

# SUPPLANTING FOREIGN ANTITRUST

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## I

### INTRODUCTION

Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anti-competitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?<sup>1</sup>

Thus asked Justice Breyer in his 2004 opinion in *F. Hoffman-La Roche, Ltd. v. Empagran, SA*,<sup>2</sup> a case brought in U.S. federal court as a class action on behalf of purchasers of certain vitamin products on foreign (non-U.S.) markets against members of a cartel. The question was, of course, rhetorical. There seems to be, at least prima facie, no good reason to impose U.S. antitrust law on other highly developed countries with their own functioning antitrust regimes, especially without or even against these countries' will.<sup>3</sup>

But the question was also strangely misplaced. Although Canada, Great Britain, and Japan—the countries Breyer named—had urged the Court to dismiss the claims by foreign plaintiffs,<sup>4</sup> the countries from which the named plaintiffs stemmed—Ecuador, Panama, and Ukraine—had remained silent.<sup>5</sup> These last three countries are representatives of less developed countries, many of which do not have very effective antitrust regimes.<sup>6</sup>

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1. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

2. *Id.*

3. *But see infra* Part IV.A.

4. In *Empagran*, several foreign governments, had submitted amicus curiae briefs arguing against extraterritorial application of U.S. antitrust law to markets outside of the United States.

5. *Empagran*, 542 U.S. at 159–60. One named plaintiff came from Australia. He withdrew when faced with the possibility of suing in Australia. See *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, *aff'd*, (2003) 130 FCR 317 (Austl.).

6. Differences exist between the three countries. Ecuador established an antitrust regime only recently. See, e.g., Luis Marín-Tobar, *Competition Regulation in Ecuador*, 9 J. COMPETITION L. & ECON. 755, 756 (2013) (outlining Ecuador's introduction of a domestic anti-competition law in 2011); Luis Marín-Tobar, *Lessons from the First Year of Competition Law in Ecuador*, CPI ANTITRUST CHRON. (2014), <https://www.competitionpolicyinternational.com/assets/Uploads/Marin-TobarFEB-142.pdf> [<https://perma.cc/9436-BXXG>] (detailing Ecuador's initial experiences as an enforcer of anti-competition law). For Panama, see, e.g., Claudia Schatan, *The Dynamics of Competition Policies in Small Developing Economies: The Central American Countries' Experience*, in NEW COMPETITION JURISDICTIONS: SHAPING POLICIES AND BUILDING INSTITUTIONS 91, 92 (Richard Whish & Christopher Townley eds., 2012) (explaining how the antitrust regimes of Central American countries suffer from limited competition culture, concentrated markets, limited official independence, scarce resources, and ill-fitting

With this in mind, Breyer's question would better have read something like this: Why should American law supplant, for example, Ecuador, Panama, or Ukraine's antitrust regimes, insofar as these countries are unable to protect their customers from anti-competitive conduct engaged in significant part by foreign companies?

This question is harder to dismiss. Arguably, supplanting these countries' ineffective competition regimes would serve a purpose. The question would not be one of superseding foreign regimes when there are none. The question would be one of filling regulatory gaps. Vis-à-vis countries with functioning antitrust regimes, the question is which of several countries should regulate the cartel. Vis-à-vis countries without functioning antitrust regimes, the question is whether the cartel is regulated at all. If the developed country does not regulate, no other country does. Hence, the issue is not whether to defer to a foreign antitrust agency. Instead, the question is whether to defer to the cartel's impunity. This policy decision would require quite a different justification.

Developing countries would likely do better if they had effective antitrust regimes, and other articles in this issue discuss what is required for success. But we also need solutions for situations in which developing countries do not (yet) have such regimes, or in which they are for other reasons incapable of dealing with an international cartel. This is the situation this article addresses. It develops an argument for when and why a developed country's antitrust regime should supplant the regime of a developing country. The question is, essentially, when and why the developed country should take over, in part, regulation of the developing country's market.

Some limitations should be mentioned. First, the article focuses on the regulation of cartels. Although supplanting antitrust law might well work also for other issues—for example, merger control or abuse of a dominant position—these issues would require different considerations, which the article does not address. Second, for purposes of the article, a developed country is defined as a country with, and a developing country as a country without, a functioning antitrust regime. The analysis is therefore not directly applicable to developing countries that have effective regimes. By contrast, some of the arguments may be applicable to small developed countries with limited resources.<sup>7</sup>

Part II begins by laying out the tension between the need for antitrust in developing countries and the obstacles these countries face in building their own regimes. It then argues for the possibility of one country's antitrust institutions

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policy models). Ukraine, at the time, was thought to have a functioning antitrust regime, which later turned out to suffer from corruption; subsequent political development created problems for antitrust enforcement. See Riccardo Croce & Hanna Stakheyeva, *Competition Law and State Aid Reform in Light of the EU-Ukraine Association Agreement and Its Impact on Business in Ukraine*, 35 EUR. COMPETITION L. REV. 23 (2014) (outlining Ukraine's recent entrance into an Association Agreement with the European Union in order to mimic its antitrust law); Mark Briggs, *Ukraine Updates Its Competition Laws*, GLOB. COMPETITION REV. (Jan. 29, 2016), (detailing the legal consequences of Ukraine's new arrangement with the European Union).

7. See MICHAL S. GAL, *COMPETITION POLICY FOR SMALL MARKET ECONOMIES* (2003).

regulating another country's market, as long as a jurisdictional basis exists. Part III discusses this idea of supplanting antitrust, its legal background, and the factors relevant for its justifiability. Part IV applies the idea of supplanting antitrust in three constellations: multinational cartels that affect markets in both developed and developing countries; transnational cartels in which cartels from developed countries target markets in developing countries; and domestic cartels that remain confined within the boundaries of the developing country. Part V discusses a number of possible objections.

## II

### DEVELOPING COUNTRIES AND ANTITRUST REGULATION

#### A. Challenges

Once, establishing antitrust regimes was thought not to benefit developing countries.<sup>8</sup> That view is no longer prevalent. Today, more than half of the developing countries in the world have antitrust regimes.<sup>9</sup>

Having laws on the books represents, however, only a first step. A greater problem for many developing countries lies in building institutions<sup>10</sup> and enforcing existing antitrust laws. Here, the data are somewhat unclear. Levenstein and Suslow found in 2004 that actual enforcement of existing antitrust law was widely lacking.<sup>11</sup> Waked, by contrast, suggests that developing countries do allocate resources to the enforcement of antitrust laws, though the degree depends on, amongst others, general macroeconomic development, openness to trade and imports, and level of corruption.<sup>12</sup> Bütke and Aydin identify several factors that constrain developing countries: limits in financial resources and expertise, unsupportive or hostile political–legal environments, limitations to legal culture, a lack of competition culture, and underdeveloped markets<sup>13</sup>

The enforcement problem is exacerbated for transboundary cartels with actors from outside the developing countries targeting the country's markets.<sup>14</sup>

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8. For discussion of a list of remaining objections to antitrust regimes in developing countries, see Dina I. Waked, *Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges*, 12 J.L. ECON. & POL'Y 193, 207–17 (2016).

9. See *id.* at 195–96.

10. William E. Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 LAW & CONTEMP. PROBS., no. 4, 2016 at 89.

11. Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 845 (2004).

12. See Dina Waked, *Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries* (Dec. 22, 2011); see also Dina Waked, *Antitrust Enforcement in Developing Countries: Reasons for Enforcement & Non-Enforcement Using Resource-Based Evidence* (July 12, 2010), <http://ssrn.com/abstract=1638874> [<https://perma.cc/2KGR-AAEK>] (examining the factors that impact developing countries' enforcement of antitrust laws).

13. Umut Aydin & Tim Bütke, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 LAW & CONTEMP. PROBS., no. 4, 2016 at 15–26.

14. Developing countries are affected, to a significant degree, by transnational and multinational cartels. See Levenstein & Suslow, *supra* note 11, at 813 (estimating, while admitting limitations to their

Often, less developed countries do not even appear to recognize the impact these cartels have on their economies.<sup>15</sup> If cartel members act outside the country, agencies have difficulties detecting and scrutinizing the cartel.<sup>16</sup> Where they do, the global market power of firms is often badly matched by the antitrust regimes of developing countries.<sup>17</sup> Even if developing countries have the resources and expertise to regulate small and midsize local cartels, they may well be unable to regulate bigger and transnational or multinational cartels.<sup>18</sup> It may often be preferable for them to allocate scarce resources to the regulation of domestic cartels.

## B. Disentangling Regulation And Regulator

The result of the previous section is ambivalent. On the one hand, developing countries would benefit from antitrust regimes. On the other hand, some of these countries have difficulty building and using the necessary institutions, particularly ones strong enough to take on large, multinational cartels.

The most obvious way to deal with these problems is for developing countries to build effective antitrust regimes. This is the focus of the other contributions in this issue. However, this does not resolve situations that occur while such institutions do not exist, and it does not resolve situations that are too big for developing countries to handle. Does that mean that, until and unless they find the resources to build such institutions, regulation of their markets will necessarily be deficient? This is so only if one assumes, like most do, that regulation has to happen in and by these countries themselves.

But this assumption is not necessary. It merges two questions that are analytically separable. Even if one assumes that developing countries would benefit from antitrust regimes, this assumption does not reveal who should be charged with developing and enforcing antitrust law. One might think the answer obvious: the underdeveloped country itself. This would be plausible if markets

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data, that in one year (1997) “the total value of potentially ‘cartel-affected’ imports to developing countries was \$51.1 billion”). For a more recent empirical study, see Marc Ivaldi, Frédéric Jenny & Aleksandra Khimich, *Cartel Damages to the Economy: An Assessment for Developing Countries*, in *COMPETITION LAW ENFORCEMENT IN THE BRICS AND IN DEVELOPING COUNTRIES* 103 (Frédéric Jenny & Yannis Katsoulacos eds., 2016).

15. See Alan Riley, *Developing Ukrainian Competition Law: The International Price-Fixing Angle*, *UKR. J. BUS. L.* (July 2010), <http://www.ujbl.info/article.php?id=68> [<https://perma.cc/98YW-8VD3>], for a detailed example of how this plays out in Ukraine.

16. See Marek Martyniszyn, *Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law*, 15 *J. INT’L ECON. L.* 181, 196 (2012) (examining the difficulties of enforcement when cartels are located abroad).

17. Carlos Maria Correa, *Competition Law and Development Policies*, in *TOWARDS WTO COMPETITION RULES* 361, 382 (Roger Zäch ed. 1999).

18. This is true even for developed, but small, economies. See, e.g., Michal S. Gal, *Extraterritorial Application of Antitrust—The Case of a Small Economy: Israel*, in *COOPERATION, COMITY AND COMPETITION POLICY* 97 (Andrew T. Guzman ed., 2011) (examining Israel’s enforcement difficulties as a small country in a global economy); Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 *FORDHAM INT’L. L.J.* 1, 14–25 (2009).

were completely national. In this case, only the affected state itself would be interested in regulation, and only that state would seem justified in making decisions.<sup>19</sup> But markets transcend borders; global cartels are among the most forceful reminders of this. The same is true for laws; their impact is not strictly territorial and can cross borders.<sup>20</sup> Consequently the market of one country could well be regulated by the antitrust regime of another. The question is not whether this is theoretically possible but rather under what conditions it is feasible, desirable, and legally permissible.

Can the domestic authorities of a developed country fill the gap of regulation in a developing country? The idea of enforcing someone else's antitrust regime is not as outlandish as it may seem.<sup>21</sup> E.U. antitrust law is to a large part enforced not by E.U. agencies but by national institutions.<sup>22</sup> Something similar is true for the Andean Community, which provides its General Secretariat with investigative powers but relies on domestic agencies for enforcement.<sup>23</sup> The idea that transboundary cartels should be regulated by domestic agencies is therefore not per se anomalous.

The question is whether such mechanisms can also operate between states. If the domestic agencies of a developing country cannot effectively regulate certain anti-competitive conduct, and no supranational institutions exist to fill the gap, a remaining possibility is what is here called "supplanting antitrust." Concretely, the question is whether a developed economy can use its antitrust regime for the regulation of cartels that affect developing countries. And if so, what are the circumstances under which this would be justifiable?

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19. See *infra* Part IV.C.

20. See Ralf Michaels, *The State as a Transnational Legal Order*, U.C. IRVINE J. INT'L., TRANSNAT'L & COMP. L. 1 (forthcoming 2016).

21. See ELEANOR M. FOX, ANTITRUST WITHOUT BORDERS: FROM ROOTS TO CODES TO NETWORKS 4 (2015).

22. See, e.g., ASSIMAKIS KOMMINOS, EC PRIVATE ANTITRUST ENFORCEMENT: DECENTRALISED APPLICATION OF EC COMPETITION LAW BY NATIONAL COURTS (2008).

23. La Comisión de la Comunidad Andina [Andean Community Comm'n] 29 Mar. 2005, Dec. No. 608, Normas para la protección y promoción de la libre competencia en la Comunidad Andina [Rules for the Protection and Promotion of Competition in the Andean Community], <http://www.sice.oas.org/trade/junac/Decisiones/DEC608s.asp> [<https://perma.cc/L2P9-QCB3>]; Luu Huong Ly, *Regional Harmonization of Competition Law and Policy: An ASEAN Approach*, 2 ASIAN J. INT'L L. 291, 307–08 (2012).

### III SUPPLANTING ANTITRUST

#### A. Assistance, Positive Comity, And Supplanting

While actual supplanting antitrust as such appears like a novel idea,<sup>24</sup> the use of developed country antitrust expertise and actors for developing countries is not unusual. Developed countries offer their regimes as models, and many antitrust regimes in developed countries around the world are the results of such modeling.<sup>25</sup> They provide technical assistance in the form of expertise and manpower.<sup>26</sup> They provide investigative assistance to concrete antitrust inquiries.<sup>27</sup> And they provide enforcement assistance by enforcing decisions, especially court decisions, made in developing countries.

Recently, Michal Gal has made a proposal that goes further.<sup>28</sup> She suggests that small and developing countries could save on antitrust enforcement costs by recognizing decisions made in developed countries with regard to the same cartel.<sup>29</sup> In her proposal, after a decision has been made in a developed country, a local plaintiff in the developing country need not prove existence of the cartel but only the local elements of the offense, as well as some procedural requirements concerning the recognized decision.<sup>30</sup>

All these assistance mechanisms differ from supplanting in a crucial way: they leave implementation to the developing country. This is different from another form of assistance that is more akin to supplanting, namely positive comity.<sup>31</sup> The OECD defines this as an instrument “whereby competition authorities can request another jurisdiction to address anti-competitive conduct that might best be fixed with an enforcement action in the country that is the recipient of that request.”<sup>32</sup> Positive comity is regulated in several international agreements.<sup>33</sup> It is

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24. But for an early proposal to use extraterritorial application of domestic antitrust law as an alternative to development aid, see Wolfgang Fikentscher, *Third World Trade Partnership: Supranational Authority vs. National Extraterritorial Antitrust—A Plea for “Harmonized” Regionalism*, 82 MICH. L. REV. 1489 (1984).

25. For analysis, see Michal S. Gal, *The ‘Cut and Paste’ of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, 9 EUR. J.L. REFORM 467 (2007).

26. D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081, 1087–96 (2009); D. Daniel Sokol & Kyle W. Stiegert, *Exporting Knowledge Through Technical Assistance and Capacity Building*, 6 J. COMP. L. & ECON. 233 (2010).

27. Marek Martyniszyn, *Inter-Agency Evidence Sharing in Competition Law Enforcement*, 19 INT’L J. EVID. & PROOF 11 (2015).

28. Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance*, 51 VA. J. INT’L L. 57 (2010).

29. *Id.* at 59–60.

30. *Id.* at 73–74.

31. See COMMITTEE ON COMPETITION LAW & POLICY, ORG. FOR ECON. COOPERATION & DEV., REPORT ON POSITIVE COMITY (1999).

32. ORG. FOR ECON. COOPERATION & DEV., CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT 11, 13 (2014).

33. See, e.g., Agreement Between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their

a version of supplanting in the sense that one country regulates the market of another. Here, the decision that enforcement should take place is still taken by the affected country (through a request), but an actual enforcement is left to the other country.

Supplanting antitrust builds on these ideas but goes further. The idea is that a developed country's antitrust agencies and courts assert jurisdiction over cartels that have some or even all of their effect in a less developed country, even in the absence of a treaty that allows for it, and even in the absence of a request by the developing country.

## B. Jurisdiction

The question of who gets to regulate a market is not merely a matter of policy but also of law—both domestic and international.<sup>34</sup> Under international law, states are limited in their ability to regulate events that take place outside their borders. What is required is a jurisdictional basis providing a genuine connection between the regulating state and the affected parties or the regulated transactions.<sup>35</sup> What exactly constitutes such a genuine connection is contested, but a reasonable level of consensus exists, both generally and with specific reference to antitrust law.

States are not required to go to the limits of what is allowed under international law; they can, and frequently do, establish further restrictions.<sup>36</sup> On the other hand, because jurisdiction is an outflow of sovereignty, states can delegate the exercise of jurisdiction to other states. Such deferral of jurisdiction has taken place, for example, where countries have granted the International Criminal Court jurisdiction.<sup>37</sup> It can also take place between states.<sup>38</sup> For example, the 1972 European Convention on the Transfer of Proceedings in Criminal

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Competition Laws, Can.–U.S., art. IV, Oct. 5, 2004, T.I.A.S. No. 04-1005.1 (enhancing the process of referring anti-competitive activities to either U.S. or Canadian authorities); Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, EC–U.S., art. IV, June 4, 1998, T.I.A.S. No. 12958 (codifying positive comity between the United States and European Communities).

34. See generally CEDRIC RYNGAERT, JURISDICTION OVER ANTITRUST VIOLATIONS IN INTERNATIONAL LAW (2008) (examining the current domestic competition laws and how they interact with international law).

35. *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. Rep. 4, 4 (Apr. 6); *Barcelona Traction, Light and Power Company (Belg. v. Spain)*, 1970 I.C.J. Rep. 3, ¶ 70 (Feb. 5); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 (AM. LAW INST., Tentative Draft No. 2, 2016).

36. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 211, reporter's note 1 (AM. LAW INST., Tentative Draft No. 2, 2016) (citing Arrest Warrant of 11 April 2000 (*Dem. Rep. Congo v. Belg.*), 2002 I.C.J. 3, 63, 76 (Feb. 14) (joint separate opinion by Higgins, Kooijmans, Buergenthal, JJ.)).

37. See, e.g., Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 621–34 (2003) (discussing states deferring jurisdiction to the International Criminal Court).

38. Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 44 (Winter 2001).

Matters allowed such transfer.<sup>39</sup> Importantly, such transfer can happen even without the consent of the country whose nationals are being subjected to the jurisdiction.<sup>40</sup> This is sometimes called the “representation principle” of jurisdiction.<sup>41</sup>

The most important traditional basis of jurisdiction is territorial jurisdiction.<sup>42</sup> States have jurisdiction to regulate conduct, including anti-competitive conduct, in their territory. This works well for domestic cartels, but less well for transboundary cartels, in particular cartels that target foreign states. In these cases, the state of the place of conduct has jurisdiction to regulate the respective conduct, but frequently has no interest in doing so, because the conduct has no impact on the state’s market. As a consequence, many states do not exercise this jurisdiction with regard to effects outside their boundaries, in particular through the so-called export cartel exemption.<sup>43</sup>

In addition, states have jurisdiction over the conduct of their own nationals under the active personality principle.<sup>44</sup> Under this principle, a state can regulate its own corporations when they are engaged in anti-competitive conduct. The basis is of limited importance in antitrust law, however, for two reasons. First, like with territorial jurisdiction, states often lack the interest in barring their own corporations from conduct that is beneficial to the corporation and not detrimental to their own markets. Second, international cartels often bring together corporations from different countries. Thus it would be unsatisfactory for a state to regulate only those members of the cartel that are its own nationals.

The most important jurisdictional basis for antitrust violations has become the effects doctrine.<sup>45</sup> Under this doctrine, a state has jurisdiction to regulate conduct that has a direct, substantial, and reasonably foreseeable detrimental effect on the state’s economy. Jurisdiction exists even where the regulated entities are not nationals of the regulating state, and where the relevant conduct (for example, the price-fixing agreement) takes place outside of that state. The doctrine, which was long contested, is now widely accepted.<sup>46</sup> It is today the most

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39. European Convention on the Transfer of Proceedings in Criminal Matters, May 15, 1972, E.T.S. No. 073.

40. For discussion see Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 113–15 (Winter 2001).

41. COUNCIL OF EUROPE, EXTRATERRITORIAL CRIMINAL JURISDICTION 14 (1990); LUC REYDAMS, UNIVERSAL JURISDICTION 21–24 (2004).

42. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 (AM. LAW INST., Council Draft Dec. 2015); CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 42 (2008).

43. See *infra* Part IV.B. For U.S. law, see Foreign Trade Antitrust Improvements Act, 15 U.S.C. §§ 6(a), 45(a)(3) (2012).

44. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 214 (AM. LAW INST., Council Draft Dec. 2015); RYNGAERT, *supra* note 42, at 88–89.

45. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (AM. LAW INST., Council Draft Dec. 2015).

46. See Ivo E. Schwartz & Jürgen Basedow, *Restrictions on Competition*, 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 60, 67 (1995).



important basis of jurisdiction over anti-competitive conduct because it ensures that the country most affected by a cartel has jurisdiction to regulate that cartel.

### C. Applicable Law

Jurisdiction to regulate is only one question. The other one, for current purposes, is what law applies. Traditionally, if a court asserts jurisdiction over claims from injuries suffered on foreign market, it will normally apply its own law to them. In the United States, this follows from the subject matter jurisdiction of federal courts, which is limited by the scope of application of federal law. In Europe, private plaintiffs can opt for applicability of the law of the court if more than one market is affected.<sup>47</sup>

The application of the court's own law can often be justified on the basis of the conflict-of-laws doctrine of interest analysis. Under interest analysis, a court will apply the law of a country that has an interest in the application of its law.<sup>48</sup> If laws conflict, a decision must be made, but often this is not necessary. If the policies of the court's law and the foreign law coincide—as can be the case, for example, in the universally accepted ban on price-fixing—a court is entitled, under interest analysis, to apply its own law. In this case, called a false conflict, the foreign country's interests are simultaneously furthered. Moreover, a country is arguably entitled to apply its own law to a situation with links to a foreign country even when it has no interest of its own, provided that the other country has no regulatory interest in regulation, either. In conflict of laws, this case is called an unprovided-for case, and it is generally dealt with by application of the forum's law.<sup>49</sup> The situation in which the less developed country has no functioning antitrust regime can be viewed as such a situation—the developing country has no law that it could want to be applied and therefore no interest in the sense of interest analysis.

The application of just one law—the forum court's law—to antitrust violations in foreign markets has advantages and disadvantages. The great advantage is simplicity: the court must apply only one law to the entire cartel, and that is the law the court knows best. The disadvantage is that the court's own law may not be the most adequate law with regard to foreign markets. If developing countries have different antitrust laws, their interests would often be better served if those laws were applied rather than those of the developed country.

The application of foreign antitrust law remains, however, a rarity. In antitrust cases, U.S. courts can assert so-called “supplementary jurisdiction” over claims governed by foreign law, though in practice they often seem unwilling to do so.<sup>50</sup> In Europe, by contrast, the applicable law is normally the law of the

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47. Council Regulation 864/2007, art. 6(3)(b), 2007 O.J. (L 199) 40 (EC).

48. For a very accessible introduction, see KERMIT ROOSEVELT, *CONFLICT OF LAWS* 43–80 (2d ed. 2015).

49. The classical case is *Erwin v. Thomas*, 506 P.2d 494 (Or. 1973).

50. 28 U.S.C. § 1367(a).

affected market.<sup>51</sup> There is no principle under international law, however, that suggests that courts should not be allowed to apply foreign antitrust law, and why agencies should not at least consider the content of foreign law. In other areas of the law, courts are used to the application of foreign law, which may be applicable under principles of choice of law. This should be possible and would actually be desirable for globalized markets.<sup>52</sup> However, that argument cannot be fully developed here.

#### D. Relevant Factors

When would supplanting antitrust be desirable? While specifying a comprehensive set of the factors to determine whether supplanting is justifiable in a given case would be premature, it is helpful to list some of the factors that contribute the analysis.

The first, and most important, factor is subsidiarity. Everything else being equal, it is preferable if a developing country regulates its own economy by itself, rather than for a developed country to do so in its stead. In this way, supplanting antitrust is normally justified only in cases in which the developing country is unable to effectively regulate a cartel on its own. This inability may rest on lack of resources or expertise in the developing country itself. It may also rest, however, on the insight that centralized regulation by the developed country would be more effective than decentralized regulation, a point that will be developed in part IV.<sup>53</sup>

A second relevant factor is the size and complexity of the event and of the regulated actors relative to the capacities of the developed country's agencies. In relatively small and simple cases, domestic agencies of underdeveloped countries can be effective. In more complex cases and cases involving strong corporate actors, such agencies may lack the required expertise and means. Here, supplanting antitrust can become attractive.

A third factor is the degree of internationality of the cartel. This concerns both the extent to which the developing country itself is affected and the total degree of internationality. First, the case for supplanting antitrust is hardest to make where a cartel is purely local, confined to the developing country.<sup>54</sup> The case is easiest where the cartel significantly affects the developed country itself. Second, the more countries that are involved, the more problematic it will be to have multiple proceedings, and the stronger the argument becomes for centralization of regulation in one country. These questions will be discussed in part IV.

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51. See INTERNATIONAL ANTITRUST LITIGATION: CONFLICT OF LAWS AND COORDINATION 225, 235 (Jürgen Basedow, Stéphanie Francq & Laurence Idot eds., 2012).

52. See William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT'L L. 371, 393 (2008).

53. *Infra* Part IV.A.

54. Whether conduct by developing country subsidiaries of OECD country-based multinational firms qualifies as transnational will depend on a case-by-case analysis.

A fourth important factor is the congruence of laws and policies. Simply speaking, supplanting seems much more legitimate where no conflict exists between the enforcing state's laws and policies and those of the underdeveloped country. In some areas, policies are the same everywhere.<sup>55</sup> Price fixing, for example, is universally abhorred. In other areas, however, some pertinent conflicts exist, and they matter. Where conflicts exist, supplanting antitrust appears problematic, unless the institutions of the developed country are willing to adopt the policies of the developing country by applying its law. An especially difficult case is the one in which the developing country has not actually developed its own independent laws and policies. In this case, supplanting antitrust can be justified insofar as the enforcing state is willing and able to develop policies that are—hypothetically, at least—catered to the needs of the underdeveloped country.

Economists once assumed that a single optimal antitrust regime could be designed in the abstract and then implemented in different countries.<sup>56</sup> In reality, the optimal antitrust regime for developing countries may be different from that of developed countries.<sup>57</sup> First, countries have not just different cultures<sup>58</sup> but also idiosyncratic policy preferences, so optimal regimes may differ between countries.<sup>59</sup> In particular if countries hope to use antitrust laws to enhance

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55. Gal, *supra* note 28, at 84–85.

56. See, e.g., DAVID J. GERBER, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION* 82 (2010); David Lewis, *Embedding a Competition Culture: Holy Grail or Attainable Objective?*, in *COMPETITION LAW AND DEVELOPMENT*, 228, 228–30 (D. Daniel Sokol et al. eds. 2013). For an attempt at a model code, see Int'l Antitrust Code Working Grp., *Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement*, 5 *WORLD TRADE & ARB. MATERIALS* 126 (1993).

57. Dina I. Waked, *Development Studies Through the Lens of Critical Law and Economics: Efficiency and Redistribution Revisited in Market Structure Analyses in the South*, 5 *TRANSNAT'L LEGAL THEORY* 649, 657 (2015). For a list of basic characteristics of developing jurisdictions, see Michal S. Gal & Eleanor M. Fox, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience*, in *THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW* 296, 304–11 (Michal S. Gal et al eds., 2015); see also Tamar Indig & Michal S. Gal, *Lifting the Veil: Rethinking the Classification of Developing Economies for Competition Law and Policy*, in *THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW* 51, 52 (Michal S. Gal et al eds., 2015).

58. See Indig & Gal, *supra* note 57, at 66–77; Wolfgang Pape, *Socio-Cultural Differences and International Competition Law*, 5 *EUR. L.J.* 438, 445 (1999) (presenting perceived cultural differences in competition law).

59. See Eleanor M. Fox, *Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries*, in *COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES* 273 (Josef Drexler et al. eds., 2012) (examining the different needs of developing countries in creating competition law); Dina I. Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices*, 38 *SEATTLE U.L. REV.* 945 (2015); see also FOX, *supra* note 21, at 9–11 (discussing six possible models for developing countries, including, as the sixth option, a tailor-made regime); Heba Shahein, *Designing Competition Laws in new Jurisdictions: Three Models to Follow*, in *NEW COMPETITION JURISDICTIONS*, *supra* note 6, at 35, 63–65 (discussing the pros and cons of 'tailor-made' competition laws as opposed to a 'cut and paste' adoption of EU or U.S. law, a contextualized translation of these laws).

democracy, existing Western-based models that focus exclusively on economic efficiency may not be adequate.<sup>60</sup>

Second, market conditions in developing countries differ in relevant ways. The policies of U.S. and E.U. antitrust law are formulated for countries with well-functioning markets, little statism, minimal corruption, and significant resources. They arguably do not fit well in developing countries where these factors are absent,<sup>61</sup> just as they would not have fit the OECD countries themselves at earlier stages of their development. Competition is often lagging, meaning that antitrust law must promote, not merely protect, competition.<sup>62</sup> Moreover, developing countries may have strong and legitimate interests in helping their corporations become competitive before opening up their markets to foreign competitors that would immediately overrun the market.<sup>63</sup>

Although it might be beneficial in theory for developing countries to develop their own idiosyncratic antitrust regimes, it seems unlikely that this will happen to a significant degree. This is so for at least four reasons.<sup>64</sup> First, developing countries often do not even develop such preferences, for lack of democratic representation or for lack of economic expertise. Second, legal and economic advisers often bring with them their own preferences, even if they aspire not to. Third, countries have incentives to match their antitrust laws to a global consensus in order to assure investors. And fourth, when international financial institutions like the International Monetary Fund and the World Bank make loans conditional on the adoption of antitrust laws, there is significant pressure for these laws to comply with a U.S.–E.U. model.<sup>65</sup> Therefore, even if an antitrust law is formally a sovereign legislative act of an underdeveloped country, substantively it often reflects global and foreign preferences more than domestic preferences.

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60. See Niels Petersen, *Antitrust Law and the Promotion of Democracy and Economic Growth*, 9 J. COMPETITION L. & ECON. 593, 594 (2013) (discussing the possibility that such models can have negative economic implications).

61. See Simon J. Evenett, *Competition Law and the Economic Characteristics of Developing Countries*, in THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS, *supra* note 57, at 15, 19–29 for an explanation of these different conditions.

62. See Oliver Budzinski & Maryam H.A. Beigi, *Generating Instead of Protecting Competition*, in THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS, *supra* note 57, at 223 (arguing that competition policy in developing countries must work to generate competition).

63. See Josef Drexler, *Consumer Welfare and Consumer Harm: Adjusting Competition Law and Policies to the Needs of Developing Jurisdictions*, in THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW, *supra* note 57, at 265, 292–93 (discussing the importance of first addressing monopolies within developing countries).

64. For reasons for a “cut and paste” approach, see Gal & Fox, *supra* note 57, at 300–03. For more general advantages and limits of a one size fits all approach, see generally, Ralf Michaels, “*One Size Can Fit All*”—*Some Heretical Thoughts on the Mass Production of Legal Transplants*, in ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE 56 (Günter Frankenberg ed., 2013).

65. Waked, *supra* note 89, at 200.

#### IV APPLICATION

How would supplanting antitrust apply in practice? To answer this question, it helps to distinguish between three types of cartels: local, transnational, and multinational cartels. Local cartels are cartels that exist exclusively within one country and its market. Transnational cartels are cartels in which actors from one or more countries conspire in order to influence the market in another country or other countries. Export cartels are the main example of such cartels. Multinational cartels, finally, combine both actors from and markets in multiple countries, where there is overlap between countries of conduct and actors on the one hand and markets on the other.

These are ideal types, and the boundaries are fuzzy. In particular, the distinction between transnational and multinational cartels may seem unusual, but because both raise different considerations the distinction is important for the assessment. The three types are addressed in reverse order, because the case for supplanting antitrust is made most easily for multinational cartels, and least easily for domestic cartels.

##### A. Supplanting Antitrust In Multinational Cases

In some ways, multinational cartels present the most interesting case. Should, the antitrust law and enforcement institutions of a developed country supplant those of other countries in multinational cartel cases?

The developing country may have a genuine interest in such supplanting—especially if the cartel is too powerful or too complex for the country's own authorities. A further interest in such supplanting is shared by developed and developing countries alike: the global interest in centralized regulation of a cartel.<sup>66</sup> When a cartel transcends boundaries, separate regulation within each affected market is inefficient because multiple agencies are required to engage in similar regulation. This duplicates regulation costs for agencies and raises costs for both plaintiffs and defendants in antitrust litigation.<sup>67</sup> Moreover, without coordination, such parallel and duplicative regulation can, in theory, lead to either over- or under-regulation.<sup>68</sup> In practice it will more likely lead to under-regulation, because no state would go above what is necessary for its own market, but some may not find it worthwhile to regulate the cartel.<sup>69</sup> Transgovernmental coordination of antitrust regulation, the main alternative to centralized

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66. OLIVER BUDZINSKI, *THE GOVERNANCE OF GLOBAL COMPETITION: COMPETENCE ALLOCATION IN INTERNATIONAL COMPETITION POLICY* 47–49 (2008); *see also* Hannah L. Buxbaum & Ralf Michaels, *Jurisdiction and Choice of Law in International Antitrust Law—A US Perspective*, in *INTERNATIONAL ANTITRUST*, *supra* note 51, at 235.

67. The focus here is on cartels. It should be noted that, in mergers in particular, parallel enforcement raises costs and risks for corporations that have to get approval from multiple agencies.

68. Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U.L. REV. 1501, 1512–21 (1998).

69. *Cf. Gal*, *supra* note 28, at 79; Andrew T. Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 362–63 (2004).

regulation, can lead to considerable costs, because agreements must be reached between different states. Thus, the most efficient way to regulate a multinational cartel is centralized regulation.

If centralized regulation is attractive, the most attractive regulator would appear to be a supranational institution. Such an institution does not exist, however. Hopes for a world antitrust court, for example within the WTO, have not materialized. Regional courts like the courts of the European Union are of little help for cases outside or beyond Europe. Thus, in the absence of such an institution, the question remains whether centralization can take place through the institutions of one of the affected countries, in particular of a developed country. Central regulation of the entire cartel by one developed country could be viewed as a stark example of positive comity.

Centralized enforcement by a developed country is not only based on a mutual interest, however. In addition, developed countries have a genuine interest in taking into account worldwide effects of a multinational cartel. As the U.S. Supreme Court argued in a somewhat different context “[P]ersons doing business both in this country and abroad might be tempted to enter into anti-competitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home.”<sup>70</sup>

This can be demonstrated with a simple thought experiment. Imagine a cartel makes supra-competitive profits of \$1 billion worldwide, of which \$100 million is made in the United States. If a U.S. court assigns treble damages to the class of U.S. purchasers, the cartel faces costs of \$300 million, which leaves it with an overall profit of \$700 million. As a consequence, the threat of treble damages in the United States alone is not a sufficient deterrent for the cartel. Importantly, the cartel is not even deterred from fixing prices in the U.S. market. Allowing only purchasers from the U.S. market to sue for treble damages thus leads to under-regulation, even for the U.S. market.<sup>71</sup>

Note that this assessment does not change when the cartel affects multiple countries with effective antitrust regimes. Even if multiple agencies around the world assess fines and damages with regard to the effect the cartel has on their

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70. *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 315 (1978); *cf. Guzman, supra* note 69, at 362–63.

71. That this is no idle speculation becomes apparent from an argument made by plaintiffs in *Empagran*:

Because the appellees' product (vitamins) was fungible and globally marketed, they were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well. Otherwise, overseas purchasers would have purchased bulk vitamins at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States, thereby preventing the appellees from selling abroad at the inflated prices. Thus, the super-competitive pricing in the United States “gives rise to” the foreign super-competitive prices from which the appellants claim injury.

*Empagran S.A. v F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1270 (D.C. Cir. 2005) (footnote omitted) (quoting Appellants' Brief). Similarly, e.g., Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. CHI. L. REV. 265, 274–76 (2005).

markets, the cartel may remain under-regulated, because not all countries affected by the cartel will actually regulate. Imagine, in the hypothetical example above, that the global cartel makes sixty percent of its profits in developed countries and forty percent in developing countries without effective antitrust institutions. If, in this case, each of the countries that do regulate confined itself to the effect on its own market, the cartel would be regulated only with regard to sixty percent of its profits—it would, in other words, remain under-deterred.

Such under-regulation is not required by the restrictions international law places on extraterritoriality: Where foreign corporations are injuring foreign purchasers in a foreign market, one could argue that the United States lacks a sufficient connection to take those foreign purchases into account. But this argument is erroneous. As long as the regulating country is affected, it has jurisdiction to regulate the cartel, even if some of the effects are felt elsewhere. International law does not require that such regulation must be confined to the effects within the regulating country. Although effects create the basis for jurisdiction, what is being regulated is the conduct.

Indeed, the same result could be reached without direct regulation of foreign markets. Imagine the United States provided a remedy only to the U.S. purchasers, but that remedy was tenfold rather than threefold damages, because that was calculated as necessary to achieve deterrence. In this case, the cartel would be as effectively deterred as it would be by granting treble damages to foreign purchaser, but there would be no problem of extraterritoriality.<sup>72</sup> If \$1 billion is the amount necessary to deter the cartel from fixing prices on a global market that includes the United States, then the United States can legitimately assess this amount in order to protect its interests. As a matter of fact, public authorities regularly assess their fines on the basis of the cartel members' worldwide turnover.<sup>73</sup>

Moreover, even in a situation with existing antitrust regulation in various countries, it would be in every country's interest that the cartel be regulated also with regard to effects on those markets that have no effective enforcement regimes.<sup>74</sup> If a supranational institution existed, it could appoint the country that should regulate the anti-competitive conduct.<sup>75</sup> In the absence of such an institution, determining the appropriate regulator is harder but not impossible. Principles of positive comity, combined with conflict-of-laws rules, should make it possible for them to defer to the best-equipped country.<sup>76</sup> This may often be the country in which most of the defendants are situated, or the country that was most affected by the cartel.

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72. Whether there would be a problem of constitutionality is a different matter.

73. See INT'L COMPETITION NETWORK GRP., SETTING OF FINES FOR CARTELS IN ICN JURISDICTIONS 15–16 (2008), <http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf> [<https://perma.cc/655G-F5MT>].

74. For a two-tier solution, see Sprigman, *supra* note 71, at 282–83.

75. See BUDZINSKI, *supra* note 66, at 166–167, 203–06.

76. See also FOX, *supra* note 21, at 2–3.

Regulation may thus be in the interest of the developed country. It is also in the interest of the developing country if enough of the previously discussed conditions are met. If a cartel affects a country without an effective antitrust regime, that country will, under most circumstances, benefit from effective regulation of the cartel, even if that regulation is performed by the institutions of a developed country. Under-regulation of the cartel would be worse for the developing country. These considerations are relevant under international law, too. Extraterritoriality is a problem for sovereignty: regulating events taking place in a foreign country threatens to impede that country's sovereignty. If a developing country raises a protest—a diplomatic protest, an *amicus curiae* brief, or even an informal complaint—this is relevant under international law. Even if the developed country has jurisdiction, the protest, as an expression of strong countervailing foreign interests, may make its exercise unreasonable.<sup>77</sup> If the country does not raise such a protest, however, this will often mean that it does not perceive regulation by the developed country as an intrusion into its sovereignty. An explicit request, as provided under positive comity, should not be required.

## B. Supplanting Antitrust In Transnational Cases

Partly different considerations occur in transnational cartels, in which actors from one or more developed countries coordinate in order to affect the markets of one or more developing countries.

Such cartels are normally best regulated by the affected country or countries themselves. These countries feel the effects of the cartel and, therefore, are best suited to determine the optimal reaction. However, when these countries do not have effective institutions, the question arises whether another country, in particular the country in which the cartel members are located or in which they act, can and should regulate the cartel. Under international law, there is no doubt that the country can do so: Both the place of the conduct and the nationality and domicile of the actor provide a sufficient nexus for the establishment of jurisdiction.<sup>78</sup> However, in antitrust law this jurisdiction is rarely exercised. Many countries exempt so-called export cartels from regulation, by law or at least in practice.<sup>79</sup>

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77. Reasonableness limitations on jurisdiction are state practice, even though it is doubtful whether they rise to the level of international law requirements. See RYNGAERT, *supra* note 42, at 178; see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (AM. LAW INST., Council Draft Dec. 2015)

78. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 212 (AM. LAW INST., Council Draft Dec. 2015) (“International law recognizes a state’s jurisdiction to prescribe law with respect to persons, property, and conduct within its territory”); *id.* § 214 (“International law recognizes a state’s jurisdiction to prescribe law with respect to the conduct, interests, status, and relations of its nationals outside its territory”).

79. See the table of selected countries in Margaret Levenstein & Valerie Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 AM. U. INT’L L. REV. 785, 819–820 (2005). See also Martyniszyn, *supra* note 16, at 186–88 (discussing arguments for and against the regulation of export cartels).



Exempting export cartels from regulation has been called “beggar-thy-neighbor” conduct,<sup>80</sup> but the exemption has a logic behind it that seems at first compelling.<sup>81</sup> Exempting export cartels creates, effectively, exclusive regulatory jurisdiction in the market country.<sup>82</sup> Normally, a good case can be made that the exporter’s country should not supplant the market country’s own policy determinations.<sup>83</sup> If the market country allows a certain conduct, no sensible goal seems to be furthered if the exporter’s country nonetheless forbids its exporters from engaging in the conduct, thereby reducing their ability to compete with other companies that face no similar legal constraints.

However, this logic only works where the market country has the capacity to regulate and where non-regulation is a deliberate policy choice. Where that is not the case, the logic breaks down, and the cartel remains unregulated: the target country cannot, and the country of origin will not regulate. This is a special problem for developing countries,<sup>84</sup> and it has inspired protest among them against developed countries’ use of the exemption.<sup>85</sup>

Is this result unavoidable without an international agreement abolishing the exemption and requiring the state in which the anti-competitive conduct occurs to regulate?<sup>86</sup> Developing countries would benefit, but will developed countries have enough of an incentive? The first step in determining the answer is asking whether the exporter’s country really has no interest in regulating the export cartel. Abstractly, this seems plausible. A country typically has little interest in regulating conduct that has its effects elsewhere.<sup>87</sup> If the goal of U.S. antitrust law is the protection of consumers, this is typically read to implicitly refer to U.S. consumers. Where resources are scarce, as they always are, priority will be given to domestic markets. In fact, countries will often even promote export control as a way of empowering their domestic corporations.<sup>88</sup>

But this is a narrow definition of interests. States do regulate conduct that affects foreign markets, at least in other areas of the law. Sometimes this happens

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80. A. Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 ANTITRUST L.J. 571, 581 (1991).

81. See D. Daniel Sokol, *What Do We Really Know About Export Cartels and What is the Appropriate Solution?*, 4 J. COMPETITION L. & ECON. 967, 971 (2008) (noting the lack of empirical data on export controls that makes non-theoretical arguments difficult); see also Martyniszyn, *supra* note 16, at 183–88.

82. The fact that the exemption is automatic and export cartels need not register may make it harder for target countries to detect them, however.

83. See *infra* Part V.A.

84. See Martyniszyn, *supra* note 16, at 195–96 (discussing the difficulty developing countries have in regulating cartels operating abroad).

85. See *id.* at 190–91 (discussing Thailand’s, and other developing countries’, opposition to export cartel exemptions).

86. See Brendan Sweeney, *Export Cartels: Is there a Need for Global Rules?*, 10 J. INT’L ECON. L. 87 (2007).

87. See Guzman, *supra* note 68, at 1512–13.

88. See, e.g., Niklas Jensen-Eriksen, *A Potentially Crucial Advantage: Export Cartels as a Source of Power for Weak Nations*, 64 REVUE ÉCONOMIQUE 1085 (2013) (chronicling Finland’s promotion of export control in order to grow Finnish producers).

as a consequence of multilateral agreements. For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal requires states to prohibit the export of waste to countries that have prohibited the import of such material.<sup>89</sup> Sometimes, this happens on the basis of local policies. For example, U.S. courts have long asserted jurisdiction over securities fraud that takes place in the United States, even if it is directed at foreign markets, on the grounds that the United States does not want to be a safe haven for fraudsters.<sup>90</sup> Many countries criminalize sex tourism<sup>91</sup> for similar reasons. A similar argument should be available for antitrust law. Developed countries, as promoters of competitive markets, have no legitimate interest in protecting anti-competitive conduct on their territory, even if the conduct only targets foreign markets.

Not only the prevention of anti-competitive conduct at home, irrespective of the place of effects, is in the interest of the developed country. The developed country also has an interest in protecting competition in foreign markets. In order to recognize this, it is not necessary to appeal to altruism. Rather, the (seemingly) local good of competition on the foreign marketplace is part of a global good.<sup>92</sup> Foreign markets are not isolated; they are part of the global economy. Insofar as developed countries want the global economy to rest on competition, the avoidance of anti-competitive effects on foreign markets is among its genuine interests. Developed countries have promoted not only competition but also competition laws and enforcement worldwide through aid and assistance. They should therefore also have an interest in not providing a safe haven for corporations engaged in such anti-competitive conduct in foreign countries. It seems inconsistent to lecture a developing country on the benefits of free competition, and then to do nothing against one's own corporations violating these principles domestically. It also is inconsistent to spend money helping a developing country develop its own antitrust regime and to not spend money preventing one's own corporations from engaging in anti-competitive conduct in that country. And it seems outright cynical for a country like the United States to put pressure on India to dismiss an action against a United States-based export

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89. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 125.

90. See the discussion in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). This was rejected by Justice Scalia in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 270 (2010) ("While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.").

91. Naomi L. Svensson, *Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws*, 28 LOY. L.A. INT'L & COMP. L. REV. 641, 642 (2006); see also Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, opened for signature May 25, 2000, 2171 U.N.T.S. 227 (entered into force Jan. 18, 2002). See also Convention on the Rights of the Child, art. 34, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

92. See Eleanor Fox, *Extraterritoriality in the Age of Globalization; Conflict and Comity in the Age of Empagran*, 1 ANTITRUST REP. 1, 11–14 (2005).

cartel, as happened in connection with the American Soda Ash Export Cartel.<sup>93</sup> What is necessary is not worldwide legal harmonization, but merely the introduction of internal consistency into the policies of export countries.

Notably, the interest of developed and developing country alike is that the cartel be regulated at all, not necessarily that it be regulated by a particular country. It seems proper to assume a priority for regulation in and by the target country of an export cartel, in accordance with the idea of subsidiarity discussed earlier. Insofar as such regulation takes place, exempting export cartels may be proper, and the export country can decide to defer under its abstention doctrines. Supplanting antitrust is only necessary and appropriate where such regulation in the target country is not possible. In that case, however, it seems weak to argue that regulation should be left to the developing country itself, which needs to establish expertise and reputation, because these are harder to develop in transnational than in domestic cartels.

### C. Supplanting Antitrust In Domestic Cases

Under current conditions of global markets, relatively few cartels are purely local. Many cartels directly affect the markets of more than one country. Moreover, in a globalized economy, it is rarely the case that a cartel's less direct effects remain purely local. However, domestic cartels exist, and they must be analyzed. What about cases in which foreign firms engage in anti-competitive conduct abroad and the damages occur entirely outside the United States?

Supplanting antitrust seems mostly impossible in this case. If a cartel remains purely local—if the cartel members, their conduct, and the affected market are all in one country—then that country is, under international law, the only one entitled to regulate the conduct.<sup>94</sup> The United States, for example, would normally have no jurisdiction over a cartel that remains within the borders of El Salvador. If El Salvador has no antitrust regime, the cartel remains unregulated. This reality has contributed to the strong push to help countries, especially developing countries, build their own antitrust regimes.<sup>95</sup>

Does this change if the country is incapable of taking on a cartel on its own? Could a developed country regulate here as well? Developed countries are interested in competitive conditions in foreign markets. This is why they provide technical and financial assistance to developing countries. They might, therefore, also be interested in regulating domestic cartels in foreign countries as a form of nonmonetary assistance.

As long as the developing country does not request enforcement, however, developed countries cannot use their own institutions to regulate the foreign

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93. See Martyniszyn, *supra* note 16, at 202–03 (describing how the United States pressured India and India acquiesced).

94. *Supra* Part III.B.

95. See Aydin & Büthe, *supra* note 13, at 28–29 (discussing importance of international efforts in encouraging new competition regimes).

market. Foreign regulation of another country's internal affairs is an illegal interference with the regulated country's sovereignty.<sup>96</sup>

Only where the developed country explicitly requests enforcement could the lack of jurisdiction be remedied through the principle of representation.<sup>97</sup> Even then, however, regulation of domestic cartels is in most cases undesirable. In domestic cases, the most desirable situation is one in which the affected country itself regulates. The long-term interest, of both developed and developing countries, is for developing countries to build the necessary institutions and expertise. If the country lacks institutions, then domestic cartels are the core cases on which domestic authorities can develop expertise and reputation. Developed countries should render all assistance necessary for effective regulation, but should generally not use their own enforcement mechanisms for foreign cases with purely domestic effects.

## V

### OBJECTIONS

Although supplanting antitrust is sometimes justified, there are bound to be objections. In fact, the idea seems unattractive to a range of different groups. Libertarians may fear the idea of regulatory meddling in export markets. Proponents of development may fear the undermining of indigenous law reform projects. Progressives may fear U.S. hegemonialism. Sovereignists may worry about the use of U.S. resources for foreign market concerns. There is some value to each of these objections, but none of them hold up.

#### A. Neocolonialism/Hegemonialism

A first objection arises from sovereignty, including economic sovereignty. Politically, sovereignty entails mastery of one's own markets. It would be hegemonialist, even neocolonialist, for a developed country to take over regulation of an underdeveloped country's markets. Supplanting antitrust may smack like a negation of independence. A developed country making and enforcing economic policies for an underdeveloped country sounds like neocolonialism. Further, the idea that a developed country's agencies expand their reach has a hegemonialist ring to it.

These concerns must be taken seriously, but they can be answered and at least some of the expected problems can be avoided. Western hegemonialism today consists not only, or not even primarily, of the expansion of Western laws—it consists of the expansion of Western economic power. This is clearest where Western corporations are engaged in anti-competitive conduct. In this case, an expansion of Western law is not hegemonialist in itself; it merely follows the expansion of such economic power. In offering their laws to those injured by the

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96. RYNGAERT, *supra* note 42, at 5–6.

97. REYDAMS, *supra* note 41, at 21–24.

conduct of their corporations, developed countries are not primarily hegemonialist—they largely re-establish the balance between economic freedom for corporations and protection of consumers that are taken for granted in those countries themselves.<sup>98</sup> If anything, it is hegemonialist to allow corporations to raid foreign markets and not offer recourse in those corporations' home courts. The fact that developing countries often do not object to such regulation by institutions in developed countries may be a sign that they approve. Indeed, foreign countries are often even themselves plaintiffs in U.S. courts.<sup>99</sup>

Supplanting antitrust could still be viewed as neocolonialist in a broader sense. Technical assistance, for example, is not purely innocent and altruistic. Experts from developed countries may also attempt to influence opinions and actions in less developed countries in order to open those markets for corporations from developed countries. Legal transplants are ways to enhance access for lawyers from developed countries. However, an important difference exists between neocolonialism and supplanting antitrust. Neocolonialism, like colonialism, depicts a situation in which a developed country exploits an underdeveloped country for its own benefit. Supplanting antitrust, by contrast, depicts a situation in which a developed country helps an underdeveloped country succeed. Of course, whether these conditions are met is easier said in theory than found in practice, and much will depend here on the factors described earlier.

## B. Lack Of Interest

If the first problem was one in which the developed country inserts too much of its own interests into the supplanting, the opposite problem is that the developed country may have no such interest at all. Lack of interest can be a problem of resources. Antitrust agencies in developed countries have limited resources and may not want to spend those on activities that do not benefit their markets. However, the agencies have other interests. Not only do regulating countries often make money from regulation—directly through fines, or indirectly through lawyers' fees.<sup>100</sup> Moreover, developed countries are already investing resources into foreign antitrust regimes in the form of technical

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98. See Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 533 (David L. Sloss et al. eds., 2011) (discussing how the Supreme Court's decision that foreign purchasers could not use U.S. antitrust law is hegemonialist).

99. For an analysis of cases, see Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism"*, 73 *WASH. & LEE L. REV.* 653 (2016). Even developed countries bring suits in U.S. courts. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016); Stéphanie Francq, *Agora: Reflections on RJR Nabisco v. European Community: A European Story*, 110 *AM. J. INT'L L. UNBOUND* 74 (2016) (discussing motivation for the EU to sue in US courts); see also Anthony J. Colangelo, *Agora: Reflections on RJR Nabisco v. European Community: The Frankenstein's Monster of Extraterritoriality Law*, 110 *AM. J. INT'L L. UNBOUND* 51, 55 (2016) (arguing that refusal to open courts to foreign sovereign plaintiffs undermines, rather than protects, foreign relations interests).

100. This assumes that fines contribute to the developing country's economy.

assistance. Underlying both development aid and substitution is a common idea that helping global markets is a genuine interest of developed countries. Levenstein and Suslow suggest that, conservatively estimated, the illegitimate gains made by multinational and transnational cartels from developing countries amount to about 15% of development aid.<sup>101</sup> Regulating such cartels is thus a way to reduce the need for development aid.

### C. Lack Of Expertise

A third problem concerns lack of country-specific expertise. Agencies in developed economies have significant expertise in markets and anti-competitive conduct, but that expertise is focused on their own markets. U.S. enforcers are used to protecting the interests of U.S. consumers. It may be hard for them to adjust their framework to a very different economy in a developing country.

This is a real problem for supplanting antitrust. It could be remedied by developing a more cosmopolitan perspective on matters of antitrust law. Given the rise of trans- and multinational cartels, such development will be required from antitrust enforcers in the developed world anyway. But it is a long way to get there, and whether U.S. authorities are at present capable of taking the specificities of foreign economies into account is an open question. To some extent, including experts from (and on) the developing country in the decisionmaking may remedy this problem. It is not certain that such expertise can effectively be provided by experts from the affected market, if only because U.S. authorities often lack the necessary expertise in listening to foreign experts. To some extent, the problem may be unavoidable, but regulation with the wrong kind of expertise may still be preferable to no regulation at all.

Finally, in some cases, it may help to use Gal's Recognition-of-Judgments Mechanism and leave the determination of country-specific considerations to the enforcement in that country.<sup>102</sup> Indeed, her solution is in important ways similar to the concept of supplanting developed here: findings and decisions are made in the developed country and then applied to the developing country. In one way, such a recognition mechanism presents an advantage over the idea of supplanting, because it retains the sovereign discretion of the institutions in the developing country and thus leaves much to their expertise.<sup>103</sup> In another way, it presents a potential disadvantage, because it does not require the institutions in the developed country to take these institutions into account. While it does present efficiency gains, it does not overcome the intrinsic problem of regulating global markets on a state-by-state basis. Further, her proposal will work only for developing countries that have functioning regimes and private suits. All of this may mean that sometimes the enforcement solution will not yield better results. Nonetheless, both ideas can be seen as complementary rather than mutually exclusive.

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101. Levenstein & Suslow, *supra* note 11, at 813, 816.

102. See Gal, *supra* note 28, at 59 (proposing the idea of the Recognition-of-Judgments Mechanism).

103. *Id.* at 76-78. Sovereignty implications of the proposal are discussed *infra* Part V.D.

#### D. The Problem Of Fit

Another possible objection is that the antitrust law of a developed country might not be adequate for the regulation of developing economies because they need different antitrust regimes.<sup>104</sup> This is a sensible objection, but it does not provide a compelling counterargument for three reasons.

The most important of the three has to do with the character of the regulated cartels. The argument in this article is not that the law of the developed country should be used for all antitrust regulation. Insofar as it is possible for a developing country in a global economy to develop its own idiosyncratic regime and apply it effectively, this must certainly be possible and it may even be desirable. This is the case for domestic cartels. However, multinational and transnational cartels affect multiple markets. Regulating them with a patchwork of idiosyncratic regimes does not necessarily do them justice.

An additional argument follows from the theory of second best.<sup>105</sup> Local and idiosyncratic effective antitrust regimes might be optimal in a hypothetical world. But they are not an alternative when they either do not exist or they are not effective enough to take on strong international cartels. Even if—especially if—the goal is to help developing countries build idiosyncratic antitrust regimes, these countries should not be expected to use their limited resources to take on big international cartels. Instead, they should be liberated from regulating international cartels that would simply be too big for them.

A way to create a better fit would be for the authorities of the developing countries to apply the law of the developing country. Application of foreign law alone does not lead to a perfect fit, because there is no guarantee that the foreign law is applied in the exact same way as it would be by the foreign country. But, it would be a partial response. Under current law, such application of foreign antitrust law is all but ruled out.<sup>106</sup> The idea of supplanting antitrust provides a new reason to rethink this restriction.

Still, one part of the critique remains unanswered. Developing countries may fear that the imposition of a developed country's antitrust laws, even if restricted to international cartels, is not aligned with these countries' own economic interests. Even if, as argued above, local regulation is not, for the time being, a workable alternative, the problem remains that these economic interests can be underappreciated. It is only a partial answer to such concerns to require the developed country's regulatory authorities to take the interests of developing countries into account.<sup>107</sup> This means that they should look at market conditions in these countries. It also means that they should confer with the countries themselves, in order to determine the optimal regulation policy vis-à-vis the international cartel. Such proposals may, to some extent, remain wishful thinking.

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104. *Supra* Part III.E.

105. R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

106. *Supra* Part III.C.

107. FOX, *supra* note 21.

First, authorities in developed countries often lack the necessary expertise concerning foreign markets. Second, these authorities may be especially averse to taking into account foreign regulatory ideals that are in conflict not just with their own ideals but also with their country's economic interests. As conditions stand today, idiosyncratic regulatory ideals of developing countries may not find the attention that they deserve.

#### E. Local Institution Building

A final objection concerns the building of local antitrust institutions. Where a developed country takes over regulation of a transboundary cartel, the affected developed country has limited opportunity to develop expertise, nor does it have an incentive to do so. In order to enable developing countries to develop expertise, so the objection goes, regulation of their local markets must be left to them.

It is true that institutions in developing countries must develop their own expertise, and supplanting antitrust is subsidiary to achieving this goal. However, it is doubtful that expertise is best learned in big transboundary cases that the institutions cannot yet handle by themselves. Contrariwise, if such cases are regulated by a developed country, the developing country has a chance to dedicate its resources to the domestic cases it can handle—and thereby, in the long run, develop the expertise to regulate also bigger transboundary cases.

## VI

### CONCLUSION

The best solution for developing countries remains the establishment of effective antitrust regimes. The best solution for global markets would be, in all likelihood, an effective and legitimate global antitrust regime, with sufficient sensitivity for local and economic differences. An ideal world would have both. This article is not concerned with this ideal world, or ways to get closer to it. Instead, it is concerned with what should be done until we get there.

This article has argued that under certain circumstances it may be both justifiable and desirable—for developed and developing countries alike—for the institutions of a developed country to supplant the antitrust regime of a developing country incapable of dealing with the concrete cartel. For multinational cartels, this means that centralized regulation by a developed country is often desirable. Multinational cartels can be regulated more efficiently if regulation stays with one centralized country. Multinational cartels can only be regulated effectively when the regulator takes into account the effects of the conduct on countries without their own efficient regulation. Likewise, cartels with effects only on a developing country are sometimes best regulated by a developed country. This is so when the developed country has a jurisdictional basis and a genuine interest, most notably in the case of export cartels. However this is not the case when the cartel is purely local to the developed country.

Supplanting antitrust raises further concrete implications that have not been discussed. The article does not discuss distinctions between public and private



enforcement of antitrust laws. It does not discuss the complex evidence-gathering mechanisms that would be required. It does not discuss whether leniency should be given also to whistleblowers in foreign markets. It does not discuss problems of public choice. In all of these regards, further work would be needed. Hopefully, the article suggests that this work would be worthwhile.

In all likelihood supplanting will remain rare. Even in the cases in which it would be justified, developed countries will often fear the expenses, the effects on their own industries, and the international relations complications with other developed countries if their industries are subject to the regulation. This makes it easier for developed countries to rely on territoriality and defer to the hypothetical sovereign decisions of developing countries on how to regulate their own markets, even when the markets are global and the developing countries lack the capacities to make such a meaningful choice. If this article has made such an argument a little harder to make, it has already achieved an important goal.