International signals: The political dimension of international competition law

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Although many states have advocated for the internationalization of antitrust laws, the United States has resisted a multilateral solution. We place the conflict over antitrust laws within the larger framework of international relations and draw out some novel implications of the debate by connecting the harmonization of international economic laws with the promotion of international peace and security. The harmonization of global antitrust laws is imbued with a political dimension that confers political benefits on the United States. By crafting institutions in which other parties must alter their domestic political structures, the United States receives a credible commitment from other states of their willingness to bear the domestic costs of adherence to the specific agreement under

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negotiation, helping the United States identify potential allies. Separating budding friends from probable foes is a critical task of international security, and the United States derives political benefits from international agreements in a way that transcends the substance of the agreements themselves.

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I. INTRODUCTION

The adoption of international norms for antitrust enforcement has so far eluded the international community. With few exceptions,[1] antitrust harmonization has largely come, where it has come at all, through the coincidental and unilateral decisions of individual states. Not only key substantive differences (regarding the protection of competition versus the protection of competitors, importantly), but also significant procedural ones (regarding the extraterritorial reach of local laws or important evidentiary rules) characterize the disparate enforcement regimes.[2] And there are now 115 separate jurisdic-

[1] *See, e.g.*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS, C (98) 35/final (1998) [hereinafter OECD RECOMMENDATION], *available at* http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193&InstrumentPID=189&Lang=en&Book=False.

[2] For example, despite considerable apparent agreement over the years in the enforcement activities of the European Commission and United States antitrust enforcement agencies, the trend-setting, disparate treatment in the two jurisdictions of the Boeing–McDonnell Douglas and GE-Honeywell mergers, and, more recently, the monopolization cases of U.S. companies like Microsoft, Intel, and Rambus, has pointed up serious, *substantive* differences in competition policy between the jurisdictions. *See, e.g.*, Alan Devlin & Michael Jacobs, *Antitrust Divergence and the Limits of Economics*, 104 NW. U. L. REV. 253 (2010); Eleanor M. Fox, *Lessons from Boeing: A Modest Proposal to Keep Politics Out of Antitrust*, ANTITRUST REP., Nov. 1997, at 19; Donna E. Patterson & Carl Shapiro, *Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons*, ANTITRUST MAG., Fall 2001, at 18; William E. Kovacic, Chairman, Fed. Trade Comm'n, Competition Policy in the European Union and the United States:

tions (not including the 50 individual states of the United States) that are active in enforcing competition laws against actions both within and without their borders—a number that has been growing steadily over the last fifteen years.[3] Harmonization is arguably desirable for its

Convergence or Divergence?, Address at the Bates White Fifth Annual Antitrust Conference 18 (June 2, 2008), *available at* http://ftc.gov/speeches/kovacic/080602bateswhite.pdf. *But see* Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency, Remarks as Prepared for the Institute of Competition Law New Frontiers of Antitrust Conference (Feb. 15, 2010), *available at* http://www.justice.gov/atr/public/speeches/255189.htm (suggesting an increasing degree of convergence). It is primarily notions of international comity—which are of course local and capricious—that serve to engender intentional agreement, and there in only limited circumstances. *See, e.g.*, Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998) and *infra* section II.B.

[3] *See* J. MARK GIDLEY & GEORGE L. PAUL, WORLDWIDE MERGER NOTIFICATION REQUIREMENTS (2009); *see also* INT'L COMPETITION POLICY ADVISORY COMM. TO THE ATTORNEY GEN. AND ASSISTANT ATTORNEY GEN. FOR ANTITRUST, FINAL REPORT 33 (2000) [hereinafter ICPAC FINAL REPORT]; Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 105 (1998); INTERNATIONAL COMPETITION NETWORK, *Member Directory* (last visited May 19, 2011), http://www.internationalcompetitionnetwork.org/index.php/en/members.

Not surprisingly, the extraterritorial application of local antitrust laws is a particularly divisive matter. It is, in fact, the ever-expanding global reach of discordant competition laws that both engenders conflict and complicates its resolution. *See infra* note 88 and accompanying text. As will be explained more fully below, most states have adopted some version of the so-called "effects" test, by operation of which even wholly extraterritorial anticompetitive behavior may be actionable if the *effect* of the behavior is felt strongly enough in domestic markets. *See, e.g.*, WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK 712–17 (2000). The effects test had its first airing by Judge Learned Hand in the *Alcoa* case: It is "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (citations omitted). Different states (and even the same state at different times) have adopted various versions of the test, requiring, among other things, varying levels of intent, and varying degrees of effect. *See, e.g.*, Eleanor M. Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, 19 N.Y.U. J. INT'L L. & POL. 565, 580 (1987); *see also Hartford Fire Ins.*

perceived efficiency effects (particularly with respect to cross-border mergers), and the debate over harmonization or internationalization often centers around the prospects for adopting a workable worldwide antitrust standard that would reduce the burdensome costs of legal uncertainty occasioned by divergent local standards.[4] But while many states—including particularly the European Union (EU)—have advocated in favor of the internationalization of antitrust laws, most notably under the auspices of the World Trade Organization (WTO), the United States has steadfastly resisted a multilateral solution.

The United States' resistance to the multilateral effort to harmonize or internationalize antitrust laws is somewhat puzzling. It is presumably in the interests of U.S. companies and U.S. enforcement agencies to have a single international antitrust standard: for companies, a single standard would reduce the transaction costs of engaging in multinational business, and for enforcement agencies, a single standard would ensure uniform and effective enforcement of antitrust laws extraterritorially. Moreover, from the point of view of the government, required adherence to an international enforcement norm

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Co. v. California, 509 U.S. 764, 795–96 (1993) (applying the Sherman Act to purely extraterritorial conduct solely on the basis of its effect in the United States).

[4] *See* Daniel A. Crane, *Substance, Procedure, and Institutions in the International Harmonization of Competition Policy*, 10 CHI. J. INT'L L. 143, 146–51 (2009). A 2003 survey by PricewaterhouseCoopers (the most recent on the topic) evaluates the cost of multijurisdictional merger reviews. According to the survey, "[t]he typical multi-jurisdictional deal requires eight completed or considered filings and generates, on average, €3.3m in external merger review costs . . . . Larger, more complex deals incur significantly higher costs." The report also notes, however, that "[w]hile merger review costs do represent a substantial proportion of the overall costs of a merger, they do not amount to a significant tax on the overall value of deals (€3.9bn is the median bid value for deals covered by [the] survey)." PRICEWATERHOUSECOOPERS, A TAX ON MERGERS? SURVEYING THE TIME AND COSTS TO BUSINESS OF MULTI-JURISDICTIONAL MERGER REVIEWS 4, *available at* http://www.globalcompetitionforum.org/PWC_Merger_Cost_Study_Report_Final_2003_Jun.pdf. As global trade and international enforcement have increased since 2003, the cost today is likely substantially larger. For a discussion of the role of business perceptions of enforcement costs in the political analysis of international competition policy, see *infra* note 88.

could serve as a "hands-tying" mechanism that would commit the government to a preferred long-term course of action and discourage defection caused by short-term, domestic political incentives.[5] Similarly, both U.S. companies and the U.S. government may have an interest in applying antitrust laws as extensively as possible, an effort far more amenable to a multilateral, supranational solution rather than a piecemeal bilateral one.

Nevertheless, the United States has, since the idea was first floated in the Havana Charter in 1948,[6] resisted every attempt at harmonizing international antitrust enforcement. Although it has acquiesced somewhat in recent years, even offering its support of the Organisation for Economic Co-operation and Development's (OECD) hard-core cartel recommendation, the United States continues to maintain that bilateral enforcement agreements and the continued extraterritorial application of its own antitrust laws represent its preferred avenue of global antitrust enforcement.[7] We hypothesize that

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[5] For example, the WTO commits the United States to a particular level of tariffs and deters it from sacrificing the long-term benefits of open trade for a short-term response to domestic demands for protection. The deterrence is not perfect—as evidenced by the steel tariff kerfuffle during George W. Bush's presidency and the Chinese tire dust-up more recently during the Obama presidency—but it substantially raises the political costs of such defections. *See* Dan Ackman, *Bush Cuts Steel Tariffs, Declares Victory*, FORBES (Dec. 5, 2003), http://www.forbes.com/2003/12/05/cx_da_1205topnews.html; Peter Whoriskey & Anne Komblut, *U.S. to Impose Tariff on Tires from China*, WASH. POST (Sept. 12, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/09/11/AR2009091103957.html.

[6] Havana Charter for an International Trade Organization (1948), *available at* http://www.yale.edu/lawweb/avalon/decade/decad057.htm.

[7] *See* Thomas O. Barnett, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement Priorities: A Year in Review, Before the Fall Forum of the Section of Antitrust Law American Bar Association (Nov. 19, 2004), *available at* www.usdoj.gov/atr/public/speeches/206455.htm; Joel I. Klein, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century, Presented at Fordham Corporate Law Institute 24th Annual Conference on International Law and Policy (Oct. 16, 1997), *available at* http://www.usdoj.gov/atr/public/speeches/1233.htm; R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Current

one reason for this seemingly contradictory preference is that the harmonization of global antitrust laws is imbued with a broader political dimension that confers substantial political benefit on the United States' preferred course. Although there are, of course, economic and self-aggrandizing explanations for the United States' intransigence, we argue that there is also an international political component that impels the United States to prefer bilateral agreements and the extraterritorial application of its own antitrust laws.

The United States has an interest in obtaining credible long-term commitments from other states—particularly developing states—to the dominant norms of global economic and political liberalization preferred by the United States. To the extent that adherence to the tenets of economic liberalization preferred by the United States is costly, adherence to those standards conveys a measure of long-term commitment. Similarly, to the extent that states can be made to adapt their domestic infrastructure and institutions to conform with the United States' preferred institutions of economic liberalization (an undoubtedly costly proposition[8]), the United States can credibly hope to initiate a process of *internalization*, whereby the adaptations made create a "lock-in" effect which helps to further the processes of market liberalization and democratization that the United States believes are essential for the maintenance of its preferred international order.[9]

Issues in International Antitrust Enforcement, Before the Fordham Corporate Law Institute 31st Annual Conference on International Antitrust Law & Policy (Oct. 7, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206479.htm.

[8] *See, e.g.*, Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 793 (2002) ("Whatever one's normative perspective, a legal system will incur costs simply in adjusting to the existence of a new legal norm.").

[9] Our point is not that efforts aimed at harmonizing international antitrust laws are necessarily imbued—intentionally or otherwise—with the power to effect widespread normative change. Rather, we simply describe the international framework within which these and all other negotiations between states occur, and we identify an important and neglected political dimension to those negotiations. Whether or not specific institutions will comport with our theory in particular situations depends on additional factors, including those generally identified by commentators analyzing international interactions revolving around competition policy.

In short, the more difficult and costly it is for a state to adhere to an international agreement, the more its continued, costly adherence signals the state's long-term commitment to the underlying tenets with which the agreement is imbued.

Moreover and not least, the process of harmonization through successive, bilateral (or narrow, regional) agreements, particularly in the economic sphere, permits the measured, evolutionary adoption of international standards. The crass realpolitik of multilateral international institutions, even though imbued with desirable normative constraints, suggests that the product of their deliberations will be less economic than political. Many have suggested, however, that regulatory competition in an arena like antitrust (where laws are invariably applied extraterritorially and where states have no ability to lure incorporations with attractive antitrust laws) makes an evolutionary, competitive approach infeasible.[10]

The recognition of political costs, however, and a consideration of the broader political environment in which international economic laws are negotiated, suggest that an evolutionary, competitive approach is in fact possible. As described in more detail below,[11] nations compete for favorable trade and other status. To the extent that their position in the normative order is affected favorably by incurring the costs of compliance with the dominant economic norms as embodied in particular agreements (because of the internalization effect), some measure of competition is possible. By this we mean that, rather than a race for the top (or bottom) engendered by the competition for incorporation fees, for example, states will compete in a race for political status. Because political status is conferred by entering into agreements with dominant economic powers, developing countries (and other states that have not yet solidified their political or economic positions) will enter into agreements without direct transfer payments in order to receive the benefits of credibility, normative change, and international acceptance. The net effect should be the effective export of consistent American (or, more recently, European) antitrust policy.

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[10] *See, e.g.*, Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1147 (2001).

[11] *See infra* notes 46–47.

Notably, because harmonization can be achieved over time, through limited agreements, the substance of the dominant international law can also be honed over time as experience proves it necessary.[12]

With one partial exception,[13] existing efforts to describe or explain the lack of international antitrust harmonization have generally focused on the direct economic effects, and the narrow political difficulties, of the harmonization of competition laws through certain international mechanisms, most notably the WTO and the OECD.[14] Largely absent in these accounts is a background theory of interna-

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[12] It is important to note that there is a normative component to this scheme that we do not take up in this analysis. The export of American or even European laws throughout the world, on terms presumptively favoring those dominant states, is not without normative, perhaps negative, effect. Although we believe that these consequences should be factored into any evaluation of the mechanism we describe, we attempt here to present a merely positive account. Moreover, in the realm of competition law, there is reason to believe that the export of U.S.-style antitrust laws would not solely benefit U.S. companies or the U.S. government at the expense of developing nations. At a minimum, American antitrust laws permit of broad discretion in enforcement. Standards of interpretation are almost entirely judge-made, and where they are not, they are propagated by independent and technical agencies. But most importantly, U.S. antitrust norms are emphatically economic in nature. In theory, they are rooted in economic laws of universal application, the effect of which should not change from country to country. Although reasonable minds can differ on what precise policy objectives antitrust laws should further, the existence of that ongoing debate at the margins will not substantially detract from the benefits of harmonization. Absent the use of antitrust laws to further protectionist policies, these disputes may remain largely academic. *But see* Patterson & Shapiro, *supra* note 2.

[13] D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37 (2007) (incorporating a basic background discussion of the role of international organizations in spreading norms of compliance).

[14] *See, e.g.*, Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933 (2003); Guzman, *supra* note 2; Sokol, *supra* note 13, at 41 n.1 (collecting additional articles in this vein); Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 KAN. L. REV. 557 (1994) [hereinafter Waller, *Neo-Realism*]; Diane P. Wood, *Antitrust at the Global Level*, 72 U. CHI. L. REV. 309 (2005) [hereinafter Wood, *Antitrust at the Global Level*]; Diane P. Wood, *The ImpossibleDream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277 (1992)

tional politics against which the practicalities—and the ultimate desirability—of international competition law harmonization can be assessed.[15] This article presents such a theory. It places the conflict over international competition laws within the larger framework of international relations and, in so doing, draws out some novel and important implications of the debate.

An important insight of this article is that, largely independent of the direct economic calculus regarding the costs and benefits of enter-

[hereinafter Wood, *The Impossible Dream*]; Diane P. Wood, *United States Antitrust Law in the Global Market*, 1 IND. J. GLOBAL LEGAL STUD. 409 (1994) [hereinafter Wood, *United States Antitrust Law*]. Andrew T. Guzman's account in particular, which briefly incorporates the effects of public choice on the otherwise purely economic calculations of states regarding the adoption of competition policies, is important and instructive. *See* Guzman, *supra* note 2, at 1529–31. However, his account treats the state's political preferences as endogenous to its revealed preferences regarding trade laws. To this extent his model does not admit of a state's ability to signal exogenous preferences through compliance with international norms and laws. Guzman's conclusion that international harmonization is unlikely between developed and developing countries because of divergent policy interests is not as robust as he would have it because, taking account of the political elements *exogenous* to a state's calculation regarding competition laws, there may be more coincidence of interest between nations than his model admits of. *See also* Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111 (1996) [hereinafter Waller, *National Laws*]. Although this analysis considers some political implications of the international harmonization of competition law, it is also too narrow in its focus, limiting its consideration of the costs and benefits to the arena of competition law itself, rather than placing competition law negotiations within a broader social and political context.

[15] For example, some commentators have suggested that the WTO is the best vehicle for achieving standardization because it facilitates direct transfer payments from powerful to developing nations in exchange for compliance. *See, e.g.*, Guzman, *supra* note 2, at 1501. Although this analysis has some compelling attributes, as noted above, it fails to position the dispute over competition policy within the larger political framework. The arguments proffered in these articles are limited by their failure to consider political transfers and the larger macro political backdrop against which micro arguments over trade policy occur. Evaluated more broadly, even seemingly asymmetrical bilateral agreements may confer substantial long-term benefits on the weaker signatory, and there may even be reason to prefer asymmetrical agreements between states. *See infra* notes 51–63 and accompanying text.

ing into a multilateral international antitrust agreement, there is an inherent "transaction benefit" in the act of engaging in exchange between states. Traditional economic and legal analyses of international relations have focused largely on the choice of organizational form ("market" exchange versus bilateral versus multilateral institutions) and the likelihood and nature of compliance with each type in the absence of a central enforcement authority. By contrast, we develop a political theory of international law that accounts on the one hand for the costs of entering into international agreements and on the other for the state's *political* preference for a specific form of agreement.

Two preliminary points should be made. First, we analyze this dynamic from the point of view of the dominant international power partly because perforce the dominant power will set the terms of international relations and, as a related matter, because the dominant power will be more interested in the normative aspects of its interactions with other states (whereas subordinate states will have neither the luxury nor the wherewithal to be so). Second, we assume that the normative implications of an agreement are only part of a "rational" state's calculus; independently of the political concerns we here enumerate, the state still expects to receive economic, security, social, or environmental values from its agreements. In this way the political framework we describe is just that—a framework defining the final value of these payoffs but not itself supplanting them.

Our basic point is twofold. By crafting institutions in which another party is made to alter its domestic institutions as a condition of agreement, the dominant state receives a credible commitment from the other state as to its willingness to adhere to the terms of the specific agreement under negotiation that, in the absence of centralized enforcement, might not otherwise be forthcoming. Additionally, the alteration of domestic institutions in a manner directed by the dominant state will *in and of itself* be viewed as a benefit of the agreement. By facilitating *domestic* normative change, the dominant state will gain a measure of assurance from the change of domestic institutions. As a result, nations derive political benefits from international agreements in a way that transcends the substance of the agreements themselves.

The process of internationalizing or harmonizing competition law provides fertile ground in which to examine these claims. On the one hand, negotiations over antitrust policy are particularly important because as government barriers to trade have fallen private barriers may well replace them. On the other hand, as tariff barriers to trade have fallen, governments may resort to the discriminate application of antitrust law to maintain preferred local monopolies and therefore to make payoffs to politically important constituents. In either case, the prospects for the illiberal application of antitrust laws and their economic importance make the debates over their form an issue of abiding concern for the process of global economic liberalization and central to domestic economic and political calculations.

Moreover, because antitrust laws regulate private conduct and set the terms for business interactions and exchange, changing them imposes substantial costs (both legal and economic) on private actors. Existing antitrust laws, the absence of them, or their selective enforcement presumptively favor the most powerful economic constituencies. Therefore, an external impetus to change those laws is likely to be costly to those interests and likely to be strenuously opposed in the domestic political system. A government that is willing to incur such costs and possibly alienate its domestic support sends a strong signal of its willingness to accede to the program of international economic liberalization.

In addition, conforming antitrust laws to the United States' standards, for example, involves adopting principles of transparency, indiscriminate application of the law, the incorporation of economic principles into the legal code, the creation of fair and independent judiciaries, the creation of highly technical and independent enforcement agencies, and the emergence of an epistemic professional community of lawyers to interpret the changes. The adoption of all of these steps is the mechanism by which the lock-in phenomenon mentioned earlier can occur. These principles spill over into other areas of law and society and ultimately alter actors' incentives and behaviors in ways that can result in the long-term internalization of these liberal norms. In particular, more than perhaps any other area of commercial law, antitrust principles contain within them the logic of significant constraints, not only on private, but also on government, conduct in every other facet of regulation and governance.

Finally, the current international competition law environment is a morass. Over a hundred jurisdictions have antitrust (or antimonopoly or competition) laws on the books, and many (but not all) of them actively enforce them—and some even do so extraterritorially.[16] Conflicts have occurred and will only become more frequent.[17] Just to name a few multijurisdictional disputes, consider the GE-Honeywell merger, the Rambus patent case, and, more infamously, the plethora of Microsoft suits.[18] Calls for resolution have come in varying degrees of stridency from government, business, and academic sources, and some form of harmonization is probably inevitable.[19] As a result, we will continue to see a range of efforts to forge international agreements.

All international institutions are imbued with a broad political dynamic. Dominant and developing states interact in fairly predictable ways, and, regardless of the content of the matters at issue—

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[16] *See* GIDLEY & PAUL, *supra* note 3, and accompanying text.

[17] For example, interjurisdictional conflicts occurred with the McDonnell Douglas–Boeing, GE-Honeywell, Kodak-Fuji, Coca-Cola–Cadbury, and InBev–Anheuser-Busch mergers, as well as with the alleged monopolization by Microsoft and Intel.

[18] Harry First & Andrew I. Gavil, *Re-Framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641 (2006); Michael C. Naughton & Richard Wolfram, *The Antitrust Risks of Unilateral Conduct in Standard Setting, in the Light of the FTC's Case Against Rambus Inc.*, 49 ANTITRUST BULL. 699 (2004); Patterson & Shapiro, *supra* note 2; Press Release, European Comm'n, Antitrust: Commission Confirms Sending a Statement of Objections to Rambus (Aug. 23, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/330&format=HTML&aged=0&language=EN&guiLanguage=en.

[19] For calls from business sources, see, for example, Michael Egge et al., *The New EC Merger Regulation: A Move to Convergence*, ANTITRUST MAG., Fall 2004, at 37; Tad Lipsky, Verizon Communications v. Trinko *and the Future of US-EU Antitrust Relations*, GLOBAL COMPETITION HIGHLIGHTS (Latham & Watkins LLP, New York, N.Y.), Apr. 2004, at 8. For calls from government sources, see, for example, Klein, *supra* note 7; Karel Van Miert, Comm'r, European Comm'n, The Transatlantic and Global Implications of European Competition Policy (Feb. 16, 1998), *available at* http://ec.europa.eu/comm/competition/speeches/text/sp1998_054_en.html. For calls from academia, see, for example, Guzman, *supra* note 2, at 1542–47; William Sugden, Note, *Global Antitrust and the Evolution of an International Standard*, 35 VAND. J. TRANSNAT'L L. 989, 1020 (2002).

whether economic, military or social—seek to further certain political goals. The role and impact of state power in international legal negotiations should not be ignored. Nevertheless, most commentators who have discussed the prospects for the internationalization or harmonization of competition policy have focused narrowly on the economic and narrow domestic political issues immediately surrounding adoption of those laws and have ignored the broader, international political context. They miss, therefore, its influence on the likely form and content of their final implementation. This article seeks to fill this gap and places the specific legal negotiations within the relevant political environment.

A. The international political environment

At the root of international political theory is the fundamental maxim that relations between sovereign nations in the absence of mitigating factors is characterized by intense competition, mutual distrust, the inability to make credible commitments, and war.[20] As one com-

[20] Political scientists characterize the international system as "anarchic." In the absence of world government (or other mitigating force), competition between states is largely unregulated by external laws or enforcement. The world is characterized by mistrust, the inability to contract, and the ultimate reliance on a state's own devices. *See* THOMAS HOBBES, LEVIATHAN 80 (Edwin Curley ed., 1994) (in the state of nature "the condition of man . . . is a condition of war of everyone against everyone"). In fuller terms:

> There is no authoritative allocator of resources: we cannot talk about a 'world society' making decisions about economic outcomes. No consistent and enforceable set of comprehensive rules exists. If actors are to improve their welfare through coordinating their policies, they must do so through bargaining rather than by invoking central direction. In world politics, uncertainty is rife, making agreements is difficult, and no secure barriers prevent military and security questions from impinging on economic affairs.

ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 18 (1984). Efficiency-enhancing gains from trade are difficult to appropriate because trade itself (and any other form of exchange or agreement between nations) is characterized by the absence of credible commitments to future behavior. And underlying the problem is the ever-present threat of the use of force. *See, e.g.*, Kenneth N. Waltz, *Anarchic Orders and Balances of Power*, *in* NEOREALISM AND ITS CRITICS 98, 98 (Robert O.

mentator notes, "Nations dwell in perpetual anarchy, for no central authority imposes limits on the pursuit of sovereign interests."[21] And states are "unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination."[22] As a result, states operating on the international stage are unable to judge the sincerity of each others' stated intentions when those intentions are contrary to this manifest interest. Because of self-help rules, states are forced in the main to assess their own security environment by assessing the capabilities of competitors, downplaying their motives. Given that the nature of the competition can implicate the fundamental survival of one (or more) of the actors, actions taken by one state to improve its own security must necessarily decrease the security of its competitor; in the absence of mitigation, security is a zero-sum game.[23] In a world where cooperation is exceedingly difficult (because there is no authority to enforce agreements, nor any basis for assessing the reliability of another state's commitments), international relations are characterized by a continuous race to the bottom, a mindless arms race rather than the opportunity to realize gains from cooperation.

Keohane ed. 1986) ("The state among states . . . conducts its affairs in the brooding shadow of violence . . . . Among states, the state of nature is a state of war."). Although this dire characterization of the international environment is, of course, a stylized approximation of the real world—there are always overlying constraints on sovereign behavior in the form of norms, reputational effects, and customary international law, HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977)—it is a useful and widely accepted heuristic for crafting a theory of international politics.

[21] *See* Kenneth A. Oye, *The Conditions for Cooperation in World Politics*, *in* INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES 81 (Robert J. Art & Robert Jervis eds., 1996).

[22] KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 118 (1979).

[23] Robert Jervis, *Offense, Defense, and the Security Dilemma*, *in* INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES, *supra* note 21, at 183 ("[A]n increase in one state's security decreases the security of others."). This security dilemma encapsulates the Cold War arms race between the United States and the Soviet Union. At its most basic, the inability to decipher preferences means that the only viable response to one state's increase in its military capabilities is a commensurate increase by its competitors because it is inherently impossible for competitor states to determine the nature of each others' intentions.

It is obvious that not all relations between states are characterized by the security dilemma, however. Canada, for example, shares an unprotected border with the most powerful nation in the world without degenerating into a destructive and costly arms race. By some mechanism, then, Canada must be able reliably to judge U.S. intentions, even absent the apparent ability by the United States credibly to bind itself to a nonaggressive policy toward Canada. The key to mitigating the pressures of the security dilemma is the ability to distinguish a state with aggressive and expansionist tendencies from a benign one.[24] States can be distinguished by their fundamental type. They can be classified as "revisionist," that is, they seek to subvert the dominant order, or they can be classified as "status quo," that is, they seek to support it.[25] But, as noted, a state's ability to judge another's *intentions* (as opposed simply to counting its armaments) is extremely tenuous and comes at great cost. In fact, political science offers few well-understood mechanisms for judging a state's propensity for aggression.

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[24] Absent credible assurances as to type, states are constrained to count weapons and, to ensure their own safety, invest in commensurate armaments simply to protect against the ever-present threat from aggressive states, whether previously identified as such or not. Realists, and particularly Waltzian neorealists, do not distinguish between states by type; rather, all states, regardless of unit-level distinction, behave at the system level in the same manner according to structural imperatives. Randall L. Schweller, *Bandwagoning for Profit: Bringing the Revisionist State Back In*, 19 INT'L SECURITY 72, 85 (1994) ("Modern realists typically assume that states are willing to pay high costs and take great risks to protect the values they possess, but will only pay a small price and take low risks to improve their position in the system."). Neoclassical realists like Schweller (who draw on classical realists like Morgenthau), by contrast, do distinguish states by type. To the neoclassical realists,

> preventing relative losses in power and prestige is sound advice for satisfied states that seek, above all, to keep what they have. But staying in place is not the primary goal of revisionist states. They want to increase, not just preserve, their core values and to improve their position in the system. These goals cannot be achieved simply by ensuring that everyone else does not gain relative to them. They must gain relative to others.

Id. at 87; *see also infra* notes 30 & 104 and accompanying text.

[25] For a more detailed discussion of the differences between the fundamental types, see *infra* note 30.

At the same time, hegemonic states have an abiding interest in spreading and maintaining their dominant worldview.[26] Not only is it imperative that dominant states receive credible signals about other states' intentions, but it is also important that dominant states attempt to inculcate their norms *within* other states that, over time, might mount credible challenges to the dominant states' security.[27] The spread of hegemony through internalization of norms occurs for three reasons. First, states with similar institutions and sympathetic domestic norms are simply better and more reliable trading partners, and it is in the hegemon's economic interest to instill its norms.[28] Second, states with defensive military postures and that adhere to the status quo present significantly less security risk to dominant states.[29] And finally, the hegemon has a normative interest in the spread of its culture, its worldview, and its norms.[30] This conception of the playing field upon which states interact leads to the conclusion that, entirely apart from the immediate and substantial economic benefits to a state from well-

[26] We do not here engage the global debate over whether the spread of economic liberalization is normatively good for developing countries in the long run. Rather we note that it is simply costly for them to change their internal domestic laws in accordance with international economic treaties. It may well be true that the cost is outweighed by the long term benefits in gains from trade and trade normalization. It is worth noting, however, that any such gains are unlikely to accrue to existing governments and that, at root, such changes must reflect system-wide, normative deviations from the status quo (from communism to capitalism, for example) that will carry with them enormous political costs.

[27] John McGinnis in fact defines hegemony as "a set of globally based mechanisms of governance to change in some formal way the conduct of nations and through these effects change the behavior of their citizens." John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT'L L. 381, 382 (2000).

[28] Judith Goldstein, *Ideas, Institutions, and American Trade Policy*, 42 INT'L ORG. 179 (1988) (states with sympathetic normative views make better trading partners).

[29] Daniel Deudney & G. John Ikenberry, *The Nature and Sources of Postwar Western Political Order*, 25 REV. INT'L STUD. 179, 189 (1999).

[30] *See, e.g.*, Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, *in* NEOREALISM AND ITS CRITICS, *supra* note 20, at 183. *See generally* KEOHANE, *supra* note 20.

ordered interactions with other states, hegemonic states also have a national security and a normative interest in the information to be gleaned from the fact that these interactions are, in fact, well ordered.

In the absence of centralized enforcement, privately held and nonverifiable information as to a state's fundamental type is the critical problem in assessing motives.[31] States wishing to escape the pressures of the security dilemma and engage in cooperative behavior need a means of conveying their preferences to others in a credible manner. There are, in general, two means by which such information can be transmitted: states can either bind themselves in such a way that they are unable to deviate from a stated behavior (known as "hands tying" in Schelling),[32] or they can signal their intention to engage in a specified course of action by incurring costs sufficiently large that they discourage the misrepresentation of preference.[33]

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[31] *See* KEOHANE, *supra* note 20, at 31 ("Order in world politics is typically created by a single dominant power [or hegemon]."). States are consequently classified as one of two types, "revisionist" or "status quo," based on their acceptance and adherence to the political norms, institutions, and rules created by the hegemon. Status quo states are those that try to improve their condition from within the framework of the accepted world order. Revisionist states, by contrast, seek to gain position both by working outside that order and by working to subvert the hegemonic order itself. For instance, the existing world order is generally accepted to be that created by the United States after World War II. It comprises a liberal international economic order, the use of multilateral institutions (such as the United Nations and the WTO), negotiation for dispute resolution rather than the threat of violence, and the promotion of liberal democratic moral norms. *See, e.g.*, Schweller, *supra* note 24, at 85; HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 32 (1948). Trade disputes between status quo states (like tariff disputes between the United States and Europe) are resolved through peaceful negotiation rather than the threat of war. Although status quo states do not entirely eschew the use of violence, they typically seek international authorization and legitimization before employing military force, as in the multilateral operations in Iraq, Kosovo, and Afghanistan. Revisionist states, on the other hand, such as North Korea, Iran, and China, will more readily use military force as a bargaining tool and are more reluctant fully to participate in transparent military, economic, and political negotiations.

[32] THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1960).

[33] DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 314 (1994).

International institutions can play a crucial role in facilitating the transmission of this information.[34] In particular, international agreements over the terms of trade, even without binding supranational enforcement authority, provide a means for states to bind themselves to a desirable course of behavior in the short run and, more importantly, to signal their acquiescence to the ruling world order in the long run. Because compliance with treaty obligations often requires signatories to alter their *domestic* laws to reflect the terms of the treaty, the costs of compliance can be substantial. In the short run, to the extent that states enforce their domestic laws they can bind themselves to a certain course of behavior. In the long run, a state's willingness to incur the substantial costs of changing its laws, both the transaction costs inherent in changing domestic laws and the even more substantial costs in domestic political capital, signals a willingness to engage other states on the terms set by the reigning international power. Moreover, there may be unintended effects, as changes in domestic laws result in a new set of domestic incentives to which actors respond, and new windows of opportunity may open up through which policy entrepreneurs can push for the internalization of new norms.[35] Competition laws in particular are susceptible to this mode of analysis.

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[34] The notion that it is international institutions (such as treaties and agreements) and not adherence to norms that induce coordinated behavior among states is consistent with some relatively recent theories of international norms that likewise adopt an institutionalist interpretation of international relations and that also consider the operation of treaties and other formal relations between states to play a pivotal role in effecting cooperation between states. *See, e.g.*, Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) [hereinafter Goldsmith & Posner, *A Theory of Customary International Law*]; Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. 115 (2002) [hereinafter Goldsmith & Posner, *Moral and Legal Rhetoric*].

[35] *See e.g.*, G. John Ikenberry & Charles Kupchan, *Socialization and Hegemonic Power*, 44 INT'L ORG. 283, 290–92 (1990); Robert O. Keohane, *When Does International Law Come Home?*, 35 HOUS. L. REV. 699, 701 (1998); Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 642 (1998); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 512–14 (1995); Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997).

> Most nations have adopted competition laws as a way to actualize (as well as to symbolize) a degree of commitment to the competitive process and to the prevention of abusive business practices . . . . The introduction of competition laws and policies has also gone hand in hand with economic deregulation, regulatory reform, and the end of command and control economies.[36]

The surest way to remove the threat of war, increase wealth, conserve resources, and protect human rights is through fundamental agreement between all states (or at least effective agreement between verifiably status quo states) under a normative umbrella that promotes all of those values. This normative convergence can be effected through the stepwise internalization of the sorts of economic and democratic values inherent in international economic liberalization, perhaps most notably through the adoption of principled international antitrust standards.[37]

B. Article outline

Section II of this article describes the current international antitrust regime and the nature of the debates surrounding international harmonization. As this section explains, the international antitrust regime is currently a decentralized one, comprising overlapping jurisdictions, disparate standards, and highly charged debates relating to the prospects for internationalization.

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[36] ICPAC FINAL REPORT, *supra* note 3, at 33. The ICPAC Final Report goes on to outline the types of initiatives desirable to the United States in fostering economic liberalization, including "[i]ncreased transparency and accountability of government actions, . . . [e]xpanded and deeper cooperation between U.S. and overseas competition enforcement authorities, . . . [and] [g]reater soft harmonization and convergence of systems." *Id.* at 35. As internationalization of competition policy occurs, these policies, as well as the corresponding notions of neutrality and nondiscrimination embodied in U.S. antitrust enforcement will likely be the touchstones of U.S. acceptance of specific harmonization efforts. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107 (1995), *available at* http://www.justice.gov/atr/public/guidelines/internat.htm.

[37] *Accord* Crane, *supra* note 4, at 156 (discussing the feasibility of achieving harmonization through multilateral agreement in incremental steps, beginning with harmonization of procedures for merger review).

Section III outlines our political theory and provides a framework for understanding the most important aspects of political relations in the international sphere. At its core, relations between nations are characterized by uncertainty and the perpetual attempts of some states to overcome barriers to cooperation in order to capitalize on the benefits of relative peace and mutually beneficial exchange. We provide the workings of a mechanism for understanding states' abilities to overcome these impediments to lasting cooperation.

Section IV then analyzes the roles of microlevel treaty negotiations and other international institutions in the political order in effecting lasting normative convergence. Fundamentally, the internationalization of antitrust laws offers one avenue through which norm internalization can occur. The concerns that imbue the costly adoption of antitrust laws with political significance likewise lead to the internalization of the institutions most conducive to long-term economic, social, and political liberalization.

Section V concludes with a consideration of the specific role of bilateral and multilateral agreements concerning competition policy in the stated framework and the prospects for international regulatory competition. It ultimately provides a more comprehensive political picture of the debates surrounding competition policy harmonization. In doing so, we examine the alteration of domestic institutions in pursuit of China's WTO accession and highlight the example of its still-new domestic antitrust legislation.

II. THE EXISTING STATE OF INTERNATIONAL ANTITRUST LAW

Most commentators have considered the economic significance of disparate antitrust authority, reflecting a concern that "different antitrust laws in different jurisdictions pose enormous costs for international corporations."[38] What is missing is a correlative recognition that enactment of specialized, domestic antitrust laws provides enormous political *benefits* to the states that implement them.

Over and above the threat to states' jealously guarded sovereignties, the harmonization or internationalization of global antitrust laws poses

[38] Sugden, *supra* note 19, at 1017.

a threat to nations' lucrative merger filing fees, the political benefits in bargaining position vis-à-vis other nations of the extraterritorial enforcement of antitrust laws and, not least, the ability to confer benefits on powerful domestic interests by the selective enforcement of antitrust laws against foreign competitors and disfavored domestic firms. The maintenance of existing antitrust laws and levels of enforcement (and, necessarily then, attempts to alter the status quo) have implications beyond the economics of antitrust, although the economics is, of course, of paramount importance. States confer and deny political favors, raise administrative revenues, send political signals, erect trade barriers, and effect social policy through operation of their antitrust laws. Undoubtedly, the wide divergence in substantive standards, procedural requirements, and levels of enforcement among global antitrust laws reflects the role of politics in shaping antitrust policy.[39] But where many commentators view these political externalities of antitrust policy as little more than impediments to the adoption of a worldwide antitrust standard, we believe that the fact that alteration of antitrust laws to comport with the dominant international norm is politically costly presents an opportunity for achieving more broadly beneficial political effects through the adoption of worldwide antitrust standards.[40]

Antitrust policy is a particularly important component of the internationalization of liberal economic order. In relative terms at least, as worldwide barriers to trade erode (i.e., as the global economy is liberalized), it becomes increasingly important that gains from international trade are not appropriated by local monopolies.[41] At the

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[39] *See, e.g.*, *id.* at 994 ("The obstacle to achieving effective international antitrust, according to the economist, is political.").

[40] *See generally* SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST (1998).

[41] *See, e.g.*, Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON. L. 665 (1999); Sir Leon Brittan, Vice President, European Comm'n, The Need for a Multilateral Framework of Competition Rules, Address before the OECD Conf. on Trade and Competition (June 29–30, 1999); World Trade Org., Working Group Set Up by Singapore Ministerial, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/16comp_e.htm (last visited July 24, 2012).

It is important to note that the notion that, absent governmental supports to monopoly and where global competition is prevalent (precisely the areas

same time, as governments are forced by accession to the terms of global trade to abandon trade-related payoffs to domestic special interests, they may resort to anticompetitive protections to accomplish the same ends.[42] Governments around the world have already instituted merger notification provisions with disparate requirements and significant—and lucrative—filing fees.[43]

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where monopolies-cum-trade-barriers are worrisome), local anticompetitive behavior will appropriate gains from trade is a bit myopic. The presence of monopoly rents *attracts* additional competition, and although monopoly can impose costs for limited periods of time, barring real trade barriers, competition will eventually wipe out those costs. In other words, anticompetitive behavior may impose very real short-run costs, but these costs are unlikely in the long run to subsume the substantial economic gains from free trade currently being realized by newly opened economies.

[42] *See, e.g.*, Louis De Alessi, *The Public-Choice Model of Antitrust*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST (Fred S. McChesney & William F. Shughart II eds., 1995).

[43] Filing fees in the United States for the largest mergers (valued at over $631 million), for example, are $280,000. For comprehensive filing fee and filing threshold information for all of the most significant jurisdictions, see generally WORLD LAW GROUP, MERGER CONTROL BASICS 2010 (2010). *See also* International Competition Network, Notification and Procedures, http://www.internationalcompetitionnetwork.org/working-groups/current/merger/notification-procedures.aspx (last visited July 22, 2012). Other countries have adopted more "modest" fees. Canada, for example, charges about CDN$50,000 for merger filings. Brazil, whose filing fee is famously triggered by virtually every multinational merger of a certain (and modest) size, essentially regardless of the presence of assets in Brazil, charges approximately $22,000. China charges no filing fee.

At the same time, filing requirements vary widely. Argentina's extensive form F1, for example, requires that parties provide detailed analysis of overlapping sales broken down by local customs code categories. *See, e.g.*, J. William Rowley, QC, & Omar K. Wakil, *The Internationalisation of Antitrust: The Need for a Global Competition Forum*, GLOBAL COMPETITION FORUM, *available at* http://www.globalcompetitionforum.org/regions/n_america/canada/Nov01-2001.pdf?id=304. Other regimes require that detailed competitive analyses be prepared at an early stage of the transaction (while others, like the United States, require the submission only of preexisting documents). Notification is required by various jurisdictions at varied times in the merger process, with some jurisdictions requiring notification within fifteen days of signing or announcing a merger agreement. And many countries derive substantial ancillary fees from late filings and gun-jumping: In the United States,

Similarly, even worldwide standard setting will not resolve the problem of the use of antitrust laws to accomplish protectionist trade policies—even U.S. and EU antitrust laws can, and do, accomplish those ends.[44] At the same time, there is a great degree of substantive agreement among the most dominant international antitrust powers, and although there remains significant procedural dissonance (and, certainly, some substantive dissonance as well),[45] proponents of har-

penalties amount to $16,000 per day. *See, e.g.*, KELLY DRYE & WARREN, PREMERGER NOTIFICATION REQUIREMENTS : THE 2012 HART-SCOTT-RODINO PREMERGER NOTIFICATION SOURCEBOOK, *available at* http://www.kelleydrye.com/practices/mergers_acquisitions/16/_res/id=files/index=0/premerger%20antitrust%20requirements%20—%20hsr%20notification%20sourcebook%202012.pdf. The upshot is that the full extent of worldwide filing fees for multijurisdictional mergers can be quite substantial. *See* PRICEWATERHOUSECOOPERS, *supra* note 4, at 4 ("The typical multi-jurisdictional deal requires eight completed or considered filings and generates, on average, €3.3m in external merger review costs . . . . Larger, more complex deals incur significantly higher costs."). As noted above, this report is out of date, and with the increase in merger enforcement regimes and global trade, the costs can only have increased since.

[44] *See* Bo James Howell, *Antitrust Law: Resisting Modern Protectionism in a Global Recession*, 13 GONZ. J. INT'L L., http://www.gonzagajil.org/index.php?option=com_content&view=article&id=195:antitrust-law-resisting-modern-protectionism-in-a-global-recession&catid=77:volume-13-issue-1-2009-2010&Itemid=26](2009–2010) ("[I]n order to protect France's Airbus, an airplane manufacturer, the European Commission denied the Boeing–McDonnell Douglas merger."); *id.* ("America is less keen to go after its own monopolies, although it appears to have no problem going after foreign ones . . . . This selective targeting by these states illustrates that most countries openly favor domestic export cartels because these domestic cartels pass most of their anticompetitive costs onto foreign consumers."); *see also* THE CAUSES AND CONSEQUENCES OF ANTITRUST, *supra* note 42.

[45] *See, e.g.*, James S. Venit & William J. Kolasky, *Substantive Convergence and Procedural Dissonance in Merger Review*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 79 (Simon J. Evenett et al. eds., 2000). There are, of course, highly charged exceptions to the general substantive convergence. *See, e.g.*, Patterson & Shapiro, *supra* note 2, at 18 (examining GE-Honeywell and discussing how, "[i]n an era of close cooperation and supposed convergence . . . the North American and European antitrust authorities reach[ed] diametrically opposed conclusions about the likelihood of anticompetitive effects in a high-profile transaction involving world-wide markets").

monization, whose arguments rely extensively on the business and regulatory inefficiencies inherent in procedural and substantive disparities, do not generally consider either the costs or benefits of harmonizing disparate policies in any but the narrowest sense.

A. The global antitrust landscape

In the international arena, where the disputes surrounding the contours of the adoption of liberal economic policies are fought out, the debate rages over the question of antitrust law harmonization and particularly the extent to which developing countries will be required to adapt to the status quo.[46] At root, in fact, the question of harmonization is the question of how much influence the dominant international regime and its proponents will have over the economies of other countries.[47] Organizations and institutions that seek to standardize and conform global antitrust regimes, such as the WTO, the OECD, and the various U.S. bilateral agreements, all promote coordination between antitrust enforcement agencies; the debate is over *what* exactly coordination entails, most notably on the part of developing countries, the extent to which mere coordination will evolve into substantive agreement, and the extent to which specific agreements will reflect the interests of the United States.

The story of the internationalization of competition law begins (although does not end) with U.S.-led efforts at bilateral cooperation agreements, aimed more at establishing coordination of enforcement efforts between states than at harmonizing substantive antitrust rules.[48] The current period of relative harmonization follows closely the immediate post-war period in which the United States asserted the supremacy and near-ubiquitous applicability of its antitrust laws.

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[46] As we have noted elsewhere, the debate also rages between the status quo countries, but these debates are less significant in and of themselves from the point of view of the political theory because of prior information exchanges between the relevant countries. At the same time, however, disputes between status quo countries are derivatively important for their role in establishing the status quo position. *See infra* note 162 and accompanying text.

[47] *See, e.g.*, Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 34; Goldsmith & Posner, *Moral and Legal Rhetoric*, *supra* note 34.

[48] *See, e.g.*, Waller, *National Laws*, *supra* note 14, at 1114.

Under the effects test, as described in 1945 in *United States v. Aluminum Company of America*,[49] U.S. court jurisdiction was extended "to prescribe conduct outside the United States as long as that conduct was intended to, and actually did, produce effects in the United States."[50] As objections from other states mounted, however, the nearly unfettered extraterritorial applicability of U.S. antitrust laws gave way to concerns for international comity,[51] and the United States began to engage the antitrust authorities of other states in limited cooperation agreements.[52] Underlying these agreements is a measure of restraint on the part of the United States (or other countries) from *requiring* substantive changes to another state's antitrust laws. Instead, these bilateral agreements extend the jurisdiction of the United States' antitrust laws as far as is easy, and they respect the operation of other states' laws. With the exception of the most recent agreements between the United States and Brazil and Mexico, the United States has conferred this restraint and respect only upon other, well-developed and manifestly status quo countries.

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[49] 148 F.2d 416, 444 (2d Cir. 1945) (acting as court of last resort in the absence of a quorum in the Supreme Court).

[50] Waller, *National Laws*, *supra* note 14, at 1112. This broad understanding of the United States' right to extraterritorial application of its antitrust laws represents a sea change from the pre-war standard explicated by Justice Holmes in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("[T]he character of an act as lawful or unlawful must be determined wholly by the law in the country where the act is done.").

[51] Starting in the 1970s, the U.S. government and courts began to limit the extraterritorial reach of United States' antitrust laws where they impinged on the interests of other states. *See, e.g.*, *Timberline Lumber Co. v. Bank of Am.*, 549 F.2d 587, 612–13 (9th Cir. 1976). At the same time, statutory and case law also sought to limit the extent of the effects test to cases in which extraterritorial acts had intended "direct, substantial, and reasonably foreseeable effect . . . ." Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2012); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993). These limitations came at least in part in response to efforts by other countries to enact so-called blocking and clawback laws designed to impede United States efforts to prosecute transnational antitrust cases. *See* Waller, *National Laws*, *supra* note 14, at 1114; ICPAC FINAL REPORT, *supra* note 3, at 36.

[52] For a brief but informative recounting of these trends and the adoption of cooperation agreements, see Waller, *National Laws*, *supra* note 14, at 1112–16.

Today the United States has bilateral cooperation agreements with Germany,[53] Australia,[54] Canada,[55] the EU,[56] Israel,[57] Japan,[58] Brazil,[59] and Mexico.[60] The EU has also entered into a similar agreement with Canada.[61] France and Germany[62] and Australia and New Zealand[63] also

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[53] Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, U.S.-Ger., June 23, 1976, 4 Trade Reg. Rep. (CCH) ¶ 13,501, *available at* http://www.justice.gov/atr/public/international/docs/0353.pdf.

[54] Agreement Relating to Cooperation on Antitrust Matters, U.S.-Austl., June 29, 1982, 4 Trade Reg. Rep. (CCH) ¶ 13,502, *available at* http://www.ftc.gov/bc/international/docs/agree_australia.pdf.

[55] Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, U.S.-Can., Aug. 3, 1995, 4 Trade Reg. Rep. (CCH) ¶ 13,503, *available at* http://www.justice.gov/atr/public/international/docs/0316.pdf.

[56] Agreement Regarding the Application of Their Competition Laws, U.S.-Eur. Communities, Sept. 23, 1991, 4 Trade Reg. Rep. (CCH) ¶ 13,504, *available at* http://www.justice.gov/atr/public/international/docs/0525.pdf.

[57] Agreement Regarding the Application of Their Competition Laws, U.S.-Isr., Mar. 15, 1999, 4 Trade Reg. Rep. (CCH) ¶ 13,506, *available at* http://www.justice.gov/atr/public/international/2296.pdf.

[58] Agreement Concerning Cooperation on Anticompetitive Activities, U.S.-Japan, Oct. 7, 1999, 4 Trade Reg. Rep. (CCH) ¶ 13,507, *available at* http://www.justice.gov/atr/public/international/docs/3740.pdf.

[59] Agreement Regarding Cooperation Between Their Competition Authorities in the Enforcement of Their Competition Laws, U.S.-Braz., Oct. 26, 1999, 4 Trade Reg. Rep. (CCH) ¶ 13,508, *available at* http://www.justice.gov/atr/public/international/3776.pdf.

[60] Agreement Regarding the Application of Their Competition Laws, U.S.-Mex., July 11, 2000, 4 Trade Reg. Rep. (CCH) ¶ 13,509, *available at* http://www.justice.gov/atr/icpac/5145.pdf.

[61] Council and Commission Decision (EC) of April 29, 1999, 1999 O.J. (L 175) 49, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:175:0049:0049:EN:PDF.

[62] *See* John J. Parisi, Enforcement Cooperation Among Antitrust Authorities, Remarks before the IBC UK Conferences, Sixth Annual London Conference on EC Competition Law n.18 (May 19, 1999), *available at* http://www.ftc.gov/speeches/other/ibc99059911update.shtm.

[63] *See id.* (containing detailed discussion of the contents of some of the agreements).

have similar agreements. Each of these agreements incorporates some common terms and attributes, most of which derive in whole or in part from a 1967 OECD Recommendation regarding cooperation in the enforcement of national competition laws between member states.[64] In its most recent incarnation—last modified in 1995—the Recommendation provides that member countries should: (1) notify each other regarding relevant investigations, (2) share information with affected member countries regarding such investigations, (3) coordinate parallel investigations, (4) assist one another in locating and obtaining information, and (5) wait before acting extraterritorially.[65] The agreements contain no provisions regarding the substantive terms of the signatories' domestic laws.[66]

The last principle, of positive comity, is undoubtedly the most important. By operation of this principle the OECD recommendation seeks to limit the extraterritorial application of a state's antitrust laws by suggesting deference to another state's.[67] Similarly, the principle of positive comity also limits a state's discretion *not* to enforce its own antitrust rules against potentially anticompetitive behavior within its own jurisdiction when that behavior has extraterritorial anticompetitive effects and another jurisdiction seeks enforcement.[68] And not surprisingly, then, the United States has entered into positive comity arrangements with only the EU and Canada, certainly the two least revisionist international entities with which it has cooperation agreements.[69]

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[64] For the most recent version of the OECD Recommendation, see Revised Recommendation of the Council Concerning Co-Operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C (95) 130/Final, *available at* http://www.oecd.org/dataoecd/60/42/21570317.pdf.

[65] *Id.* at 2.

[66] There is, as noted, an OECD agreement regarding the enforcement of antitrust laws against hard-core cartels, however, which does prescribe substantive policy. *See supra* note 1.

[67] Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 732–33 (2001).

[68] *See* Allison J. Himelfarb, Comment, *The International Language of Convergence*, 17 U. PA. J. INT'L ECON. L. 909, 914 (1996).

[69] The United States and European Commission have even promulgated an elaborating agreement regarding positive comity. Agreement on the Application of Positive Comity Principles in the Enforcement of their Competition

From the U.S. perspective, at least, these agreements have limited, though not insubstantial authority. Because they are not treaties they do not override any inconsistent provisions of U.S. domestic law.[70] Although it is true that entry into such agreements is authorized by the U.S. State Department, and they are formal, binding "executive agreements" that limit the exercise of *discretionary* authority vested in U.S. enforcement agencies,[71] this is of only limited effect. The United States' decentralized enforcement apparatus permits both private plaintiffs and state attorneys general to enforce U.S. antitrust laws without regard for these agreements.[72]

Most recently, where the terms of these agreements would violate U.S. domestic law, Congress has seen fit to *amend* U.S. law in order to accommodate them. The International Antitrust Enforcement Assistance Act of 1994, for example, permits the Justice Department and

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Laws, U.S.-Eur. Communities, June 4, 1998, 37 I.L.M. 1070, *available at* http://www.usdoj.gov/atr/public/international/1781.htm.

[70] *See* U.S. CONST. art. 2, § 2, cl. 2.

[71] Under the terms of the Case-Zablocki Act of 1972, 1 U.S.C. § 112b (2012), and regulations thereunder at 22 C.F.R. pt. 181, these agreements must be approved by the State Department.

[72] The difficulties for international harmonization inherent in the decentralized nature of United States antitrust enforcement are described in Wood, *United States Antitrust Law*, *supra* note 14, at 415 ("Whatever benefits Americans may see in the decentralized system of antitrust enforcement[,] . . . it is clear that the system imposes certain costs and disadvantages on those subject to the system (both Americans and foreigners coming within the jurisdiction of the U.S. laws).").

It is noteworthy that Canada passed a law that went into force on June 21, 2002, allowing more extensive private antitrust enforcement. *See* An Act to Amend the Competition Act and the Competition Tribunal Act, R.S.C. 2002, c. C-23; *see also* Competition Act, R.S.C. 1985, c. C-34. Predictably, the law has engendered substantial debate regarding the potential for abuse of antitrust laws by competitors through private actions. Although a private right of action is available in the EU and many member states, it is almost never used; nevertheless, efforts to bolster access by private parties to courts, evidence, and collective actions sufficient to enable more private litigation, notably in the UK, are omnipresent—and likewise controversial. *See, e.g.*, William E. Kovacic, *Public Participation in the Enforcement of Public Competition Laws*, *in* CURRENT COMPETITION LAW, vol. II, at 167 (Mads Andenas et al. eds., 2004).

the Federal Trade Commission to share otherwise confidential antitrust evidence with foreign antitrust agencies and to use their investigative powers to collect information for use by foreign antitrust agencies pursuant to bilateral mutual assistance agreements.[73]

But these agreements do not seriously effect a *harmonization* of antitrust laws between the signatories. Rather, they enable coordination of efforts, most notably in the sharing of information between jurisdictions. The comity principles recommended by the OECD and adopted by some of the agreements does effect a kind of second-order harmonization, by reducing the likelihood of dual review of potentially anticompetitive behavior by different enforcement authorities implementing different antitrust laws and by encouraging conciliation between enforcement agencies in order to secure compliance. But little has occurred in the way of actual, substantive harmonization.

Undoubtedly, one source of blame for the failure of past harmonization efforts is the United States, which, although in certain international environments has led the way toward multilateral agreements, has repeatedly backed away from them when they threatened U.S. interests.[74] Even the most recent—and perhaps most powerful—initiative to incorporate international antitrust standards into the WTO has met with opposition from the United States.[75]

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[73] 15 U.S.C. §§ 6201–6212 (2012).

[74] *See* Waller, *supra* note 35, at 344–45 ("Every attempt to establish transnational competition law, with the exception of that of the European Union, has ended either in complete failure or in dilution into aspirational measures with little content. The United States has played a curiously ambivalent role in these efforts, often initiating international efforts and then scuttling them when majoritarian voting at the international level has influenced the project in directions not to its liking."); *see also* Guzman, *supra* note 2, at 1535.

[75] The United States participates in the WTO Working Group on the Interaction between Trade and Competition Policy, but largely opposes the promulgation of substantive international antitrust rules through the WTO. *See* Fox, *supra* note 41, at 670. *See* Douglas A. Melamed, Acting Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Promoting Sound Antitrust Enforcement in the Global Economy, Address before the Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law and Policy 8 (Oct. 19, 2000), *available at* http://www.usdoj.gov/atr/public/speeches/6785.htm; *see also* Guzman, *supra* note 14, at 952 (noting the United

Instead the United States has taken a fairly firm position against the internationalization of antitrust law and in favor of the extraterritorial application of its own (and other nations') domestic antitrust laws, tempered by the tenets of positive comity.[76]

The historical pattern of the U.S. position with respect to international antitrust agreements follows the course that the political theory of international economic harmonization would predict. Immediately following World War II, the United States was, at least in the Western World, the sole world power, both in military and economic terms. As such, it could assert its dominance with relative impunity. No other nation was in a position to challenge its dominance militarily, and with its security environment stabilized, the need for concession—and the need for evaluating states on the basis of their intentions—was minimized. At the same time, while secure in its immediate environment, the United States was of course saddled with the uncertainty of the longevity of its hegemony. Predictably, it set about not only asserting its short-term dominance, but also imposing the *conditions* of its preferred world order to guard against the eventuality of its own demise. To this end the United States set about creating international fora like the United Nations and other arrangements that would institutionalize and thus preserve its desired modes and orders.[77] At the same time, the United States set about exporting the "machinery of capitalism" throughout the world.

Thus, in the immediate post-war period the United States encountered no impetus to cooperate with other countries regarding their competition policies, and, by asserting its own antitrust jurisdiction throughout the world, it was able to reach even vestigial corporate

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States' opposition to multilateral international antitrust rules). As noted below, however, the United States' position is an evolving one, and even now there is greater acceptance of a limited role for international institutions in antitrust enforcement. *See infra* note 117 and accompanying text.

[76] *See, e.g.*, Klein, *supra* note 7.

[77] *See, e.g.*, Robert Kagan, *Liberalism and American Foreign Policy*, *in* THE BETRAYAL OF LIBERALISM: HOW THE DISCIPLES OF FREEDOM AND EQUALITY HELPED FOSTER THE ILLIBERAL POLITICS OF COERCION AND CONTROL 172 (Hilton Kramer & Roger Kimball eds., 1999) (discussing U.S. intentions with regard to imbuing the United Nations with its normative framework).

elements of the deposed Axis powers.[78] By imposing its own institutions on other countries with little regard for their short-term economic interests, the United States was able to extract binding signals from compliant countries of their willingness to engage in the U.S.-led world order in the long term.[79] As its economic hegemony began to erode,[80] the United States was faced with more and more strident opposition to the threats to sovereignty implicit in the extraterritorial reach of its competition laws. Suddenly faced with uncertain intentions and uncertain security, the United States began in the 1970s to adhere to the common law principle of comity.[81] By restricting the extraterritorial application of its own antitrust laws out of respect for the application of other nations' similar laws, the United States initiated a period of cooperation and information exchange. To the extent that other nations had laws worth respecting, the United States would restrict the application of its own laws so as not to infringe upon another nation's. At the same time, the United States would engage in an exchange of information with other nations in anticipation of the application of its laws. In short, the United States sacrificed the marginal, extraterritorial application of its antitrust laws for the sake of the exchange of information implicit in the application of positive comity and for the signal of restraint inherent in negative comity. It is noteworthy and not at all surprising, of course, that this exchange did

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[78] *See* Waller, *National Laws*, *supra* note 14, at 1112–13.

[79] *See* DANIEL W. DREZNER, U.S. TRADE STRATEGY: FREE VERSUS FAIR (2006).

[80] *See* KEOHANE, *supra* note 20, at 9 ("After the mid-1960s, however, U.S. dominance in the world political economy was challenged by the economic recovery and increasing unity of Europe and by the rapid economic growth of Japan.").

[81] Consistent with Goldsmith and Posner's elegant critique of conventional theories of customary international law, the United States' seeming compliance with the international custom of comity is best understood, not as arising out of any sense of disembodied obligation, but rather as arising out of a coincidence of interest between the United States' long-term security goals and those of other states (as well as, perhaps, other states' more short-term economic concerns). *See* Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 34, at 1132 ("Nations do not act in accordance with a norm that they feel obliged to follow; they act because it is in their interest to do so. The norm does not cause the nations' behavior; it reflects their behavior.").

not generally take place between the United States and developing or otherwise revisionist states.[82]

As multilateral international institutions like the General Agreement on Tariffs and Trade (and subsequently the WTO), the OECD, and even the United Nations Conference on Trade and Development—all incorporating in varying degrees important elements of the U.S. vision of the world political economy—have gained in legitimacy, importance and respect, the United States has once again begun to shift its rhetoric, if mildly, in the direction of the limited harmonization of competition laws under the auspices of an international organizing body.[83] Some harmonization of competition laws and policy is probably inevitable.[84] In fact, as we suggest below, the growing importance of competition policy for international trade laws suggests both that the harmonization of competition laws is in fact inevitable and that the adoption of competition policies actually reflects the dynamic we outline here on a larger level. That is, antitrust law is increasingly seen as a condition for a well-functioning trade law, and it is one that,

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[82] The United States entered into bilateral cooperation agreements only with developed and secure states up until the 1990s, and it incorporated principles of positive comity only in its agreements with Canada and the European Commission (EC). *See, e.g.*, Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, *supra* note 55; Agreement on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, *supra* note 69.

[83] *See* ICPAC FINAL REPORT, *supra* note 3, at 35, 281–302; Robert D. Anderson & Frédéric Jenny, *Convergence or Divergence?: Antitrust at the Crossroads*, 16 ANTITRUST 40, 42 (2001) ("The United States, which previously had expressed reservations, indicated in July 2001 that it saw potential merit in at least some aspects of the [Report (2000) of the WTO Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/4 (Nov. 30, 2000)]."). As at least one commentator has noted, however, the United States has been slow to embrace any form of global competition governance, largely using the rhetoric of sovereignty to support its intransigence. *See* Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based Upon the European Union Model*, 15 EMORY INT'L L. REV. 467, 467–68 (2001).

[84] *See* Foster, *supra* note 83, at 473–75. The U.S.-preferred locus for harmonized international antitrust, however, is not any existing international institution, but rather the largely aspirational Global Competition Forum. *See* ICPAC FINAL REPORT, *supra* note 3; Klein, *supra* note 7.

undoubtedly, imposes significant costs on the states that adopt it, almost regardless of its specific content.[85] The inclusion of competition policy goals within international trade organizations like the WTO certainly reflects the growing awareness that *effective* trade policy should control government and private abuse of the open access to markets. At the same time, the adoption of competition policy requirements may also send important signals about a state's commitment to the international normative order not necessarily conveyed by the adoption of trade laws alone. To the extent that trade harmonization laws do not significantly impact a state's *domestic* legal apparatus,[86] the adoption of a manifestly beneficial trade law alone may not send very powerful signals about a state's type.[87] If, on the other hand,

[85] Of the eighty-odd competition statutes in operation today, at least forty were adopted by Eastern bloc countries since the fall of the Soviet Union. *See* William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 362 (2000). Every one of these states had a powerful legacy of state control of the economy and retains the vestiges of government-supported monopolized industry. The adoption—or at least the application—of principled antitrust laws would profoundly alter both power and ideology in those states and could not be popular with those consequently dispossessed. *See* Fox, *supra* note 41.

[86] The reduction of trade barriers is a predominantly international phenomenon, and while it certainly implicates domestic institutions, it sends a far weaker signal as to fundamental type than does the altering of wholly domestic laws that regulate domestic relationships. Note, however, that, particularly among budget-constrained states, trade barriers are used extensively to subsidize domestic industries. *See, e.g.*, Josh Ederington & Jenny Minier, *Why Tariffs, Not Subsidies? A Search for Stylized Facts*, 5 CONTRIBUTIONS ECON. ANALYSIS & POL'Y 1, 1 (2005), http://ssrn.com/abstrac =271149. It cannot be doubted, of course, that reductions in trade barriers may be politically very costly for a state; however, to the extent that the destruction of trade barriers does not entail the establishment of internal institutions with their own staying power and clear normative influence on domestic relationships and behavior, trade liberalization itself may not be particularly indicative of a state's fundamental type.

[87] As Andrew Guzman has noted, the continued adherence to trade laws (or, more starkly, the breach of those agreements) can have a strong reputational effect which can, in the long run, indicate a state's type. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1861 (2002). Although this is an important tool for the revelation and interpretation of preferences among nations, as we have noted, it is somewhat weaker

states are made to conform (or create) their domestic antitrust laws and enforcement as a condition to full inclusion within a trade organization, they will incur significant up-front costs which may convey important information about their willingness to engage in free trade—and about their fundamental type.[88]

B. The politics of international antitrust law harmonization

The most likely course of development of international competition laws is one of continued extraterritorial application of domestic laws tempered, not only by principles of positive comity, but also by adherence to a set of international guidelines, perhaps promulgated under the aegis of the International Competition Network, or even the WTO, mandating certain domestic structural and substantive legal ground rules.[89] The politics of international relations, and not the economics of antitrust policy, suggest this outcome. While many commentators have focused on the economic consequences of various proposed international competition regimes, few have focused on the international poli-

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than the mechanism we propose here, simply because it requires substantial time (and recognized opportunities for breach) to function. *See supra* note 13 and accompanying text.

[88] Note that here in particular the fact that the requirement is imposed exogenously is important. As noted, many states have adopted competition laws unilaterally. However, without one or more principles or standards to comport with, these laws may be nothing more than attempts by revisionist states to exploit the globalization of the economy for their own advantage. For example, readily adopting the effects test model of extraterritorial enforcement, many states have employed premerger notification requirements with almost ridiculously low triggers to extort filing fees from proposed transnational mergers. Although there may be a legitimate competition policy component to these laws, they impose enormous transaction costs on the merging parties and increase the costs of merging by increasing the risk of challenge from multiple jurisdictions. At the same time, because they may be insufficiently principled, the unilateral adoption of such antitrust laws may not convey any valuable information about a state's fundamental type or willingness to comport with the existing world order. *But see* Guzman, *supra* note 87, at 1871–72 (which would suggest that, in the long run, even the adoption of faulty antitrust laws may reveal information about a state as it adopts particular enforcement practices).

[89] *See, e.g.*, Sugden, *supra* note 19, at 1017–19.

tics of antitrust internationalization.[90] As discussed more fully below, the politics of international relations, and specifically the problems of coordination and the ever-present need for reassurance absent central enforcement, permeate discussions of international trade. This is not to say, of course, that economic interests are not important and even paramount—it is to say simply that economic preferences, especially those filtered through a state's foreign policy makers, are likely to permit political considerations, and understanding these political considerations can inform our understanding of the international debate over competition policy. Fundamentally, antitrust addresses an economic problem, but its solutions are not simply economic.[91]

Proposals for limited harmonization through an institution like the WTO would condition continued or new membership in the organization on adherence to certain prescribed domestic conditions including (1) the passage and nondiscriminatory enforcement of laws prohibiting market foreclosure by dominant firms,[92] (2) transparency, and (3) the domestic provision of a judicial system with the safeguards of due process.[93] An additional requirement, oft suggested and

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[90] *See, e.g.*, Guzman, *supra* note 14; Guzman, *supra* note 2; Waller, *Neo-Realism*, *supra* note 14; Waller, *supra* note 35; Wood, *United States Antitrust Law*, *supra* note 14. As noted above, several commentators have focused on politics writ small—the internal politics affecting the adoption of a particular (or even any) international antitrust regime. However, while these concerns are certainly well-founded, they are incomplete.

[91] In the domestic realm this notion has long been recognized by public choice theorists. *See, e.g.*, THE CAUSES AND CONSEQUENCES OF ANTITRUST, *supra* note 42.

[92] As Eleanor Fox has noted, this entails the prohibition of cartelization and price fixing, abuse of dominance or monopolization, and certain vertical restraints. *See* Fox, *supra* note 41, at 671. We take issue with the proscription against vertical restraints, but the principle of prohibiting market-foreclosing restraints (limited, then, to markets with high barriers to entry) is a sound one. It is not surprising that the closest thing we have today to an international antitrust law is the OECD's Recommendation Concerning Effective Action Against Hard Core Cartels. *See* OECD RECOMMENDATION, *supra* note 1.

[93] *See* Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 AM. U. INT'L L. REV. 343, 365–66 (2002); Fox, *supra* note 41, at 671–72; *see also* World Trade Organization,

currently well accepted with some success around the world, is the provision for a technologically savvy regulatory enforcement agency.[94] Although this sort of normative harmonization would certainly help, the concern for businesses is far more one of substance; the fundamental principles of liberalization—transparency, market access, and due process—are doubtless desirable, but they are insufficient to protect business interests against legal and economic uncertainty.[95] As Egge points out: "[W]here there is uncertainty regarding legal risk for the same conduct across jurisdictions, coupled with the potential for extremely harsh consequences, a firm may very well decide to forego [sic] transactions or business strategies that in fact are competitively neutral or even procompetitive."[96]

And yet the United States continues to resist pressures aimed at harmonizing substantive antitrust laws and insists instead that each state enforce its own laws, in its own fashion. Arguably this reflects the United States' fears that harmonization will entail a weakening of its own laws. Certainly no other country, and not even the EU, has the political muscle to impose significant legal changes on the United States. That said, the recent move toward harmonization around the EU's competition policy regime from Asian states, such as China, Japan, and Korea, could well marginalize U.S. influence in this sphere.[97] Viewed through the broader political lens, however, the

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Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]. Others have voiced skepticism. *See, e.g.*, Daniel K. Tarullo, *Competition Policy for Global Markets*, 2 J. INT'L ECON. L. 445, 452 (1999).

[94] *See* Kovacic, *supra* note 85, at 405.

[95] *See* Michael George Egge, Remark, *The Harmonization of Competition Laws Worldwide*, 2 RICH. J. GLOBAL L. & BUS. 93, 99–100 (2001).

[96] *Id.* at 96.

[97] *See* EUROPEAN COMM'N—EXTERNAL RELATIONS DIRECTORATE GEN., EU-CHINA RELATIONS: AN OVERVIEW OF SECTORAL DIALOGUES BETWEEN CHINA AND THE EUROPEAN COMMISSION 1, 3 (2005), *available at* www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/200/200602/2006022201en.pdf ("In the area of competition policy . . . Chin[a] is currently drafting comprehensive competition law and the draft law in fact bears many similarities to the EU model . . . . The dialogue will enhance the EU's technical and capacity building

United States' reluctance to support harmonization may not be so puzzling. More than antitrust is at stake in the machinations surrounding the internationalization of antitrust laws, and by flexing its political muscle in the important realm of global antitrust, the United States may effect far larger, long-term normative change.

III. INTERNATIONAL POLITICAL THEORY

A. Unitary rational actor assumption

Before we get to the details, a disclaimer is in order. Implicit in our argument is the assumption that the state as an entity has intentions, preferences, the ability to interpret other states' preferences and inten-

assistance to China in the area of competition policy, a process which is facilitated by the fact that the emerging Chinese competition system follows the 'European model.' "); Ajit Singh, *Competition Policy, Development and Developing Countries* 10 (Indian Council for Research on Int'l Econ. Relations, Working Paper No. 50, 1999), *available at* http://www.icrier.org/pdf /wto7.pdf ("Following the end of World War II, the U.S. occupation authorities in Japan enacted U.S. type anti-trust laws in part to punish the large Japanese firms—the zaibatsu—who were thought to have been responsible for aiding and abetting Japan's aggression and war effort. However, as Professors Richard Caves of Harvard University and Professor Uekusa of Tokyo University, leading students of Japanese industrial organization, point out, the U.S.-imposed laws had no domestic constituency in the country. The laws therefore soon fell into disuse for this as well as other strategic cold war-related considerations."); INT'L CHAMBER OF COMMERCE, COMMENTS OF MICHAEL BLECHMAN ON INTERNATIONAL COMITY CONSIDERATIONS ON BEHALF OF THE INTERNATIONAL CHAMBER OF COMMERCE AND THE BUSINESS AND INDUSTRY ADVISORY COMMITTEE TO THE OECD BEFORE THE ANTITRUST MODERNIZATION COMMISSION 6–7 (2006), *available at* http://www.iccwbo.org/uploadedFiles/ICC/policy /competition/Statements/ICC_BIAC_Comments_Intl%20ComityAMC.pdf ("Despite significant progress, recent antitrust investigations conducted in multiple jurisdictions have had divergent outcomes, and emphasize that coordination among enforcement agencies could benefit from greater reliance on traditional comity mechanisms. For example, while the United States consulted with both the [European Commission] and the Korean Fair Trade Commission (KFTC) in their investigations of Microsoft's business practices, the enforcement agencies ultimately imposed divergent remedies on Microsoft. In a [Justice Department] press release, Deputy Assistant Attorney General J. Bruce McDonald asserted that the KFTC and EC remedies were in direct conflict with the United States' belief that "remedies that strip out functionality can ultimately harm innovation and the consumers that benefit from it.").

tions, and a fundamental existence independent of the individual agents that constitute it. This unitary rational actor assumption, although descriptively counterfactual, is nevertheless a useful and well-accepted heuristic device for crafting a theory of international politics.[98] Because our intention in this article is not to describe, even in probabilistic terms, the specific manner of interaction between states vis-à-vis international institutions, but is instead to develop a broad and predictive theory of the role of international competition law negotiations in overcoming international coordination problems, the heuristic is a useful one.[99]

By unitary we mean that the state can be said to intend with one mind and act with one voice.[100] Attempting to build a macro-level theory by considering unit-level inputs produces indeterminacy; there are simply too many factors, too many actors, and too many idiosyncrasies to develop a coherent predictive theory of international politics. At the same time, the realities of international relations *require* certain behaviors of states, even when individual agents acting on behalf of the state might behave otherwise.[101] The rational assumption posits that states act according to the rules of procedural rationality: they have ordered and transitive preferences, survey their environ-

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[98] Kenneth N. Waltz, *Reductionist and Systemic Theories*, *in* NEOREALISM AND ITS CRITICS, *supra* note 20, at 47, 56–57.

[99] *See* KEOHANE, *supra* note 20, at 29 ("Systemic analysis will not yield determinate predictions about states' pursuit of wealth and power. Even if it did, these predictions would be subject to inaccuracy insofar as great variations in state behavior resulted from variations in their internal characteristics. Nevertheless, systemic theory can help us understand how the constraints under which governments act in the world political economy affect their behavior.").

[100] Waltz, *supra* note 20, at 56–57.

[101] KEOHANE, *supra* note 20, at 28 ("We do not need to understand the idiosyncrasies of the actors to explain their behavior, since the situation they face mandates that they must act in a particular way. They will do so if they are rational; if they fail to do so, they may (if the environmental conditions are stringent) cease to exist."). *Cf.* Armen Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 213, n.7 (1950) (explaining how economic efficiency in the marketplace results from constrained calculations "combined with the essentials of Darwinian evolutionary natural selection").

ments, and select the strategy that best realizes their preferences.[102] In effect, this means that states are like units. They differ only in terms of capabilities, and each has at its core the same goal: its own survival.

This assumption, of course, sacrifices descriptive clarity. It fails to explain why particular states adopt particular strategies, and it ignores the impact of particular leaders at particular times. But what is gained is a theory of general applicability, yet with powerful predictive powers.[103] Moreover, "once state interests are determined, governments do pursue them in a rational unitary fashion."[104]

It is important not to overstate the unitary assumption and to be concrete about its extent. On the one hand, we take a state's preferences as given and exogenous. In our analysis this means that dominant states seek to maintain the hegemony and to spread its norms. At the same time, these states prefer not to confer benefits on other states that will exploit them (that is, if they are revisionist). Thus hegemonic states seek information as to type to further the maintenance and spread of the hegemony and to limit instances of free riding. At the same time, nonhegemonic states have their own preferences. For purposes of our analysis it is sufficient simply to classify them as either revisionist or status quo; they need not desire the same results as the hegemon (e.g., they need not seek to be inculcated with liberal norms)

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[102] *See, e.g.*, JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 17 (1994) ("Put simply, rational behavior means choosing the best means to gain a predetermined set of ends. It is an evaluation of the consistency of choices and not of thought process, of implementation of fixed goals and not of the morality of those goals.").

[103] Waltz, *supra* note 20, at 56–57 ("Theory explains regularities of behavior and leads one to expect that the outcomes produced by interacting units will fall within specified ranges. . . . A theory has explanatory and predictive power. A theory also has elegance. Elegance in social science theories means that explanations and predictions will be general. A theory of international politics will, for example, explain why war recurs, and it will indicate some of the conditions that make war more or less likely; but it will not predict the outbreak of particular wars. Within a system, a theory explains continuity. It tells one what to expect and why to expect it. Within a system, a theory explains recurrences and repetitions, not change.").

[104] Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 227 (1993).

but only not to resist the institutions instrumental to the diffusion of those norms. This is important because the hegemon's decision as to the efficacy of an institution depends on assumptions about the non-hegemonic states' internal institutions; the inculcation of norms requires "internalization." This point mirrors the "fall-back" position described by Robert Keohane, in which Realists recognize that state preferences cannot be derived "from the external positions of states."[105] Thus, some examination of the role of domestic actors and interests is critical, at least for our analysis, in evaluating the strength of the non-hegemon's signal.[106] This should not be construed as a violation of our use of the unitary rational actor assumption, as we still take preferences to be formed exogenously to the particular legal dispute. But looking inside the "black box" of the state is important for understanding the long-term dynamic of the signaling mechanism.

At the same time, although rational self-interested behavior by specific *agents* of a government will not, looked at in isolation, necessarily advance the long-term relationships between the state itself and its competitors in the world order, at least in the modern United States, even self-interested behavior will be constrained by the internal norms of behavior that pervade U.S. foreign relations. Taken together, the foreign policy behaviors of interested agents of the U.S. government, in the long term, appear to fit the model of the unitary rational actor, despite the presence of a strong assumption that each individual and each individual action advances far narrower goals.[107] This stems at

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[105] Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, *in* NEOREALISM AND ITS CRITICS, *supra* note 20, at 158, 183.

[106] Here we note, but do not pursue, that a similar analysis might profitably be undertaken from the point of view of the nonhegemonic state, in which the strength of the hegemon's signals must be evaluated with respect to its internal politics as well. However, because our point is that international institutions are useful from the hegemon's perspective for the inculcation of its world view as well as their ability to signal *to the hegemon* private information regarding a state's type (which, by definition, is known as to the hegemon itself), we do not undertake such an analysis here.

[107] For example, despite the existence of numerous specific instances seemingly to the contrary, one can fairly describe United States foreign relations during the Cold War in broadly consistent terms of the maintenance of the balance of power.

least in part from the effect of social norms on government actors, especially to the extent that these actors represent the United States' putative interests in the international sphere. Even leaving aside moral adherence to these norms, because there are short-term reputational costs to defecting from these norms, individual actors may be constrained by their own rational interest to act in the state's interest.[108]

B. The role of politics in international economic activity

Most of the legal literature addressing the adoption of international trade laws, and competition laws in particular,[109] neglects to place its analysis within a broad political framework.[110] To be sure, some commentators identify and engage the narrow political aspects of competition policy,[111] but even these analyses adopt a fairly myopic political view, in which political ramifications are limited to the allocation of direct economic benefits.[112] Other commentators, most notably public choice theo-

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[108] Robert A. Kagan, Neil Gunningham & Dorothy Thornton, *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 L. & SOC'Y REV. 51, 68–72 (2003). Perhaps the most noteworthy distinction between individuals' and state' interests is the difference in rational time horizon.

[109] For purposes of this article, we will identify competition laws as a subset of the larger universe of trade laws. Although competition laws are not necessarily trade laws per se, there is a growing recognition that the two are interrelated and that effective international trade policy must include some sort of competition policy. *See, e.g.*, ICPAC FINAL REPORT, *supra* note 3, at 33 ("[M]ore and more nations have come to recognize the value of competition as a tool for spurring innovation, economic growth, and the economic well-being of countries around the world . . . . Competition policy can help facilitate economic liberalization.").

[110] *See, e.g.*, Guzman, *supra* note 2; Wood, *United States Antitrust Law*, *supra* note 14; Waller, *Neo-Realism*, *supra* note 14.

[111] *See, e.g.*, Guzman, *supra* note 10; Wood, *The Impossible Dream*, *supra* note 14.

[112] Guzman notes, by way of analogy, that international intellectual property policy harmonization did not occur until the negotiations were moved within the framework of the WTO. He explains that the WTO enabled transfer payments, whereby developing countries agreed to the Agreement on Trade-Related Aspects of International Property Rights (TRIPs) in exchange for improved access to the markets of developed countries. Although this description may be accurate, we argue that it is incomplete in that it ignores

rists, identify and analyze the implications of international agreements for the domestic balance of power but likewise fail to consider the politics of repeated interactions among states *at the level of the state*.[113]

However, we argue that there is another aspect to these negotiations. As we discuss more fully below, states' engagements in international negotiations necessarily occur against a backdrop of the ongoing maintenance of and challenge to the existing hegemonic political order. Political competition is pervasive, and there is no reason to assume that it is absent from trade negotiations or from any other legal wranglings. Trade negotiations, like any other interaction among states, present opportunities for obtaining critical information regarding national preferences vis-à-vis the existing political environment. Moreover, the fundamental importance of obtaining and providing this information suggests that analysts should look for and anticipate its presence in international negotiations.[114] As Robert Gilpin writes:

> [P]olitics largely determines the framework of economic activity and channels it in directions intended to serve the interests of dominant groups; the exercise of power in all its forms is a major determinant of the nature of an economic system . . . . [T]he dynamics of international

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the overlying political dynamic whereby the hegemon uses international legal negotiations to evoke signals of acceptance of the political order. *See infra* note 167.

[113] *See, e.g.*, Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 935 (1996); Guzman, *supra* note 10; Guzman, *supra* note 2. While public choice theorists do, therefore, place their analyses within a larger political framework, because, at root, they neglect to consider macro- or system-level politics and concentrate instead on the implications of micro- or unit-level inputs, they miss the overarching connection between specific policy issues and national security. Implicit in their analysis is a rejection of the unified rational actor model of behavior, which holds that for purposes of political analysis, the state itself may be modeled as a rational actor. *See infra* note 125.

[114] Sometimes a trade dispute is just a trade dispute, of course. The ability of trade negotiations to elicit credible commitments on larger international matters should not be seen to overshadow the content of the trade laws themselves. And, especially when the negotiations occur between two states already known to accept the hegemonic order, the signaling dynamic we propose may be largely ignored.

> relations in the modern world is largely a function of the reciprocal interaction between economics and politics.[115]

Politics plays an intrinsic role in the international economy, and "to say anything about the *content* of international economic orders and about the regimes that serve them, it is necessary to look at how power and legitimate social purpose become fused to project political authority into the international system."[116]Thus, placing international competition law negotiations within the relevant political context is essential to understanding the full dynamics of the negotiations.

What is lacking in the political science and the legal literature relating to international relations and international law is a mechanism to explain *how* states can make the initial analysis as to another state's fundamental type. We note that there do exist theories to explain how certain international institutions can help identify what we call "second-order" preferences, by which we mean those more specific economic or political interests that are implicated by a particular legal or political interaction. The anarchic nature of international relations means that any agreements between states, whether regarding adherence to international norms, treaties, or other international institutions that require enforcement between states, implicate the exchange of unverifiable private information.[117] This literature effectively assumes away the first order calculus of a state's type, however, and analyzes the prospects for agreements regarding specific institutions. Guzman's compliance literature, for example, provides a framework for analyzing how states can fashion agreements in multiple

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[115] Robert Gilpin, *The Nature of Political Economy*, *in* INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES, *supra* note 21, at 270.

[116] John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, *in* INTERNATIONAL REGIMES 195, 198 (Stephen D. Krasner ed., 1983); *see also* Kenneth W. Abbott, *"Economic" Issues and Political Participation: The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV. 971, 977–87 (1996).

[117] For scholarship providing useful theories for identifying mechanisms that permit agreements between states, see generally Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, *in* THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION 50 (Eyal Benvenisti ed., 2004); Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 34; Guzman, *supra* note 87; Koh, *supra* note 35.

periods that will yield cooperation.[118] In Guzman's analysis, a state's concern for its reputation among other states in repeated interactions provides it with the necessary incentive to adhere to otherwise unenforceable agreements, for, by defecting from an agreement, the state reveals its unworthiness as a negotiating partner.[119] Guzman's analysis is limited, as he acknowledges, however, in the sense that states will defect from an agreement when the gains from defecting are greater than the costs, including the long-term reputational costs. Because any state may find it in its interest to breach some agreements, and even status quo states realize that they may have legitimate domestic reasons to defect from previously agreed upon international obligations,[120] it is impossible for other states to infer too much information about the defecting state's fundamental type from the fact of its defection. However, the defection may reveal that the state has a relatively higher discount rate (and thus it values much more its short-term payoffs but insignificantly its long-term reputation) because other states will never have perfect information about the defecting state's expected payoffs (or the defecting state's type) from its history of adherence and defection. As a result, other states continually update their beliefs on whether the defecting state has a discount rate that is "too high." In Guzman's analysis this is irrelevant—what he demonstrates is that the existence of reputational costs arising from breaches of international obligations imbues international law with an important self-enforcement mechanism that permits agreements between states even absent a fortuitous coincidence of interest. Guzman's analysis is persuasive, yet incomplete. For while other states may treat the defecting state *as though* it is a revisionist state because of its willingness to violate its obligations, the remaining uncertainty is costly, and it is not addressed by Guzman's theory.

In addition, Guzman's mechanism is cumbersome. That is, in the first period—when states enter into their original agreements—they do not yet have any knowledge about other states' propensities to defect. It is only once a defection has occurred that other states gain

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[118] Guzman, *supra* note 87, at 1840–60.

[119] *Id.* at 1844.

[120] For an obvious example, consider the continuing trade disputes between the United States and the EU.

any valuable information.[121] As Guzman notes, "[a] country that develops a reputation for compliance with international obligations signals to other countries that it is cooperative."[122] Of necessity (since it is an evolutionary, trial-and-error type of mechanism), states are forced to incur significant costs that they would not otherwise spend in forging agreements with states that have not yet revealed their propensities to defect. Moreover, because by definition the would-be breaching state discounts the future too highly (and hence, at the time of breach, discounts its future reputation too much for it to check its behavior), at the time of contracting, its high discount rate will not lead it to eschew agreements even when it knows that it is likely to breach them in the future if it can derive gains in the short term.

In contrast, the theory we outline here recognizes the importance of determining type in the first stage of repeat play and suggests a mechanism for doing so (this is particularly evident in agreements relating to national security interests in which the very survival of a state may be implicated). This is especially important with the realization that states make numerous overlapping agreements with each other at any given time. Thus, not only might a state incur the costs associated with making the agreement in question, but, during the time between the agreement and the eventual breach, the state might enter into additional agreements, relying on the faulty assumption (based on insufficient information from the first agreement) that the state is cooperative because it has developed a "reputation" for cooperation.

Likewise, Guzman's theory is fairly blunt. As he notes, "[h]aving the ability to either 'commit' or 'not commit' is valuable, but the ability to choose from a range of commitment levels is even more valu-

[121] A state that fears for its reputational costs in the repeated interaction, but which nevertheless foresees that it might end up choosing to breach a particular agreement, may not enter the agreement in the first place. But notice the fundamental problem here: only those states that care for their reputational capital will refrain from entering into agreements they anticipate they might eventually violate. The implication is that states either have, or do not care about, information as to another state's fundamental type—the reputation mechanism only works where there *are* in fact reputational costs, which may not always be the case.

[122] Guzman, *supra* note 87, at 1849. This is only true to a point, however. In actuality, the state only signals that it has *not yet* defected.

able."[123] This recognition leads Guzman to note that different forms of international institutions comprising varying degrees of commitment—based on varying degrees of "formality" and "clarity"—are thus valuable.[124] We agree. However, we note that Guzman's theory of reputation is a vague tool for evaluating commitment, partly because it relies on the relatively indeterminate concept of formality to convey information.

C. Anarchy and hegemony

The ever-present concern for politics in trade negotiation stems from the anarchic nature of the international system that forces states to be the sole guarantors of their own security. Because the system is one of self-help, states that ignore security to pursue other goals, or otherwise fail to protect themselves, will be punished by the system.[125] For this reason, some commentators emphasize the pervasive distrust that exists in international politics and the difficulties that states face in achieving cooperation.[126] As Jervis points out, "[T]he heart of the security dilemma argument is that an increase in one state's security can

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[123] *Id.* at 1856.

[124] *Id.*

[125] Kenneth Waltz draws the analogy between states and firms in a competitive market. *See* Waltz, *supra* note 20, at 56–57. Successful firms, like successful states, are those that have a well-defined understanding of what preservation means. For example, in a market economy, successful firms will maximize profits and adapt to competitive pressures and changing market circumstances. Similarly, successful states must be able to recognize the components of security made necessary by the system and identify those states that threaten that security. In this same vein, Waltz also notes that firms' and states' success or failure, and likewise firms' and states' actions vis-à-vis other firms or states, may be judged without recourse to the motives and behaviors of the entities' agents. Although firm theory and public choice theory have made enormously important contributions to the analysis of firm and state behavior, for purposes of analyzing a firm's engagement with the market or a state's engagement with the international order, a more stylized "black box" approach is sufficient. *See infra* note 166 and accompanying text.

[126] This is the general position of realist thinkers within international relations theory. *See* JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001); MORGENTHAU, *supra* note, at 32; Waltz, *supra* note 20, at 56–57.

make others less secure not because of misperception or imagined hostility, but because of the anarchic context of international relations."[127] In other words, the imperative for providing for one's own security and the structural impediments to cooperation can make the international environment one of pervasive mistrust. At the heart of this mistrust is the inherent difficulty in discerning other states' motivations.

At its worst, the international environment can be characterized by a destructive and wasteful arms race rooted in states' efforts to maintain their security against the uncertain threats from other states whose motivations are unknown.[128] The need for self-protection prevents meaningful cooperation among states because security depends on the *relative* power of states, and states will necessarily forgo cooperation that might alter the relative distribution of capabilities against them.[129] In fact, realists believe that a state "will eschew cooperation even though participation in the arrangement was providing it, or would have provided it, with large absolute gains. Moreover, a state concerned about relative gains may decline to cooperate even if it is confident that partners will keep their commitments to a joint arrangement."[130]

Nonetheless, the theory of hegemonic stability asserts that cooperation can arise in a world controlled by a single dominant power and in which the maintenance of order *requires* continued hegemony.[131] Hegemony rooted in and disseminated through legitimate rather than

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[127] ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS 76 (1976).

[128] *See* sources cited *supra* note 20.

[129] *See* Joseph M. Grieco, *Anarchy and the Limits of Cooperation*, *in* INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES *supra* note 21, at 79 ("[S]tates are positional, not atomistic, in character. Most significantly *state positionality may constrain the willingness of states to cooperate*. States fear that their partners will achieve relatively greater gains; that, as a result, the partners will surge ahead of them in relative capabilities; and, finally, that their increasingly powerful partners in the present could become all the more formidable foes at some point in the future.").

[130] *Id.*

[131] KEOHANE, *supra* note 20, at 31. As Keohane notes, "cooperation, which we define . . . as mutual adjustment of state policies to one another, also depends on the perpetuation of hegemony." *Id.*

coercive means can engender widespread adherence to a common goal and pervasive cooperation.[132] If the hegemon has established an order based on norms of cooperation and nonviolent dispute resolution, as is the case with the post–World War II world led by the United States, then, as noted above, members of that order may be able to cooperate to achieve mutual gains free of the omnipresent threat of the use of force.[133] It is fairly safe to argue that military power is no longer a factor in disputes between France and Germany, between the United States and Canada, or between many other members of the international community. Of course, this is not to argue that politics is no longer relevant; to the contrary, politics may be more relevant. Many states do not subscribe to the hegemonic norms of behavior and the trick is identifying those states so that they cannot exploit the benefits of hegemonic stability in order to subvert that order.[134] Concern for relative security, even within a hegemonic order, constrains states to distinguish between other states on the basis of their willingness to

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[132] *See* MORGENTHAU, *supra* note 31, at 32 ("Legitimate power, which can invoke a moral or legal justification for its exercise, is likely to be more effective than equivalent illegitimate power, which cannot be so justified. That is to say, legitimate power has a better chance to influence the will of its objects than equivalent illegitimate power. Power exercised in self-defense or in the name of the United Nations has a better chance to succeed than equivalent power exercised by an 'aggressor' nation or in violation of international law."); *see also* KEOHANE, *supra* note 20, at 138 (noting that the United States established and strengthened its hegemony through cooperation and restraint rather than imposition and aggression).

[133] *See* KEOHANE, *supra* note 31, at 138 ("Hegemonic power and the international regimes established under conditions of hegemony combine to facilitate cooperation. Hegemony itself reduces transaction costs and mitigates uncertainty, since each ally can deal with the hegemon and expect it to ensure consistency for the system as a whole. The formation of international regimes can ensure legitimacy for the standards of behavior that the hegemon plays a key role in maintaining. In the areas of money and trade, where their allies' cooperation was necessary, American leaders therefore invested resources in building stable international arrangements with known rules. It made sense for the United States to bind itself, as well as others, in order to induce weaker states to agree to follow the American lead."). For our purposes, "institutions" can be substituted for "regimes."

[134] *See* RANDALL L. SCHWELLER, DEADLY IMBALANCES: TRIPOLARITY AND HITLER'S STRATEGY OF WORLD CONQUEST 64 (1998).

pursue their self-interest through adherence to the established rules of hegemonic order or by challenges and threats to it.

D. The identification of state preferences

The importance of a state's position with respect to the hegemony suggests a more nuanced and realistic distinction between revisionist and status quo states than that traditionally offered by international relations theorists.[135] As we have noted, all states seek to improve their position relative to others. It is not, as the traditional definition would have it, merely that revisionist states self aggrandize and status quo ones do not; rather, what distinguishes bad (revisionist) states from good (status quo) states is the *means* by which they seek to improve their position. Status quo states are content to improve their positions from within the established order, utilizing only "legitimate" means to do so. Revisionist states, by contrast, will adopt illegitimate means to improve their positions, and they will flout or exploit the established order to do so. In the current regime, "legitimate" means are limited to negotiation, diplomacy, restrained (and justified) use of force, and generally economic rather than militaristic accretions to power.[136] Revisionist states, then, are those that resort to aggression or that exploit the cooperation engendered by the hegemonic order for their own relative gain.

Separating unverified states by their type is both essential and difficult. As James Morrow points out, "[u]ncertainty about the motivations of others raises [several] strategic problems in politics."[137] The two most important of these are a state's ability to signal its true motivations to another and its ability credibly to commit itself to a particular course of action.[138] The ability to signal one's motivation or underlying type entails the revelation of privately held, unverifiable information. Because the information is privately held and unverifi-

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[135] *See supra* note 105 and accompanying text.

[136] *See* KEOHANE, *supra* note 20, at 136–37.

[137] James D. Morrow, *The Strategic Setting of Choices: Signaling, Commitment, and Negotiation in International Politics*, *in* STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 77, 79 (David A. Lake & Robert Powell eds., 1999).

[138] *Id.*

able, and because states have an incentive to misrepresent themselves as status quo states, an effective signal must entail a cost that an actor of one type would be willing to incur but that an actor of another type would not. This cost creates what game theorists refer to as a "separating equilibrium."[139]

The anarchic nature of international politics makes it difficult to create the costs necessary to a separating equilibrium because there is no central enforcement authority to ensure that the costs will actually be borne by the state. The cost must be created endogenously, not exogenously, to the state itself. Absent exogenous enforcement of costs, it is difficult for states reliably to incur sufficient costs—difficult but not impossible. States regularly incur endogenous and sufficient costs. For example, incurring domestic audience costs may be a useful way for international leaders reliably to signal their type. Audience costs arise when a leader places at stake his own (individual) reputation or political survival by adopting a particular course of action.[140]

Perhaps the most costly action a state can take is to transform or rework its own domestic structures and institutions. States depend on existing relationships with domestic political elites for their stability, on various means of rent extraction for their wealth, and on particular configurations of domestic law for their power. Adjusting any of those relationships is likely to be extremely costly, as it affects the very fundamental nature and purpose of a state. Thus, if a state can be made to take such an action, the cost incurred by doing so may be able to function as a particularly powerful signal of type and preference.

Even though the costs to a state in changing its domestic laws are generally assumed to be significant (because of the powerful presumption that the status quo is favored by strong private interests, or else it would not be the status quo), it is worth noting that, particularly with respect to trade liberalization laws, other important inter-

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[139] A separating equilibrium is a "*solution* to a game in which players of different types adopt different *strategies* and thereby allow an uninformed player to draw inferences about an informed player's type from that player's actions." BAIRD, GERTNER & PICKER, *supra* note 33, at 314; *see also* MORROW, *supra* note 102, at 225.

[140] *See* James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 577 (1994).

ests will likewise favor revision.[141] Although there can be no doubt that, particularly in relatively disadvantaged developing countries, various forms of protectionism are strongly preferred by ascendant private economic interests (who stand to receive the most direct and largest gains from closed economic policies both because they are most influential in crafting the policies themselves and because they have more at stake), other, perhaps more dispersed interests likewise favor more liberalized economies (not least because the converse of the above is true: removing protectionist barriers to trade hurt larger, more powerful interests relatively more). International negotiations over trade policy may become a focal point for these dispersed interests to rally together to exert their collective political pressures in favor of liberalization, and collectively their political power may be substantial and even greater than that of the dominant domestic interests. As a result, the strength of the signal (but not, necessarily, the binding mechanism, which depends far more on the state's propensity actually to enforce laws) from the state's willingness to alter its domestic laws is weakened to the extent that the costs to the state are mitigated by political payouts. It is imperative for the purposes of this article that there be costs associated with domestic law changes. It is presumed, of course, that there are, but the existence of compensating transfer payments from the beneficiaries of the new laws suggests there may not always be. As noted above, the theory presented here does not purport to describe specific effects of specific behaviors. Rather, it provides a metalevel framework for conceptualizing those effects. In this case, there are some fascinating issues percolating just below this level of generality, and the public-choice theoretic aspects of the intersection between domestic and international politics is a likely and fruitful font of future work in this area.

This notion is illuminated by the fundamental insight of transaction cost economics—that the choice between arm's-length, decentralized interactions and institutional interactions (whether through contract or hierarchy) is largely dictated by the degree of asset speci-

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[141] Morrow, *supra* note 137, at 93 ("Increasing economic openness benefits segments of society with international ties and makes developing international economic ties attractive to firms and individuals that do not have them.").

ficity in the transaction—and leads to the converse notion that institutional interactions are enabled by the existence of asset specificity.[142] Specifically, when one party must make a costly commitment to a certain course of action before the other party confers any benefits, that party has made an asset-specific investment in the agreement. This investment binds the actor to a particular course of action and enables the institutionalization of the agreement. As is well known in game theory literature, this kind of binding can enable transactions that otherwise would not occur due to the unacceptably high level of uncertainty. The key in this analysis, however, is the reversal of the existing information asymmetry. Without the bonding mechanism, the hegemonic state is uncertain as to the other state's fundamental type, and, in the short term, its willingness to accede to the terms of agreement. On the other hand, the lesser state knows that the hegemon will behave in fairly predictable ways and will be constrained by reputational concerns (or, perhaps, a normative preference for adherence to the rule of law). Although the lesser state may prefer to contract on different terms, it knows at least what *type* of state the hegemon is, and it knows that there are constraints on its behavior.

By incurring binding costs (by "pledging" some asset) the lesser state makes a credible commitment to abide by the terms of the agreement, a commitment that is, perhaps, even stronger than any commitment offered by the hegemon. (What is more, the hegemon may be coercing the lesser state into the institution anyway and may be offering no substantial commitment.) Nevertheless, the agreement is consummated because the lesser state incurs the costs of altering its domestic institutions to fit the preferences of the hegemon. And as in the path dependence analysis, by "specifying its asset" in this way, the lesser state commits to a future course of action dictated by its new institutions because the cost of reverting to the old is too high.

A hegemonic state can find itself in a unique position to create such costs for states of unverified preference towards the hegemonic order. Because the hegemon creates the institutions and structures necessary to maintain cooperation and stability in the international system, it can use the desirability of admission to those institutions to

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[142] Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 519–38 (1983).

evoke signals of type from other states. If adherence to and harmonization with the hegemonic order necessitates domestic political transformation, then only those states with preferences commensurate with the order will pay the cost of admittance.[143]

Some states have already been identified as being of one or another type. Negotiations with these states are primarily focused on the microlevel details. However, the preferences of many states, particularly developing ones, are uncertain. In the existing order promulgated by the United States, progress towards democracy and a liberal market economy can be assumed to represent support for the order. However, the states of concern may have only nascent democracies at best and may be in the process of transitioning from a command or protected economy toward a liberal one. It is in the interest of these states to signal their willingness to commit themselves to both the normative and instrumental components of the hegemonic order, while it is in the interest of the hegemonic state to press for the acceptance of domestic laws and policies that will not only fulfill the immediate goal at hand, but will also effect the internalization of those components.

As an example, China's accession to the WTO represents a signal of this transition toward a liberal economy. The accession has institutionalized the process of China's domestic reform externally through the force of WTO obligations. Although uncertainty remains over the future orientation of China's government policies, WTO membership ensures that the process of economic reform will be charted within the disciplines of the WTO system. Consistent with our argument, EU policy makers have stated that China's accession to the WTO denotes "a symbolic day for global trade. It marked a turning point in international trading system."[144]

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[143] In addition to the immediate benefits that accrue from joining a particular institution, membership in the hegemonic order becomes a desirable good in and of itself. Thus, being viewed as "good" or "status quo" becomes a constitutive part of the state's identity.

[144] Romano Prodi, President, European Commission, Presentation to the China Europe International Business School (Apr. 16, 2004), *available at* http://www.ceibs.edu/forum/2004/0416_prodi.html ("China's accession to the WTO was a symbolic day for global trade. It marked a turning point in international trading system—the inclusion of the world's most populous nation finally allowing the World Trade Organization to live up to its hitherto

IV. THE PROCESS OF NORMATIVE CONVERGENCE

The process by which international institutions impose domestic costs on negotiating partners itself imbues those nations with the norms desirable for further international cooperation. As has been frequently noted, international institutions reflect the norms and desires of the dominant world power or powers that create or maintain them.[145] To the extent that these institutions impose restrictions or conditions upon the domestic institutions of nondominant signatories, they impose some measure of the dominant world order on those

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rather ambitious title. In many ways it also marked a turning point in EU-China trade relations, as China moved inside the club, allowing both sides to trade on a more equal footing."); *see also* Pascal Lamy, Trade Commissioner, European Union, saying on Oct 16, 2000, "the WTO needs China in if it is to become the World Trade Organization"; Lamy also notes that the "WTO will of course, be impacted by the accession of China. Its credibility will be enhanced." OECD economist and China investment expert Ken Davies has said, "The Chinese government committed itself to transparency when it adhered to the WTO. This is a major development in a country without a long tradition of open public consultation on law-making . . . . There is still plenty of scope for further expansion of foreign investment in China because important sectors of the economy are still in the process of being opened to foreign participation as a result of China's WTO accession . . . ." Ken Davies, OECD, Ask the Economists: Made in China: Is the Game Changing?, *available at* http://mingus.charlesmingus3art.com/index2.php?artikel=192&searchquery=itin&PHPSESSID===; *see also* the EU bulletin Feb 2001, where the Commission points out, "that the accession of the People's Republic of China and Chinese Taipei to the WTO should foster the process of lasting economic reform and sustainable development which they have initiated and that their accession would bring bilateral relations between them and the European Union into a stable and legally binding framework." It also pointed out that "in view of the importance of China's entry into the world trading system, their accession must form the subject of formal unanimous approval by the Council."

[145] *See, e.g.*, KEOHANE, *supra* note 20, at 63; *see also* Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 213, 222 (1990) ("[M]ost political institutions . . . arise out of a politics of structural choice in which the winners use their temporary hold on public authority to design new structures and impose them on the polity as a whole. . . . [Institutions are] weapons of coercion and redistribution . . . [,] the structural means by which political winners pursue their own interests, often at the great expense of political losers.").

countries' domestic institutions.[146] As the nondominant countries develop along the paths prescribed by their new domestic institutions, they develop norms of behavior that incorporate the terms of the dominant world order imposed on them by their participation in the international political economy.[147] Through this process of "socialization through external inducement,"[148] "the spread of hegemonic norms [actually] alters domestic political incentives."[149] Through operation of this process, the hegemonic power not only receives credible commitments from unverified states as to specific investments, but it also receives an incremental assurance from each norm-creating interaction that lowers the cost of future interactions. Ultimately, the process of economic liberalization sets in motion the creation of a middle class in developing or unverified states, the existence of which will exert internal pressures on the state in the direction presumptively desired by the hegemonic order:

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[146] See Thomas M. Callaghy, *Lost Between State and Market: The Politics of Economic Adjustment in Ghana, Zambia, and Nigeria*, *in* ECONOMIC CRISIS AND POLICY CHOICE: THE POLITICS OF ADJUSTMENT IN THE THIRD WORLD 257, 292 (Joan Nelson ed., 1990). *See also* Don Suh, *Situating Liberalism in Transnational Legal Space*, 12 DUKE J. COMP. & INT'L L. 605, 623 (2002) ("For example, in countries with a thin or nonexistent technocratic base such as Zambia, international institutions such as the World Bank and [International Monetary Fund] have exerted greater influence, significantly undermining the interests of the political regime. According to Callaghy, a Zambian official remarked that 'The [International Monetary Fund] and World Bank have become the Ministry of Finance of Zambia.'").

[147] The process by which this norm creation occurs—sometimes referred to as "internalization"—is described in some detail below. However, a full discussion of the process of internalization is beyond the scope of this article. For representative views on the matter, offered largely by "interpretivist" or "constructivist" accounts of international relations, see generally Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000); Ikenberry & Kupchan, *supra* note 35; Koh, *supra* note 35; Slaughter, *supra* note 35.

[148] Ikenberry & Kupchan, *supra* note 35, at 285 & n.3. Ikenberry and Kupchan describe this process of norm entrepreneurship as externally induced policy change ("cooperation through coercion") causing a subsequent norm shift ("cooperation through legitimate domination"). *Id.* at 291; *see also* SELL, *supra* note 40, at 175–216.

[149] Ikenberry & Kupchan, *supra* note 35, at 216.

- [Economic development brings] urbanization, mass education, occupational specialization, growing organizational networks, greater income equality, and a variety of associated developments that mobilize mass participation in politics . . . and lead[s] to a workforce that is independent minded and has specialized skills that enhance its bargaining power against elites.
- It [also] tends to develop interpersonal trust and tolerance, and it leads to the spread of post-materialist values that place high priority on self expression and participation in decision making. Insofar as it brings higher levels of well-being, it endows the regime with legitimacy, which can help sustain democratic institutions through difficult times.[150]

In both the international politics and the international law literatures, the ability of international regimes to effect domestic normative change is referred to as "internalization."[151] Although not explicitly adopting the language of path dependence, the identified internalization mechanisms are strikingly similar. Internalization occurs when an actor adopts a set of norms for practical reasons, such as the result of coercion or to accrue immediate benefits reaped from acquiescence, but eventually comes to identify those norms with his own interest and identity.[152] When a norm becomes internalized, the actor no longer follows it out of a desire to attain a reward or avoid punishment but because the actor comes to accept the rule "as a guide for behavior."[153] The norm becomes a constitutive part of the actor's identity.[154]

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[150] Ronald Inglehart, *Culture and Democracy*, *in* CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS 80, 92 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000).

[151] *See* Keohane, *supra* note 35; Koh, *supra* note 35.

[152] Koh, *supra* note 35, at 642–44; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996). *See also* Sokol, *supra* note 13, at section IV-C.

[153] Koh, *supra* note 35, at 640.

[154] Koh points out the relevance of seat belt use campaigns as examples of the internalization of norms. As laws were passed requiring the use of seat belts, and the costs of noncompliance rose, more and more people began to choose to use their seat belts. However, over time, "citizens who viewed the seat belt law as legitimate, and themselves as law-abiding, felt an internal pull towards compliance with the new law based on both the perceived legitimacy of the rule and their own sense of self-identity." Koh, *supra* note 35, at 632; *see also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990).

When a state harmonizes with international standards, as with competition law, it is forced to restructure and adjust its domestic laws and institutions. With the possible exception of the physical survival of the polity, there should be nothing more sacred and sacrosanct to a government than the domestic nature of its state.[155] The very purpose of a state is to maintain and protect its preferred system of laws. It depends on the existing pattern of rent extraction for its resources and on the relationships with the political elites for its power. Changing any of those things changes the fundamental nature of the state. This is a powerful signal. A state that is willing to harmonize its laws with those of the hegemon opens itself to the process of internalizing those norms deemed relevant by the leading state.

Harold Koh describes three processes by which a norm becomes internalized within a domestic population: social internalization, political internalization, and legal internalization.[156] The types of legal negotiations that we are examining here are likely to involve all three processes. Political internalization will occur during the negotiations, as certain sectors of the domestic political elite will come to support the adoption of the new legal standards. Eventually, if the negotiations are successful, enough of the elite will agree with the new policy so as to achieve legal internalization, whereby the laws and standards promoted by the hegemon are adopted by the unverified state. Finally, once the new laws are in place, social internalization will occur as domestic actors learn to anticipate the new incentives created by the new laws and adjust their behavior accordingly.

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[155] Realists argue that survival is the primary concern of political decision makers, but it seems possible that a state may not wish to survive at all costs. The debate over the trade-off between civil liberties and security in the wake of the September 11th attacks in the United States illustrates that a state may not necessarily place its physical survival as an absolute priority.

[156] Koh, *supra* note 35, at 641 ("Social internalization occurs when a norm acquires so much public legitimacy that there is widespread adherence to it. Political internalization occurs when the political elites accept an international norm and advocate its adoption as a matter of government policy. Legal internalization occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or some combination of the three.").

As discussed earlier, legal negotiations have both a micro and a macro nature with which our theory is concerned. The relationship between the two levels helps to provide the critical dynamic that we examine here. Although a state may be seeking only to capitalize on the short-term gains likely to flow from the adoption of the particular laws in question, doing so opens the state to the process of internalization. The laws promulgated by the hegemon may very likely also serve to advance the normative values espoused by the dominant state, as is evidenced by the claims of U.S. politicians and negotiators.[157] International law, and especially trade negotiations such as competition policy, is particularly relevant for such a task. The state likely enjoys support from members of the elite who benefit from the existing competition laws and may be loath to see them change.[158] However, successfully changing the laws may empower an entirely new set of interests with stakes in the new laws, which can result in social internalization of the new norms.[159] And, of course, successful legal harmonization will entail both legal and political internalization, as the new laws must both be accepted by the ruling political elite and enshrined in the domestic legal codes.

A hegemonic state has tools at its disposal by virtue of its dominance in the international system. Hegemonic states are responsible for maintaining order and stability in the system, and since the end of World War II, the United States has sought to utilize international institutions to obtain moral legitimacy for its dominance,[160] as well as to distribute the

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[157] *See id.* at 643.

[158] Of course, there may be other powerful domestic interests that would support changes in the existing laws. However, it may be possible to generalize that the power structure benefits from the laws in place. *See* Koh, *supra* note 35, at 623.

[159] Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2022 (2002).

[160] *See* Kagan, *supra* note 77, at 172 ("The wielding of great power still required an honorable and principled justification that conformed to the American character. Americans, therefore, tried to resolve the moral conundrum of power . . . [by attempting] to construct an international system—whether in the form of a concert of great powers, the League of Nations, the United Nations, or the NATO alliance—in which the wielding of American power could receive the blessing of other nations and could be depicted as advancing not only, or even primarily, the narrow interests of Americans but the broader goals of an international community of civilized states.").

costs of system maintenance to other states.[161] However, as discussed earlier, the hegemon must be picky about who is allowed to reap the benefits of its order, as revisionist states seek to strengthen themselves at the expense of others and to undermine the established rules of the game.[162] Not only does the hegemon wish to identify potential revisionist states, but the dominant state also seeks to inculcate its values into the domestic orders of others. By utilizing both the short- and long-term dimensions of the signaling mechanism extant in international legal negotiations, the hegemonic state may be able to achieve both goals.

One reason that changing domestic institutions is such a powerful signal to the hegemonic state is the "lock-in" effect of existing institutions. The unverified state, by adjusting its internal laws and policies, both incurs the immediate transaction cost of doing so, which can be incredibly costly due to the public choice aspect, and sets itself on a particular path desired by the hegemonic state. The new institution changes domestic incentives, empowers previously marginalized domestic interests, and institutionalizes a new set of norms.[163] Due to

[161] This is not to claim that the United States exclusively relies on international institutions or that the United States is forced to utilize such organizations. Often, the United States is forced to act against international consensus in support of what the United States feels is in its own best interest or that of the system. The U.S. rejection of the Kyoto Protocol, the debate over U.S. exemptions and protections from the International Criminal Court, and the fact that NATO did not wait for United Nations approval of the campaign against Serbia demonstrate that the hegemon will rely on its own devices when it deems necessary. However, institutions do allow the United States to share the burden of leadership, to obtain some degree of moral and multilateral legitimacy for its actions, and to pressure other states to adopt the normative values of the order.

[162] *See supra* note 46; *see also* ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 124 (1999) ("A status quo state is one that has no interest in conquering other states, redrawing boundaries, or changing the rules of the international system . . . . Status quo states have the interests they do, in other words, in virtue of their perceptions of the international order and their place within it as desirable, not because of brute material facts . . . . Revisionist states, in turn, have the desire to conquer others, seize part of their territory, and/or change the rules of the game.").

[163] The recent negotiations over China's accession to the WTO provide emphasis for this point. U.S. trade negotiators and politicians made the link between trade law reform and domestic political reform explicit, stating

bureaucratic inertia, the commitment signaled by the domestic change will be more resilient.[164]

Thus, by coercing states to harmonize their laws, the hegemon gets not only the short-term benefit of the immediate policy adjustment, but also receives a credible and costly assurance. When the unverified state binds itself to a present course of action, the hegemonic state can infer, through the operation of the "lock-in" effect, that the unverified state will have a greater propensity to maintain hegemonic values in the long term.[165]

As suggested, the development of domestic institutions that comport with international norms creates a path-dependent effect whereby the future course of institutional change will likewise reflect those norms. Path dependence is the effect by which future choices are constrained by prior ones.[166] Subsequent developments which must be

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strong beliefs that effecting the former would lead to progress in the latter. Domestic political reformers and human rights activists inside China also expressed their view that Chinese participation in the WTO would strengthen the political and social power of forces driving China towards increased acceptance of rule of law and liberal norms. *See infra* note 197.

[164] *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 7 (1990) ("Institutions, together with the standard constraints of economic theory, determine the opportunities in a society. Organizations are created to take advantage of those opportunities, and, as the organizations evolve, they alter the institutions. The resultant path of institutional change is shaped by (1) the lock-in that comes from the symbiotic relationship between institutions and the organizations that have evolved as a consequence of the incentive structure provided by those institutions and (2) the feedback process by which human beings perceive and react to changes in the opportunity set.").

[165] Notably, the very states that are most likely to be unverified—newly established democracies—may themselves have an interest in establishing locked-in democratic institutions in order to "further stabiliz[e] the domestic political status quo against nondemocratic threats." Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 220 (2000).

[166] Stephen E. Margolis & S.J. Liebowitz, *Path Dependence*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 17 (1998) ("In all instances that path dependence is asserted, the assertion amounts to some version of 'history matters.' Path dependence can mean just that: Where we are today is a result of what has happened in the past."); *see also* W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 ECON. J. 116 (1989).

integrated into an existing framework "lock-in" the original choice of technology and in each successive iteration, absent a paradigm shift, serve to narrow the range of choices for each subsequent development. Once the original investment is made, subsequent investments are constrained by the higher costs of divergence from a particular path (or limited range of paths). As our theory suggests, a state's compliance with the strictures of certain international institutions is a useful prediction of the state's fundamental type because it is a reliable predictor of future behavior. A state that incurs the substantial cost of altering its domestic institutions to accommodate international agreements that incorporate the dominant worldview sets itself on a path that may lead toward full compliance with the dominant worldview.

There are several ways in which this occurs. First, as our analysis indicates, the initial cost of compliance represents a substantial fixed cost. Creating, say, an antitrust enforcement agency represents a substantial initial investment, not least in terms of the opportunity cost of the requisite political, human, and financial capital. Adjudication of antitrust disputes and the creation of antitrust laws through the antitrust authority will have a relatively low unit cost because of the up-front investment, making the use of the newly created antitrust authority more likely. Thus, by establishing an appropriate (i.e., sufficiently technical and transparent) antitrust enforcement mechanism in accordance with the putative terms of an international agreement, a state can credibly commit to adhere to a program of law enforcement that respects the rule of law and that adheres to an established set of international principles that reflect the dominant world order.

Second, once a domestic institution is established and produces a body of output or a norm of behavior, it becomes relatively more desirable to follow the established norm or to build upon the existing output than to change established procedures or create new precedents out of whole cloth. Likewise, adherence to an established norm permits and encourages cooperation and coordination among domestic constituents and thus lowers the cost of compliance with the established institution relative to the cost of noncompliance or revision. Thus compliance costs are also lower under the established norm, which, as before, is modeled on a norm established by the world order created by the hegemon.

Finally, the domestic institution itself inculcates certain norms as its output and compliance become more regular and follow established patterns. As constituents and politicians act and react in particular ways when interacting with the newly established institution, those same forms of action are followed by others, and they create predictable and well-established norms of behavior surrounding the institution. Once again, these norms of behavior, although surely significantly informed by cultural, economic, and historical factors particular to the state, will nonetheless likely follow generally desirable patterns, which could be predictable and well explained by the path dependent theory.

The path-dependent effects of the establishment of a particular institution correspond to our notions of microlevel information dissemination through bonding and macrolevel information dissemination through signaling. In the short run, the costs of complying with the established institution will likely outweigh the costs of changing it, and states will be more effectively bound to behave in certain desirable and predictable ways by establishing the requisite domestic institution.[167] In the long run, the norms of behavior engendered by the institution will reflect desirable, dominant global norms. As these spill over into other areas of law, the establishment of the domestic institution required by accession to the international one will be seen to engender widespread adherence to those norms and can help in shifting a marginally revisionist state toward greater acceptance of the status quo in subtle ways.[168]

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[167] It is worth noting, of course, that the path dependence of already established institutions is a similarly substantial cost that must be overcome for new institutions to take hold. The fact that institutional change is so costly is, as we have noted, one of the reasons why it is a valuable signal, however. Moreover, the staying power of institutions means that some exogenous shock may be required to alter them. International institutions can provide such an exogenous shock and thus capitalize upon nascent normative change that simply has not yet taken place because of the immovability of existing institutions.

[168] The ability of international institutions, and the WTO in particular, to effect hegemonic policy initiatives and even broader social norms in areas of interaction outside their immediate scope is referred to as linkage. *See* Jose E. Alvarez, *The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146 (2002). The incorporation of an international intellectual property regime (the TRIPS Agreement) into the framework of the WTO is a powerful example. *See id*. at 147–48

Other commentators have identified revisionist states as those states that have high discount rates by operation of which, absent powerful short-term commitments, these states cannot credibly bind themselves to future behavior (because the reputational, retaliatory, or other costs will be incurred in the heavily discounted future).[169] Although we disagree that the distinction between "good" and "bad" states is purely one of relative discount rates (in fact, there is a strong normative distinction that more nearly approximates reality),[170] the adoption of such a distinction does not change, and, in fact, strengthens, our analysis. At root, the discount rate point leads to the conclusion that it is difficult to separate states as to type by their willingness to incur long-term, normative or institutional costs because future costs will be discounted too heavily by precisely those states most in need of being bound by those costs. But even under a discount rate analysis, revisionist states do not exhibit *infinitely* high discount rates. Future costs may still be costly even in the heavily discounting present. In particular, revisionist states will be precisely those states that will find the prospect of internal normative change through the lock-in effect to be costly. (By definition, status quo states will invite the normative change in the direction of hegemonic norms.[171])

(noting that the WTO's "established trade regime . . . served a useful purpose: it enabled the U.S. and the Western interests to 'launder' their unilateralist pressures"). In terms of the broader purpose of effecting normative domestic change, it is notable that the WTO "has encouraged the rise at both the international and national levels of an epistemic community of trade experts with a common expertise, as well as a shared (at least rhetorical) commitment to liberalized trade as a positive social good." *Id*. at 148.

[169] Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 34; Goldsmith & Posner, *Moral and Legal Rhetoric*, *supra* note 34; Guzman, *supra* note 87; *see also* ERIC A. POSNER, LAW AND SOCIAL NORMS 19–20 (2000).

[170] Guzman, *supra* note 87.

[171] Human rights treaties illustrate this tension. Absent domestic normative impetus toward the protection of human rights, human rights will not be protected through treaty. *See generally* Hathaway, *supra* note 159 (undertaking a detailed quantitative analysis of treaty compliance indicating widespread noncompliance and even a correlation between treaty ratification and *worse* human rights practices). As has been frequently noted, the benefits (and costs) of human rights treaties accrue entirely internally; there is no reciprocal exchange of benefits, except to the extent that a state has a preference that

V. SYNTHESIS

A. The cost of internalization

Internalization of international norms can arise from a state's adherence to any form of international institution, provided the institution requires or causes the state to undergo domestic institutional change in accordance with the hegemonic norms. This suggests that the specific content of the domestic legal change indicated by accession to the international institution in question (that which imposes the cost and which effects a separating equilibrium) will be relevant to the process of internalization.

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other states respect human rights (a real, but extremely weak, exception). The realist maxim regarding international law seems to apply in spades: Human rights treaties are respected only where they are not needed, and where they are needed they are not respected. *See* KEOHANE, *supra* note 20, at 63 ("International regimes should not be interpreted as elements of a new international order 'beyond the nation-state.' They should be comprehended chiefly as arrangements motivated by self interest: as components of systems in which sovereignty remains a constitutive principle. This means that, as Realists emphasize, they will be shaped largely by their most powerful members, pursuing their own interests."); *see also* George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379 (1996); Guzman, *supra* note 87. But the truth behind this maxim is instructive: when states have a domestic normative apparatus that respects human rights, human rights will be respected. This knowledge undergirds (with a few notable—and disastrous—exceptions) U.S. foreign policy with respect to human rights: effect domestic economic and institutional change, and civil rights will follow. *See* The White House, *A National Security Strategy for a New Century*, *in* AMERICA'S STRATEGIC CHOICES 351, 359 (Michael E. Brown et al. eds., 2000) ("[The United States] seek[s] a world in which democratic values and respect for human rights and the rule of law are increasingly accepted. This will be achieved through broadening the community of free-market democracies . . . ."). Note that the United States does support human rights treaties even where compliance is almost certain to be nonexistent. However, this is not (likely) out of wishful thinking, but rather out of regard for the effects of human rights treaty support on the United States domestic audience and other optimistic foreign audiences. The effort, then, to identify status quo states, and to extort domestic institutional change as a signal of compliance with the status quo, in the long view, not only supports immediate compliance with the institution, but lays the groundwork for salutary normative domestic change that can support otherwise insupportable human rights treaties.

Notably, the prospect of that long-term effect will itself impose an additional cost on states otherwise inclined to resist the dominant norms. To the very extent that the domestic change is likely to have a liberalizing effect, it imposes a cost over and above the immediate transaction costs of altering domestic laws (which are incurred by both revisionist and status quo states) and which is born only by revisionist states. That is, the prospect of long-term domestic change through operation of institutional lock-in will impose an additional (albeit perhaps highly discounted) cost on revisionist states that will not be felt by status quo states. To this extent, then, an unverified state that acquiesces to domestic legal change by dint of its participation in an international institution is more likely than not to be a status quo state, and states that find the prospect of domestic institutional change relatively more costly (revisionist states) are less likely to accept the consequences of accession.

B. The political problems with the WTO

Antitrust laws are peculiar in the realm of international trade regulation. Unlike other proscriptions relating to international trade, antitrust rules seek to alter directly the imposition of laws and regulations that affect largely private behavior. Trade laws such as those enforced by the WTO, on the other hand, relate almost entirely to government action.[172] Although the distinction is perhaps irrelevant from the point of view of the economic actor (either private or public law can be co-opted to further private interests' goals, and each has the same economic effect as the other), it is perhaps central to the

[172] One notable exception to this was the WTO's hearing of the Kodak/Fuji trade dispute, a dispute that revolved around government (in)action at best tangentially and that, not coincidentally, looked suspiciously like an antitrust dispute. *See Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DSAA/R (1997). The only other similarly positioned, quasi-antitrust WTO cases are: *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, AB-2004-3 (2004); *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (2004); and *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R & WT/DS162/AB/R (2000). *See generally* Philip Marsden, *Trade and Competition: WTO Decides First Competition Case—With Disappointing Results*, 3 COMPETITION L. INSIGHT 3 (2004); C. FRED BERGSTEN, ET AL., NO MORE BASHING: BUILDING A NEW JAPAN–UNITED STATES ECONOMIC RELATIONSHIP 157–92 (2001).

political actor in the international political economy. Developing countries especially, but even dominant states, might generally be willing to surrender some sovereignty in their own external dealings with other states, which is what trade laws generally accomplish: forbearance by states from regulating, legislating, or otherwise erecting barriers to market access.[173] It is another matter entirely for states to forbear from regulating their own constituents as they see fit. Antitrust laws, however, are the private analogue to trade laws. They entail affirmative state action against domestic private interests to erase perceived barriers to market access, albeit sometimes aimed at foreign-held firms. Although the WTO can resolve trade disputes through its supranational dispute resolution process, harmonization of antitrust laws calls for specific domestic application of competition policy by a state's own enforcement and policymaking authorities.

Although some call for the true internationalization of antitrust enforcement, often within the WTO, the organization is not institutionally structured to take on such a role.[174] And at the same time, states will be reluctant to give up the lucrative imposition of merger notification provisions that can be enforced only with the threat of domestic antitrust enforcement.[175] Within the cooperative framework of the WTO negotiating process, states are unlikely to be required to give up this source of revenue and political leverage.

These costs, coupled with the omnipresent problems of domestic judicial reliability in developing (and even developed) nations,[176] are in fact opportunities for the beneficial politicization of international antitrust harmonization. As we have noted, the imposition of particu-

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[173] Guzman, *supra* note 2, at 1529–31.

[174] Tarullo, *supra* note 93, at 450–51. *See also* Sokol, *supra* note 13, at section V-A.

[175] Abbot B. Lipsky, *Antitrust Economics—Making Progress, Avoiding Regression*, 12 GEO. MASON L. REV. 163 (2003).

[176] *See, e.g.*, Epstein, *supra* note 93, at 344 (noting that extensive internationalization of antitrust laws would founder because "nationalist courts are ill-equipped to deal with differing economic traditions and concepts of competition and because attempts to harmonize widely divergent definitions of competition that arise from divergent jurisprudential experiences would be futile").

lar antitrust laws on unverified or developing states, even where such an imposition would be resisted by those states, will have political ramifications because of those very costs. By altering their domestic laws to reflect standards promulgated by international institutions under the dominance of the hegemonic powers; by ensuring effective and fair enforcement of those laws by altering their judiciaries; and, most importantly, by imposing substantial costs on domestic private interests (in the case of antitrust, most often by *removing* the protections or the prospect of protections against foreign competition) even within the domestic realm, states supply a credible signal of their accession to the dominant norms of economic liberalization and democratization.[177]

Nevertheless, the placement of an international antitrust body within the WTO is predictable. In the first place, as others have noted, the WTO comprises over 150 nations varying widely in terms of their levels of economic development as well as the extent to which they are verifiably committed to the dominant worldview.[178] The WTO has proven its mettle in achieving important international-level policy agreement, most notably in the intellectual property area.[179] Likewise it has proven its acumen as a vehicle for extracting domestic institutional changes in exchange for membership and the continued bene-

[177] It is worth noting, again, that the problem in most cases is not underenforcement of insufficiently effective antitrust laws, as some have suggested. *See, e.g.*, Fox, *supra* note 41, at 668 (quoting the U.S. Trade Representative in saying that "if a foreign market was not penetrable by efficient American forms, and if no sovereign restraint could be found, then a private restraint must exist"). Nor is it that powerful U.S. antitrust laws are necessary to tear down private barriers to trade. *See id.* ("[T]he U.S. Assistant Attorney General for Antitrust added that if trade law could not pry open a closed foreign market, then U.S. antitrust law could and would do the job.") (citing Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 10–12 (1997)). Rather the real danger is the *over*-use of *heavy-handed* antitrust laws to effect government-supported barriers to market entry.

[178] There are currently 155 members. For list of members, with dates of membership, see WORLD TRADE ORG., *Members and Observers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited July 14, 2012).

[179] Guzman, *supra* note 14.

fits thereof.[180] And as Andrew Guzman has noted, its institutional arrangement is conducive to the exchange of reciprocal benefits between dominant and developing countries.[181]

For all of these factors, however, the usefulness of the WTO as a mechanism for international legal harmonization is questionable. The Agreement on Trade-Related Aspects of International Property Rights (TRIPS Agreement) itself provides an instructive cautionary tale.[182]

The placement of an international patent harmonization treaty within the WTO is certainly not accidental. At the time, the alternative proposed forum, the World Intellectual Property Organization (WIPO), had far broader membership (it was open to all United Nations member countries); however, the prospect of linking intellectual property protection to trade and market access issues was attractive to the United States and provided it with a mechanism it could use to leverage its power over developing countries.[183] Because developing countries had so few patents, they could not credibly commit to a pure intellectual property protection regime; however, to the extent that intellectual property protection could be linked to the development of liberalizing domestic institutions required by the WTO (and desired by developing states), the protections offered by developing countries could be made more secure.

The TRIPS Agreement as it was finally constituted contained most of what the United States sought in negotiations over its terms.[184] In

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[180] *See supra* note 163 and accompanying text regarding China's accession to the WTO. However, it bears noting that the costs extracted from China for accession rights were, in accordance with WTO procedures, imposed unilaterally by the United States and not by the WTO itself.

[181] *See* Guzman, *supra* note 2.

[182] *Contra* Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 433–35 (2007) (distinguishing the TRIPS Agreement from antitrust).

[183] SELL, *supra* note 40, at 137. As Sell notes, based on an interview with a WIPO official, the United States felt it had no retaliation mechanism for patent abuse by developing countries because they held so few patents. The prospect, then, of linking intellectual property protection to trade was of paramount importance to the United States. *Id.* at 248 n.99.

[184] *See id.* at 138 ("The United States succeeded in getting most of what it wanted in the TRIPs [Agreement].").

particular, the agreement reflects the United States' fundamental market-based economic approach and the identification of patent protection with trade liberalization. In contrast, throughout the TRIPS Agreement negotiations, developing countries negotiated from the point of view of a "dependency analysis," through which they viewed liberal elements of the agreement (like its prohibition against the granting of exclusive licenses)[185] as deleterious to their interests, which they believed could be furthered only through strong state intervention. The adoption of the agreement predominantly on the United States' terms (not without exception, of course[186]), brought "intellectual property protections into [the U.S. and Western interests'] trade regime, [and] delegitimized the piracy of intellectual property."[187] However, the agreement has yet to engender genuine change: "In nearly every instance, targeted states have chosen not to implement and enforce these new policies. In short, targeted countries have changed their policies, not their minds."[188] It is possible, of course, that the normative influence of the TRIPS Agreement's institutional costs has simply not yet taken hold in these states and that their willingness even to undertake costly policy changes that have not yet engendered normative changes still reflects positively on their fundamental type.

However, the disjunction between positive and normative change embodied in the adoption of the TRIPS Agreement does suggest a difficulty for hegemonic states in evaluating the *quality* of the information supplied by the mere adoption of domestic institutional change, at least when adopted under the auspices of a multilateral institution with an often-attenuated enforcement mechanism. It might be that, at base, the difficulty can be accounted for by analyzing the actual cost of the changes incurred—that is, it may be that the institutional changes wrought by the TRIPS Agreement upon developing countries were

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[185] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 31 (Apr. 15, 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

[186] *See, e.g.*, TRIPS Agreement arts. 65, 66 (granting grace periods to developing countries before they are obligated under the terms of the agreement); *id.* art. 27 (permitting countries to exempt drug patents).

[187] Alvarez, *supra* note 168, at 148.

[188] SELL, *supra* note 40, at 177.

not, without the addition of sufficient enforcement costs, sufficiently costly in themselves to make developing countries' commitments to the underlying liberal norms very credible. In time, however, as certain domestic interests in even recalcitrant states find strategic value in exploiting the new, TRIPS-related institutions, we can expect that more normative development will occur.[189] By altering the relative costs of pursuing status quo versus revisionist policies (by altering the domestic institutions that may be used, or at least "legitimately" used to further those policies), international institutions cannot help but effect this change at the margins. The external imposition of new institutions forcefully overcomes domestic resistance to institutional change that might otherwise prevent the adoption of new institutions (and their attendant norms). In doing so, it also alters the relative costs of following the old (revisionist) versus the new (status quo) norms embodied in those institutions—a factor that, over sufficient time, may lead to internalization of the new norms.[190]

One implication of our theory, then, is that negotiated agreements between nations through institutions like the WTO that seek to balance the costs and benefits of international legal harmonization are not, in fact, as valuable as coerced agreements between dominant and weak countries. The benefit of incorporating the TRIPS Agreement into the WTO framework, then, was less that agreement was easier to obtain because the WTO structure facilitated transfer payments from dominant to developing countries,[191] and more, perhaps, that the WTO's

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[189] Inglehart, *supra* note 150, at 92 (discussing internal interests in forcing the development of norms—the creation of a middle class).

[190] In this way the imposition of institutions by external forces overcomes the *existing* path-dependent forces that otherwise would serve to entrench existing institutions and norms. *See, e.g.*, ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 102 (1984) (citing Stinchcombe, and noting that institutional change is costly); ARTHUR L. STINCHCOMBE, CONSTRUCTING SOCIAL THEORIES 120–21 (1968) (referring to "sunk costs" (like existing functional institutions) which tend to "preserve a pattern of action from one year to the next" absent sufficient incentive to alter them); Arthur, *supra* note 166, at 121–25. *See also supra* notes 166–68 and accompanying text (discussing path dependence as a force for engendering normative change).

[191] For this argument, see Guzman, *supra* note 14, at 947–51; Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 936 (2002). Moreover,

linkage mechanism enabled dominant states to coerce costly agreements from developing countries.[192] That the developing countries have proved to be less than lackluster in enforcing the agreement is far less troublesome under the latter analysis than under the former.[193]

At the same time, of course, taken as a whole, developing states' engagement in the WTO process, which by its very nature incorporates a liberal economic view of the world order, sends a strong signal of their willingness to acquiesce to the hegemony. Even though the WTO itself may be a somewhat weak manifestation of the United States' preferred order, it is still undoubtedly a liberalizing institution.[194] As noted above, the fact that the United States might prefer to advance its competition policies through bilateral agreements does not mean that it can do so only through bilateral agreements. Moreover, we believe that an understanding of the mechanism we outline here is implicit in U.S. involvement with organizations like the WTO and in its general preference for certain institutions (like the WTO) that more comprehensively reflect the hegemonic order than

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there is credible evidence that, in fact, the TRIPS Agreement *did not* transfer to any substantial degree benefits to developing countries in exchange for their participation. *See* Phillip McCalman, *Reaping What You Sow: An Empirical Analysis of International Patent Harmonization*, 55 J. INT'L ECON. 161 (2001) (noting that the patent protection incorporated in the TRIPS Agreement in fact resulted in substantial transfers to the United States from developing countries (as well as from Canada, the UK, and Japan)).

[192] *See, e.g.*, Alvarez, *supra* note 168, at 147 (noting that the success of the TRIPS Agreement "might be attributable to credible hegemonic threats"); SELL, *supra* note 40, at 107–40.

[193] *See infra* note 197 and accompanying text (discussing the negotiation of the TRIPS Agreement and the attendant lack of enforcement by developing countries).

[194] *See* Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 69 (2000) ("The WTO may generally produce outcomes desirable to its influential members. But the very institutional structure that produces these desirable outcomes also may provide a foundation for resistance to particular U.S. objectives. Because the WTO parties cannot fully specify how the organization should operate, WTO officials have some freedom to pursue their own interests . . . . The governments also have some selfish incentives . . . to respond to focused pressure from well organized and homogenous groups.").

others, such as the United Nations Conference on Trade and Development. Nevertheless, the decision to utilize one institution or another to further its agenda is, of course, informed as well by United States' interests other than its desire to inculcate its particular normative world view. Rather, organizations like the WTO are effective because they can accommodate a wide range of complementary U.S. interests, the achievement of some of which do entail conferring limited benefits on unverified states (like China, for example).

It may be, however, that the fundamental weakness of the WTO is in fact what others have identified as its strength: its ability to accommodate transfer payments from developed to developing countries in order to secure their agreement within the WTO.[195] By making agreements more attractive and less costly (and correspondingly less coerced), such transfer payments can induce agreement among nations that otherwise would not willingly incur the substantial costs of compliance. As such, the existence of transfer payments can distort the separating equilibrium and minimize the signal of acquiescence to the status quo offered by such agreements. Notably, however, the long-term benefits of norm internalization may still accrue because agreeing countries, even if they are induced to agree because of the prospect of immediate transfer payments, still must undertake to effect domestic institutional change (at least eventually).

China's accession to the WTO was made particularly onerous by the United States, which refused to countenance its accession until it complied to the United States' satisfaction with a host of domestic institutional changes. Between formally beginning the accession process in 1986 until its final accession in 2001, China adopted significant changes in domestic policies on tax, trade, judiciary, and the like.[196] And on August 30, 2007, China passed a new, comprehensive antitrust law—the Chinese Antimonopoly Law—that went into effect August 1, 2008.[197]

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[195] Guzman, *supra* note 2.

[196] Julia Ya Qin, The Impact of WTO Accession on China's Legal System: Trade, Investment and Beyond (Wayne State Univ. L. Sch. Research Paper No. 07-15, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract _id =985321.

[197] Fan long duan fa [Antimonopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007

VI. CONCLUSION: THE POLITICAL PROMISE OF BILATERAL INTERNATIONAL AGREEMENTS

Just as multilateral agreements such as the WTO have their role despite the problems they can impose, we have argued here that bilateral agreements have their role as well—a largely political but equally important role. Such small-scale accords provide inherent "transaction benefits" through the very act of exchange. For the state, and the United States in particular, obtaining credible long-term commitments from other states—especially developing ones—to the dominant norms of global economic and political liberalization can signal adherence to the tenets of that liberalization. When such adherence is costly, it suggests at least some degree of long-term commitment. It is even better if the adherence costs entail some adaptation of domestic infrastructure or institutions in order to conform with the agreement because in this case the process can initiate internalization whereby the adaptations made create a lock-in effect that helps to further market liberalization and democratization.

Moreover, from a political standpoint, the disputes between nations over the specific content of antitrust laws and their particular applications can themselves be powerful information disseminating devices. In the case of the allegedly nearly catastrophic Boeing–McDonnell Douglas merger dispute, for example, the EU's initial intransigence and protectionism and the United States' adherence to technical economic doctrine[198] revealed fundamentally divergent theories of antitrust enforcement. Large-scale harmonization or centralization would have glossed over that distinction, a distinction that may speak volumes about a state's commitment to economic liberalization.[199]

STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517–23 (China), *available at* http:// english.peopledaily.com.cn/90001/90776/90785/6466798.html.

[198] In this case, clearance was based on the U.S. Federal Trade Commission's application of the diminished competitor doctrine, which, in contrast to Europe's antitrust laws, focuses entirely on the question of adverse consequences to customers. *See, e.g.*, United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

[199] The merger was approved by U.S. antitrust authorities, but was almost scuttled by the European Commission until the parties agreed to certain divestiture and conduct conditions. The obvious intent (allowable under EU law) was to protect Airbus from more effective competition occasioned by

Certainly, the recent judgments against Microsoft in the United States and EU have served only to increase the divergence between these two doctrines. And the divergence with U.S. market-based competition policy appears to be spreading across the globe: similar allegations against Microsoft were subsequently raised by competition agencies in far eastern countries, namely South Korea and Japan,[200]

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a procompetitive merger. However, other European firms are suppliers of parts to Boeing and McDonnell Douglas, and still other firms—other European airlines—are purchasers of Boeing aircraft. By maneuvering to advance trade policy (here protectionist trade policy) through operation of its antitrust laws, the European Commission was not necessarily advancing the interests of all European firms, and, although it may have known that its political position was still tenable, it certainly adopted a policy adverse to certain domestic political interests. It is worth pointing out in this regard that, to the extent that the United States does strive to advance its larger normative agenda through efforts directed at harmonizing competition policy, it is likely to push to exclude from that policy the explicit protection of competitors (which lies at the heart of the Boeing–McDonnell Douglas and GE-Honeywell disagreements between U.S. and EU competition authorities). In the first place, this makes good economic sense. Although antitrust laws will always be co-opted to some degree by competitors in order to stifle competition, antitrust rules should never be rationalized on that account. Furthermore, for the precise reason that antitrust laws that protect competitors are subject to capture by politically powerful interests, by removing or diminishing the opportunity to do so, states of necessity make the adoption of antitrust laws less popular among powerful constituents and thus correspondingly more costly to adopt. As is often the case, from the point of view of political capital expenditures, the economically sound policy is often the most expensive one.

[200] On September 17, 2007, Microsoft lost its appeal against the European Commission's case. The €497 million fine was upheld, as were the requirements regarding server interoperability information and the bundling of Media Player. This case arose on Sun Microsystems' complaint in December 1998 against Microsoft's refusal to provide interface information necessary for Sun to be able to develop products that would enable it to compete on an equal footing in the market for work group server operating systems. In 2000, the European Commission expanded its investigation and charged Microsoft with violating antitrust laws. In March 2004, the EU ordered Microsoft to pay €497 million ($613 million), the largest fine ever handed out by the EU at the time. The European Commission said,

> Microsoft Corporation has violated the EU Treaty's competition rules by abusing its near monopoly (Article 82) in the PC operating system. Microsoft abused its market power by deliberately restricting interoperability between Windows PCs and non-Microsoft work group

where the competition agencies have generally followed the European lead. These same countries are walking the EU path on antitrust questions centered on intellectual property as well, as evidenced by the investigations involving Qualcomm.[201] If this trend continues, the

> servers, and by tying its Windows Media Player . . . , a product where it faced competition, with its ubiquitous Windows operating system. This illegal conduct has enabled Microsoft to acquire a dominant position in the market for work group server operating systems, which are at the heart of corporate [information technology] networks, and risks eliminating competition altogether in that market.

Press Release, European Commission, Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine (Mar. 24, 2004), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/382 (footnote omitted).

In April of 2005 the Korea Fair Trade Commission (KFTC) launched an investigation into Microsoft. At the end of that year, Microsoft was found guilty of tying its Windows Media Player to the Windows server operating system and its instant messaging program to the desktop version of Windows. KFTC said, "Such practices raised the barrier to entry for competing companies, leading to restriction of market competition and obstruction of consumer welfare." KOREA FAIR TRADE COMM'N, THE FINDINGS OF THE MICROSOFT CASE 1 (Dec. 7, 2005), *available at* http://www.luc.edu/law/academics/special/center/antitrust/pdfs/microsoft_press_release.pdf.

The U.S. Justice Department settled its case through an agreement with Microsoft on November 2, 2001. The issue central to the case was whether Microsoft was allowed to bundle its flagship Internet Explorer Web browser software with its Microsoft Windows operating system. It was alleged that this unfairly restricted the market for competing Web browsers (such as Netscape Navigator and Opera) that were slow to download over a modem or had to be purchased at a store. Underlying these disputes were questions whether Microsoft altered or manipulated its application programming interfaces to favor Internet Explorer over third party Web browsers, Microsoft's conduct in forming restrictive licensing agreements with original equipment computer manufacturers, and Microsoft's intent in its course of conduct. A prolonged and involved trial followed. The proposed settlement required Microsoft to share its application programming interfaces with third-party companies and appoint a panel of three people who had full access to Microsoft's systems, records, and source code for five years in order to ensure compliance. However, the Justice Department did not require Microsoft to change any of its code or prevent Microsoft from tying other software with Windows in the future.

[201] In October of 2005, six companies, including Ericsson, Nokia, Texas Instruments, and Broadcom, filed a complaint with the EU alleging that

Qualcomm offered lower royalty payments for its cell phone–chip patents if its customers also bought the chips. According to the complainants, the terms and conditions under which chipset manufacturer Qualcomm licensed its patents for mobile telephone technology seemed not to be fair, reasonable and nondiscriminatory and, therefore, may have breached EC competition rules. Two years later, in October of 2007, the EC launched an antitrust action against Qualcomm in response to the complaints. At the heart of the case was the allegation by the phone makers that Qualcomm broke an agreement to license patents on "fair, reasonable and nondiscriminatory terms." In November of 2009, however, the EC announced that it closed the investigation. The EC noted that it committed time and resources to the investigation and that there was a complex body of evidence about which the EC had not yet reached formal conclusions. In light of the fact that all complainants had either withdrawn or indicated their intention to withdraw their complaints, the EC determined it was inappropriate to invest further resources in the investigation.

Soon after the complaint against Qualcomm was filed with the EU, in April of 2006, Nextreaming, a developer for embedded multimedia software for mobile phones, reported Qualcomm Inc. to the KFTC for allegedly monopolizing the industry. Earlier that month, KFTC officials had raided the Korean offices of Qualcomm on allegations that the company had violated South Korean antitrust rules. In July of the same year Texas Instruments and Broadcom lodged complaints against Qualcomm with the KFTC, alleging that the cell phone modem chip maker had abused its dominant position in the market there.

In the beginning of 2007 the KFTC formed a task force and launched a full-scale investigation into antitrust claims brought against Qualcomm, modeled after the task force investigating antitrust complaints against Microsoft. The KFTC commissioner commented, "We have been investigating Qualcomm's case since last April but we have found it to be a complicated case where facts are difficult to establish." In July of 2009, the KFTC dismissed much of the complaint against Qualcomm but imposed a $208 million fine on the company for its practice of providing discounts and rebates to Korean customers who purchased products mainly from Qualcomm, while charging higher royalty fees for phone chips to customers who purchased modem chips from Qualcomm's competitors.

In November of 2006, Japan's Fair Trade Commission (JFTC) warned Qualcomm that it might investigate the chip maker's licensing and business practices. In September 2009, the JFTC issued a cease-and-desist order to Qualcomm, requiring it to remove cross-license provisions without compensation and provisions prohibiting Japanese licensees from "assert[ing] their essential patents against other licensees that had agreed to a similar provision." Choe Sang-Hun, *South Korean Regulator's Investigation Adds to Qualcomm's*

United States' reluctance to pursue broad competition policy harmonization may incur yet more costs, namely a new kind of isolationism, with the United States against the world. This dynamic may be unfolding in stark relief as the set of global enforcement actions against Google begins its tortuous path, with investigations under way or concluded (over narrower issues like specific mergers) in the United States, the EU, Japan, and China. Until that day, though, our theory indicates solid political reasons for the United States to eschew harmonization. In sticking with bilateral agreements and unilateral actions, the United States can design its policy with the aim of establishing separating equilibria, with friends on one side and foes on the other.

Nor does it appear likely that the United States will face much pressure at home over its intransigence on the antitrust harmonization front. Although multinational firms such as Microsoft and Qualcomm undoubtedly bear the brunt of disjointed global antitrust policy, they are unlikely to push their home government to join forces with the EU. To the contrary, even though a failure to synchronize antitrust regimes is costly for U.S.-based multinationals, any move to abandon market economics in competition policy would be far more costly. All of which simply reinforces the factors we discuss here: the important political benefits of bilateral international antitrust agreements.

Woes, INT'L HERALD TRIBUNE, Jan. 2, 2007, *available at* http://www.nytimes.com/2007/01/02/business/worldbusiness/02iht-chip.4081244.html.] The Tokyo High Court granted a stay of the JFTC order in February 2010, pending a decision after a hearing on the merits.

In the meantime, the EC launched the investigation against a U.S. company, Rambus Inc., in July 2007. Press Release, European Comm'n, Antitrust: Commission Confirms Sending a Statement of Objections to Rambus (Aug. 23, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/330&format=HTML&aged=0&language=EN&guiLanguage=en). The investigation ended in a settlement, with the EC finding no violations and Rambus agreeing to put a cap on the royalty rates it charges for certain patented innovations.