RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

REVIEW ESSAY

NEW PERSPECTIVES ON INTERNATIONAL ANTITRUST

Global Competition: Law, Markets, and Globalization. By David J. Gerber. Oxford, New York: Oxford University Press, 2010. Pp. xx, 394. Index. $82.50.

International and Comparative Competition Law. By Maher M. Dabbah. Cambridge, New York: Cambridge University Press, 2010. Pp. xxxiv, 679. Index. $160, cloth; $80, paper.

Cooperation, Comity, and Competition Policy. Edited by Andrew T. Guzman. Oxford, New York: Oxford University Press, 2010. Pp. xii, 374. Index. $95.

The idea of creating an international legal framework for global competition is not new. It dates back to attempts to create a new world order that began to emerge after World War I in response to the growing influence of international cartels. Attempts to reach an international agreement on antitrust culminated after World War II in the Havana Charter,[1] signed by virtually all trading nations, although it was eventually abandoned due to noncompetition-related events. While never completely dormant, international antitrust has gained new momentum in the past two decades or so, evidenced by the intensity of the global exchange on international antitrust issues. This momentum is driven, inter alia, by the significant increases in international trade. It is also fueled by the exponential growth in the number and trading power of jurisdictions that have adopted antitrust laws, thereby increasing possible jurisdictional overlaps while providing a wider regulatory toolbox to deal with antitrust matters with a transborder dimension. Such developments strengthen the need to solve an existing paradox: while major businesses are often global, antitrust rules regulating their conduct are not.

Academic scholarship plays an important role in these developments, both mapping the challenges that lie ahead—based on past efforts and the current state of antitrust around the world—and suggesting ways to meet such challenges. Indeed, in the past few years, we have evidenced a significant upsurge in books written by leading academics on the subject. This review analyzes some recent contributions to this literature, while focusing on three related questions that it raises. First, what is international about antitrust? Second, what challenges are faced by international antitrust? Third, what are the prospects for future developments in international antitrust: do history and realism militate against a true international solution, or can such a solution evolve and, if so, under what conditions?

This review focuses on David Gerber's excellent new book, *Global Competition: Law, Markets, and Globalization*, which has already been recognized as a significant contribution to the field. Gerber, a professor at the University of Chicago-Kent, is known, in part, for his extensive and thought-provoking scholarship on diverse antitrust questions. His previous book, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, is a highly regarded classic in the field and was translated into many languages. His new book seeks to understand the process of global antitrust development and the issues that it raises by looking at the domain from a variety of angles and combining

[1] Havana Charter for an International Trade Organization, UN Doc. E/CONF.2/78 (Mar. 24, 1948).

them to reveal often unseen dimensions of the analysis.

This review also considers other recent and important contributions to the field, notably *International and Comparative Competition Law*, a recent book by Maher Dabbah, a professor at Queen Mary, University of London, and *Cooperation, Comity, and Competition Policy*, a volume edited by Andrew Guzman, a professor of law at the University of California, Berkeley. This choice of books represents the two types that exist in the literature: those that cover a wide range of international antitrust issues and solutions (Gerber, Dabbah) and those that focus on specific types of solutions, such as unilateral enforcement and bilateral cooperation agreements (Guzman).[2]

Dabbah's book includes two main themes that are sometimes interwoven: comparative antitrust and the internationalization of antitrust. Dabbah, a prolific writer whose books have been well received, blends together numerous academic and practical sources that analyze the book's two themes, and he offers thoughtful insights and suggestions.

The Guzman-edited volume has two parts and contains contributions from prominent antitrust scholars from around the world. The first part provides country reports on the extraterritorial reach of the laws of individual countries, such as Australia, Brazil, Canada, China, the European Union, Israel,[3] Japan, Singapore, and the United States. The extent of actual cooperation among jurisdictions on antitrust issues with a transborder dimension is also explored. These reports provide the reader with a sense of how different jurisdictions (although all developed countries) deal with antitrust issues with a transborder dimension, thereby revealing possible overlaps or gaps in enforcement. In addition, an interesting chapter by Daniel Sokol, a professor at the University of Florida, on international antitrust institutions describes the role that they play in the viability of international solutions. The second part of the book builds upon the first part and offers several proposals for effectively managing the current situation of overlapping regimes. Guzman, who has written some of the seminal articles on international antitrust, is also a contributing author.

I. WHAT IS INTERNATIONAL ABOUT ANTITRUST?

Let me first discuss what is international about antitrust and why that segment of antitrust law and policy has come to the forefront. As Gerber elaborates, the lowering of government-erected barriers to trade has increased the number of antitrust problems with a transborder dimension. Many major cartels and mergers are international in scope. Furthermore, firms such as Intel, Google, and Microsoft hold monopolistic positions in world markets. Anticompetitive conduct by such firms may harm all the jurisdictions in which their products are sold.

Another aspect of internationalization is the number of jurisdictions that have adopted antitrust laws. Whereas three decades ago only about two dozen jurisdictions had antitrust laws, current figures approximate more than one hundred ten jurisdictions. Such jurisdictions include developed and developing countries, large, medium, small, and even micro economies, and an assortment of countries that give different weights in their regulatory policies to the market's invisible hand. With the recent adoption of antitrust regulations by China, national antitrust regimes now encompass all major economies in the world. Proliferation of antitrust measures has thus become an international phenomenon.

This proliferation of antitrust regimes amplifies another aspect of internationalization: antitrust (in)application by one jurisdiction may affect other jurisdictions, regardless of whether they

[2] Additional recent books that include a strong international antitrust dimension include FIONA MARSHALL, COMPETITION REGULATION AND POLICY AT THE WORLD TRADE ORGANISATION (2010) (focusing on attempts to include antitrust through the WTO), and ANESTIS S. PAPADOPOULOS, THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY (2010) (studying the influence of the European Union on antitrust elsewhere). Significant contributions on this topic have also been made in journal articles. They lie, however, beyond the scope of this review.

[3] This reviewer contributed a chapter on Israel to this book, but that chapter is not discussed in this review.

have adopted antitrust laws.[4] Such externalities can be significant. Antitrust prohibitions in a given jurisdiction may affect the ability or motivation of foreign firms to enter and expand in the foreign market (access effect). For example, if a local monopolist enters into exclusive dealing arrangements with local distributors, this arrangement might limit the ability of foreign firms to participate in the market.

In addition, the (in)application of antitrust prohibitions in one jurisdiction may also affect the conduct of international firms in other markets in which they trade (conduct effect). Such externalities may be positive. For example, the finding of an international cartel by one jurisdiction may prevent its continuation elsewhere. Yet the collage of national antitrust enforcement might create negative effects. For example, a veto by a major economy may prevent a merger that is welfare-enhancing for another jurisdiction. But even if agreement exists on substantive matters, the sheer number of national merger applications needed to allow a merger between international firms creates inefficiencies. Negative effects can also arise from the nonenforcement of one jurisdiction's laws. To give but one example, limited levels of actual enforcement of prohibitions against international cartels in most jurisdictions have led to underdeterrence. Ultimately, the access and conduct effects grow in parallel to the number and international significance of the jurisdictions that adopt antitrust laws.

Beyond such externalities, other problems created by the internationalization of antitrust abound. These problems include duplication of enforcement resources by jurisdictions affected by the same anticompetitive conduct; high regulatory costs borne by the regulated firms; and difficulties related to information gathering when the anticompetitive conduct takes place elsewhere. These problems create what Gerber terms the "scissors paradox" (p. 95): the same globalization forces that increase the need for antitrust also constrain its development and undermine its effectiveness.

These aspects of the internationalization of antitrust affect the motivation for the final component: developing and applying legal tools to deal effectively with competition issues with a transborder dimension. Such tools fall into three main categories: unilateral enforcement with extraterritorial reach, bilateral or multilateral agreements based largely on comity principles, and broader international cooperation (international antitrust). The latter includes a wide range of solutions, ranging from voluntary harmonization and soft-law agreements to a binding multilateral agreement applied by a global antitrust authority. A growing consensus suggests that international antitrust is the only tool that offers a real solution to all international antitrust issues. Yet whether and to what extent such solutions should and may be adopted is still an open question.

II. Challenges Faced by International Antitrust

To identify workable global solutions, one must begin by identifying the challenges to international antitrust. Accordingly, the three books offer rich and insightful discussions of such issues.

One method to identify possible challenges is to learn from past events. Indeed, many scholars have pointed to the failure of past attempts to reach an international antitrust solution as present indicators of hurdles to reaching a binding international antitrust regime. One of the main strengths and unique features of Gerber's book is that it dispels some of the assumptions wrongly made based on past efforts, thus clearing the way for a fresh discussion of the possibility of adopting an international solution. Most interestingly, it provides a first-rate, meticulous historical analysis of the reasons for the failure of two past attempts to reach a global competition law regime.

As Gerber elaborates, the first time that global antitrust was considered and discussed was the World Economic Conference organized by the League of Nations in 1927. International antitrust was regarded as a way of improving the conditions of international trade by limiting privately erected

[4] For elaboration of the access and conduct effects, see Michal S. Gal & A. Jorge Padilla, *The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy*, 76 ANTITRUST L.J. 899, 909–12 (2010).

https://doi.org/10.5305/amerjintelaw.106.2.0401 Published online by Cambridge University Press

barriers to trade, in particular international cartels. It was also viewed as part of a process to develop an international community based on international norms that strive to establish "economic peace" to limit incentives to enter into an armed conflict. Yet an agreement was never reached given the rapid deterioration of the global economic situation that culminated in World War II. At the same time, the effort led many to recognize competition-related limitations to international trade and to embrace the idea that global markets should be subject to a normative framework established by the international community. The idea was rekindled after World War II, in a very different context, one haunted by the lack of a sense of an international community. At the same time, the political, military, and economic dominance of the United States provided an opportunity to institutionalize international cooperation on international economic issues. The global antitrust project became part of the U.S.-led grand design for global economic institutions that would provide a framework for the global economy and create a barrier against future global catastrophes. In particular, the Havana Charter sought to create an international institution that would protect global trade by creating a normative framework for trade relations to combat both governmental and private barriers to trade. Some major parts of this project were established, including the General Agreement on Tariffs and Trade, the World Bank, and the International Monetary Fund. Yet the Cold War stopped the Havana Charter in its tracks, leading to a fallback on a system of parallel jurisdictional enforcement as the basis for regulating global markets. Jurisdictions thus began to develop their own solutions to the transborder antitrust issues that surfaced in their respective jurisdictions.

Gerber's analysis clearly and convincingly indicates that the intrinsic qualities of a global antitrust regime did not stand in the way of its establishment, but, rather, external noncompetition-related events were responsible.[5] Moreover, the two attempts played an important role in carving the way for current efforts given the broad international political support that they generated, which promoted antitrust efforts and experiments in many countries. Accordingly, as Gerber argues, these examples should not be used as indicating failures to reach an international agreement but rather as playing a catalytic role in the road towards a global antitrust agreement. His assessment, by itself, is an important contribution: it dispels wrongful notions about the willingness and ability of the international community to reach an international antitrust agreement, at least in the past.

The question then arises whether we can duplicate the now-recognized near-success to reach a global antitrust solution or whether international dynamics have changed so that such a solution is no longer possible. The three books elaborate the current challenges of reaching an international antitrust solution. This review focuses on five related factors that I have chosen because of their centrality in achieving such a solution and the significant changes that they have undergone and because overcoming them is not always as simple as it seems.

The first factor centers on the prevalent regulatory ideology, which has experienced a marked change in recent years. Whereas sixty years ago most jurisdictions were not based—or were only partly based—on market economies, the current situation is different. The fall of Communism in Eastern Europe and the adoption of a more market-based economy in China, in parallel with the weakening belief in the ability of governments to efficiently control business parameters even in less intrusive governmental models, have dramatically changed the regulatory toolbox used by most jurisdictions. Competition has become a central regulatory tool for many jurisdictions.

This change increases the potential for a global antitrust solution as many more negotiators come to the table with a similar ideological framework. Yet it also raises some possible obstacles. Most importantly, different shades of market economies give different weights to competition and other regulatory tools (e.g., compare China's form of market socialism with U.S. capitalism). Other shades result from differences in goals. As Eleanor Fox, a professor at New York University School of

[5] One can, however, question why such an agreement was not reached among Western states, as it evolved in other areas of international trade.

https://doi.org/10.5305/amerjintelaw.106.2.0401 Published online by Cambridge University Press

Law, argues, intrajurisdictional distributive effects may be more important to some jurisdictions than to others.[6] Countries might resist regulatory tools where the distribution of benefits further weakens the weaker groups in society, especially those systematically excluded in the past. Furthermore, resistance may arise even where weaker groups are not harmed in absolute terms, but the enlargement of the welfare pie mostly enriches already strong groups in society. Yet this resistance may also be true of developed countries, as current cries for social justice around the world indicate.

Interestingly, even when distributional issues are not given much weight in an intrajurisdictional context, they become more important in an interjurisdictional one.[7] They arise because the internal balances that are inherent in one regime (e.g., through the tax system) are often absent in the international sphere. Accordingly, countries may be less willing to concede their powers to a central institution if it is perceived to be blind to interjurisdictional distribution issues. Distribution thus becomes much more important when one moves beyond an organic unity. This observation implies that a global solution should not only be globally optimal, but also Pareto-optimal.

The second factor centers on the number of jurisdictions that adopt an antitrust law, a direct result of the change in market ideology. As Gerber observes, domestic antitrust experiences play an important role in determining how far convergence may go towards creating an effective normative regime for global competition, given that the interplay between national and international domains is key to understanding the dynamics of global antirust. Has this change increased or decreased the ability to reach international antitrust solutions? Interestingly, it pushes in two different directions. On the one hand, the experimentation with antitrust laws creates a basis for a common understanding of its benefits and limitations. On the other hand, public-choice limitations may arise when national regulators are required to relinquish some of their current powers in order to apply a truly international antitrust regime, such as an international anticartel authority. In addition, the application of antitrust might lead to a realization that it is not a good solution to all competition problems. But more importantly, differences in antitrust laws might create obstacles to an international antitrust regime. Indeed, a comparative analysis of the experiences of different jurisdictions with antitrust is a major part of Gerber's book. The analysis crystallizes the differences as well as the similarities among competition cultures. Gerber analyzes in depth the U.S. and the EU experiences and also provides a more truncated analysis of what he calls "other players" (p. 120): Australia, Canada, China, Japan, Latin America, South Korea, and sub-Saharan Africa. As Gerber argues, these "other" countries hold the key to the future development of a global antitrust strategy, since informed divergence is the baseline for reaching an international solution. The comparative analysis, which goes beyond "law on the books" to analyze law in practice, deepens our understanding of what bridges need to be built to overcome the differences. Additional recent books, including the one by Dabbah and the second edition of Einer Elhauge and Damien Geradin's book *Global Competition Law and Economics* (2011), also provide in-depth and thoughtful comparisons of antitrust regimes that serve as an important basis for analyzing the motivation and possible basis for an international antitrust regime.

A third significant factor, which is central to Gerber's and Dabbah's analyses, is the increase in trade levels and the interconnectedness of markets. How does this change affect motivations to reach global solutions? Obviously, it enlarges the pool of cases with extraterritorial effects, thereby generally increasing motivations to reach a global solution. Also, as elaborated above, such motivations are further increased by the high number of jurisdictions that have adopted antitrust laws, which increases the externalities imposed on one

[6] Eleanor M. Fox, *Competition, Development, and Regional Integration: In Search of a Competition Law Fit for Developing Countries*, *in* COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES (Mor Bakhoum, Josef Drexl, Eleanor M. Fox, Michal S. Gal & David Gerber eds., forthcoming 2012).

[7] Michal S. Gal, *Restrictive Agreements and Unilateral Restraints*, *in* ECONOMIC THEORY AND COMPETITION LAW 247 (Josef Drexl, Laurence Idot & Joël Monéger eds., 2009).

jurisdiction by antitrust enforcement elsewhere. In particular, the entry of China and India into the antitrust arena strengthens motivations to reach a global antitrust solution given that, due to their economic weight, both will effectively have veto power over decisions that have external effects. For example, their decision to prohibit an international merger will most likely result in the abandonment of the merger by the merging parties, even if the merger can potentially create procompetitive effects elsewhere in the world.

A fourth factor involves jurisdictions' experiences with alternative solutions. Such experiences—and their limitations—form an important part of the analysis in the three books reviewed. While the Gerber and Dabbah books analyze in depth the whole range of solutions explored, the Guzman-edited volume mainly focuses on unilateral extraterritoriality and cooperation through bilateral agreements.

A major motivation for exploring international antitrust is the realization that unilateral extraterritorial enforcement provides only a partial solution to such issues. Gerber and Dabbah assess the differences between U.S. and EU doctrines of extraterritoriality and their development, while Guzman offers a wider array of experiences that serve to emphasize the problems that plague the extraterritorial application of one's own laws. To mention a few concerns, small jurisdictions can rarely create a credible threat when they apply their laws to prohibit the conduct of large international firms. Indeed, even large established jurisdictions face significant obstacles to the extraterritorial application of their laws, such as obstacles to obtaining information, clashing remedies imposed by other jurisdictions, and resistance to the extraterritorial application of their laws.[8] The shortcomings of a system of parallel unilateral enforcement have been the main catalyst for the adoption of more cooperative regulatory tools.

[8] In light of such resistance, Dabbah makes several interesting suggestions: dealing with such questions solely though intergovernmental consultation and negotiation, confining the assertion of extraterritoriality to exceptional circumstances, and abandoning the remedy of treble damages in such cases.

Accordingly, some countries have explored bilateral solutions. Yet, as all three books indicate, such agreements are often quite limited in the extent of cooperation that they create. Most include provisions for notification and exchange of information and positive comity principles, which require jurisdictions to apply their laws in a nondiscriminatory fashion when requested to do so by the other party. While the potential benefits of such agreements are recognized (e.g., they do not intrude on the sovereignty of countries, have potential to reduce conflicts among countries, and limit information-gathering problems), they provide poor tools for solving most international antitrust challenges, such as clashing remedies, underdeterrence, and duplication of enforcement. To a large extent, this concern arises because the model on which such agreements are based is unilateral enforcement: each jurisdiction continues to apply its own laws in its own territory.

As elaborated elsewhere, an alternative solution that may affect motivations to adopt a global solution are regional competition law agreements that are based on joint enforcement (RCAs).[9] RCAs allow jurisdictions to escape the dilemma of choosing between extreme decentralism (unilateral enforcement) and extreme centralism (global enforcement) by creating a form of participatory and cooperative governance on antitrust issues that extend beyond their borders. Dabbah offers an interesting survey and analysis of existing RCAs.

How do RCAs affect the motivation to reach an international antitrust solution? A positive experience in an RCA may strengthen the motivation to adopt global solutions, as evidenced by the motivations of the European Union to push towards a global solution. Yet for these steps to be taken, the experience with the RCA must be carried over to a larger scale of cooperation.[10] Moreover, RCAs may provide their members with a stronger voice, given that they aggregate the bargaining power of their members in the international arena. This

[9] Michal S. Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 U. TORONTO L.J. 239, 258–61 (2010).

[10] *Id.*

arrangement, in turn, might increase their willingness to take more cooperative steps in international antitrust because their position will be given more weight. It might also strengthen the motivation of other jurisdictions to enter into global agreements, as an RCA provides a higher degree of credible enforcement by its members.[11]

Of course, it is not only the mere aggregation of the experiences of different jurisdictions in applying such solutions that comes into play. Rather, international power dynamics play an important role in determining the ability to reach global antitrust solutions. This factor is the fifth one explored. Indeed, as Guzman elaborates in his contribution to his edited volume, the fear of loss of sovereignty and the veto power by the major antitrust enforcers lower incentives to reach international solutions. I would add that the recent entry of China and India into the antitrust world changes existing dynamics. Their strong trading power limits the ability of the United States and the European Union to solve most of their antitrust problems between themselves and increases their motivations to coordinate enforcement. Yet it might be that before the newcomers concede to an international solution they will first wish to explore the boundaries of their own power to solve international antitrust issues affecting their interests.

III: Prospects for International Antitrust

Given these changes, the most interesting and highly debated question is forward-looking: what form should and can international antitrust take? International antitrust solutions are divided into two categories: legally binding and nonbinding solutions. While a relative consensus seems to emerge from all three books with regard to the latter, views differ significantly with regard to the former. At one end of the spectrum lies Gerber's cautiously optimistic prediction, which is partly based on his suggestion of a new tool, the commitment pathway, to further international antitrust. Dabbah is much more wary in his predictions. Contributors to the Guzman-edited volume vary greatly in their views.

Nonbinding agreements, which strive to reach some level of coordination and harmonization of national antitrust enforcement efforts through voluntary mechanisms, are the main international antitrust tool used today. Such efforts currently center on creating guidelines and best practices to streamline unilateral enforcement. Both Gerber and Dabbah recognize the benefits of such soft convergence: it reduces problems of clashing remedies and under-deterrence; it creates greater trust and confidence between antitrust authorities; and the pragmatic and voluntary nature of nonbinding agreements increases motivations of participation. Yet both authors agree that such international efforts have not succeeded so far in solving many of the international antitrust problems because current solutions are based on unilateral enforcement or limited bilateral flexible relationships. Furthermore, the lack of binding force offers a low level of legal certainty.

The shortcomings of current solutions have led to a strong debate concerning the necessity and practicality of reaching a binding international antitrust agreement. Gerber suggests that the development of a binding global legal regime, capable of effectively combating anticompetitive conduct in global markets, is not only necessary to meet the central challenges of the twenty-first century but is also doable. Most scholars would agree with the first part of the conclusion. Indeed, Gerber makes a strong and convincing case for such a solution: a global antitrust mechanism may effectively resolve jurisdictional conflicts, generate a reliable basis for business decisions, allocate implementation responsibilities among international and domestic actors efficiently, and support the development of domestic antitrust capacities. Yet the practicality of a global solution is controversial. Accordingly, Gerber's conclusion, which contests the current inevitability of the failure of a binding global solution, is quite radical. But Gerber holds his ground firmly and provides a thorough and sometimes provocative analysis of such a regime to conclude that the benefits and motivations are greater than the costs.

[11] *Id.*

https://doi.org/10.5305/amerjintelaw.106.2.0401 Published online by Cambridge University Press

To overcome some of the apparent obstacles, Gerber proposes a flexible approach, sensitive to differences among antitrust regimes, which he calls a "commitment pathway." This approach attempts to bridge differences in goals, institutional capacities, and normative prohibitions among different jurisdictions by creating a process that does not require harmonization as a starting point but strives to achieve it in the long run. This pathway would require countries to commit to venturing together along a pathway towards commitment but would not mark at the outset the details of the final resulting legal regime. By so doing, the agreement uses a temporal dimension to reduce the pressure of an early commitment, which may limit the incentives to participate.

The commitment pathway method suggested is an important contribution to our thinking. The downside, however, is that the discussion focuses on the method of reaching such an agreement and conditions, rather than on its content. What is missing, in my view, is an analysis of different modes of cooperation, such as a comparison of an agreement under which each jurisdiction continues to apply its own law unilaterally but would be required to meet certain standards (as was proposed for the World Trade Organization (WTO)), and an agreement that establishes a global antitrust authority (similar to the EU model). Each of these modes creates a different set of benefits and problems. Such an assessment would have further strengthened the superb content of Gerber's book.

Indeed, specifying (or not specifying) the mode of cooperation would certainly affect the motivation of countries to join the commitment pathway as the end goal affects their motivation to join in the first place. For example, one of the main obstacles to creating an international antitrust framework within the WTO was the strong resistance of developing countries, based on the mode of cooperation suggested. The model most debated involved a requirement that each country enforce its own laws to prevent cartels affecting its jurisdiction and international trade, coupled with the use of WTO institutions to punish countries not fulfilling their enforcement duties. Given their limited enforcement resources, many developing countries feared that they would not be able to meet this requirement and would be sanctioned by the WTO. Alternatively, they would have to spend their limited resources on prosecuting international cartels, rather than domestic ones, even if setting such priorities is otherwise inefficient. Although discussions involved technical assistance to developing jurisdictions in enforcing their own laws, these countries feared that such assistance would not actually materialize. Accordingly, the mode of the proposed agreement, rather than the motivation to reach it, stood in the way of a WTO antitrust agreement.

Another obstacle that might stand in the way of reaching an international agreement by use of a commitment pathway is the fear of being the first to commit without being sure that others will follow. In some RCAs, the first mover might even lose from committing. For example, the commitment of Senegal to the West African Economic and Monetary Union, which required it to abolish its operational antitrust authority and instead rely on a joint authority, which has yet to prove the worth of its existence, serves as such an example.[12] One way to mitigate this concern is by creating, where possible, an evolutionary pathway that would increase not only commitments but also benefits. That is, only countries that commit to a higher level of cooperation will be able to use the joint mechanisms and gain more from their commitments. Yet this possibility will not solve all problems, especially if the commitment has a positive network externality: as the number and size of countries that commit increase, so does the value of the network to all.

Only time will tell whether Gerber's cautiously optimistic conclusion and his suggested framework for moving the global antitrust wagon forward will indeed materialize and whether a global antitrust agreement might be reached. Yet the analysis in the book is eye-opening and serves as an important and unparalleled basis for future discussions on the subject.

[12] *See, e.g.*, Mor Bakhoum & Julia Molestina, *Institutional Coherence and Effectivity of a Regional Competition Policy: The Case of the West African Economic and Monetary Union (WAEMU)*, *in* COMPETITION POLICY AND REGIONAL INTEGRATION, *supra* note 6.

Dabbah is much more wary in his predictions. He views the failure of the attempt to include antitrust under the WTO as a serious setback, which significantly affects the prospect of pursuing a multilateral option through binding obligations. Yet he opines that this development is not necessarily bad: since countries are at different stages of economic development and at different stages in the learning curve necessary for the efficient enforcement of their antitrust laws, it is not an appropriate time to apply a binding international antitrust agreement. But his objection seems to run even deeper, beyond the current time frame: the consent of countries "can never be guaranteed" due to concerns over sovereignty and the uncertainty of benefits received from opting for a global solution (p. 88). Moreover, since antitrust defines "the commercial identity of countries and [serves as] an expression of their economic independence," Dabbah believes that the chances of an international body being able to assume the responsibility to apply antitrust in an international setting do not appear to be particularly realistic (p. 569). To strengthen this point, he argues that the strongest case for a binding multilateral agreement is merger control, where antitrust is closely interwoven with domestic policies that may differ from one country to another. One counterargument that can be raised is that domestic laws and policies do not necessarily have to be similar for jurisdictions to agree to some international rules that are Pareto-optimal for all. While an agreement on the substantive rules governing international mergers might indeed be highly problematic, such rules may be welfare-enhancing in the case of international cartels that harm all the countries in which they trade.

In his contribution to the Guzman-edited volume, Paul Stephan, a professor at the University of Virginia, takes an even stronger stance against international antitrust. His view is based on three propositions: many international economic transactions involve innovative, knowledge-based industries; no consensus exists about the optimal structure and conduct of such industries; and, in the absence of such a consensus and especially given political pressures and the potential difficulties from cooperation that requires difficult choices rather than merely technical competence, cooperation might protect incumbents and stifle innovation. Accordingly, his conclusion is that the case for international antitrust cooperation turns on dubious premises and unrealistic hopes. He does not completely close the door, however, should a way be found to insulate competition specialists from the conventional pressures to cater to special interests and to confine cooperation to subjects on which antitrust has reached a solid and general consensus. Arguably, these two conditions might be fulfilled if one broadens the view beyond the monopolization and merger cases that Stephan explores. The institutional condition can be met by ensuring that the institutional structure limits such pressures. Much can be learned from the experience of other international organizations such as the WTO and the International Monetary Fund. Furthermore, it might be the case that interest groups have more power in a national setting than in most international settings. The second condition can be met in the case of international cartels. Widespread agreement exists that such cartels harm all the countries in which they operate. The main "glitch" in this view involves export cartels. Indeed, as Fox argues in her chapter in the Guzman-edited volume, the problem of export cartels that create outward-oriented harm may be fully resistant to national-level solutions. But parallel and reciprocal international commitments—where each country limits its own export cartels but gains limitations on cartels affecting its own jurisdiction—may overcome this problem as well. Guzman's suggestion of transfer payments between signatories to ensure that all benefit from enforcement, as elaborated in his contribution, may serve as an additional tool to reach a Pareto-optimal global solution.

Anu Bradford, a professor at the University of Chicago, takes an even more extreme stance in her contribution to the Guzman-edited volume. She argues that binding agreements are neither feasible nor desirable and that nonbinding cooperation offers a better pathway for international antitrust. Her conclusion is based on a collective-action problem in international antitrust cooperation: the conflicting views that a globally optimal antitrust regime—as evidenced in cases in which different jurisdictions have reached different results

and the different industrial policy goals furthered by developed and developing jurisdictions—would lead to a shallow agreement offering limited net gains. Bradford finds further strength for her claim in the assumption that antitrust laws are rarely used opportunistically for protectionist purposes, and thus no need exists to pursue a binding agreement with enforcement provisions. Finally, nonbinding regimes capture the highest gains of cooperation, thereby reducing the need for a binding solution. They do so in part by enabling countries to cooperate on a flexible case-by-case basis and to adopt only those norms that serve them well in any given situation, thereby avoiding the problem of watering down rules to accommodate divergent preferences. While the contribution is thought-provoking, proponents of a binding agreement may question some of the underlying assumptions. To give but one example, even if we assume that antitrust is rarely used for protectionist purposes, this assumption does not lead to the conclusion that there is no need to pursue an agreement with enforcement provisions. Studies have shown that cartel prohibitions are rarely enforced against international cartels, except in a handful of jurisdictions, due to resource constraints.[13] This under-enforcement leads to significant under-deterrence, as most of the profits of such cartels remain in the hands of such cartelists. An international anticartel agreement may thus achieve what nonbonding measures cannot.

Finally, it is noteworthy that Dabbah's book includes a chapter that focuses on the interaction of competition and trade policy, a subject often ignored in books on international antitrust. Yet, as Dabbah clearly shows, this subject has great relevance for analyzing the tools available to deal with competition issues arising from the internationalization of trade. The chapter considers the degree of complementarity and substitutability between the two policies. Dabbah concludes that although the issue of market access forms a linkage between competition and trade policy, trade law does not obviate the need for competition policy in the global economy. His assessment results from the perspective adopted by each set of laws: while trade laws focus on opening markets to foreign firms and creating a fair and free global system of trade, antitrust addresses the role of foreign firms from the point of view of their contribution to the efficacy of the domestic marketplace.

[13] *See, e.g.*, Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 FORDHAM INT'L L.J. 1 (2009).

IV. CONCLUSION

The field of international antitrust is growing in its importance, in parallel with the increase in global trade. The interesting and thought-provoking literature that has emerged strives to analyze and help move along the change from chaotic legal pluralism largely based on unilateral enforcement towards an international order that would be more Pareto-optimal than the one that currently exists. It focuses on whether costs from divergent competition policies need to be accepted as simply a fact of life in a multijurisdictional system. The three recent contributions to the growing literature on international antitrust analyzed in this review provide the reader with different points of view, which significantly contribute to the debate on the future of international antitrust.

MICHAL S. GAL
University of Haifa Faculty of Law

BOOK REVIEWS

International Authority and the Responsibility to Protect. By Anne Orford. Cambridge, New York: Cambridge University Press, 2011. Pp. ix, 235. Index. $110, cloth; $40, paper.

The autonomy and sovereignty of the state were confirmed in 1945 in the UN Charter. Its Articles 2(4) and 2(7) are unequivocal in that respect. The Security Council was the only entity that could decide that a state's behavior had threatened or endangered international peace and security and, consequently, that it was not entitled to the autonomy and sovereignty enshrined in the Charter. Scarcely three years later, however, the Charter's commitment to the sovereignty of its member states began to erode. Beginning with