An Economic Defense of Concurrent Antitrust Jurisdiction

WILLIAM S. DODGE†

SUMMARY

I. INTRODUCTION 27

II. APPROACHES TO EXTRATERRITORIALITY 29
  A. *Three Basic Approaches* 29
  B. *Exclusive v. Concurrent Jurisdiction* 30

III. THE ECONOMIC ARGUMENT AGAINST CONCURRENT JURISDICTION 31

IV. AN ECONOMIC DEFENSE OF CONCURRENT JURISDICTION 32
  A. *Exclusive Jurisdiction and Underregulation* 33
  B. *The Definition of Efficiency* 35

V. MAKING CONCURRENT JURISDICTION MORE EFFICIENT 38

VI. CONCLUSION 39

I. INTRODUCTION

For nearly a century, courts and commentators have wrestled with the question of when U.S. antitrust laws should apply extraterritorially. Initially, U.S. courts adopted a territorial approach, applying the Sherman Act[1] only to anticompetitive conduct that occurred on U.S. soil.[2] In time, the territorial approach gave way to an effects approach, which extended the Sherman Act's reach to foreign conduct causing anticompetitive effects in the United States.[3] A third alternative—the balancing approach—developed to moderate jurisdictional conflicts created by the effects approach.[4] The story of U.S. extraterritorial antitrust enforcement ever since has been a contest between balancing and effects,[5] with effects winning a narrow victory in the Supreme Court's *Hartford Fire* decision.[6] Yet it is

† Professor of Law, University of California, Hastings College of the Law. This article is an expanded version of remarks given at a symposium to honor Professor Russell Weintraub on February 21, 2002. Thanks to Matt Adler, Jeff Atik, Ash Bhagwat, Hannah Buxbaum, Andrew Guzman, Joel Trachtman, and Jay Westbrook for comments on an earlier draft.

1. Sherman Act, 15 U.S.C. §§ 1–7 (2000).

2. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356–57 (1909).

3. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443–44 (2d Cir. 1945).

4. *See* KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976).

5. *Compare* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987) (balancing) *with* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 921–26, 948–52 (D.C. Cir. 1984) (effects).

6. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); *see also id.* at 818–19 (Scalia, J., dissenting) (arguing for balancing approach). In other areas of law, the territorial approach has continued to dominate. *See, e.g.*, E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (territorial approach to Title VII).

HeinOnline -- 38 Tex. Int'l L.J. 27 2003

only recently that scholars have begun to consider the extent to which these three approaches—territorial, effects, and balancing—are economically efficient.[7]

To assess the economic efficiency of these three approaches, it is useful to divide them into two basic groups: (1) those that would assign legislative jurisdiction over an activity exclusively to one nation and (2) those that would allow concurrent legislative jurisdiction by more than one nation over the same activity. The territorial and balancing approaches belong in the exclusive-jurisdiction category. Each attempts to assign regulatory authority over a particular activity exclusively to one nation—the territorial approach to the nation where the activity occurs; the balancing approach to the nation with the strongest interest in the activity. The effects approach, by contrast, favors concurrent jurisdiction, allowing any nation that feels a sufficient effect from an activity to regulate it. Professor Weintraub and I (among others) have argued in favor of concurrent antitrust jurisdiction.[8]

The strongest argument against concurrent jurisdiction is that it results in overregulation.[9] Professor Andrew Guzman has recently argued that concurrent jurisdiction is inefficient because it allows any country that suffers a loss in national welfare from an activity to prohibit it, even if the activity causes a net gain in world welfare.[10] In this article, I offer an economic defense of concurrent antitrust jurisdiction. Whether such jurisdiction is efficient, I will argue, depends critically on how one defines efficiency.

In Part II, I explain the three basic approaches to extraterritoriality and classify them as promoting either exclusive or concurrent jurisdiction. Part III sketches the economic argument against concurrent jurisdiction—that it may result in overregulation by allowing countries to prohibit activities that cause a net gain in world welfare. Part IV presents an economic defense of concurrent antitrust jurisdiction in two parts. First, exclusive jurisdiction is just as likely to lead to inefficient underregulation as concurrent jurisdiction is to lead to inefficient overregulation. Second, the level of regulation produced by concurrent jurisdiction can only be considered inefficient if one adopts a Kaldor-Hicks, rather than a Pareto, definition of efficiency. I argue that, at least in this context, a Pareto definition is more appropriate. In Part V, I note that even under a system of concurrent antitrust jurisdiction there are some changes in procedure that could improve efficiency, particularly in the area of merger regulation. Part VI concludes.

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7. *See, e.g.*, Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002) [hereinafter Guzman, *Choice of Law*]; Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1 (2001); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1510–21 (1998) [hereinafter Guzman, *International Antitrust*]; Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207 (1996); Gunnar Schuster, *Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts*, 26 LAW & POL'Y INT'L BUS. 165 (1994).

8. *See* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998) [hereinafter Dodge, *Extraterritoriality and Conflict-of-Laws Theory*]; Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992); *see also* Diane P. Wood, *International Law and Federalism: What is the Reach of Regulation?*, 23 HARV. J.L. & PUB. POL'Y 97, 109–10 (1999); Jay Lawrence Westbrook, *Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business*, 25 TEX. INT'L L.J. 71 (1990).

9. Other traditional arguments against concurrent jurisdiction include a desire to promote uniformity in decisions concerning the applicable law and a desire to avoid conflict with other nations. For a discussion of these and other arguments against concurrent jurisdiction, see Dodge, *Extraterritoriality and Conflict-of-Laws Theory*, *supra* note 8, at 147–50.

10. Guzman, *International Antitrust*, *supra* note 7, at 1510–21; Guzman, *Choice of Law*, *supra* note 7, at 906–09.

HeinOnline -- 38 Tex. Int'l L.J. 28 2003

II. APPROACHES TO EXTRATERRITORIALITY

U.S. antitrust laws are generally silent on whether their extraterritorial application should be limited in any way,[11] and for the most part Congress has been inclined to leave this question to the courts.[12] The courts have applied three quite different approaches to determine the extraterritorial scope of U.S. antitrust laws, two of which promote exclusive jurisdiction and one of which promotes concurrent jurisdiction.

A. *Three Basic Approaches*

Over the past century, U.S. courts have adopted three basic approaches to the extraterritorial reach of U.S. antitrust laws: (1) a territorial approach; (2) an effects approach; and (3) a balancing approach.[13] Initially, U.S. courts opted for a territorial approach, consistent with then-prevailing doctrine in the conflict of laws.[14] Writing for the Supreme Court in the 1909 case *American Banana Co. v. United Fruit Co.*, Justice Holmes held that the Sherman Act did not apply to anticompetitive activities that occurred outside the United States, reasoning that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[15]

The effects approach is closely associated with Judge Learned Hand's 1945 opinion in *Alcoa*,[16] although one can find hints of it in earlier Supreme Court opinions.[17] *Alcoa* held that the Sherman Act applied to anticompetitive agreements, "though made abroad, if they were intended to affect imports and did affect them."[18] "[I]t is settled law," Hand wrote, "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 . . . ."[19] In 1993, the Supreme Court adopted the effects approach in *Hartford Fire*, holding that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[20]

Between *Alcoa* and *Hartford Fire*, other courts experimented with a balancing approach to moderate the extraterritorial reach of the Sherman Act. In *Timberlane Lumber*

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11. There are, however, several statutes creating exemptions to U.S. antitrust laws for anticompetitive conduct that has no effects in the United States. *See, e.g.*, Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a, 45(a)(3) (2000); Export Trading Company Act of 1982, 15 U.S.C. §§ 4001–16 (2000); Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61–66 (2000).

12. Dodge, *Extraterritoriality and Conflict-of-Laws Theory*, *supra* note 8, at 144–46 (discussing congressional intent and the legislative history of the FTAIA).

13. For a more detailed discussion of the three approaches and their development, see *id.* at 121–43.

14. *See* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179.

15. 213 U.S. 347, 356–57 (1909) (citing Slater v. Mexican National R.R., 194 U.S. 120, 126 (1904)).

16. 148 F.2d 416 (2d Cir. 1945).

17. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927) ("[B]y their own deliberate acts, here and elsewhere, [the conspirators] brought about forbidden results within the United States."); Thomsen v. Cayser, 243 U.S. 66, 88 (1917) ("[T]he combination affected the foreign commerce of this country and was put into operation here.").

18. *Alcoa*, 148 F.2d at 444.

19. *Id.* at 443.

20. 509 U.S. 764, 796 (1993). The Court suggested that it might adopt a balancing approach if it were impossible for the defendant to comply with the laws of both countries. *Id.* at 798–99. The European Court of Justice has adopted a strikingly similar approach to the extraterritorial application of E.U. competition law. *See* Case 89/85, *In re* Wood Pulp Cartel, 1988 E.C.R. 5193, 5242–44.

HeinOnline -- 38 Tex. Int'l L.J. 29 2003

Co. v. Bank of America, the Ninth Circuit proposed that courts weigh a number of factors to determine "whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[21] Although, the Restatement (Third) of Foreign Relations adopted this balancing approach,[22] the Supreme Court narrowly rejected it in *Hartford Fire*, over a strong dissent from Justice Scalia.[23]

B. Exclusive v. Concurrent Jurisdiction

To evaluate the efficiency of these approaches, it is useful to divide them into two categories: those that try to assign legislative jurisdiction over a particular activity exclusively to one nation; and those that allow concurrent legislative jurisdiction by two or more nations over the same activity.[24] The territorial approach of *American Banana* clearly falls into the exclusive-jurisdiction category. If "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done,"[25] then only one country's law may apply to any particular act.[26]

The balancing approach found in *Timberlane* and Restatement (Third) of Foreign Relations Section 403 also properly belongs in the exclusive-jurisdiction category. Despite a comment in the Restatement (Third) suggesting that the "[e]xercise of jurisdiction by more than one state may be reasonable,"[27] balancing can have no other purpose than to favor the law of the state with the greater interest. This was the objection that Judge Malcolm Wilkey made to Professor Louis Henkin, the Restatement's chief reporter, while it was being drafted:

> Comparative interest balancing inherently suggests that the less important interests must defer to the more important state interest.... Otherwise, the balancing would be gratuitous: why should the dual states' interests be compared at all, if *not* to vindicate the more reasonable state's interests at the expense of the other state.[28]

Justice Scalia's dissent in *Hartford Fire* illustrates how the balancing approach inevitably tends toward exclusive jurisdiction. Scalia concluded that Section 403's factors "point... clearly against application of United States law,"[29] but the factors on which he

21. 549 F.2d 597, 613–15 (9th Cir. 1976); *see also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979). *Timberlane*'s balancing approach built on Kingman Brewster's proposal for a "jurisdictional rule of reason" in international antitrust cases. *See* BREWSTER, *supra* note 4, at 446.

22. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

23. *See Hartford Fire*, 509 U.S. at 814–22 (Scalia, J., dissenting).

24. In the conflict of laws, approaches that allow concurrent jurisdiction are called "unilateral" because they determine the applicability of the forum's law without reference to whether another state's law might apply, while those that aim for exclusive jurisdiction are called "multilateral" because they attempt to choose among the laws of more than one state. *See* Dodge, *Extraterritoriality and Conflict-of-Laws Theory*, *supra* note 8, at 107–10 (distinguishing between unilateralism and multilateralism in conflicts). The "vested rights" theory of the first Restatement of Conflicts and the "most significant relationship" test of the Restatement (Second) of Conflicts are both multilateral, exclusive-jurisdiction approaches, while Brainerd Currie's "governmental interest analysis" and other "forum law" theories are unilateral, concurrent-jurisdiction approaches. *See id.* at 110–21.

25. 213 U.S. 347, 356 (1909).

26. Unless, of course, the act is done in more than one country. *See, e.g.*, Thomsen v. Cayser, 243 U.S. 66 (1917); United States v. Pacific & Arctic Ry. & Navigation Co., 228 U.S. 87 (1913).

27. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. d (1987).

28. Letter from the Honorable Malcolm R. Wilkey to the Chief Reporter (Apr. 24, 1984), *reprinted in* 25 VA. J. INT'L L. 43, 46 (1984).

29. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 819 (1993) (Scalia, J., dissenting).

HeinOnline -- 38 Tex. Int'l L.J. 30 2003

relied simply showed that it would have been reasonable for the United Kingdom to apply its law, not that it was unreasonable for the United States to do so.[30] In short, the balancing approach attempts to assign regulatory authority over an activity exclusively to the nation with the strongest interest in that activity.

The effects approach, by contrast, permits any nation that feels a sufficient effect from an activity to regulate it.[31] Since more than one nation may feel effects from the same activity, more than one nation may have authority to regulate it under an effects approach. The result is the system of concurrent antitrust jurisdiction that I and others have advocated and that Professor Guzman has criticized as inefficient.

III. THE ECONOMIC ARGUMENT AGAINST CONCURRENT JURISDICTION

The economic argument against concurrent jurisdiction begins by positing an "optimal global antitrust policy."[32] "A global lawmaker would seek to allow all transactions for which the net effect on total world welfare is positive and would seek to prevent activities for which the net effect on total world welfare is negative."[33] Thus, for example, a merger that reduces consumer welfare should be permitted if the reduction in consumer welfare is smaller than the gain in producer welfare.[34] Moreover, Professor Guzman would determine the optimal global antitrust policy without reference to its distributional effects: "From the perspective of a global planner, the distribution of the costs and benefits of an activity are not at issue. For example, if an activity reduces the welfare of some individuals or even some countries, but increases worldwide welfare, the activity should be permitted."[35]

National antitrust regulation, however, will always diverge from this optimal global policy because a national regulator's perspective differs from that of the hypothetical global regulator. "A government seeking to maximize the welfare of its own residents will fail to take into account an activity's costs and benefits to the extent they are felt outside the borders of the country."[36] A national regulator, therefore, will permit some activities that are globally welfare reducing and prohibit some activities that are globally welfare increasing. Guzman argues that a regime of concurrent jurisdiction in which all countries can apply their laws extraterritorially will result in overregulation.[37]

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30. For a more detailed analysis of Justice Scalia's *Hartford Fire* dissent, see Dodge, *Extraterritoriality and Conflict-of-Laws Theory*, *supra* note 8, at 138–43.

31. In the Supreme Court's current formulation, what is required is a substantial and intended effect in the United States. *Hartford Fire*, 509 U.S. at 796.

32. Guzman, *International Antitrust*, *supra* note 7, at 1510; *see also* Guzman, *Choice of Law*, *supra* note 7, at 898 ("The analysis begins by establishing the globally efficient substantive law—the global optimum. This is the set of substantive policies that would exist if a single benevolent and well-informed global policymaker were able to establish laws.").

33. Guzman, *Choice of Law*, *supra* note 7, at 898.

34. Guzman, *International Antitrust*, *supra* note 7, at 1511 ("Because the planner's objective is to maximize overall economic well-being, both consumers and producers matter. In economic terms, the planner maximizes the sum of the consumer and producer surplus.").

35. Guzman, *Choice of Law*, *supra* note 7, at 898.

36. *Id.* at 904. In the United States, Supreme Court precedent would also seem to prohibit a court from considering foreign benefits. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963) (rejecting argument that "anticompetitive effects in one market could be justified by procompetitive consequences in another").

37. Guzman, *Choice of Law*, *supra* note 7, at 906–09.

HeinOnline -- 38 Tex. Int'l L.J. 31 2003

> If every country applies its laws extraterritorially, each country will have the ability to prevent the transaction . . . . This means that for the transaction to be permitted, being globally efficient is not enough, it must improve the welfare of every country. Transactions that increase world welfare but that harm even a single country will be prevented.[38]

One can illustrate this point with an example loosely based on the 1997 merger of Boeing and McDonnell Douglas.[39] Assume that two American producers want to merge. The merger will benefit the American producers by creating economies of scale and allowing each to benefit from technologies developed by the other. It will harm American consumers by increasing the market power of the companies. It will harm European consumers for the same reason and will harm European producers by increasing the strength of their largest competitor. Assume that overall the benefits of this merger outweigh its costs because the benefits enjoyed by the American producers will be greater than the costs imposed on all of the other parties combined. A global regulator would want this transaction to go forward. So would an American regulator, because the benefits to the American producers will necessarily be greater than the costs to American consumers. However, a European antitrust regulator would block the merger because its producers and consumers are harmed and enjoy none of the merger's benefits. A system of concurrent jurisdiction that permits the European regulator to block this transaction is arguably inefficient because it diverges from the "optimal global antitrust policy."

IV. AN ECONOMIC DEFENSE OF CONCURRENT JURISDICTION

There are at least two possible responses to the charge that concurrent antitrust jurisdiction results in an inefficiently high level of regulation. The first is to point out that exclusive jurisdiction results in an inefficiently low level of regulation. The second is to question whether the proper definition of efficiency in this context is the one that Professor Guzman's argument assumes.

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38. *Id.* at 907; *see also* Guzman, *International Antitrust*, *supra* note 7, at 1512–21 (describing how policies of countries that can apply their antitrust law extraterritorially will diverge from the optimal global policy). The problem of overregulation resulting from concurrent jurisdiction is sometimes described as "an 'anticommons' problem." Trachtman, *supra* note 7, at 67. "Anticommons" refers to "a property regime in which multiple owners hold effective rights of exclusion in a scarce resource." Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 668 (1998) (emphasis omitted). "A *tragedy of the anticommons* can occur when too many individuals have rights of exclusion in a scarce resource. The tragedy is that rational individuals, acting separately, may collectively waste the resource by underconsuming it compared with a social optimum." *Id.* at 677. Concurrent antitrust jurisdiction may result in a tragedy of the anticommons where multiple nations hold the right to prevent a transaction resulting in too low a level of transactions.

39. The FTC approved the merger without conditions, while the European Commission withheld its approval until Boeing agreed to substantial concessions. *See In re* Boeing Company/McDonnell Douglas Corp., FTC, File No. 971-0051 (July 1, 1997) (statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek, III & Christine A. Varney), *available at* http://www.ftc.gov/opa/1997/9707/boeingsta.htm; Commission Decision of 30 July 1997 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement (Case IV/M.877 Boeing/McDonnell Douglas), 1997 O.J. (L 336) 16.

HeinOnline -- 38 Tex. Int'l L.J. 32 2003

A. *Exclusive Jurisdiction and Underregulation*

Even if it is true that concurrent jurisdiction leads to overregulation, exclusive jurisdiction leads to *underregulation*.[40] To illustrate the point, one need only vary the facts of the Boeing merger example a little. Assume now that the overall costs of the merger outweigh its benefits, but that these costs and benefits are still not distributed evenly. The benefits to American producers outweigh the costs to American consumers, but once the costs to European consumers and producers are considered, the merger is seen to be welfare reducing.

Both exclusive jurisdiction approaches would assign jurisdiction to the American regulator in this case: the territorial approach based on the location of the merger; the balancing approach based on a variety of factors, including the nationality of the parties to the merger and the location of the conduct, that would indicate a stronger U.S. interest in the transaction. But the American regulator will allow the merger to go through because it benefits the United States, despite the fact that it is welfare reducing from a global perspective. Thus, exclusive jurisdiction leads to underregulation just as surely as concurrent jurisdiction leads to overregulation.[41]

To his credit, Professor Guzman acknowledges this point. "Because no country has the correct incentives," he writes, "a choice-of-law rule that grants exclusive jurisdiction to one state will lead to a sub-optimal level of regulation."[42] And he specifically notes that the territorial approach "leads to systematic underregulation."[43] Nevertheless, Professor Guzman concludes that "the objective of achieving a globally efficient choice-of-law regime is best served through application of the presumption against extraterritoriality."[44] This conclusion seems to rest on two arguments. First, Guzman assumes that "a legislature is least likely to specify the extraterritorial reach" of a statute "in those situations in which a country has little or no interest in the extraterritorial application of its laws."[45] Thus, the presumption serves as a "filter" (although "not a perfect" one) "for cases in which the jurisdiction has little interest."[46] Second, Guzman notes that "if there is underregulation, the country that bears the cost can correct the problem by specifying the reach of its laws. If the country chooses not to correct the problem of underregulation, it is because the costs are small."[47] This "automatic correction mechanism"[48] does not work for overregulation

40. For a more extended discussion, see Dodge, *Extraterritoriality and Conflict-of-Laws Theory*, *supra* note 8, at 153–58.

41. If one prefers the "anticommons" characterization of concurrent antitrust jurisdiction, see *supra* note 38, one should understand that exclusive jurisdiction may lead to a tragedy of the commons: too many transactions may be permitted because the nation with exclusive jurisdiction lacks the incentives to regulate optimally. *See* Trachtman, *supra* note 7, at 15 (noting that "the international system is both a commons and an anticommons"). *See generally* Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, 1243, 1244–45 (Dec. 13, 1968).

42. Guzman, *Choice of Law*, *supra* note 7, at 904–05. *See also* Trachtman, *supra* note 7, at 42 ("Allocation of a bundle of authority on the basis of either a comparative effects test or regulatory advantage presents problems of moral hazard, or agency costs: the regulator may not, in a unilateral (non-reciprocal) mode, without further structuring, have appropriate incentives to safeguard the preferences of other states.").

43. Guzman, *Choice of Law*, *supra* note 7, at 910; *see also* Guzman, *International Antitrust*, *supra* note 7, at 1521–24 (describing how the antitrust policies of countries that cannot apply their laws extraterritorially will be weaker than the optimal global policy).

44. Guzman, *Choice of Law*, *supra* note 7, at 926.

45. *Id.*

46. *Id.*

47. *Id.* at 927.

48. *Id.*

because "the costs of the overregulation are borne by foreigners, so there is no reason for the legislature to alter the jurisdictional reach of the law."[49]

Both arguments are flawed. When a statute deals with a domestic subject matter[50] and is silent about its extraterritorial reach, one may reasonably assume that Congress was "primarily concerned with domestic conditions."[51] To say that Congress is primarily concerned with domestic conditions, however, is not to say that it has little or no interest in the extraterritorial application of its laws. Foreign conduct frequently affects domestic conditions, and as Professor Guzman recognizes, Congress has a legitimate interest in regulating such conduct.[52] When Congress is silent about the extraterritorial reach of a statute, a court concerned with effectuating congressional intent ought to apply that statute extraterritorially to any conduct that causes substantial effects in the United States.[53] A court should not assume that legislative silence means legislative indifference.[54]

The problem with Professor Guzman's "automatic correction" argument is two-fold. In the first place, it ignores the public choice issues that Guzman wants to incorporate into his model.[55] Public choice theory generally predicts that regulation will favor industry at the expense of consumers.[56] The public choice literature further suggests "that organized special interest lobbying activities are more successful at *preventing* proposed legislation than at promoting special interest legislation."[57] Thus, Congress may fail to correct the problem of underregulation that the presumption against extraterritoriality creates, not because the costs of underregulation are small, as Guzman suggests, but rather because the consumers who would benefit from greater regulation are too disorganized compared with industry, which also has the relatively easier task of simply blocking passage of a law. Although a full public choice analysis of extraterritoriality is beyond the scope of this article, public choice theory suggests that courts should adopt an approach that tends toward too much regulation, rather than too little.

In the second place, Professor Guzman's argument ignores the impact that the presumption against extraterritoriality may have on international negotiations.[58] Guzman and I agree that nations stand to gain from cooperation on international regulatory issues.[59] But judicial efforts to prevent overregulation of foreigners through the presumption against

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49. *Id.*

50. I have argued elsewhere that the presumption against extraterritoriality should "be rebutted when it is clear from the subject of the statute that Congress was not primarily concerned with domestic conditions." William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 123 (1998) [hereinafter Dodge, *Understanding the Presumption Against Extraterritoriality*]. Examples would be the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1–78dd-2 (2000), the Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421 (2000), and the Refugee Act of 1980, 8 U.S.C. § 1253 (2000).

51. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

52. *See* Guzman, *Choice of Law*, *supra* note 7, at 894 ("[T]he only basis of jurisdiction to be considered is 'effects.' When an activity has no effect on any person within a jurisdiction, that jurisdiction has no reason to regulate the activity. Similarly, if an activity has an effect on the residents of a jurisdiction, that jurisdiction has, at the very least, an interest in regulating the activity."). Moreover, globalization has made the location of the conduct an increasingly poor proxy for effects. *Id.* at 923.

53. *See* Dodge, *Understanding the Presumption Against Extraterritoriality*, *supra* note 50, at 124.

54. Indeed Professor Guzman rejects just such an argument in a different context. *See* Guzman, *Choice of Law*, *supra* note 7, at 916–20 (arguing that foreign legislatures may have an interest in permitting an activity although their statutes are silent).

55. *See id.* at 900–04.

56. *See id.* at 901–02.

57. Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 109 (1990).

58. In other words, Professor Guzman considers efficiency in static, rather than dynamic, terms. I am indebted to Joel Trachtman for this alternative characterization.

59. *See* Guzman, *Choice of Law*, *supra* note 7, at 932–38; Guzman, *International Antitrust*, *supra* note 7, at 1542–47; Dodge, *Extraterritoriality and Conflict-of-Laws Theory*, *supra* note 8, at 158–68.

HeinOnline -- 38 Tex. Int'l L.J. 34 2003

extraterritoriality reduce the incentives of foreign governments to negotiate.[60] As Professor Weintraub has written: "If in fact a significant sacrifice of United States interests results from attempts to serve comity, international accommodation may . . . , ironically, be retarded rather than advanced. Our bargaining chips will have been given away before the political branches could use them."[61]

The presumption against extraterritoriality simply cannot be justified on grounds of economic efficiency. It hinders the application of statutes to foreign conduct causing domestic effects, which Congress may legitimately wish to regulate, in a way that Congress may find difficult to overcome. It also tends to undercut the possibility of negotiations that might result in a more efficient international regulatory system. If exclusive-jurisdiction approaches like territoriality and balancing lead to underregulation and concurrent-jurisdiction approaches like effects lead to overregulation, the efficiency argument between the two would seem to be a tie.[62]

B. *The Definition of Efficiency*

The efficiency argument between exclusive and concurrent jurisdiction is a tie, however, only if one accepts that the definition of efficiency that Professor Guzman employs is the correct one. Economic analysis typically employs two different definitions of efficiency. Under a Kaldor-Hicks definition, an activity is efficient if it increases net welfare regardless of any change in welfare distribution.[63] Under a Pareto definition, an activity is efficient only if it increases net welfare *and* leaves no party worse off.[64] For example, say that party A values a book more than party B does. Under a Kaldor-Hicks definition, it is efficient for A to take the book from B without B's consent because A's gain is greater than B's loss.[65] Under a Pareto definition, this transaction is not efficient, despite the net gain in welfare, because B is left worse off. Pareto efficiency requires the

60. It should be obvious that courts cannot themselves negotiate with foreign jurisdictions, and their efforts to cooperate in the absence of a treaty ensuring reciprocity are doomed by the so-called "prisoner's dilemma." Countries A and B might both be better off if they cooperated by restraining the extraterritorial application of their laws, but if A's judges cooperate and B's do not, A will be worse off than if neither country's judges cooperated. *See* Dodge, *Extraterritoriality and Conflict-of-Laws Theory*, *supra* note 8, at 159–63. In another context, I have termed this "the judge's dilemma." William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 224 (2002) [hereinafter Dodge, *Breaking the Public Law Taboo*].

61. Weintraub, *supra* note 8, at 1817. *Cf.* Trachtman, *supra* note 7, at 67 (arguing that, because a negotiated agreement would likely base jurisdiction on effects, "there is no basis for arguing that the structure of jurisdictional allocation wherein the U.S. can assert the effects test is, or at least has been, inefficient").

62. One might break this tie by determining which approach leads to more globally inefficient outcomes, but testing this empirically would appear to be quite difficult and to the best of my knowledge no one has yet attempted such a study.

63. *See* Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 513 (1980) ("One state of affairs (*E'*) is Kaldor-Hicks efficient to another (*E*) if and only if those whose welfare increases in the move from *E* to *E'* could fully compensate those whose welfare diminishes with a net gain in welfare. Under Kaldor-Hicks, compensation to losers is not in fact paid."). *See generally* J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

64. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 14 (5th ed. 1998) ("A Pareto-superior transaction . . . is one that makes at least one person better off and no one worse off."); Coleman, *supra* note 63, at 513 ("An allocation of resources is Pareto superior to an alternative allocation if and only if no one is made worse off by the distribution and the welfare of at least one person is improved."). *See generally* WILFREDO PARETO, COURS D'ECONOMIE POLITIQUE (1897).

65. *See generally* Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 INT'L REV. L. & ECON. 367 (1997).

HeinOnline -- 38 Tex. Int'l L.J. 35 2003

party who would gain from a transaction to negotiate with and compensate the party who will lose from it.

Professor Guzman's argument against concurrent jurisdiction assumes that the Kaldor-Hicks definition of efficiency is the correct one. He posits that the "optimal global antitrust policy" is one that results in the greatest net increase in world welfare, regardless of its distributional effects.[66] "[I]f an activity reduces the welfare of some individuals or even some countries, but increases worldwide welfare, the activity should be permitted."[67] But it is not obvious that the Kaldor-Hicks definition of efficiency is the better one in this context. To allow an American regulator to impose harms on Europeans on the ground that the benefits to Americans are greater than the harms to Europeans is not more obviously justifiable than to allow A to take a book from B because A values it more.[68]

Several standard criticisms of Kaldor-Hicks efficiency apply in the context of international antitrust regulation as well.[69] Perhaps most important, the Kaldor-Hicks criterion requires comparisons of welfare, which in turn requires one to choose a metric for measuring welfare.[70] One must somehow measure how much A gains from having the book and how much B loses from not having it so that one can tell whether A has gained more than B has lost. Professor Guzman wants to avoid choosing a metric,[71] but without a unit of measurement one simply cannot say that any particular transaction is Kaldor-Hicks efficient.[72] Pareto efficiency, by contrast, does not need metrics because it requires consent. If B sells the book to A, we know that B values it less than A, even if we do not know by precisely how much. "Where resources are shifted pursuant to . . . a [voluntary] transaction, we can be reasonably sure that the shift involves an increase in efficiency. The transaction would not have taken place unless both parties had expected to be made better off."[73]

Of course, within a national system, we permit regulators to adopt policies that are Kaldor-Hicks efficient but not Pareto efficient. For example, the United States' prohibition of monopolization[74] is Kaldor-Hicks efficient because the increase in consumer surplus is greater than the decrease in producer surplus, but it is not Pareto efficient because the

66. *See supra* notes 32–35 and accompanying text.

67. Guzman, *Choice of Law*, *supra* note 7, at 898.

68. In evaluating the efficiency of a particular transaction, one typically uses the status quo—e.g., no merger, B's ownership of the book—as a baseline. Whether the status quo distribution of welfare is itself defensible is a separate question and one that is beyond the scope of this article.

69. For an excellent recent summary of the criticisms, see Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241, 248–62 (2000).

70. *See* Coleman, *supra* note 63, at 519 (noting that "in order to infer from the satisfaction of the Kaldor-Hicks test that there has been a net gain in utility, we need to know whether winners have won more than losers have lost, which requires interpersonal-cardinal comparability").

71. He writes: "The maximization of global welfare should be a noncontroversial assumption because the manner in which global welfare is calculated is not specified. The only restriction on the global welfare function is that it must involve some form of aggregation of national welfare functions (which are, themselves, not specified). Thus, for example, if the protection of the environment is an important concern, it can be included as part of the global welfare function simply by including it in appropriate individual welfare functions." Guzman, *Choice of Law*, *supra* note 7, at 885 n.5.

72. *See* Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1223 (1991) ("Unless one is willing to make interpersonal comparisons, however, it simply cannot be said that such an uncompensated Kaldor-Hicks move is an improvement."). A commonly used metric for comparison is wealth. *See, e.g.*, Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). But wealth suffers from at least two problems as a metric. First, it only values those things that are traded in the marketplace. Second, wealth has a declining marginal utility—i.e., a dollar is worth less to a rich person than to a poor one.

73. POSNER, *supra* note 64, at 15.

74. 15 U.S.C. § 2 (2000).

HeinOnline -- 38 Tex. Int'l L.J. 36 2003

monopolist is made worse off.[75] My purpose in this article is not to argue that the Kaldor-Hicks definition is inappropriate in all contexts, but simply to argue that it is inappropriate in assessing the efficiency of international antitrust regulation.

At least three factors distinguish the national from the international system in a way that make a Pareto definition of efficiency more appropriate for the latter. First, the fact that national regulators are accountable to the national constituency through the democratic process gives regulatory decisions that transfer wealth a legitimacy that is lacking in the international context. European producers and consumers cannot be said to have "consented" to the American regulator's decisions in the same way that American consumers have.[76] Second, national taxing systems make it possible to reimburse parties for the distributional effects of regulatory decisions.[77] Nothing similar exists at the international level.

Third, negotiations are, perhaps counterintuitively, more feasible on the international level. One of the principal arguments against Pareto efficiency—and, by implication, in favor of Kaldor-Hicks—depends on the difficulty of obtaining consent. Judge Posner has written that "the Pareto-superiority criterion is useless for most policy questions" because "[i]t would be impossible to identify, let alone negotiate for the consent of, everyone affected by" a particular change.[78] There are simply too many individuals that will be affected by any particular choice of national policy. In the international context, however, the potential number of parties is limited to the number of nation-states, at least if one is willing, as I am, to permit nations to adopt international antitrust policies that are Kaldor-Hicks but not Pareto efficient with respect to their residents.[79] Although more than eighty countries today have antitrust laws,[80] that number is far lower than the millions of individuals who may be affected by a particular change in domestic law.

One might still worry about the possibility of "hold-up" behavior: if many countries may block a welfare-increasing merger, they might be tempted to withhold their consent not simply because they would be harmed by the merger but because they could extort additional compensation from those who would benefit from the merger.[81] This danger is

75. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 91–92 (1981).

76. *Cf.* Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons from Our Federalism*, 68 ANTITRUST L.J. 219, 226–27 (2000) (arguing that a supranational merger authority would find it difficult to approve mergers that are Kaldor-Hicks, but not Pareto, efficient).

77. Of course, such reimbursement does not always occur. If it did, the difference between Kaldor-Hicks and Pareto efficiency would dissolve. Adler, *supra* note 69, at 251–52.

78. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 489 (1980); *see also* Posner, *supra* note 72, at 89; Calabresi, *supra* note 72, at 1216 ("Unfortunately, the set of Pareto superior changes which would make no one worse off and at least one person better off must ex ante be a void set.").

79. Although national policies that are Kaldor-Hicks but not Pareto efficient may still be problematic, they are at least more justifiable on legitimacy and potential reimbursement grounds. *See supra* notes 76–77 and accompanying text.

80. International Competition Policy Advisory Committee Final Report 33 (2000), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm (last visited Aug. 21, 2002) [hereinafter ICPAC Final Report]. Of these, approximately fifty provide for or require premerger notification. Overall, approximately sixty countries provide for or require antitrust notification, either pre- or postmerger. *Id.* at 37 & Annex 2-C. These numbers represent a dramatic spread of antitrust law: Prior to 1990 only twenty-eight countries had such laws. Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 105, 109 n.15 (1998).

81. *See* William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075, 1104–05 (1998) ("Merger review provides an occasion to impose conditions that promote achievement of other objectives, such as obtaining commitments that the merged entity acquire some percentage of its inputs from domestic producers."). Countries might also impose premerger notice

HeinOnline -- 38 Tex. Int'l L.J. 37 2003

overstated. As a practical matter, because of limitations on jurisdiction and the enforcement of judgments, it is only large regulators like the United States and the European Union that have the ability to apply their antitrust laws extraterritorially.[82] Of course, this situation is hardly ideal. Nations other than the United States and the members of the European Union may be harmed by anticompetitive activities beyond their borders and have a legitimate interest in regulating those activities. I have argued elsewhere that nations should negotiate conventions to enforce each other's regulatory laws and judgments as a way of overcoming such limitations.[83] However, negotiated limits on the ability of smaller countries to engage in "hold-up" behavior could be one price of admission to such conventions.

The best counterargument, I think, is that with a Kaldor-Hicks standard costs and benefits will tend to even out over time.[84] One merger may benefit Americans at the expense of Europeans, but the next will benefit Europeans at the expense of Americans. In the end, the distribution will be relatively even, and a number of welfare-enhancing mergers will have occurred that would not have occurred under a Pareto standard because of high transaction costs. Of course, there is no guarantee that this result will occur.[85] Moreover, I believe that the transaction costs of negotiations are not so high as is supposed. If it would truly benefit the parties to trade one merger off against another in this way, national decision makers are capable of realizing this fact and negotiating arrangements that would facilitate such a process. A Pareto standard that requires such negotiations has the advantages of avoiding errors in the evaluation of efficiency by requiring consent;[86] legitimating such trades with the consent of democratically accountable representatives;[87] and allowing for transfer payments to account for any residual inequalities in distribution.[88]

V. MAKING CONCURRENT JURISDICTION MORE EFFICIENT

So far I have considered only whether it is efficient for more than one nation to apply its antitrust law to a particular transaction, but one may also consider whether the processes for enforcing national antitrust law are themselves efficient.[89] Particularly in the merger area, there are a number of changes that could be made to lower the transaction costs of premerger review without compromising the ability of countries to remedy anticompetitive effects on their markets.

First, as noted in the Final Report of the International Competition Policy Advisory Committee ("ICPAC"), a number of countries set their notification thresholds so low that

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requirements in order to obtain revenue from filing fees. *See* ICPAC Final Report, *supra* note 80, at Annex 3-A (listing jurisdictions that impose substantial filing fees, including the United States).

82. *See* William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL'Y INT'L BUS. 363 (2001).

83. *See* Dodge, *Breaking the Public Law Taboo*, *supra* note 60.

84. *See generally* A. Mitchell Polinsky, *Probabilistic Compensation Criteria*, 86 Q.J. ECON. 407 (1972).

85. *See* Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's* The Economics of Justice, 34 STAN. L. REV. 1105, 1112 (1982) ("The problem with this strategy is that there is no guarantee for each individual that he will be no worse off at the end of the series of Kaldor-Hicks moves."); Adler, *supra* note 69, at 253 (noting that "particular persons may suffer large losses in particular rounds of Kaldor-Hicks evaluation, such that the gains they reap in other rounds are not substantial enough to make them net winners from the overall practice").

86. *See supra* notes 69–75 and accompanying text.

87. *See supra* note 76 and accompanying text.

88. *See supra* note 77 and accompanying text.

89. *See generally* Gordon Tullock, *Two Kinds of Legal Efficiency*, 8 HOFSTRA L. REV. 659 (1980). Tullock writes: "As far as I know, no one has ever questioned the desirability of efficiency in the process of law enforcement . . . ." *Id.* at 659.

HeinOnline -- 38 Tex. Int'l L.J. 38 2003

they catch a large number of transactions that are unlikely to have any substantial anticompetitive effects on them.[90] Others require notification based on factors, like worldwide sales or assets, unrelated to the effect a merger is likely to have in those particular jurisdictions.[91] The burden on international mergers could be eased if countries with low premerger notifications thresholds were to raise them (as the United States has recently done[92]) and if all countries were to require notification based on factors related to a merger's local effects, such as domestic sales and assets.[93] Second, again as noted in the ICPAC Final Report, the burden on international mergers could be reduced if countries would harmonize their rules about when parties may file premerger notification and agree on a relatively short (*e.g.*, 30-day) period of initial review.[94]

Third, countries could increase the efficiency of the premerger review process by agreeing on a single form that could be filed in multiple jurisdictions, with annexes for country-specific information.[95] France, Germany, and the United Kingdom have had such a common notification form since 1997.[96] Such harmonization would not only avoid some duplication, but would also enhance cooperation among national authorities who would be reviewing the same information presented in the same format.[97]

Each of these proposals would preserve concurrent jurisdiction over mergers with substantial anticompetitive effects in more than one country, thereby avoiding the underregulation that attends exclusive jurisdiction[98] and ensuring that mergers are Pareto efficient.[99] But each of these proposals would also increase the efficiency of concurrent jurisdiction by reducing the transaction costs of reviewing international mergers.

VI. CONCLUSION

In choosing an approach for the extraterritorial application of antitrust law, economic efficiency is an important concern. But it is also important to be clear about what "efficiency" means. In this article, I have argued that the system of concurrent antitrust jurisdiction produced by the effects approach is Pareto efficient and that Pareto efficiency is a more appropriate standard in this context than Kaldor-Hicks efficiency.[100] I have also shown that even under a Kaldor-Hicks standard, concurrent jurisdiction resulting from an effects approach is no more inefficient than exclusive jurisdiction based on a territorial or

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90. ICPAC Final Report, *supra* note 80, at 94–98.

91. *Id.* at 102–03.

92. *See* Pub. L. No. 106-553, 114 Stat. 2762 (codified at 15 U.S.C. § 18(a) (Supp. 2002)) (raising size of transaction threshold from $15 million to $50 million).

93. ICPAC Final Report, *supra* note 80, at 156.

94. *Id.* at 109–14, 157. *See also* RICHARD WHISH & DIANE WOOD, MERGER CASES IN THE REAL WORLD: A STUDY OF MERGER CONTROL PROCEDURES 110–11 (1994) (recommending harmonization of time periods).

95. OECD Committee on Competition Law and Policy, Report on Notification of Transnational Mergers, 2–4 (1999), *available at* http://www.oecd.org/pdf/M000013000/M00013730.pdf (proposing model filing form) [hereinafter Report on Notification]; WHISH & WOOD, *supra* note 94, at 108–10 (recommending model filing form).

96. ICPAC Final Report, *supra* note 80, at 120. A copy of the form is available at http://www.finances.gouv.fr/formulaires/DGCCRF/concentration/controle_ue/formgb.htm.

97. Report on Notification, *supra* note 95, ¶ 4. The ICPAC Final Report was skeptical of this proposal because much of the information currently submitted is specific to national markets. ICPAC Final Report, *supra* note 80, at 120. However, the proposal seems unlikely to increase the burden on mergers since it appears to be the widespread practice of international merger lawyers to prepare an internal regulatory memorandum for each transaction which is then adapted for each national jurisdiction. WHISH & WOOD, *supra* note 94, at 109.

98. *See supra* Part IV.A.

99. *See supra* Part IV.B.

100. *See supra* Part IV.B.

balancing approach—the latter produces underregulation just as the former produces overregulation.[101] Finally, I have identified several procedural reforms that could increase the efficiency of concurrent jurisdiction by reducing transaction costs. In sum, the effects approach is the most economically efficient approach to extraterritorial antitrust regulation, but it could be made more efficient still.

101. *See supra* Part IV.A.

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