sphere of influence.

Second, the dissertation updates the general international antitrust discussion to address the changed geopolitical power balance in international economic affairs as well as to address the fact that most jurisdictions today do have codified competition law. Since the last wave of scholarly work, several key aspects have changed: there is substantial experience in international voluntary cooperation between competition authorities and – perhaps more importantly – the number of competition authorities has increased drastically, as has the amount of competition law they enforce. Finally, the geopolitical situation has changed, with BRIC countries, China in particular, exerting greater influence on international cooperation through increased economic power. The mentioned changes have profound significance when considering the objectives to strive for in international antitrust and – importantly – how to approach such objectives in a regime complex reality.

²⁹⁴ Based on the author's personal experience as an ICN Non-Governmental Advisor.

These changed circumstances allow potential for deeper cooperation. However, cooperation endeavors should acknowledge not only the high number of jurisdictions with competition law, but also the increased number of NCAs of higher maturity. Thus, there are likely more voices than the transatlantic duo of the EU and the US.

Third, the dissertation reveals fundamental problems that stand in the way of deeper cooperation – as cooperation is traditionally conceived at least. Globalization and the amount of cross-border business increases year on year and with it, so does the need for cooperation to ensure that competition is maintained and global markets are efficient. However, beyond a point, cooperation interlinks with both trade and, ultimately, politics. While the underlying goals of economic major powers – such as the EU, the US, and China – are not necessarily so different, the means of reaching them do differ and such differences impose inherent limitations on antitrust cooperation.

It is important to understand these limitations in order to be better able to focus on research and consequential proposals based on what is even conceivable. That is, cooperation that streamlines and unequivocally supports trade without impacting a nation's sovereignty. Such deeper cooperation could well take place within procedural areas. And while binding intergovernmental treaties may not be worth striving for, voluntary-based cooperation – either via transgovernmental networks or intergovernmental opt-in frameworks – may yet yield significant further benefit.

Finally, in addition to the mentioned three main contributions, the work is in an area that is not commonly researched by legal scholars in the Finnish or Nordic legal communities. It could help shed light on the matter and pave the way for future research in this region on related topics linking to international antitrust specifically or international cooperation in economic and trade matters more generally.

6.3 Future research is needed

The dissertation uncovers several research questions that are worthy of future research. Of these, research based on empirical data would be of particular use. Many questions seem to remain unresolved due to competing – and partially conflicting – doctrinal approaches. Actual data could help show the most viable path forward and would thus be particularly valuable. Development in this regard appears to be coming with initiatives by the OECD and *Bradford and Chilton* in their Comparative Competition Law Project.²⁹⁵

²⁹⁵ OECD CompStats Database and OECD International Cartel Database; Comparative Competition Law Project <<http://comparativecompetitionlaw.org/data/>> (28 July 2020).

In the context of international antitrust, empirical work, *inter alia*, into the prevalence and impact of export cartels could be hugely beneficial. Data is currently still surprisingly scarce on the international impact of the current nation-state system, which relies on an effects-based test in claiming jurisdiction for foreign import cartels, while exempting export cartels. This scarcity of empirical data in part limits meaningful doctrinal work, preventing it reaching its full potential. In particular, being able to link the current situation to past practices and thus uncovering whether this is becoming a more or less significant problem would be useful.

Another theme where empirical data could be significantly relevant concerns the effectiveness of convergence as a strategy for improving international antitrust and the international organizations that aim to facilitate it, such as the ICN, the OECD, the ICC, and the UNCTAD. Said strategy has been the primary mode for advancing international antitrust for the past decade, yet its weight and impact lacks proper auditing. This could be done, *inter alia*, by looking at various recommendations and other soft law that they have published and whether a correlation can be found in approaches taken by national competition regimes in their respective areas. As a reference point of a general nature, the ICN Recommended Practices for Merger Notification and Review Procedures have been shown to have contributed to merger control reforms in tens of competition authorities.²⁹⁶ Research diving deeper into what is behind such a result could bring interesting insights to the ways in which voluntary cooperation is successful but could also show where another approach is needed.

Work that would help understand the impact of utilizing public interest considerations as a part of competition policy would also be useful, particularly such research that takes international dimensions into consideration. As *Stiglitz* and *Fox* argue, many countries – and developing countries in particular – do benefit from national competition law that protects certain national champions or other domestically relevant public interests.²⁹⁷ It could be useful to better understand where the boundaries of these benefits lie and in what kinds of particular situations.

Prior to the ascent of the Chicago School and the consumer welfare test it propagates, broader public interest considerations were actually more accepted in the US, as well as in Europe. In terms of current debates, the American New Brandeis School is arguing that this should be revived and is the subject of much discussion in the US.²⁹⁸ While the EU arguably considers what it terms ‘non-competition’ public interest goals more than the US – such as the integrity of the

²⁹⁶ ICN (2013), p. 16.

²⁹⁷ Stiglitz (2017), pp. 14–16; and Fox (2012), pp. 8–18.

²⁹⁸ Werden (2018); and Khan (2018).

internal EU market – it has recently been moving towards a narrower, economics-based way interpreting its competition rules, rather than *vice versa*. This can be seen in the debate on the interrelation of competition law and data protection.²⁹⁹ It is beyond the scope of this dissertation to analyze the specifics and possible reasons for this, but research into the merits of ‘non-competition’ public interest goals as a legitimate part of competition law and policy could prove interesting for the development of international antitrust.

History shows that systems respecting national sovereignty have a better success rate than more intrusive options. However, coordinated efforts are necessary in an ever-globalizing world. Reconciling the two requires creativity and compromise. In any case, a better world order of international antitrust calls for renewed interest in and optimism towards structured multilateral frameworks.

²⁹⁹ See e.g. Geradin & Kuschewsky (2013); and Kalimo & Majcher (2017).

Laws and Abbreviations

ANSAC	American Natural Soda Ash Corporation
Australian Competition and Consumer Act (2010).	
BRIC	Brazil, Russia, India, China
China	People's Republic of China
China's Anti-Monopoly Law	Anti-Monopoly Law of the People's Republic of China, implemented as of 1 August 2008.
ESG	Environmental, Social, and Governance
EU Blocking Regulation	Council Regulation (EC) No. 2271/96 of 22 November 1996 (as amended)
DG	Directorate-General of the EU
DOJ	US Department of Justice
ECJ	European Court of Justice
EU	European Union
Export Trading Act	15 U.S.C. §§ 4001-4003 [2000]
Foreign Trade Antitrust Improvements Act	15 U.S.C. § 6a [2000]
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICN	International Competition Network
ISO	International Standardisation Organisation
ITO	International Trade Organisation
MNC	Multinational corporation
NCA	National competition authority
NGO	Non-governmental organization
OECD	Organisation for Economic Cooperation and Development
OPEC	Organization of the Petroleum Exporting Countries
Russia	Russian Federation
TA	Trade agreement
TFEU	Treaty on the Functioning of the European Union

TRIPs	The Agreement on Trade-Related Aspects of Intellectual Property Rights
UK Bribery Act	Bribery Act 2010
UK Enterprise and Regulatory Reform Act	Enterprise and Regulatory Reform Act 2013
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UN Framework Convention on Climate Change	
US	United States of America
U.S.C.	United States Code
Webb-Pomerene Act	15 U.S.C. §§ 61-65. [1973].
WTO	World Trade Organisation

Bibliography

Literature

- Abrantes-Metz Rosa M. and Sokol Daniel D. (2014): Antitrust Corporate Governance and Compliance in Oxford Handbook of International Antitrust Economics (R. D. Blair and D. D. Sokol eds.). Oxford University Press.
- Aine, Antti (2011): Kilpailu ja sopimus. Suomalainen Lakimiesyhdistys.
- Aine, Antti (2001): Kilpailuoikeus ja perusoikeudet. Lakimies 2/2001.
- Alter, Karen J. & Raustiala, Kal (2018): The Rise of International Regime Complexity. 14 Annual Review of Law and Social Sciences.
- Arlen, Jennifer and Kraakman, Reinier H. (1997): Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes. 72 NYU Law Review 1.
- Aydin, Umut (2010): The International Diffusion of Competition Laws. APSA 2010 Annual Meeting Paper. Available at: <<https://ssrn.com/abstract=1657456>> (22 March 2020).
- Bardach, Eugene and Patashnik, Eric M. (2016): A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving. Sage Publishing.
- Bentham, Jeremy (1970): An Introduction to the Principles of Morals and Legislation (J.H. Burns & H.L.A. Hart eds.) Clarendon Press.
- Bhattacharjea, Aditya (2006): The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective. 9 Journal of International Economic Law 2.
- Bhagwati, Jagdish N. & Krueger, Anne O. (1995): The Dangerous Drift to Preferential Trade Agreements. AEI Press.
- Blauberger, Michael & Krämer, Rike (2013): European Competition vs. Global Competitiveness Transferring EU Rules on State Aid and Public Procurement Beyond Europe. 13 Journal of Industry, Competition, and Trade Ind Compet Trade.
- Bourguignon, François, and Thomas Scott-Railton (2015): The Globalization of Inequality. Princeton University Press.
- Bradford, Anu (2010): International Antitrust Cooperation and the Preference for Nonbinding Regimes in Cooperation, Comity, and Competition Policy (Guzman, Andrew T. ed.). Oxford University Press.
- Bradford, Anu; Chilton, Adam; Megaw, Chris; Sokol, Nathaniel (2019): Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets. 16 Journal of Empirical Legal Studies 2.
- Bradford, Anu; Chilton, Adam S.; Linos, Katerina; Weaver, Alex (2019): The Global Dominance of European Competition Law Over American Antitrust Law. Available at: <<https://ssrn.com/abstract=3339626>> (22 March 2020).
- Bradford, Anu; Gadinis, Stavros; Linos, Katerina (2018): Unintended Agency Problems: How International Bureaucracies Are Built and Empowered. 57 Virginia Journal of International Law 2.
- Bradford, Anu & Posner, Eric A. (2011): Universal Exceptionalism in International Law. 52 Harvard International Law Journal 1.

- Campbell, Neil & Rowley, William (2008): The Internationalization Of Unilateral Conduct Laws- Conflict, Comity, Cooperation And/Or Convergence? 75 *Antitrust Law Journal* 2.
- Cao, Yang (2020): Regulating Digital Platforms in China: Current Practice and Future Developments. *Journal of European Competition Law & Practice*, lpa001.
- Capobianco, Antonio & Nyeso, Anita (2018): Challenges for Competition Law Enforcement and Policy in the Digital Economy. 9 *Journal of European Competition Law & Practice* 1.
- Connor, John & Helmers, Gustav (2008): Statistics on Modern Private International Cartels 1990-2005. American Antitrust Institute Working Paper No. 07-01.
- Dabbah, Maher (2010): International and comparative competition law. Cambridge University Press.
- De Burca, Grainne; Keohane, Robert; Sabel, Charles F. (2014): Global Experimentalist Governance. 44 *British Journal of Political Science* 3.
- De Burca, Grainne; Keohane, Robert; Sabel, Charles F. (2013): New Modes of Pluralist Global Governance. 45 *NYU Journal of International Law and Politics* 3.
- De Geest, Gerrit & Dari-Mattiacci, Giuseppe (2013): The Rise of Carrots and the Decline of Sticks. 80 *University of Chicago Law Review* 1.
- Dari-Mattiacci, Giuseppe and De Geest, Gerrit (2010): Carrots, Sticks, and the Multiplication Effect. 26 *Journal of Law, Economics and Organization* 2.
- Dworkin, Ronald (1986): *Law's Empire*. Harvard University Press.
- Finell, Lisbe (2017): Regulating unilateral use of significant market power with competition law in European Union Telecommunications: a compliance oriented perspective. University of Helsinki.
- Fiorelli, Paul & Tracey, Ann Marie (2007): Why Comply – Organizational Guidelines Offer a Safer Harbor in the Storm. 32 *Journal of Corporation Law* 3.
- Fox, Eleanor M. (2015): *Antitrust Without Borders: From Roots to Codes to Networks*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum. Available at: <www.e15initiative.org/> (22 March 2020).
- Fox, Eleanor M. (2014): Monopolization and Abuse of Dominance: Why Europe is Different. 59 *The Antitrust Bulletin* 1.
- Fox, Eleanor M. (2012): Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries in *Competition Policy and Regional Integration in Developing Countries* (Josef Drexl, Mor Bakhoun, Eleanor M. Fox, Michal Gal and David Gerber, eds.). Edward Elgar.
- Fox, Eleanor M. & Trebilcock, Michael J. (2012): The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project in the *Design of Competition Law Institutions: Global Norms, Local Choices* (Eleanor M. Fox & Michael J. Trebilcock, eds.). Oxford University Press.
- Friedrichs, Jörg & Kratochwil, Friedrich (2009): On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology. 63 *International Organization* 4.
- Gadinis, Stavros & Miazad, Amelia (2019): Sustainability in Corporate Law. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441375> (22 March 2020).
- Gal, Michal (2010): Free Movement of Judgments: Increasing Deterrence of International Cartels Though Jurisdictional Reliance. 51 *Virginia Journal of International Law* 1.
- Geradin, Damien & Kuschewsky, Monika (2013): Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue. Available at: <<https://ssrn.com/abstract=2216088>> (22 March 2020).
- Gerber, David J. (2010): *Global competition: Law, Markets and Globalization*. Oxford University Press.
- Gestel, Rob van & Micklitz Hans-W. (2011): Revitalizing Doctrinal Legal Research in Europe: What about Methodology? in *European legal method: paradoxes and revitalisation* (Ulla Neergaard, Ruth Nielsen and Lynn Roseberry eds.). DJØF Publishing.

- Gifford, Daniel & Kudrle, Robert (2015): *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy*. University of Chicago Press.
- Goldsmith, Jack & Posner, Eric A. (2006): *The New International Law Scholarship*. 34 *Georgia Journal of International and Comparative Law* 2.
- Goldsmith, Jack & Posner, Eric A. (2005): *The Limits of International Law*. Oxford University Press.
- Guzman, Andrew T. (2008): *How International Law Works*. Oxford University Press.
- Guzman, Andrew T. (2001): *International Law: A Compliance Based Theory*. UC Berkeley Public Law Research Paper No. 47. Available at: <<https://ssrn.com/abstract=260257>> (22 March 2020).
- Guzman, Andrew T. (2000): *International Antitrust and the WTO: The Lesson from Intellectual Property*. UC Berkeley Law & Economics Research Paper No. 2000-20. Available at: <<https://ssrn.com/abstract=248317>> (22 March 2020).
- Guzman, Andrew T. & Meyer, Timothy (2011): *International Soft Law*. 2 *Journal of Legal Analysis* 1.
- Hervey, Tamara et al. (2011): *Research Methodologies in EU and International Law*. Hart Publishing.
- Hoecke, Mark van (2015): *Methodology of Comparative Legal Research*. 2015 *Law and Method* 12. Available at: <<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001>> (22 March 2020).
- Hoekman, Bernard (2011): *The WTO and the Doha Round: Walking on Two Legs*. World Bank Economic Premise 68.
- Husa, Jaakko (2018): *Advanced Introduction to Law and Globalisation*. Edward Elgar.
- Hutchinson Terry (2017): *Doctrinal Research: researching the jury in Research Methods in Law* (Burton, Mandy, Watkins, Dawn eds.). Routledge.
- Hutchinson, Terry and Duncan, Nigel (2012): *Defining the Doctrinal*. 17 *Deakin Law Review* 1.
- Ioannou, Ioannis and Serafeim, George (2017): *The Consequences of Mandatory Corporate Sustainability Reporting*. Harvard Business School Research Working Paper No. 11-100.
- Inazumi, Mitsue (2005): *Universal jurisdiction in modern international law: expansion of national jurisdiction for prosecuting serious crimes under international law*. *Intersentia*.
- Jenny, Frederic (2012): *Export Cartels in Primary Products: The Potash Case in Perspective* in *Trade, Competition and the Pricing of Commodities* (Evenett & Jenny eds.). Centre for Economic Policy Research.
- Jensen-Eriksen, Niklas (2013): *A Potentially Crucial Advantage. Export Cartels as a Source of Power for Weak Nations*. 64 *Revue Economique* 1095.
- Kaczorowska, Alina (2000): *International competition law in the context of global capitalism*. 21 *European Competition Law Review* 2.
- Kalimo, Harri & Majcher, Klaudia (2017): *The concept of fairness: linking EU competition and data protection law in the digital marketplace*. 42 *European Law Review* 2, 210.
- Kant, Immanuel (1784): *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*. Translated as 'The Idea for a Universal History with a Cosmopolitan Purpose' in *Political Writings* by H. B. Nisbet (Hans Reiss ed.). Cambridge University Press.
- Katz, Mark N. (2017): *Fluid Dynamics: Global Great Powers in the 21st Century*. FIIA Working Paper 8–10.
- Khan, Lina A. (2018): *The New Brandeis Movement: America's Antimonopoly Debate*. 9 *Journal of European Competition Law & Practice* 131.
- Kingsbury, Benedict (2009): *The Concept of 'Law' in Global Administrative Law*. 20 *European Journal of International Law* 1.
- Kooiman, Jan (2003): *Governing as Governance*. Sage.
- Kooiman, Jan (1993): *Modern Governance: New Government-Society Interactions*. Sage.
- Koskenniemi, Martti (2007): *The Fate of Public International Law: Between Technique and Politics*. 70 *Modern Law Review* 1.
- Koskenniemi, Martti & Leino, Päivi (2002): *Fragmentation of International Law? Postmodern Anxieties*. 15 *Leiden Journal of International Law*.

- Kovacic, William (2019): Competition Policy in the European Union and the United States: Focal Points for Future Trans-Atlantic Cooperation. *Antitrust & Public Policies*. Available at: <<http://a-p-p-review.com/article/view/12897>> (3 August 2020).
- Kovacic, William (2008): Competition policy in the European Union and the United States: convergence or divergence in the future treatment of dominant firms? *Competition Law International*. Available at: <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=F3082B20-A7C3-431E-B829-35E51D8C1D14>> (3 August 2020).
- Kovacic, William (2003): Extraterritoriality, institutions, and convergence in international competition policy. *Proceedings of the 97th Annual Meeting of the American Society for International Law* 309.
- Krawiec, Kimberly D. (2003): Cosmetic Compliance and the Failure of Negotiated Governance. *81 Washington University Law Review* 2.
- Krisch, Niko (2014): The Decay of Consent: International Law in an Age of Global Public Goods. *108 American Journal of International Law* 1.
- Krisch, Nico (2006): The Pluralism of Global Administrative Law. *17 European Journal of International Law* 17.
- Kuoppamäki, Petri (2003): Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa. *Suomalainen lakimiesyhdistys*.
- Langevoort, Donald (2017): Cultures of Compliance. *54 American Criminal Law Review* 949.
- Langevoort, Donald (2002): Monitoring: The Behavioral Economics of Corporate Compliance with Law. *Columbia Business Law Review*.
- Lau, Cubie; Fisher, Cliff; Hulpke, John; Kelly, William; and Taylor, Susanna (2017): United Nations Global Compact: the unmet promise of the UNGC. *13 Social Responsibility Journal* 1, pp. 48–61.
- Levenstein, Margaret C. & Suslow, Valerie Y. (2014): Cartels and Collusion: Empirical Evidence' in *Oxford Handbook of International Antitrust Economics* (R. D. Blair & D. D. Sokol eds.). Oxford University Press.
- Levenstein, Margaret C. & Suslow, Valerie Y. (2007): The Economic Impact of the U.S. Export Trading Company Act. *27 Antitrust Law Journal* 2.
- Lianos, Ioannis (2016): Global Governance of Antitrust and the Need for a BRICS Joint Research Platform in Competition Law and Policy in *Competition Policy for the New Era: Insights from the BRICS Countries* (Eds. Tembinkosi Bonakele, Eleanor Fox, and Liberty Mncube). Oxford University Press.
- Lianos, Ioannis (2009): The Contribution of the United Nations to the Emergence of Global Antitrust Law. *15 Tulane Journal of International & Comparative Law* 2.
- Mateus, Abel (2019): Is There a Consensus on Antitrust for the Big Tech? Available at: <<https://ssrn.com/abstract=3508055>> (3 August 2020).
- Messerlin, Patrick (1994): Should Antidumping Rules be Replaced by National or International Competition Rules? *49 Aussenwirtschaft* 1.
- Ng, Wendy (2019): *The Political Economy of Competition Law in China*. Cambridge University Press.
- Nuccio, Massimiliano and Marco Guerzoni (2019): Big data: Hell or heaven? Digital platforms and market power in the data-driven economy. *23 Competition & Change* 3, pp. 312–328.
- Paha, Johannes ed. (2016): *Competition Law Compliance Programmes: An Interdisciplinary Approach*. Springer.
- Papadopoulos, Anestis (2010): *The international dimension of EU competition law and policy*. Cambridge University Press.
- Paruzel, Agnieszka; Steinmann, Barbara; Nübold, Annika; Ötting, Sonja; and Maier, Günter W. (2016): Psychological contributions to competition law compliance in *Competition Law Compliance Programs: An Interdisciplinary Approach* (Paha ed.). Springer.

- Pollack, Mark A. & Shaffer, Gregory C. (2010): *Transatlantic Governance in the Global Economy*. Rowman & Littlefield.
- Popkova, Elena; Ragulina, Julia; and Bogoviz, Aleksei (2019): *Industry 4.0: Industrial Revolution of the 21st Century*. Springer.
- Rasche, Andreas (2009): "A Necessary Supplement": What the United Nations Global Compact Is and Is Not. 48 *Business & Society* 4.
- Raustiala, Kal & Victor, David G. (2004): The Regime Complex for Plant Genetic Resources. 58 *International Organization* 2.
- Rawls, John (1971): *A Theory of Justice*. Harvard University Press.
- Riley, Anne & Sokol, Daniel D. (2015): Rethinking Compliance. *Journal of 31 Antitrust Enforcement* 3.
- Ristaniemi, Michael (2018): Convergence, divergence or disturbance – How major economic powers approach international antitrust. *Concurrences Review* N° 3-2018, Art. N° 87243.
- Ristaniemi, Michael (2017): Export Cartels and the Case for Global Welfare. 10 *Global Antitrust Review* 173.
- Ristaniemi, Michael (2014): What Extraterritorial Application of Competition Law Means for MNCs. 7 *International In-House Counsel Journal* 28, 1.
- Sargentich, Lewis (2018): *Liberal Legality: A Unified Theory of our Law*. Cambridge University Press.
- Sauter, Wolf (2016): *Coherence in EU Competition Law*. Oxford University Press.
- Savaresi, Annalisa (2016): The Paris Agreement: A new beginning? 34 *Journal of Energy & Natural Resources Law* 1.
- Schilling, Theodor (1996): The Autonomy of the Community Legal Order: An Analysis of Possible Foundations. 37 *Harvard International Law Journal* 389.
- Sil, Rudra & Katzenstein, Peter J. (2010): Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms across Research Traditions. 8 *Perspectives on Politics* 2.
- Singh, Gurwinder (2017): *Subsidies in the Context of the WTO's Free Trade System*. Springer.
- Slaughter, Anne-Marie (2005): *A New World Order*. Princeton University Press.
- Slaughter, Anne-Marie & Zaring, David T. (2007): *Networking Goes International: An Update*. Washington & Lee Legal Studies Paper No. 2007-12.
- Smits, Jan M. (2015): What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research in Rethinking Legal Scholarship: A Transatlantic Dialogue (Rob van Gestel, Hans-W. Micklitz & Edward L. Rubin eds.). Cambridge University Press.
- Smits, Jan M. (2012): *The mind and method of the legal academic*. Edward Elgar.
- Sokol, Daniel D. (2015): Tensions between antitrust and industrial policy. 22 *George Mason Law Review* 5.
- Sokol, Daniel D. (2013): Policing the Firm. 82 *Notre Dame Law Review* 2.
- Sokol, Daniel D. (2012): Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement. 78 *Antitrust Law Journal* 1.
- Sokol, Daniel D. (2008A): Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements. 83 *Chicago-Kent Law Review* 231.
- Sokol, Daniel D. (2008B): What Do We Really Know About Export Cartels and What is the Appropriate Solution? 4 *Journal of Law and Economics*.
- Sokol Daniel D. & Blumenthal, William (2012): Merger Control: key international norms and differences, in *Research Handbook on International Competition Law* (A. Ezrachi ed.). Edward Elgar.
- Steffen, Will & Richardson, Katherine & Rockström, Johan & Cornell, Sarah & Fetzer, Ingo & Bennett, Elena & Biggs, Reinette & Carpenter, Stephen & Vries, Wim & de Wit, Cynthia & Folke, Carl & Gerten, Dieter & Heinke, Jens & Persson, Linn & Ramanathan, Veerabhadran &

- Reyers, Belinda & Sörlin, Sverker. (2015): Planetary Boundaries: Guiding Human Development on a Changing Planet. 347 *Science* 6223.
- Stephan, Paul B. (2005): Global Governance, Antitrust, and the Limits of International Cooperation. 38 *Cornell International Law Journal* 1.
- Stiglitz, Joseph E. (2017): Towards A Broader View of Competition Policy. Roosevelt Institute Working Paper. Available at: <<http://rooseveltinstitute.org/towards-broader-view-competition-policy/>> (22 March 2020).
- Stucke, Maurice E. & Ezrachi, Ariel (2020): Competition Overdose. Harper Collins (forthcoming).
- Subramanian, Arvind & Shang-Jin Wei (2007): The WTO Promotes Trade, Strongly but Unevenly. 72 *Journal of International Economics* 1.
- Sunstein, Cass R. (2014): Nudging: A Very Short Guide. 37 *Journal of Consumer Policy* 583.
- Sweeney, Brendan J. (2010): The internationalisation of competition rules. Routledge.
- Sweeney, Brendan J. (2007): Combating foreign anti-competitive conduct: what role for extraterritorialism? 8 *Melbourne Journal of International Law* 2.
- Sweeney, Brendan (2004): Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition. 5 *Melbourne Journal of International Law* 375.
- Tomohara, Akinori & Takii, Sadayuki (2011): Does globalization benefit developing countries? Effects of FDI on local wages. 33 *Journal of Policy Modeling* 3.
- Toye, Richard (2012): The International Trade Organization in the Oxford Handbook on The World Trade Organization (Martin Daunton, Amrita Narlikar, and Robert M. Stern eds.). Oxford University Press.
- Tuori, Kaarlo (2004): Oikeudenalajaotus – strategista valtapeliä ja normatiivista argumentaatiota. *Lakimies*, 7/8, pp. 1196–1224.
- Tversky, Amos and Kahnemann, Daniel (1974) Judgment under Uncertainty: Heuristics and Biases. 185 *Science* 4157.
- Virtanen, Martti (1998): Market Dominance Related Competition Policy. An Eclectic Theory and Analyses of Policy Evolution. Turku School of Economics and Business Administration.
- Wang, Xiaoye; Su, Jessica; Han, Wei (2018): Competition Law in China. Wolters Kluwer.
- Wagner-von Papp, Florian (2012): Competition law and extraterritoriality in the Research Handbook on International Competition Law (Ariel Ezrachi ed, Edward Elgar 2012).
- Weiler, Joseph and Haltern, Ulrich (1996): The Autonomy of the Community Legal Order-Through the Looking Glass. 37 *Harvard International Law Journal* 411.
- Wellner, Philip A. (2005): Effective Compliance Programs and Corporate Criminal Prosecutions. 27 *Cardozo Law Review* 1.
- Werden, Gregory J. (2018): Back to School: What the Chicago School and New Brandeis School Get Right. Available at: <<https://ssrn.com/abstract=3247116>> (22 March 2020).
- Whish, Richard and Bailey, David (2012): Competition law. Oxford University Press.
- Wilhelmsson, Thomas (2004): Yleiset opit ja pienet kertomukset ennakoitavuuden ja yhdenvertaisuuden näkökulmasta. *Lakimies* 2, pp. 199–227.
- Wils, Wouter (2013): Antitrust Compliance Programmes & Optimal Antitrust Enforcement. 1 *Journal of Antitrust Enforcement* 1.

Non-scientific articles and other publications

- Barbosa, David (2013): U.S. Court Fines Chinese Vitamin C Makers. *The New York Times*. Available at: <<http://www.nytimes.com/2013/03/16/business/global/us-fines-chinese-vitamin-c-makers.html>> (22 March 2020).
- Beattie, Alan (2018): WTO suffers collateral damage from Trump and China. *Financial Times*. Available at: <<https://www.ft.com/content/45c6967c-d143-11e8-a9f2-7574db66bcd5>> (22 March 2020).
- Capobianco, Antonio, Davies, John, and Ennis, Sean F. (2015): Implications of Globalisation for Competition Policy: The Need for International Cooperation in Merger and Cartel Enforcement.

- E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum. Available at: www.e15initiative.org/ (22 March 2020).
- Chasan, Emily (2018): Governments push ESG investment forward. Bloomberg Briefs. Available at: <https://www.bloomberg.com/professional/blog/governments-push-esg-investment-forward> (22 March 2020).
- Coppola, Maria; Kraus, Elizabeth; Lagdameo, Cynthia; O'Brien, Paul, and Tritell, Randolph (2020): (Nearly) A Century with the ICN. Competition Policy International. Available at: <https://www.competitionpolicyinternational.com/nearly-a-century-with-the-icn/> (2 August 2020).
- Dudovskiy, John (2018): Research Design. Available at: <https://research-methodology.net/research-methodology/research-design/> (22 March 2020).
- Erixon, Fredrik (2018) The Economic Benefits of Globalization for Business and Consumers. European Centre for International Political Economy, Trade Working Paper. Available at: <https://ecipe.org/publications/the-economic-benefits-of-globalization-for-business-and-consumers/> (22 March 2020).
- Financial Times (2019): New Agenda. Available at: <https://aboutus.ft.com/en-gb/new-agenda/> (22 March 2020).
- Fink, Larry (2018): A Sense of Purpose. Available at: <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> (22 March 2020).
- Kovacic, William (2018): Two Views of Exclusion: Why the European Union and the United States Diverged on Google. Promarket. Available at: <https://promarket.org/2018/04/09/two-views-exclusion-european-union-united-states-diverged-google/> (7 August 2020).
- Murray, Grant Murray (2019): Antitrust and sustainability: globally warming up to be a hot topic? Kluwer Competition Law Blog. Available at: <http://competitionlawblog.kluwercompetitionlaw.com/2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a-hot-topic/> (22 March 2020).
- Puri, Lakshmi (2005): Competition Provisions in Regional Trade Agreements: How to Assure Development Gains. United Nations Publication.
- Rosling, Hans, Rosling Ola, and Rosling Rönnlund, Anna (2018): Factfulness: Ten Reasons We're Wrong About the World--and Why Things Are Better Than You Think. Flatiron Books.
- Stanford Encyclopedia of Philosophy (2020): Aristotle's Political Theory. Available at <https://plato.stanford.edu/entries/aristotle-politics/> (22 March 2020).
- Sustainserv (2015): Impact of the EU Directive on Non-Financial Reporting. Available at: https://www.sustainserv.com/images/pdf/Reports/Sustainserv_EU_Directive.pdf (22 March 2020).
- United States Council for International Business (2019): Global Business Endorses the ICN Framework for Competition Agency Procedures. Available at: <https://www.uscib.org/global-business-endorses-the-icn-framework-for-competition-agency-procedures/> (22 March 2020).
- Weissmann, Jordan (2017): Trump Has One Big Idea to Fix America's Trade Deals. It's Not Very Good, Slate. Available at: <https://slate.com/business/2017/02/the-big-problem-with-trumps-trade-strategy.html> (22 March 2020).

Interviews

Professor Hao Qian at the EU-China Law School at CUPL in Beijing, in June 2017.

Official material

- Almunia, Joaquin (2010): Compliance and Competition Policy. Speech/10/586.
- European Commission (2020A): Inception Impact Assessments concerning new competition tool. Available at: https://ec.europa.eu/competition/consultations/2020_new_comp_tool/new_comp_tool_inception_impact_assessment.pdf (2 August 2020).

- European Commission (2020B): White Paper on levelling the playing field as regards foreign subsidies. COM(2020) 253.
- European Commission (2018): European Commission presents comprehensive approach for the modernisation of the World Trade Organisation. IP/18/5786.
- European Commission (2017): State aid: Commission and China start dialogue on state aid control. IP/17/1520.
- European Commission & Chinese NDRC (2017): Memorandum of Understanding on a dialogue in the area of the State aid control regime and the Fair Competition Review System. Available at: <http://ec.europa.eu/competition/international/bilateral/mou_china_2017.pdf> (22 March 2020).
- European Competition Network: (2011): Best Practices on Cooperation between EU National Competition Authorities in Merger Review. Available at: <https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf> (22 March 2020).
- European Parliament (2011): Resolution on the Annual Report on EU Competition Policy. 2011/2094(INI).
- Finch, Andrew (2018): Remarks at “Antitrust in the Financial Sector: Hot Issues & Global Perspectives”. Available at: <<https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-remarks-antitrust>> (22 March 2020).
- ICN (2019): Framework on Competition Agency Procedures. Available at: <<https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/>> (22 March 2020).
- ICN (2016): Recommended Practices for Merger Notification Procedures. Available at: <<https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices/>> (22 March 2020).
- ICN (2013): Statement of Achievements 2001-2013. Available at: <<https://centrodecdec.files.wordpress.com/2015/07/2001-2013-icn-statement-of-achievements.pdf>> (22 March 2020).
- ICN (2007): Co-Operation between Competition Agencies in Cartel Investigations. Available at: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_Cooperation.pdf> (25 July 2020).
- ICN (2005): Waivers of Confidentiality in Merger Investigations. Available at: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_ModelWaiver.pdf> (25 July 2020).
- Institute of Directors in Southern Africa (2016): King Report on Corporate Governance. Available at: <https://c.yimcdn.com/sites/www.iodsa.co.za/resource/resmgr/king_iv/King_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf> (22 March 2020).
- Le Maire, Bruno (2019): Concluding Remarks at the Bretton Woods: 75 years later – Thinking about the next 75 Conference. Available at: <https://www.banque-france.fr/sites/default/files/media/2019/09/03/bw_conference_summary.pdf> (22 March 2020).
- League of Nations (1927): Report and Proceedings of the World Economic Conference, Held at Geneva, 4-23 May 1927. Doc. C.356.M.129.1927.LI.
- OECD (2018): Rethinking Antitrust Tools for Multi-Sided Platforms. Available at: <<https://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm>> (2 August 2020).
- OECD (2015): Provisions on Negative Comity. Available at: <<https://www.oecd.org/daf/competition/competition-inventory-provisions-negative-comity.pdf>>.
- OECD (2014A): International Co-operation in Competition Law Enforcement. C/MIN(2014)17.
- OECD (2014B): Recommendation on international co-operation. C(2014)108 - C/M(2014)10.
- OECD (2012): Improving International Co-operation in Cartel Investigations. DAF/COMP/GF(2012)16.
- OECD (2011): Promoting Compliance with Competition Law. DAF/COMP(2011)20.

- Panizza, Roberta (2018): The Principle of Subsidiarity. European Parliament Fact Sheets. Available at: <<http://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>> (22 March 2020).
- World Bank (2019): GDP 2019. Available at: <<http://databank.worldbank.org/data/download/GDP.pdf>> (22 July 2020).
- WTO (2019): World Trade Statistical Review.
- WTO (2004): Doha Work Programme – Decision Adopted by the General Council on 1 August 2004. WT/L/579.
- WTO (1998): Japan - measures affecting consumer photographic film and paper. WT/DS44/R.
- UNCTAD (2019A): Competition Issues in the Digital Economy. TD/B/C.I/CLP/54
- UNCTAD (2019B): Key Statistics and Trends in Trade Policy 2018. Available at: <https://unctad.org/en/PublicationsLibrary/ditctab2019d1_en.pdf> (22 March 2020).
- UNCTAD (2013): World Investment Report 2013: Global Value Chains: Investment and Trade for Development. Available at: <<https://worldinvestmentreport.unctad.org/wir2013/>> (28 July 2020).
- UN International Law Commission (2006): Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. United Nations (A/CN.4/L.682).
- United States (2015): Seventh United Nations Conference to review the UN Set on Competition Policy: International Cooperation on Merger cases as a tool for effective enforcement of competition. Available at: < https://unctad.org/meetings/en/Presentation/CCPB_7RC2015_PRES_RTIntCoop_USA_en.pdf> (22 March 2020).
- United States Sentencing Commission (1987): Federal Sentencing Guidelines (as amended).
- Xi Jinping (2017): Speech at the World Economic Forum: Jointly Shoulder Responsibility of Our Times, Promote Global Growth. Available at: <http://news.xinhuanet.com/english/2017-01/18/c_135991184.htm> (22 March 2020).
- Xinhua (2011): China urges international cooperation on enforcement of competition law. Available at: <<http://en.people.cn/90883/7602396.html>> (22 March 2020).
- Vestager, Margrethe (2019): Competition and sustainability. Available at <https://ec.europa.eu/competition/speeches/index_2019.html> (22 March 2020).
- Vestager, Margrethe (2017): Getting the best out of globalization. Available at: <https://ec.europa.eu/competition/speeches/index_theme_22.html> (22 March 2020).

Cases

European Commission

- EU Commission decisions against Google no. 39740, 40099, and no. 40411.
- EU Commission decision against Amazon no. 40462.

European Court of Justice

- Ahlström Oy and others v. European Commission C-89, 104, 114, 116-117, 125-129/85.

European Union General Court

- Gencor Ltd. v. European Commission T-102/96.

United States Supreme Court

- Hartford Fire Insurance Co. v. California (1993), 509 US 764.
- Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP (2004) 540 U.S. 398.

United States Court of Appeals for the Second Circuit

- United States v. Aluminum Co. of America (1945), 148 F. 2d.



**UNIVERSITY
OF TURKU**

ISBN 978-951-29-8173-1 (PRINT)
ISBN 978-951-29-8174-8 (PDF)
ISSN 0082-6987 (Print)
ISSN 2343-3191 (Online)