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Cover Page Footnote

Allison Murray, Loyola Law School, Los Angeles, Juris Doctor, May 2019. Special thanks to Professor David Kesselman and to the ILR team of editors and staff.

Given Today's New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?

BY ALLISON MURRAY*

INTRODUCTION

Trump. Le Pen. Brexit. Protectionist rhetoric has consumed the international political stage. Western countries and their leaders were once the drivers of economic globalization, relying on free-market speeches and the prospect of removing trade barriers to appeal to their constituents.[1] They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The "our country first, world trade after" mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized.[2]

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced.

* Allison Murray, Loyola Law School, Los Angeles, Juris Doctor, May 2019. Special thanks to Professor David Kesselman and to the ILR team of editors and staff.

1. *See* JEFFREY L. CHIDESTER & PAUL KENGOR, REAGAN'S LEGACY IN A WORLD TRANSFORMED 12-13, 23 (2015).

2. Robert Plummer, *Protectionism: Is it on the way back?*, BBC NEWS (Sept. 17, 2012), http://www.bbc.com/news/business-18104024.

Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders' best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law.[3] So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States ("U.S."), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally.[4] To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes.[5] Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western *leaders* in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western *lawmakers* themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions

3. *See* Anu Bradford, Robert J. Jackson & Jonathon Zytnick, *Is EU Antitrust Enforcement a Tool for Protectionism? An Empirical Analysis*, 15 J. EMPIRICAL LEGAL STUD. 165 (2018).

4. *See* Pete Kasperowicz, *How Trump's Steel Tariffs Could Break the WTO*, WASH. EXAMINER (Mar. 6, 2018, 9:00 AM), http://www.washingtonexaminer.com/how-trumps-steel-tariffs-could-break-the-wto/article/2650771; Ana Swanson, *Trump to Impose Sweeping Steel and Aluminum Tariffs*, N.Y. TIMES (Mar. 1, 2018), https://www.nytimes.com/2018/03/01/business/trump-tariffs.html.

5. *See* Swanson, *supra* note 4; Kasperowicz, *supra* note 4.

that could counteract that progress.[6] Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization ("WTO"), "once formal trade barriers come down, other issues become more important."[7] Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

This paper explores how the near-term enforcement of antitrust and competition laws may be either the last hope for preserving aims toward a free global economy or the final nail in free trade's coffin. We will begin by examining the background of antitrust and competition laws, explaining the goals and economic theories at the heart of the laws, including the myriad of criticisms. Next, we will take a general view of the prevalence of competition laws in the world market, revealing the differences in underlying theory and enforcement by the top three players on the international trade stage. This paper will finish with the subject most at the center of the recent rise of protectionist rhetoric: the perception of unfair enforcement of antitrust laws among the United States, the European Union, and China.

6. *See* Swanson, *supra* note 4; Kasperowicz, *supra* note 4.

7. *Investment, Competition, Procurement, Simpler Procedures*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (last visited Sept. 7, 2018).

I. BACKGROUND OF ANTITRUST LAW

It is no great revelation that trade has become increasingly global. However, it is nowhere near the true, theoretical conception of free trade contemplated by economic theorists. In that world of perfect free trade, businesses would "enter and exit markets instantly and without cost," no single firm would be "large enough to influence prices by altering output," and any business that "tried to charge more than its costs would be undercut by another [competitor]."[8] The efficiency of this perfectly competitive environment would know no borders and require no government enforcement.

Of course, such a perfect world does not exist. Firms can become large enough to influence output and prices, businesses can collude amongst themselves to edge out a new market entrant, and the firms engaging in these business practices could suffer no or minimal repercussions from the market.[9] "A market is not politically neutral; its existence creates economic power which one actor can use against another."[10]

The economic inefficiencies that plague the real world have caused national lawmakers, especially those in less developed economies, to pursue nationalist policies to protect their national industries.[11] These "economic nationalists . . . frequently regard trade negatively, believing it to be destructive of traditional values."[12] They recognize that under reasonably certain circumstances, namely where large economies and monopolists can exploit their market positions, free and unregulated trade may actually be more harmful than beneficial.[13]

To protect their national markets from such realities, lawmakers adopt antitrust laws. These laws serve to promote and preserve fair competition in an otherwise free market.[14] They "ensure that the market is free to allocate resources in response to demand . . . free from restraints imposed by private parties."[15] Without such private "restraints," resources are certain to be allocated more efficiently by maximizing

8. EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 1 (Hart Publ'g 2d ed. 2011).

9. *Id.* at 4.

10. ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 23 (1987).

11. *Id.* at 113.

12. *Id.* at 172.

13. *Id.* at 179.

14. *See* Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, 394 (1994).

15. Daniel J. Gifford, *Antitrust, and Trade Issues: Similarities, Differences and Relationships*, 44 DEPAUL L. REV. 1049, 1049 (1995).

aggregate national wealth,[16] while still providing nations with some control and protection from firms engaging in foul play. This adoption of antitrust law was long regarded as a solution that enabled the best of both worlds; it was thought to be a win-win for nations wanting to compete on the international economic stage without giving up their sovereign ability to penalize those that attempt to take advantage of such an open economic market.[17]

The formation and enforcement of national antitrust laws has become a quite prominent trend internationally.[18] Nearly all countries that are, purport to be, or aim to be major players in the global economy have adopted some form of domestic competition law. Since the 1890s, the amount of "gross domestic product ("GDP") in countries with antitrust enforcement rose from less than 20 percent to over 95 percent."[19] Over 120 nations have adopted antitrust laws into their domestic legal systems, and nearly 20% of these nations have adopted these laws in the last fifteen years.[20]

II. CRITICISM OF ANTITRUST LAW

Although antitrust laws have been widely adopted, the laws are not without criticism.

A. Ambiguity in the Laws

Many critics of antitrust law claim that the laws themselves are "couched in vague, indefinable terms, permitting the Administration and the courts to avoid defining in advance what a 'monopolistic' crime is and what it is not."[21] These critics claim that antitrust laws rely on "deliberate vagueness and ex-post facto rulings" rather than "clear definitions . . . known in advance and discoverable by a jury after due legal process," which clearly calls into question their efficacy.[22] The vagueness and lack of clear definitions for the concepts at issue in antitrust law have caused significant discussion in academic circles:

Today, courts appear to be confused about whether market power and monopoly power are similar or distinct concepts . . . Supreme Court

16. Schoenbaum, *supra* note 14, at 394.

17. *Id.*

18. *See generally*, Pierre Cremieux & Edward A. Snyder, *Enforcement of Anticollusion Laws Against Domestic and Foreign Firms*, 59 J.L. & ECON. 775 (2016).

19. *Id.* at 777.

20. *Id.* at 776-78.

21. Murray N. Rothbard, *Abolish Antitrust Laws*, MISES INST. (May 25, 2010), https://mises.org/library/abolish-antitrust-laws.

22. *Id.*

opinions demonstrate a marked inconsistency as to whether market power and monopoly power are similar or distinct concepts. We can find no Supreme Court opinion that contrasts the terms "market power" and "monopoly power" deliberately and explicitly, i.e., that finds the existence of one but not the other. . . . Other Supreme Court opinions also appear to treat market power and monopoly power as identical concepts.

Despite these references, however, the Supreme Court, in other cases, seems to have articulated standards for "monopoly power" and "market power" that, at least linguistically, are incompatible. In *NCAA v. Board of Regents*, the Court defined "market power" as "the ability to raise prices above those that would be charged in a competitive market." By contrast, the Supreme Court has consistently defined "monopoly power," at least for section two cases, in accordance with the definition articulated in *United States v. E. I. du Pont de Nemours & Co.*—i.e., as "the power to control prices or exclude competition." Strictly construed, the Court's language appears to require a higher burden of proof to establish "market power" than to demonstrate "monopoly power," because proof of a defendant's ability to exclude competition would not suffice to demonstrate the existence of "market power."[23]

The varied and unpredictable scope of what constitutes a "market" is perhaps the clearest example that critics use to highlight antitrust law as muddied and inconsistent. Market definitions are suggested by the parties to the proceedings and are presumably skewed toward whatever position the suggesting party takes in the dispute. The court either adopts one of these definitions or, if entirely unpersuaded, creates a new one that is more fitting to the situation at hand. Often, the court receives criticism for using too narrow or too broad of a definition.[24] Most importantly, while the court requires some rationale behind the definitions proposed by the parties, there is no preset or standard for the scope of market definitions.

This largely affects the landscape of antitrust law because whatever market definition is adopted by the court can substantially affect the court's findings. For example, the European Union ("E.U."), in a recent investigation of Google, claimed that Google had dominated the market and abused fair competition laws.[25] The E.U. authorities defined the

23. Thomas Krattenmaker, Robert Lande & Steven Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 246-47 (1987) (footnotes and citations omitted).

24. *Id*.

25. Hosuk Lee-Makiyama, *Protecting Competition or Competitors? – Europe's Pursuit of Silicon Valley*, OPEN POLITICAL ECON. NETWORK: BLOG (Dec. 5, 2016), http://www.opennetwork.net/protecting-competition/.

relevant product market as the Android operating system.[26] Naturally, because the operating system was considered "its own market" and Google obtained control over 100% of the operating system, the court found that Google maintained a monopoly.[27] Had that relevant product market been characterized by the court more broadly, perhaps as cell phone operating systems or as online shopping forums, Google probably would not have been found to have the requisite market control required to be a monopolist.[28] That ruling, as with many cases, hinged entirely on the scope of the market definition being applied, leaving behind the uncertainty that had the market definition been broader, the court perhaps would have ruled the opposite way.

B. Antitrust's Competing Goals

Especially in the U.S., a criticism of antitrust is that the goal of preserving competition in economic markets, the most intuitive and obvious goal of enacting competition laws, has taken a backseat to a different goal set by the legislature: consumer protection.[29] It is argued that the introduction of a consumer welfare standard has led to inconsistent enforcement, as it is a contradictory goal to preserving competition.[30]

At some level, consumer protection and preservation of competition through antitrust laws appear to have consistent effects. Economists and laypersons alike seem to understand the concept that "monopolies lead to high prices, while competition in the form of a marketplace with many sellers drives prices down."[31] It is a matter of basic supply and demand. As low prices are beneficial to consumers, why wouldn't consumers be inherently protected by laws preserving a larger supply and more competitors? As with many economic concepts that rely on unattainably perfect rational behaviors, there are real-world exceptions.

There are many sets of circumstances in which the application of antitrust laws to preserve competition in the market may actually hurt

26. *See id.*

27. *Id.*

28. Surely, we can think of various other companies—Apple, Amazon—who are equally if not more dominant than Google in the "cell phone operating systems" or "online shopping" markets.

29. *See generally* Barak Orbach, *How Antitrust Lost its Goal*, 81 FORDHAM L. REV 2253 (2013).

30. *See generally id.*

31. *Id.* at 2263.

consumers.[32] Among these circumstances are the following: (1) the maintenance of "low prices for 'bads,'"[33] a term for products that are deemed to have negative consequences on society, like tobacco; (2) "low prices for status goods";[34] and (3) "the pursuit for innovation in durables and fashion goods."[35] After all, a consumer could benefit from a large company lowering its prices, regardless of whether the company's purpose in doing so is to undercut the competition and force its competing businesses out of the market.[36] That company is clearly utilizing an anticompetitive and monopolistic tactic, but the lowered price would benefit the consumer. Advocates of antitrust laws assume that the next course of action for a monopolist would be to increase its prices to the detriment of its consumers once the company is the only provider of its product, but it is possible that a company would not elect that course of action. It is possible, although improbable, that the consumer in this scenario would never be harmed by the company's anticompetitive conduct, therefore making consumers better off without the intervention of antitrust laws.

U.S. antitrust laws at least purport to concern themselves with long-term competition in the market rather than short-term consumer benefit. However, recent case law suggests that even calling "preservation of long-term competition" the goal of the law is debatable. The U.S. Supreme Court in *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.* ruled that "predatory price cutting is not unlawful unless the predator has a reasonable prospect of recouping his investment from supracompetitive profits."[37] This ruling insulated certain kinds of anticompetitive behavior so long as the behavior does not result in a reasonable possibility of harm to consumers. While the ruling attempted to address the above example, to many, the Court appeared to be struggling to maintain a balance between preserving competition and protecting consumers, which solidifies the criticism that consumer protection, a concept that can be at direct odds with perfect competition, is treated as one of the dual aims of the law itself.

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32. Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 151 (2010).

33. The reference to "bads" describes products that the author deems to be bad for society, e.g., tobacco. The argument here is that low prices for bad products encourage consumers to purchase the products, even though they may ultimately be unhealthy or harmful to consumers. *See* Orbach, *supra* note 32, at 151.

34. *See id.*

35. *See id.*

36. Donald J. Boudreaux & Thomas J. Dilorenzo, *The Protectionist Roots of Antitrust*, 6 REV. AUSTRIAN ECON. 81, 83 (1993).

37. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 254 (1993).

C. Antitrust: Isn't It Just Protectionism on its Face?

Closer to the critical point of this paper, another popular criticism of antitrust law is that the laws themselves are inherently protectionist.[38] Trade protectionism is a "theory, practice, or system of fostering or developing domestic industries by protecting them from foreign competition."[39] Protectionism is "a politically motivated defensive measure."[40] Economics experts agree that "in the short run, it works. But, it is very destructive in the long term."[41] While preserving the country's competitive abilities for a short period, protectionism eventually makes the country engaged in protectionist policies and its industries "less competitive in international trade."[42] The more inward a country focuses, the more coddled and inefficient its markets and domestic companies become. In addition, surrounding countries will retaliate with protectionist policies, further thwarting the efficiencies gained from a free trade economy and its attendant benefits like downward price pressure and availability of goods for consumers.

Protectionist trade measures characteristically include tariffs, subsidies, quotas, and currency valuation activities.[43] In the U.S., economists have argued that the Great Depression of the 1930s was deepened by the highly protectionist policies. During that time, the U.S. maintained the largest tariff rates of that century.[44] They were intended to prop up the national industries that were struggling in light of the country's poor economic health.[45] Counterintuitive as it was, the very policies implemented to battle the poor national economy and to retain domestic jobs appeared to worsen the problem.[46]

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38. Boudreaux & Dilorenzo, *supra* note 36, at 93.

39. *Protectionism*, DICTIONARY.COM, http://www.dictionary.com/browse/protectionism (last visited Sept. 7, 2018).

40. Kimberly Amadeo, *Trade Protectionism and Its Methods with Examples, Pros and Cons*, THE BALANCE, https://www.thebalance.com/what-is-trade-protectionism-3305896 (last updated Jul. 31, 2018).

41. *Id.*

42. *Id.*

43. *See id; see also* Arye L. Hillman, *Protectionist Policies as the Regulations of International Industry*, 67 PUB. CHOICE 101, 103 (1990).

44. *See* Sarah Gardner & Scott Tong, *The American Protectionism Bill that Made the Great Depression Worse*, MARKETPLACE (Aug. 24, 2017, 2:14 PM), https://www.marketplace.org/2017/08/24/sustainability/trade-stories-globalization-and-backlash/what-was-one-worst-pieces-us-legislation; Bruce Bartlett, *The Truth about Trade in History*, CATO INSTIT.: COMMENT. (July 1, 1998) https://www.cato.org/publications/commentary/truth-about-trade-history.

45. Martin Armstrong, *Did Tariffs Cause the Great Depression?*, ARMSTRONG ECON.: BLOG (July 9, 2018), https://www.armstrongeconomics.com/world-news/sovereign-debt-crisis/did-tariffs-cause-great-depression/.

46. *See* Bartlett, *supra* note 44.

Critics of antitrust law contend that protectionism was the main reason behind the creation of antitrust laws. In the U.S., small farmers were being underpriced by larger, more efficient farms.[47] Antitrust laws were enacted to protect those underperforming farmers from the lower-priced competitors.[48] Critics claim that the antitrust laws artificially stunted the market efficiency of the larger firms and, presumably, the technological advances that such efficiency would have driven in the markets, and thereby stunted the true value of competition rather than promoting it.[49]

These critics appear to greatly oversimplify the issues. It is true that antitrust laws do superficially disrupt the market, like any form of regulation would, despite their avowed purpose to avoid market disruptions. Antitrust enforcement can and does thwart the market efficiency the laws intend to promote. However, by protecting competition, sometimes in the form of propping up inefficient competitors, it ensures that market power is not concentrated in any one actor. In doing so, it ensures that market power cannot be abused by any one actor. The societal goals of avoiding this kind of market abuse can be viewed as protectionist. But, are not all laws inherently protectionist in some manner? Perhaps not in the sense that they favor domestic firms over foreign ones, but surely in the sense that they intend to serve as protection for whatever the scope of regulation pertains to—here, the markets.

A further criticism of competition law's protectionist roots is that "competition law might—especially through selective, discriminatory enforcement—be abused as a trade barrier."[50] That is true, and further to the point of this paper, it may become more likely given the recent political climate. However, shouldn't we be wary of a world without such protections? The fact that a law can be abused does not eliminate the need for that law altogether. Antitrust law is but a tool that can be wielded to support either free trade or protectionist aims.[51] It depends entirely on those with the power to enforce and evaluate antitrust claims.

Despite the protectionist roots of antitrust laws, their preservation has provided the opportunity for at least some version of free trade. The protections afforded to countries through antitrust laws may be the only

47. *See* Boudreaux & Dilorenzo, *supra* note 36, at 83.

48. *See id.*

49. *See* Rothbard, *supra* note 21.

50. Tim Büthe, *The Politics of Market Competition: Trade and Antitrust in a Global Economy*, *in* THE OXFORD HANDBOOK OF THE POLITICAL ECONOMY OF INTERNATIONAL TRADE 213, 215 (Lisa L. Martin ed., 2015).

51. *See generally id.*

safeguards that provide these countries with the requisite peace of mind to consider engaging in a global free trade market. One would think that the pro-free trade, anti-protectionism critics of antitrust laws would value some market distortion over the outright elimination of all free trade.[52] Of course, this assumes that the critics of protectionism would value any course of action that results in some free trade over none.

D. Anti-Dumping: The Premier Protectionist Tool of Antitrust

Anti-dumping policies are the antitrust topic that receives the most frequent and stark criticism. Anti-dumping policies allow governments to "impose duties [(e.g., fines on a company)] whenever goods are sold in export markets at less than their fair [(e.g., market)] value."[53] The policies are intended to "prevent firms from price discriminating between markets," especially national ones.[54] Similar to the above protectionist arguments about antitrust laws on the whole, critics often argue that antidumping laws "induce more distortions in the market than they resolve."[55]

What sets antidumping apart from the rest of antitrust policy? Why is antidumping a riper target for criticism? Although all competition laws address market distortions, anti-dumping is the only measure among them that does not merely act to eliminate anti-competitive behavior of a firm; rather, anti-dumping is punitive in nature.[56] A successful antidumping claim results in relief that is more severe than a mere injunction or making the injured party whole.[57] Anti-dumping cases result in the imposition of fines and high tariffs on the anticompetitive party, even to the extent that the fines or tariffs dramatically affect the party's ability to continue its current and future business dealings.[58] For this reason, certain countries, like Japan, share the view that anti-dumping measures are the most easily abused antitrust tool and a great threat to the preservation of free market competition.[59]

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52. *See id*. at 220.

53. Ian Wooton & Maurizio Zanardi, *Anti-Dumping Versus Anti-Trust*: *Trade and Competition Policy*, *in* II HANDBOOK OF INTERNATIONAL TRADE: ECONOMIC AND LEGAL ANALYSES OF TRADE POLICY AND INSTITUTIONS 383, 384 (E Kwan Choi & James C. Hartigan eds., 2002).

54. *Id.*

55. *Id.*

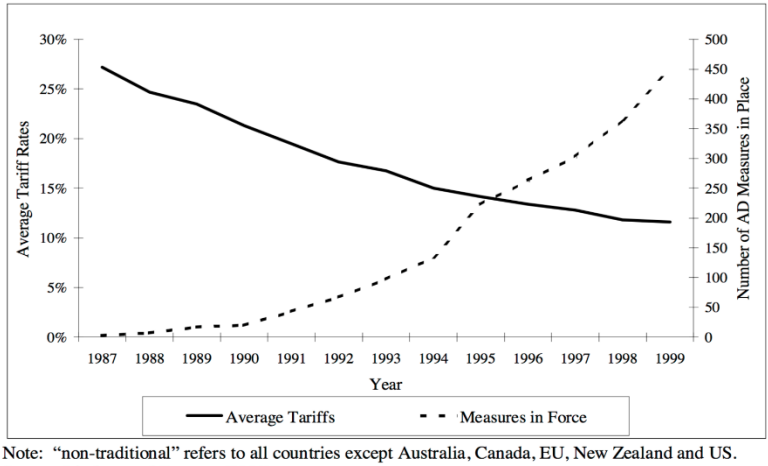
56. *See id*. at 390.

57. *See Anti-dumping, Subsidies, Safeguards: Contingencies, etc*, WTO (Sept. 15, 2018), https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.

58. *See* Elizabeth L. Gunn, *Eliminating the Protectionist Free Ride: The Need for Cost Redistribution in Antidumping Cases*, 28 B.C. INT'L & COMP. L. REV. 165, 176 (2005).

59. *See* Wooton & Zanardi, *supra* note 53, at 394.

Anti-dumping legislation gained popularity after the Second World War, perhaps unsurprisingly coinciding with the declining popularity and use of tariffs.[60] Today, over ninety countries have adopted anti-dumping laws; nearly every country that has antitrust laws has anti-dumping laws as well.[61] Some experts argue that trade liberalization and anti-dumping laws have spurred the rise of anti-dumping measures. These experts point to agreements that have eliminated trade tariffs as the cause of these adoptive anti-dumping measures.[62] See Figure 1 below.



Note: "non-traditional" refers to all countries except Australia, Canada, EU, New Zealand and US.
Source: Lindsey and Ikenson (2001).

Figure 1: Average tariffs and definitive AD measures for non-traditional users (Source: Wooton & Zanardi)[63]

Even against the "we want free trade" public backdrop of the 1980s and 1990s, countries attempted to protect themselves from overt anti-competitive behavior, like price dumping.[64] Any alternative risked losing public support for trade liberalization at the first sign of abuse in the market.[65] One can imagine the public outcry that would ensue if a country was unable to respond to anticompetitive behavior. Even the U.S., which had traditionally been a staunch advocate for free trade, "imposed more than 600 antidumping measures and nearly 300 anti-subsidy duties since

60. *See id.* at 385.
61. *See id.* at 386.
62. *See id.* at 384.
63. *Id.* at 390.
64. *See id.* at 391.
65. *See id.* at 387.

1980," each of which were "aimed at correcting what the U.S. government deemed to be unfair trade."[66]

A key criticism of anti-dumping policy is that it is used inconsistently to serve special political interests.[67] In the U.S., steel is an "emblem of [the] country's descent from greatness."[68] American steelmakers have lobbied for decades to preserve and protect the domestic industry.[69] Today, the U.S. makes "half as much as 50 years ago and employs just a third of the workers."[70] Past U.S. Presidents made it part of their political platforms to initiate trade policies that would limit the importation of competing steel products, especially from Europe and Japan.[71] The Trump Administration appears to be no exception. Although Trump recently resorted to imposing tariffs, he first used anti-dumping measures to protect the American steel industry.[72]

The first trade case brought by the U.S. government during the Trump Administration was an anti-dumping case alleging that producers from other countries (Brazil, Norway, and Australia) deliberately sold silicon metal (a raw material required to produce steel) "at artificially low prices in the U.S."[73] The alleged dumping margins were 134.9%, 45.7%, and 52.8% respectively.[74] After an affirmative ruling in favor of the U.S. in October of 2017, the U.S. Department of Commerce ("DOC") made final affirmative determinations in February of 2018.[75]

Additionally, on November 28, 2017, the DOC self-initiated an anti-dumping case against China alleging that China exported common alloy aluminum sheets at a low price in order to materially injure the domestic

66. Kasperowicz, *supra* note 4.

67. *See* Wooton & Zanardi, *supra* note 53, at 218.

68. *Protection American Steel from imports makes no sense*, THE ECONOMIST (Apr 27, 2017), https://www.economist.com/news/finance-and-economics/21721413-far-saving-jobs-it-will-destroy-them-protecting-american-steel-imports.

69. *See id.*

70. *Id.*

71. *See id.*

72. *See* Kasperowicz, *supra* note 4.

73. *Globe Specialty Metals Files Antidumping and Countervailing Duty Actions Against Brazil, Kazakhstan, Norway, and Australia*, GLOBE NEWS WIRE (Mar 08, 2017, 11:52 AM), https://globenewswire.com/news-release/2017/03/08/933518/0/en/Globe-Specialty-Metals-Files-Antidumping-and-Countervailing-Duty-Actions-Against-Brazil-Kazakhstan-Norway-and-Australia.html.

74. *Id*.

75. Press Release, U.S. Dep't of Commerce, U.S. Department of Commerce Issues Affirmative Preliminary Antidumping Duty Determinations of Silicon Metal from Australia, Brazil and Norway (Oct. 5, 2017), https://www.commerce.gov/news/press-releases/2017/10/us-department-commerce-issues-affirmative-preliminary-antidumping-duty.

industry for that product in the U.S.[76] This self-initiation is highly unusual and has not been done in more than twenty-five years.[77] In its initial evaluation, the U.S. estimated that the illegal prices being set were between 48 to 100 percent less than the fair market value.[78]

These are only a few examples of antidumping cases that have affected the darlings of American industry. According to the DOC, "enforcement of U.S. trade law is a prime focus of the Trump administration. From January 20, 2017, through February 26, 2018, the Department of Commerce initiated 102 antidumping and countervailing duty investigations—a 96% increase from 52 in the previous period. The Commerce Department currently maintains 424 antidumping and countervailing duty orders which provide relief to American companies and industries impacted by unfair trade."[79]

Of course, the hope remains that the U.S. process continues to be impartial and unmoved by political interests. Fairness is an integral part of our justice system and serves as the cornerstone justification for the imposition of otherwise unacceptable tariffs on foreign parties. However, such need for impartiality (in perception or otherwise) has not dissuaded special interest groups and political figures from publicly lobbying the U.S. Government to make certain rulings. As to the self-initiated case against China referenced above, Congressmen, CEOs, labor union leaders, and other politically powerful individuals created a spectacle of their public lobbying efforts, citing the importance of "protecting" the U.S. constituents from "trade practices . . . threatening U.S. jobs."[80]

The perception that the law is susceptible to manipulation based on special political interests is partly what made Boeing's 2017 filings against Bombardier for anti-dumping violations, and the preliminary findings of the U.S. International Trade Commission ("ITC") in favor of

76. Press Release, U.S. Dep't of Commerce, U.S. Department of Commerce Self-Initiates Historic Antidumping and Countervailing Duty Investigations on Common Alloy Aluminum Sheet From China (Nov. 28, 2017), https://www.commerce.gov/news/press-releases/2017/11/us-department-commerce-self-initiates-historic-antidumping-and.

77. Alex Lawson, *US Triggers New China Trade Case with Rare Maneuver*, LAW 360 (Nov. 28, 2017, 4:14 PM), https://www.law360.com/articles/989055/us-triggers-new-china-trade-case-with-rare-maneuver.

78. Press Release, U.S. Dep't of Commerce, U.S. Department of Commerce Finds Dumping and Subsidization of Imports of Aluminum Foil from the People's Republic of China (Feb. 27, 2018), https://www.commerce.gov/news/press-releases/2018/02/us-department-commerce-finds-dumping-and-subsidization-imports-aluminum.

79. *See id.*

80. Chris Veech, *Rep. James Comer Says U.S. Aluminum Jobs in Jeopardy*, TRISTATEHOMEPAGE.COM (Jan. 11, 2018, 11:23 AM), http://www.tristatehomepage.com/news/local-news/rep-james-comer-says-us-aluminum-jobs-in-jeopardy/909831854.

Boeing, so controversial.[81] Essentially, Boeing brought an action against Bombardier, a smaller competitor, alleging that Bombardier had been offering passenger jet products at well below its own costs.[82] Boeing, a U.S. company, was ridiculed in the press and accused of filing the suit merely to obliterate a smaller foreign competitor's growing foothold in a product market where Boeing already had strong market power.[83] Boeing was perceived as a bully and a whiner, while Bombardier, the party alleged to have engaged in the improper and anticompetitive conduct, was portrayed as a victim.

The U.S. Government made its preliminary ruling that Bombardier had engaged in anticompetitive conduct and recommended the application of hefty duties (~300%) against Bombardier as punishment.[84] The preliminary ruling suggested that Boeing was well within its rights to bring the claim, despite being the larger and more powerful market player. Even still, the international and domestic press toward Boeing and the U.S. was pointedly negative. High profile national leaders, including British Prime Minister Theresa May, threatened trade wars against the U.S. and warned Boeing that continued action could jeopardize its contracts.[85] Ultimately, the U.S. International Trade Commission ("USITC") reversed its position and issued a decision against Boeing.[86] The surprise ruling, which was contrary to their initial recommendation, calls into question whether the USITC succumbed to the immense political pressure surrounding the issue.[87]

Critiques aside, the benefit of anti-dumping policies is that they can be effective even without a supranational system of power. Much like a country's standard trade tariff systems, the duties are imposed by that country without requiring any coordination or cooperation from other

81. Benjamin Zhang, *Boeing Scored a Big Victory Against its Canadian Rival, but it May Start a Nasty Trade War.*, BUS. INSIDER (Sept. 26, 2017), https://www.businessinsider.com/boeing-commerce-department-bombardier-tariff-219-trade-war-2017-9.

82. *See* Leslie Josephs, *Boeing Loses Trade Case Over Bombardier Passenger Jets*, CNBC (Jan. 26, 2018, 4:54 PM), https://www.cnbc.com/2018/01/26/boeing-loses-trade-case-over-bombardier-passenger-jets.html.

83. *See* Dan Ikenson, *Boeing Takes Trade Law Abuse to A Whole New Level*, FORBES (Sep 14, 2017, 4:58 PM), https://www.forbes.com/sites/danikenson/2017/09/14/boeing-takes-trade-law-abuse-to-a-whole-new-level/#2cc755a110a5

84. Vicki Needham, *US Finalizes Hefty Duties in Bombardier-Boeing Trade Case*, THE HILL (Dec. 20, 2017, 6:30 PM), http://thehill.com/policy/finance/365915-us-finalizes-hefty-duties-in-bombardier-boeing-trade-case.

85. *See* Gordon Rayner, et al., *Theresa May Threatens U.S. with Trade War Over Bombardier Row*, THE TELEGRAPH (Sep 28, 2017), *http://www.telegraph.co.uk/news/2017/09/27/theresa-may-threatens-us-withtrade-war-bombardier-row/.*

86. *See* Josephs, *supra* note 82.

87. *See id*.

countries.[88] However, unlike standard trade tariff systems, anti-dumping measures are still an acceptable application of a country's power because they are not precluded by trade agreements.[89] In light of the recent economic struggles of the Western world and resulting protectionist views, there seems to be no incentive for countries to subvert the trend toward increased anti-dumping enforcement.

III. PREVALENCE OF ANTITRUST LAWS IN THE WORLD MARKET

Antitrust, and its proverbial little brother, antidumping, are the subject of academic dart throwing, but no realistic alternative solution appears to have taken their place. Legislatures seem to have accepted that antitrust is the only option to ensure any free trade, as this paper has suggested on numerous occasions. Each of the three major players in the world economy—the United States, the European Union, and China—have antitrust laws and enforce them. None show any sign of stopping. So, the fact remains that these laws are the reality with which we must continue to contend.

A. The United States

The U.S. has a long history of antitrust enforcement. The U.S. was one of the first nations to adopt antitrust laws through the enactment of the Sherman and Clayton Acts in 1890 and 1914, respectively. At that time, it was the response to a public outcry for protection from domestic monopolistic firms. So, at least initially, antitrust laws in the U.S. were highly political, sitting at the forefront of public debate and playing a large role in deciding elections.[90] As time went on, the public outcry for protection from domestic monopolistic firms turned into an outcry against international firms.[91] The U.S. antitrust system of laws gained popularity and clout with its constituents more quickly and gained more public awareness than similar laws in other countries.[92]

The U.S. system of antitrust laws then began to serve as an example of antitrust laws abroad. Setting aside the wide reach of U.S. influence in international matters generally, the sheer size of the U.S. market itself made U.S. antitrust law something to learn from.

88. *See* Wooton & Zanardi, *supra* note 53, at 2.

89. *See id.*

90. WERNHARD MÖSCHEL, US VERSUS EU ANTITRUST LAW, ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/WernhardMoeschel.pdf (last visited Mar. 12, 2018).

91. *See id.*

92. *See id.* at 2.

Although the U.S. spurred on the trend, its antitrust law is significantly different from that of other countries in several ways. At a high level, some distinctive features of the U.S. laws are the possibility of criminal sanctions on bad actors, the automatic trebling of damages, and the encouragement of private actors to bring suits.[93] Today, over 75% of antitrust cases in the U.S. are brought through private enforcement.[94] These features are not common to other jurisdictions.

B. European Union

After the U.S. adopted its antitrust laws, Europeans recognized the need for their own version of competition laws. The E.U. enacted the first collective prohibition on competition-distorting agreements in the Treaty of Rome in 1957.[95] The E.U. has since set out its antitrust policy in the Treaty on the Functioning of the European Union ("TFEU").

Despite the fact that the E.U. and the U.S. subscribe to similar legal constructs and economic policies, major differences between the U.S. and E.U. antitrust laws and their enforcement exist. One such difference is that private enforcement claims are nearly nonexistent in Europe.[96] Although the number of private enforcement claims are starting to increase, they are being brought at a rate far lower than private enforcement claims in the U.S. Virtually all antitrust litigation in the E.U. is brought by the European Commission.[97] Unlike the U.S., the E.U. did not experience the same politicization of these issues that led to public support and awareness at the constituent level of its general population.[98] To some, the European Commission bringing most antitrust cases may give the impression that the E.U. is more regimented and strategic about which cases to pursue than its U.S. counterparts.

Another difference is that European competition laws do not provide for criminal sanctions,[99] or automatic treble damages for antitrust violations.[100] Again, unlike the U.S., public support for antitrust law was weaker and less politicized in Europe. This weaker support may have made E.U. constituents less accepting of severe consequences for bad actors. Of course, some scholars might say that U.S. constituents are just

93. *Id.* at 2, 5.
94. *Id.* at 5.
95. *See* ELHAUGE & GERADIN, *supra* note 8, at 49.
96. *See* Möschel, *supra* note 90, at 5.
97. *See* ELHAUGE & GERADIN, *supra* note 8, at 11.
98. *See* Möschel, *supra* note 90, at 11.
99. *See id*.
100. *See* ELHAUGE & GERADIN, *supra* note 8, at 71.

generally more comfortable with extreme punitive measures than their E.U. counterparts, and antitrust law is no exception.

On a global scale, the E.U. model has displaced the U.S. model as the international example to follow.[101] Perhaps the E.U. competition laws are perceived as more moderate, or perhaps the E.U. is just perceived as a better example of international cooperation. As the E.U. is a trade regime made up of many countries that have had to cooperate and negotiate amongst themselves, the E.U. laws were already the product of many great minds from many countries. To succeed at all, the sovereign nations of the E.U. have had to concede on national positions in order to form a centralized community position. The U.S. model was not subject to multinational negotiations. On the contrary, the U.S. generally does not make concessions during trade-related negotiations, and it is becoming increasingly clear that the Trump Administration is especially unwilling to make trade concessions.[102] This may be a contributing factor to the perception that the U.S. model is necessarily more extreme than its E.U. counterparts.

Another reason for the trend toward the E.U. model may be the perception that the U.S. seems to look more favorably on dominant firms, especially given the reality that a large concentration of large firms were founded in the U.S.[103] The E.U. and most non-U.S. countries are thought to be more suspicious of large and dominant firms, and therefore are perceived to be more objective in their antitrust analysis.[104] In comparison to the U.S. model, the E.U. system has been said to have a more active government presence, wider policy goals, and less stringent theoretical guidelines.[105]

C. China

China's Anti-Monopoly Law ("AML") went into effect in 2008.[106] A newcomer to the area of antitrust, China's "core provisions of the AML were modeled largely on E.U. competition law and, to a lesser extent, on

101. Bo James Howell, *Antitrust Law: Resisting Modern Protectionism in a Global Recession*, 13 GONZ. J. INT'L L. 1, 4-5 (2010).

102. *See* Shawn Donnan, *U.S. Anti-Dumping Cases Fueled by Trump Trade Threats*, FIN. TIMES (May 7, 2017), https://www.ft.com/content/fc84be52-31d5-11e7-9555-23ef563ecf9a.

103. *See id*.

104. *See id*.

105. *See id*.

106. Steven C. Sunshine, et al., *Antitrust: The Rising Tide*, *in* 2009 INSIGHTS: NAVIGATING TUMULTUOUS TIMES 72 (Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates et al., eds 2009), https://corpgov.law.harvard.edu/wp-content/uploads/2009/02/2009_insights.pdf.

the laws of the United States, Germany, Japan, and other countries."[107] On its face, the law appears neutral; "[i]t subjects foreign and domestic corporations to anti-trust scrutiny" and "promote[s] economic efficiency" as its policy motive.[108] However, the Chinese law is different from the U.S. and the E.U. laws in that it widely reserves the government's right to reject foreign acquisitions because of national security concerns; these concerns are both national and "economic" ones.[109]

To be fair, other countries, including the U.S. and E.U., reserve this right as well.[110] However, scholars say that the scope of China's "national security" concerns is much broader than the interpretations of other countries.[111] China's antitrust laws, unlike the E.U. and U.S., are not primarily enacted to promote market efficiency. Instead, there is a focus on national economic security, which serves to protect "'strategic and sensitive' industries and Chinese national champions."[112] China's leadership has long feared "that Western critics 'aim to change [China's] economic infrastructure and weaken the government's control of the national economy.'"[113] So, the leadership has gone to great lengths to avoid these changes.

China's political system does not share the same Western democracy and rules of law as the U.S. and the E.U.[114] Further, China does not share the same economic ideology of the U.S. and E.U. protectionism. "Market manipulation" is not a dirty phrase with negative connotations in China. By virtue of China's communist system, its government bodies are expected to intervene and insulate the country in ways that Western capitalists would not. Unlike the U.S., China's people have not been trained to trust a "market" but a government.

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107. *International Antitrust Enforcement: China and Beyond: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 59 (2016) [hereinafter *International Antitrust Enforcement Hearing*] (statement of Prof. Thomas J. Horton, Professor of Law and Heidepriem Trial Advocacy Fellow, University of South Dakota School of Law).

108. Anu Bradford, *Chinese Antitrust Law: The New Face of Protectionism?*, HUFFINGTON POST (May 25, 2011), https://www.huffingtonpost.com/anu-bradford/chinese-antitrust-law-the_b_116422.html.

109. *Id.*

110. *See* Foreign Investment and U.S. National Security, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/foreign-investment-and-us-national-security (last updated Aug. 28, 2018).

111. Thomas J. Horton, *Antitrust or Industrial Protectionism?: Emerging International Issues in China's Anti-Monopoly Law Enforcement Efforts*, 14 SANTA CLARA J. INT'L L. 109, 125-126 (2016).

112. *Id.* at 124.

113. *See International Antitrust Enforcement Hearing*, *supra* note 107, at 64 (statement of Prof. Thomas J. Horton).

114. *See id.* at 66.

It is likely that Chinese antitrust laws will never mimic any Western economic view of free markets.[115] Setting political systems aside, the Eastern world's concept of free trade is more concerned with notions of fairness between nations.[116] This may explain why China places significantly high strategic value on not becoming overly dependent on imports. Conversely, the Western view of free trade, at least in theory, does not concern itself with national fairness or import dependency as much as it does with global market efficiency.

IV. INTERNATIONAL ENFORCEMENT ISSUES

Despite the strong propensity towards the adoption of antitrust laws at the national level, countries appear to have generally abandoned all hope for an international body of antitrust enforcement.[117] The U.S. continues to withhold support for internationalization, and its lack of support has proven to be quite persuasive to members of international cooperative efforts.

A. Failed Attempts at Establishing an International Body of Antitrust Governance or Harmonization

Formal international competition law attempts have failed, in large part, due to lack of support from the U.S.[118] The first attempt was commissioned by the League of Nations, which explored whether an international system against cartel arrangements was within the realm of possibility.[119] At the time, "Europeans looked at cartel arrangements as an attempt to preserve economic stability," and the reports praised some cartels as "instruments of peace, international cooperation, and prosperity."[120] As a result, the League did not adopt any measures against cartel activity, citing the greater good.

After World War II, it was again argued that there was a need for international governing authority over antitrust enforcement.[121] World leaders and lawmakers sought a new, more cooperative world and discussed competition laws during the proposed International Trade Organization ("ITO") Havana Charter in 1947.[122] The notes from those

115. *Id.* at 78.
116. *See* GILPIN, *supra* note 10, at 391.
117. *See generally* Howell, *supra* note 101.
118. *See* ELHAUGE & GERADIN, *supra* note 8, at 1242.
119. Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U.L. REV. 343, 349 (1997).
120. *Id.* at 349-50.
121. *See* ELHAUGE & GERADIN, *supra* note 8, at 1239-40.
122. *See* Waller, *supra* note 119, at 350.

discussions contained "detailed rules regarding the substance and enforcement of competition law,"[123] indicating that it was heavily debated and discussed, but ultimately no competition rules were decided upon.[124] The U.S. was among those countries which refused to ratify the contemplated competition rules.[125]

Shortly after the Havana Charter, nations enacted the General Agreement on Tariffs and Trade ("GATT").[126] The GATT, like the agreements that came before it, remained silent on international competition rules.[127] This repeated failure to address international competition rules in international trade agreements suggests that centralized international competition laws may be a non-starter for years to come.

The World Trade Organization ("WTO") was established in 1995 and is the closest entity to a central authority on international trade laws, despite the fact that no centralized law exists.[128] Again, the Doha Ministerial attempted to negotiate international competition rules and introduce them into the established authority of the WTO.[129] By 2004, during the Doha Round of trade negotiations, the plans to adopt competition laws were foiled.[130] Developing countries and the U.S. did not provide their support for the introduction of competition laws.[131]

As a result, although the WTO was established to be a primary venue to litigate antitrust matters between countries, the WTO can argue only that a country unfairly applied their own country's domestic laws.[132] There is still no international set of laws promulgated by the WTO. Given that discrepancies exist even between the three major trade countries, the lack of internationally set authority is quite limiting.

Given these historically failed and haphazard attempts, it is not likely that a uniform antitrust law can be adopted globally. China, the U.S., and the E.U. all subscribe to varying versions of free trade and what constitutes an appropriate method of enforcement. Further still, the national values significantly differ between these countries. In China,

123. *Id.*
124. *See* ELHAUGE & GERADIN, *supra* note 8, at 1240.
125. *See* Waller, *supra* note 119, at 350.
126. *See id.*
127. *See id.*
128. *See generally About WTO*, WTO, https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Sept. 7, 2018).
129. *See* ELHAUGE & GERADIN, *supra* note 8, at 1240.
130. *See id.*
131. *See id.*
132. *What is the WTO*, WTO, https://www.wto.org/english/thewto_e/whatis_e/whatwedoe.htm (last visited Sept. 15, 2018).

national security terms and the promotion of national industry is paramount.[133] Similarly, the U.S., while not allowing for the same breadth of application as China in its national security terms, seems determined to preserve its domestic laws despite the clear preference of other nations for E.U. competition laws.[134]

B. Informal Harmonization and Cooperation

Efforts to informally harmonize international competition laws have continued despite the failure of formal international laws. The Organization for Economic Cooperation and Development ("OECD") and the United Nations Conference on Trade and Development ("UNCTAD") each adopted codes that outlined negotiations and agreed to competition law principles.[135] The codes were completely informal and non-binding.[136] Although the OECD's latest recommendations for antitrust cooperation were revised relatively recently in 1995, the agreement is still a "law . . . of the softest variety."[137] This is in part because Western industrialized nations seek to address anticompetitive behavior, while the burgeoning countries are more concerned with promoting economic development and regulating multinational corporations.[138]

The International Competition Network ("ICN") is another institution that encourages cooperative action on antitrust principles.[139] However, the ICN, much like other informal networks, does nothing to limit or minimize the protectionist behaviors of countries, which is common in the face of uncertainty and lack of consensus on topics such as antitrust.[140]

Lack of enforceability aside, these negotiations and cooperative efforts "established a framework that has been reasonably successful and has set the stage for more binding commitments on a bilateral basis."[141] The fact of the matter is that there is no economic model that is globally or unanimously accepted by all nation-states, so there can be no truly successful global harmonization.[142] To internationalize the law, even in

133. *See* Bradford, *supra* note 108.
134. Cremieux & Snyder, *supra* note 18, at 778.
135. Waller, *supra* note 119, at 350-51.
136. *See id.*
137. *Id.* at 361-62.
138. *See id.* at 351.
139. *See* Howell, *supra* note 101, at 6.
140. *See id.*
141. Waller, *supra* note 119, at 362.
142. AM. BAR ASS'N SECTION OF ANTITRUST LAW, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST, WORKING DRAFT (Sept. 1, 1991),

an informal capacity, would require the policy behind the laws to be agreed upon.[143] How can one agree to perfect and protect an economic policy that is not itself uniform amongst all nations?[144]

C. Regional and Bi-lateral Treaties

In addition to informal harmonization efforts, certain regional and bilateral treaties have been put in place to encourage cooperation on antitrust enforcement.[145] In 1991, the U.S. and E.U. entered into a cooperative antitrust agreement.[146] Other nations have also entered into antitrust cooperation agreements.[147] These agreements are not harmonized, vary widely, and contain different levels of required cooperation.[148] Yet, they are a country's best bet for solidifying any kind of binding cooperation with another country on antitrust laws.

V. CURRENT POLITICAL CLIMATE AND RISING PROTECTIONISM RHETORIC

Our current political climate reveals a return to protectionist rhetoric and policies. Today, the bulk of protectionism is accomplished through non-tariff barriers, such as domestic content legislation and other restrictive measures.[149] Antitrust is another one of these measures that will, at least for the foreseeable future, be a growing and pivotal force on the world stage.

A. Perception of Unfair Enforcement

As mentioned earlier in this paper, there is a widespread perception that domestic countries unfairly apply antitrust laws to foreign firms through "unequal enforcement in order to create favorable market conditions" for their domestic industries and firms.[150] A systematic bias against foreign companies would thwart the goal of antitrust and undermine countries' cooperative efforts.[151] In nearly equal measure, the

https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_1991_full_report.authcheckdam.pdf.

143. *See id.*
144. *Id.*
145. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 142, at 279.
146. *See* ELHAUGE & GERADIN, *supra* note 8, at 1226.
147. *See id.* at 1239.
148. *See id.*
149. GILPIN, *supra* note 10, at 204.
150. Horton, *supra* note 111, at 139.
151. *See* Bradford et al., *supra* note 3, at 8.

E.U., U.S., and China have been the accused and the accuser of claims of unfair antitrust enforcement.[152]

In the Western markets, China is said to have been discriminatory in its application of antitrust law to foreign businesses.[153] Even after the enactment of its antitrust laws, the consensus by scholars has been that China is focused on protecting its own domestic companies and industries, and the law is used to create a barrier to entry for foreign firms.[154] Through the AML national security language, China has expressed and codified its perceived interest in avoiding adverse impacts to its domestic small and medium-sized enterprises and has rejected the "survival of the fittest, markets will self-correct inefficiencies" economic theories shared by most Western countries.[155]

Not surprisingly, some of the strongest criticism of China has come from the U.S. Chamber of Commerce.[156] It claims that China is using AML to "advance policy and boost national champions . . . [through] systemic, officially sanctioned curtailment" of rights afforded under the laws.[157] Further, the Chamber adds that "all transactions blocked or conditionally approved to date have involved foreign companies."[158] Generally, "foreign companies have well-founded concerns about how . . . China's legal framework for antitrust enforcement provides opportunities for protectionism and industrial policy to sway decisions."[159] Companies and countries alike considered China's AML to be a "newer, subtler form of protectionism, one cloaked in regulatory impartiality but intended primarily to promote Chinese companies, especially the big, powerful, state-owned companies."[160]

Although the U.S. appears to be quick to make these allegations, it is not immune from being on the receiving end of similar charges.[161] The U.S. has also attempted to preserve its own "economically important industries which are threatened by import competition" through protectionism on many occasions, though perhaps with more subtlety

152. *See* Horton, *supra* note 111, at 140.
153. *See id*. at 135.
154. *See id*. at 115.
155. *Id*. at 128-130.
156. *See id*. at 138.
157. *Id*.
158. *Id*.
159. *Id*.
160. Neil Gough, Chris Buckley & Nick Wingfield, *China's Energetic Enforcement of Antitrust Rules Alarms Foreign Firms*, N.Y. TIMES (Aug. 10, 2014), https://www.nytimes.com/2014/08/11/business/international/china8217s-energetic-enforcement-of-antitrust-rules-alarms-foreign-firms.html.
161. *See generally* Plummer, *supra* note 2.

than China.[162] Some academics observe that the U.S. appears to be "less keen to go after its own monopolies, although [the U.S.] appears to have no problem going after foreign ones."[163]

Even the E.U., who is often considered to be the most moderate of the three, is not immune. High ranking U.S. officials "accused the E.U. of bias against U.S. companies."[164] Even then-President Barack Obama suggested that the E.U. was engaging in protectionism.[165]

The oddity here is that these perceptions of misapplication of the law have been proven to be unfounded, at least in the E.U. An empirical study of over 5,000 cases from 1990 to 2014 evaluated the E.U.'s enforcement of antitrust laws on foreign and domestic merger activity.[166] They concluded that the E.U. is less likely to challenge a U.S. or foreign acquirer, a fact in direct opposition to what the U.S. has claimed.[167] Rather, the E.U. appears to apply more stringent guidelines to its domestic E.U. members.[168] The study concluded that while the E.U. has engaged in extraterritorial enforcement of its own laws, it has been more cautious to do so than the U.S.[169] Whether that will change considering the recent political climate has yet to be tested. Further, only time will tell whether similar studies will be conducted and reveal similar conclusions as to the U.S. and China's enforcement of antitrust laws.

The fact remains that all countries have nationalist policies. Where antitrust laws support the welfare enhancing goals of a country or its constituents, it makes sense that national leaders will gladly enforce those antitrust laws.[170] The question becomes, what happens when the enforcement of the law results in less favorable conditions for a nation's constituents? At least in perception, any sensitivity to its national constituents will seem like a misapplication of the law.[171] As long as nations have priorities that are inherently at odds with some other nations' adopted economic policies, there is a risk of a perception of unfair enforcement.[172]

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162. Gifford, *supra* note 15, at 1074.
163. Howell, *supra* note 101, at 9.
164. Suzanne Lynch, *EU's Google Ruling Cranks Up Tension With Big US Firms*, IRISH TIMES (Apr. 21, 2016), https://www.irishtimes.com/news/world/europe/eu-s-google-ruling-cranks-up-tension-with-big-us-firms-1.2618020.
165. *See id*.
166. Bradford et al., *supra* note 3, at 3.
167. *See id*. at 24.
168. *See id*. at 8.
169. *See* Bradford et al., *supra* note 3, at 1; Waller, *supra* note 119, at 380.
170. *See* Gifford, *supra* note 15, at 1065.
171. *See id*.
172. *See id*. at 1092.

B. Outcry for Protectionism, Generally

Given the lingering effects of the recent global recession, "the cry for protectionist policies is louder than it has been for decades."[173] No longer are political leaders "willing to subordinate [their] short-term economic interests to long-term interests and to the larger good of the international economy."[174] Articles far and wide seem to suggest the same thing: the E.U. and U.S. populations are hearing about protectionism as a far more familiar and welcomed concept as of late.[175]

The above-referenced articles, like many published before and since, demonstrate a sentiment felt by many observing the international political scene. There has been a staunch rise of populist and protectionist rhetoric from many nations. In addition, we know from the history of the enactment of U.S. antitrust laws that strong political support from the masses can create strong effects in republic-based political environments.[176] Rightly or wrongly, for better or for worse, this protectionist rhetoric has changed the political backdrop against which antitrust laws are and will be bred and enforced in the near term.

C. The United States, Donald Trump, and Making America Great Again

Trump has been long perceived to carry a protectionist agenda. Although not an "isolationist," an extreme version of protectionism that very few would expect an international business mogul to have, Trump has openly and proudly stated that his focus is on "America First."[177] He made countless speeches during his election and since obtaining office that have repeated "the idea that America is being taken advantage of by other countries and the assertion that trade deals and immigration have destroyed jobs and fueled crime."[178] His message has reached the masses of the American and international populations.[179] His own campaign slogan, "Make America Great Again," cements a message, even to

173. Howell, *supra* note 101, at 9.

174. GILPIN, *supra* note 10, at 365.

175. *See generally* Daniel Ben-Ami, *World Trade: Is Protectionism On The Rise?*, IPE (Feb. 2017), https://www.ipe.com/investment/briefing-investment/world-trade-is-protectionism-on-the-rise/10017403.article.

176. Orbach, *supra* note 29, at 2266.

177. *See* Krishnadev Calamur, *A Short History of 'America First'*, THE ATLANTIC (Jan. 21, 2017), https://www.theatlantic.com/politics/archive/2017/01/trump-america-first/514037/.

178. Dan De Luce, *Trump Sticks to a Protectionist, Isolationist Script in First Big Speech*, FOREIGN POL'Y (Mar. 1, 2017, 12:58 AM), https://foreignpolicy.com/2017/03/01/trump-sticks-to-a-protectionist-isolationist-script-in-first-big-speech/.

179. *See id*. *See generally* Don Lee, *Trump Wants To Cut Bilateral Trade Deals, But What If Nobody Comes To The Table?*, L.A. TIMES (May 26, 2017, 1:40 PM), http://www.latimes.com/business/la-fi-trump-trade-strategy-20170526-story.html#.

individuals unschooled in antitrust doctrine or other generally accepted economic theories, that Trump, a celebrated businessman, finds there is an imbalance in the way America had been participating in world trade.

Trump's actions so far are nearly as strong as his rhetoric. In attempts to further free trade, he has worked toward "getting rid of the foreign market access borders that often shut out American goods and services, and having stronger enforcement of our trade agreements."[180] Despite those actions however, he has also continued to criticize former leaders for the current trade agreements in place or those potential agreements negotiated between the U.S. and various countries around the world, especially the Trans-Pacific Partnership.[181] Further, he has made it clear that tariffs are not something he is afraid to implement.[182]

Trump is clearly supporting protectionism through his actions and rhetoric, a choice that reverberates as a war cry through the heart of pro-world trade economists. His statements have fueled several articles warning that Trump's protectionism is perhaps the greatest threat to "the system of rules and regulations that has governed world trade for decades."[183] Will that come to fruition? Considering his recent tariff decisions, it may.[184]

D. Brexit and Le Pen in the (former) E.U.

Trump is not alone in his protectionist sentiments. In March of 2017, the United Kingdom ("U.K.") served notice terminating its participation in the E.U.[185] While trade relations are only a small part of that which the E.U. negotiated on behalf of its members, Brexit still broadly represents the U.K.'s rejection of steps toward economic integration in favor of making its own decisions on trade.[186] Clearly, this decision was the result of the U.K.'s protectionist aims. Leading up to the U.K.'s vote to leave the E.U. and since, articles conveying protectionist viewpoints have been on the rise. For example, it was suggested that coordination within the E.U. unnecessarily limited the U.K.'s freedom to run their country:

180. Sean Hackbarth, *What Has President Trump Done So Far On Trade?*, U.S. CHAMBER COM. (May 11, 2017, 12:45 PM), https://www.uschamber.com/above-the-fold/what-has-president-trump-done-so-far-trade.

181. *See* Lee, *supra* note 179.

182. Kasperowicz, *supra* note 4, at 2.

183. Ben-Ami, *supra* note 175.

184. Kasperowicz, *supra* note 4, at 2.

185. Peter Willis & Richard Eccles, *Brexit: Competition Law Implications*, BIRD & BIRD (Oct. 2, 2017), https://www.twobirds.com/en/news/articles/2016/uk/competition-law-implications-of-a-brexit.

186. Ben-Ami, *supra* note 175.

By withdrawing from the EU, we can organize economic and social affairs in this country not by deliberate design from the top down, but more organically and spontaneously . . . It's because we know in our bones that it is a daft way to run a whole continent. I suspect it is not only the Brits who will soon be demanding the freedom to opt out.[187]

By some, coordination with the E.U.'s efforts were perceived as eliminating the power of the U.K. altogether:

And this is the thing with the EU. Once consent is established for the basic foundation, the ossification process begins to the point where you no longer have the power, reform is impossible and like trade and agriculture, it simply drops out of public discourse. Why debate that which cannot be influenced? This is how we drift from democracy to technocracy—and subsequently stagnation and disaffection. That is why I would vote to leave every single time.[188]

Supporters even grew concerned that all of the E.U. nations had lost their ability to function separate from the E.U.:

The EU has become too economically and politically integrated for its member states to function as truly independent nations.[189]

Whether this type of rhetoric will result in further political actions toward protectionism within the U.K.'s borders, or was just intended to encourage British citizens to vote for Brexit, enough of the population seemed to agree by way of a popular vote for Brexit that its parliamentary body could manage its own economic affairs just fine without the E.U. playing a role.

On the mainland, other E.U. nations seem affected by a rise in protectionist rhetoric. Marine Le Pen, a French politician, led an—albeit unsuccessful—campaign for the presidency of France, in which she called for "smart protectionism," introducing the term into the living rooms of the population.[190] Whether an effective strategy or not, she garnered support from "ordinary middle-class French people" in part because "protectionism sounds like common-sense economics" as well as a job creation plan.[191] The accepted and long-term effects of such a potential economic plan were not discussed as much as the rhetoric,

187. *7 Reasons Why We Should Leave The Eu*, CAMPAIGN FOR INDEP. BRITAIN, http://campaignforanindependentbritain.org.uk/the-economy/. (last visited Sept 7, 2018).

188. *Best Be Leaving Now*, CAMPAIGN FOR INDEP. BRITAIN, https://campaignforanindependentbritain.org.uk/tag/trade-bloc/ (last visited Sept 15, 2018).

189. Timothy B. Lee, *The Brexit Vote is a Symptom of Larger Problems With the European Union*, VOX, https://www.vox.com/2016/2/25/11110592/brexit-britain-vote-explained (last updated June 22, 2016, 3:50 PM).

190. *See* Bill Wirtz, *Le Pen is Stoking France's Passion For Protectionism*, CAPX (Feb. 16, 2017), https://capx.co/le-pen-is-stoking-frances-passion-for-protectionism/.

191. *Id*.

which proudly touted: "we need protectionism."[192] Although Le Pen was not ultimately elected, she brought to the limelight a sentiment of protectionism and garnered political support for it, which set the stage for the far-right protectionism that seems to be sweeping the politics of other E.U. countries.

E. General Protectionist Sentiment on the Rise

Although the above represent a few admittedly cherry-picked examples of growing protectionism, the WTO has reported that there has been a "surge in antitrade rhetoric around the world . . . being accompanied by a rise in the introduction of protectionist measures by the world's leading economies."[193] Between October of 2015 and May of 2016, the major world economies "introduced new protectionist trade measures at the fastest pace seen since the 2008 financial crisis, rolling out the equivalent of five each week."[194]

The WTO's warning was intended to raise awareness that the creeping protectionism of the 1930s may be rearing its ugly head yet again, with the intention of preparing world leaders to avoid the pitfalls of such an approach.[195] With so many agreements in place that are designed to prevent countries from raising tariff levels and engaging in the policies which plagued the world economy during the Great Depression, it makes sense that individual countries may fall back to antitrust law as a lever to promote protectionist policies.

VI. CONCLUSION

There is a clear "conflict between the evolving economic and technical interdependence of the globe and the continuing compartmentalization of the world political system composed of sovereign states . . . ."[196] This conflict can breed protectionist political views. Unless and until there is a complete paradigm shift away from protectionism, which is impossible, the global economy will not meet the "rational" assumptions necessary to preserve free market efficiency.

Some amount of protectionism is inevitable. Although "inefficient" in economic and academic circles, protectionism preserves the sovereign powers enjoyed by certain countries. In this way, it is a necessity of free

192. *Id*.

193. Shawn Donnan, *WTO Warns On Rise Of Protectionist Measures By G20 Economics*, FIN. TIMES (June 21, 2016), https://www.ft.com/content/2dd0ecc4-3768-11e6-a780-b48ed7b6126f.

194. *Id*.

195. *See id*.

196. *See* GILPIN, *supra* note 10, at 11.

trade. This paper is not intended to be a commentary on whether protectionism is right or wrong, but rather a demonstration and prediction that antitrust law, a tool of political and economic power, can and will be wielded by individual countries to promote protectionist policies that will affect the international trade landscape in the near term.

While attempting to act on this protectionism is difficult because of the web of international trade agreements currently in existence, individual countries may still use domestic antitrust law to meet protectionist aims, especially given that an international authoritative body governing the use of antitrust does not exist. Countries serious about preserving free trade may cooperate with one another to adopt realistic economic policies that serve to dull the blade of antitrust law through regional agreements, but ought not to attempt to eliminate it altogether.

Antitrust law, like medicine, must be used appropriately to be effective. While antitrust laws generally should encourage free trade, as promoting competition is the aim of their enforcement, they are also at risk of being used to thwart free trade. That risk is further exacerbated by perceptions of unfair enforcement and the divisive rhetoric of world leaders. In this way, antitrust law has the potential to weaken the already delicate international cooperative framework that exists to foster free trade. Absent a change in perceptions and the protectionist rhetoric fueling the current political landscape, antitrust law is likely to be manipulated to serve protectionist viewpoints, making it increasingly likely to become a nail in free trade's coffin, instead of the key to its preservation. It may be a nail that nations are able to ignore for the sake of its benefit, or it may be the one that finally puts an end to the pursuit of truly international free trade. Only time will tell, but one thing is clear: anti-trust law is a field that will impact the international economic community significantly for years to come.