

ANTITRUST AND SOCIALLY RESPONSIBLE COLLABORATION: A CHILLING COMBINATION?

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ABSTRACT

Businesses are increasingly using collaboration to address concerns about sustainability, transparency, human rights, and labor conditions in global markets. Such collaborations include the development of certifications and standards, the sharing of information about factories and suppliers, and agreements to share facilities, like less than full delivery trucks. Yet at the same time, federal antitrust policies broadly prohibit agreements that restrain trade or commerce, creating the potential for innovative collaborations to result in legal prosecution. This article applies antitrust law to socially responsible business collaboration in an effort to determine whether antitrust law chills potentially beneficial agreements. The article concludes that careful structuring of agreements can avoid many antitrust violations, but also finds that certain types of agreements, including those that could have the most impact on scarce resources and vulnerable commodity producers, are forbidden. Accordingly, this article argues that per se rules forbidding certain practices, including price fixing and resource sharing, be reconsidered in light of current economic and social conditions. It also questions certain assumptions about the benefits of competition in light of current environmental and fair labor challenges.

I. Introduction

A review of recent literature in the field of sustainable and socially responsible business reveals that companies are increasingly considering collaboration as a means of solving intractable global problems.¹ Business entities concerned about human rights and labor practices may collaborate with other businesses, government agencies, and non-governmental organizations on certifications and standards at shared factories and facilities.² To save costs and

¹ See e.g., ANDREW S. WINSTON, THE BIG PIVOT: RADICALLY PRACTICAL STRATEGIES FOR A HOTTER, SCARCE, AND MORE OPEN WORLD 11, 211–26 (2014) (discussing a need for new practices, including increasing collaboration, in order to address key business concerns); Ram Nidumolu, Jib Ellison, John Whalen & Erin Billman, *The Collaboration Imperative*, HARVARD BUS. REV., <http://hbr.org/2014/04/the-collaboration-imperative-2> (Apr. 2014) (analyzing most effective models for sustainability collaborations); Simon Mainwaring, *Why Business Collaboration Is Necessary in a Socially Sustainable World*, <http://www.mashable.com/2011/06/09/business-collaboration-sustainability/> (Jun 9, 2011); Mariete M. Van Huijstee, Mara Francken & Pieter Leroy, *Partnerships for Sustainable Development: A Review of Current Literature*, 4 ENV’T L. SCI. 75 (2007) (reviewing literature and defining partnership as collaborations between actors from “two or more spheres of society (state, market and civil society”); see generally ERIC LOWITT, THE COLLABORATION ECONOMY: HOW TO MEET BUSINESS, SOCIAL, AND ENVIRONMENTAL NEEDS AND GAIN COMPETITIVE ADVANTAGE 1-2, 5-7 (2013) (describing the need to transition to an economy built on collaboration across sectors and businesses).

² See, Mark Anner, *Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains*, 40 POLITICS & SOCIETY 609, 609 (2012) (arguing that corporate governance programs influenced by corporations are more likely to consider wage and hour violations, and less likely to emphasize workers’ rights to organize); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State*, 8 IND. J. GLOBAL LEGAL STUD. 401, 413–17, nn.38–39 (2001) (describing coordinated efforts by multinational enterprises to monitor and enforce minimum labor standards, including Social Accountability International’s SA-8000 code). One example is the Fair Factories Clearinghouse, a non-profit organization that helps businesses utilizing common factories to share audits and other information, and implement corrective action. See

reduce environmental impacts, the most ardent of competitors have agreed to share facilities, like less than full delivery trucks,³ and engage in joint research and development.⁴ Competitors in resource-intensive commodity markets, including coffee and lumber, have collaborated on environmental certification standards for production, and in some cases have engaged in harvest share agreements to reduce over-harvest and waste.⁵

Section one of the Sherman Act broadly prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce,”⁶ leaving all of these collaborations potentially vulnerable to challenge.⁷ However, the very breadth of this century-old statutory language has forced courts to engage in an evolving analysis of what behavior should and should not be prohibited.⁸ Seemingly clear language prohibiting agreements among and between competitors may, in fact, not stand as a barrier to certain types of arrangements.⁹ The purpose of this article,

<http://www.fairfactories.org/what-we-do/Mission.aspx>; *Major Apparel Brands and Manufacturers Aim to Advance Global Factory Conditions Using New Collaborative Approach to Compliance Audits*, BUS. WIRE (Jun. 19, 2012), <http://bi.galegroup.com.ezproxy.proxy.library.oregonstate.edu/global/article/GALE|A293598681/4b99219fe0e79f257229ae62f95d266?u=s8405248>. Another approach is for businesses to seek certification under common standards such as the SA-8000 or the ISO 14000, or to adopt voluntary industry standards. See MARC J. EPSTEIN, *MAKING SUSTAINABILITY WORK: BEST PRACTICES IN MANAGING AND MEASURING CORPORATE SOCIAL, ENVIRONMENTAL, AND ECONOMIC IMPACTS* 72–78 (2008).

³ Nestle, Pepsico, and the innovative company TRI-VISOR were recently honored for creating a mechanism to share space in less than full truck loads to retail distribution centers. In this arrangement, TRI-VISOR served as a neutral facilitator for the collaboration between competitors. See <http://www.co3-project.eu/innovation/> (Jun 24, 2014) (announcing winners of the 1st prize for Best European Horizontal Collaboration project).

⁴ A variety of joint research projects are described in Part II.B.3, *infra*. Antitrust policy has historically recognized innovation as a policy goal and rarely prosecuted joint research and development projects. See Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 BERKELEY TECH. L.J. 535, 544–45 (2001) (arguing generally that intellectual property rights have been interpreted too broadly, permitting anticompetitive restrictions on licensing).

⁵ For an in-depth discussion of the development of sustainability standards in coffee markets, see BENOIT DAVIRON & STEFANO PONTE, *THE COFFEE PARADOX: GLOBAL MARKETS, COMMODITY TRADE AND THE ELUSIVE PROMISE OF DEVELOPMENT* 164–203 (2005). For a description of the Forest Stewardship Council, see *infra* note 36. The problem of conservation in fisheries and the use of market share divisions is discussed in Part IV.A.3, *infra*.

⁶ Sherman Antitrust Act, 15 U.S.C. § 1 (2012) [hereinafter “Sherman Act”].

⁷ A number of other statutory provisions potentially apply to business collaborations. Section 2 of the Sherman Act applies to monopolization and attempted monopolization. See 15 U.S.C. § 2 (2012). The Clayton Act contains specific provisions relating to price discrimination, exclusionary practices, and corporate mergers. See 15 U.S.C. § 12–13a, 14, 18 (2012). The Federal Trade Commission Act prohibits “unfair methods of competition” as well as “unfair or deceptive acts or practices.” 15 U.S.C. § 45 (2012). The scope of this article, however, is explicitly limited to section 1 of the Sherman Act, which refers to restraints on trade.

⁸ Decades of literature surround the interpretation of the Sherman Act’s broad prohibition on restraints of trade. See, e.g., Richard A. Posner, *The Chicago School of Antitrust Law*, 127 U. PA. L. REV. 925, 925–45 (1979) (chronicling the development of the Chicago and Harvard schools of antitrust analysis and concluding that the approaches had largely converged); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPECTIVES 43, 44–59 (2000) (surveying the “evolution of thinking about competition since 1890 as reflected by major antitrust decisions and research in industrial organization”).

⁹ See Part IV.B., *infra* (describing practices unlikely to raise antitrust concerns). The potential flexibility of antitrust law has led some to conclude that application of the Sherman Act should not be an impediment to social and environmental collaboration. See Sarah Rackoff, *Room Enough for the Do-Gooders: Corporate Social Accountability and the Sherman Act*, 80 SO. CAL. L. REV. 1037, 1038 (2007) (arguing generally that “current antitrust law provides sufficient space for companies to address social and environmental issues without running afoul of the law”); Christine A. Varney, *Antitrust Immunities*, 89 OR. L. REV. 775, 778 (2011) (“I would be hard-pressed to find a single example where a firm refrained from clearly procompetitive unilateral or joint conduct because the antitrust laws apply.”). In contrast, this article argues that per se prohibitions on price fixing, group

therefore, is to determine the outer limits courts have placed upon such agreements, and to assess the potentially chilling effect of antitrust law on socially responsible collaboration. Based on this analysis, the article seeks to determine if statutory changes are needed to allow for the type of socially responsible collaboration in which businesses are seeking to engage, and which would have the greatest potential impact on environmental, human rights, and sustainability challenges.

Part II sets forth the economic and business justification for engaging in collaborations across businesses, including those between and among competitors, and provides examples of key types of collaborations. Part III considers the application of antitrust laws and describes the struggle to determine the boundaries of what practices courts might find acceptable. Based on this analysis, Part IV examines the chilling effect of antitrust law on socially responsible collaborations, and considers what changes may need to be made. Part V concludes with an examination of some of the basic policy assumptions that underlie antitrust law, and suggests the need for evolution of these assumptions in the face of increasing resource scarcity, global environmental degradation, and climate change.

II. Collaborating for a Sustainable, Equitable, and Transparent Global Economy

A. Why Collaborate?

A number of forces are currently pushing business toward greater collaboration and partnership with varied organizations, including competitors, other businesses, governmental agencies, faith-based organizations, and non-governmental organizations. One force driving collaboration is the increasing globalization and consolidation of the marketplace.¹⁰ As wealthier developed nations outsource production and supply of goods, a lack of parity in environmental and labor laws has created an unfair burden on developing nations.¹¹ This inequality, as well as the increasing economic power of a small number of multinational corporations (MNC), has led to calls for private and public labor and environmental standards and certifications to protect vulnerable populations.¹²

boycotts, and output limitation and market divisions do in fact have a chilling effect on potentially highly beneficial socially responsible collaboration. *See Part IV.A., supra.*

¹⁰ See Rackoff, *supra* note 9, at 1039–43 (describing a need for regulation in global supply chains); Sarah Saadoun, *Private and Voluntary: Are Social Certification Standards a Form of Backdoor Self-Regulation?*, 45 COLUM. HUMAN RIGHTS L. REV. 281, 288–90 (2013) (describing rise of global supply chain and growth in size and power of multinational corporations); Aaron Grieser, *Defining the Outer Limits of Global Compliance Programs: Emerging Legal & Reputational Liability in Corporate Supply Chains*, 10 OR. REV. INT'L L. 285, 294–97, 300–11 (defining global supply chains and identifying drivers of new corporate compliance programs, including reputational liability and liability under U.S. statutes).

¹¹ See Joseph E. Stiglitz, *Regulating Multinational Corporations: Toward Principles of Cross-Border Legal Frameworks in a Globalized World: Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451, 476–80 (describing influence of multinational corporations (MNCs) and asymmetrical balance of power and information between the MNCs and developing nations); Blackett, *supra* note 2, at 402–26 (describing the asymmetrical nature of economic globalization and the difficulty of using corporate self-regulation to improve labor conditions in developing nations).

¹² See Annette Burkeen, *Private Ordering and Institutional Choice: Defining the Role of Multinational Corporations in Promoting Global Labor Standards*, 6 WASH. U. GLOBAL STUD. L. REV. 205, 205–13 (2007) (arguing that globalization and the rise of multinational corporations have led to a “race to the bottom” in labor standards, and that a mix of private and public law is necessary to create and enforce global labor standards); Michael S. Baram, *Multinational Corporations, Private Codes, and Technology Transfer for Sustainable Development*, 24 ENVTL. L. 33 (1994) (evaluating the role of private codes in ensuring appropriate technology transfers by MNCs as may be

Beyond the pressure of globalization, many believe that the international economy is driving to a point at which human enterprise will exceed the earth's carrying capacity.¹³ Because public goods—including access to clear air, water, and other natural resources—are treated as “free” to the businesses that utilize them, the impacts of pollution and the overuse of limited resources are externalized, resulting in costs to society, rather than the actors that create them.¹⁴ The externalization of costs and the public goods problem can contribute to environmental damage, biodiversity decline, and poor working conditions in developing nations, and threaten the ultimate sustainability of basic goods and commodities.¹⁵

In a scenario in which resources are limited, costs of those resources are externalized, and differing legal regimes create legal inequalities across nations, market mechanisms and government regulation may be too slow, too unwieldy, and systematically insufficient to create meaningful change.¹⁶ Nor can any single business—even giant MNCs like Walmart—solve global problems on their own.¹⁷ In the face of these seemingly insurmountable obstacles, many believe “[c]ollaboration [is] one of the few models that could catalyze solutions to the sustainable development challenges that we face at the speed and scale that we need.”¹⁸

The potential benefits of collaboration are significant. Statistics from the European Union suggest that 20-25% of anthropogenic greenhouse gas (GHG) emissions (the agents of climate

necessary for sustainable development); Saadoun, *supra* note 10, at 290 (considering the intersection of public and private standards and concluding that private certification can undermine environmental and labor rights certifications by encouraging regulators to avoid independent assessments of legal standards).

¹³ See Jan G. Laitos & Lauren Joseph Wolongevicz, *Why Environmental Laws Fail*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 1, 14 (2014) (noting that the earth and environmental goods have limits, and humans must respect the boundaries of those limits or risk permanent degradation of the planet).

¹⁴ For a discussion of externalities and their impact on the environmental, see NICHOLAS A. ASHFORD & CHARLES C. CALDART, ENVIRONMENTAL LAW, POLICY, AND ECONOMICS 131–35 (2008); PAUL E. HARDISTY, ENVIRONMENTAL AND ECONOMIC SUSTAINABILITY 49–52 (2010) (explaining old theories of competitive markets, the problem of externalities, and how the two need to be reconciled to ensure sustainability). Some of the most interesting work in the area of environmental externalities is currently being done in corporate accounting, where attempts are being made to develop systems for accounting that would include social and environmental impacts of corporate activities. See Epstein, *supra* note 2, at 143–62.

¹⁵ See Verena Bitzer, Mara Francken & Pieter Glasbergen, *Intersectoral Partnerships for a Sustainable Coffee Chain: Really Addressing Sustainability or Just Picking (Coffee) Cherries?*, 18 GLOBAL ENVTL. CHANGE 271, 272 (2008) (analyzing various partnerships in the coffee industry and concluding they will ultimately be unable to create a sustainable supply chain); Todd Johnston, *The Role of International Equity in a Sustainable Future: The Continuing Problem of Third World Debt and Development*, 6 BUFF. ENVTL. L.J. 35, 36, 46–47, 51–53 (1998) (describing the way externalization of costs in developing nations can particularly attract “dirty” or extractive industries); Matthew Tuchband, *Systematic Environmental Externalities of Free Trade: A Call for Wiser Trade Decisionmaking*, 83 GEO. L.J. 2099, 2101, 2104–08 (1995) (identifying systematic externalization of certain costs caused by free trade agreements, including loss of regional diversity).

¹⁶ See Bruce Paton, *Collaboration Among Industry, Civil Society, and Government for Sustainability: A Framework for Identifying Opportunities*, 3 PROGRESS IN INDUSTRIAL ECOLOGY—AN INTERNATIONAL JOURNAL 148, 149 (2006) (proposing a framework of opportunities for collaboration to enhance corporate social responsibility).

¹⁷ See Burkeen, *supra* note 12, at 231–32 (pointing to cost pressure and competition between businesses as one reason a mix of public and private labor standards are necessary, particularly to protect vulnerable populations in developing nations); Rackoff, *supra* note 9, at 1045 (noting the relative size of Nike and its inability to solve the problem of sweatshops on its own); Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARVARD BUS. REV., Dec. 2006, at 3 (contrasting the high degree of attention paid to Nestle’s 0.0008% consumption of the world’s groundwater with the relative low amount of attention paid to the 70% share of groundwater used in agricultural irrigation).

¹⁸ GlobeScan/SustainAbility Survey, *Collaborating for a Sustainable Future* (2012), <http://www.globescan.com/component/edocman/?view=document&id=47&Itemid=591> (last visited Feb. 27, 2015).

change) come from transportation and logistics, but the capacity utilization of the logistics network is less than 50%, creating an enormous potential for reduction in GHG emissions through shared resources and joint logistics planning.¹⁹ Businesses collaborating on audits of shared factories for compliance with human rights and labor standards can save significant costs and eliminate the possibility of conflicting reports, while making it possible to create significant change in factory conditions that a single business could not implement on its own.²⁰ When it comes to the utilization of public goods, collaborative agreements can be essential in ensuring that limited resources are not exhausted.²¹ This can be seen in the case of fishing conservation agreements, where, paradoxically, studies have shown that harvest share arrangements have increased the recovery rate of threatened fish stocks, lowered the bycatch rate, and increased production.²² On an internal scale, partnerships can also expand corporate competencies, raise employee morale and improve company image, which can create additional external value.²³

Perhaps most importantly, however, collaboration can increase the potential for creative problems solving. Businesses engaging in collaborations do not cite cost reduction as their primary motivation; rather, they point to risk sharing and the benefits of diverse perspectives.²⁴ Even in the midst of significant economic turmoil, companies expect collaboration to increase, particularly multi-stakeholder and NGO/government/business collaboration.²⁵

B. Examples of Socially Responsible Collaborations

While the common stereotype of collusion might be two competitive corporations sitting down together to fix prices or assign market share, firms actually create collaborative agreements at a multitude of points in the manufacturing or production process. Firms may collaborate to create value at stages including “technology development, product design, manufacturing,

¹⁹ See Collaboration Concepts for Co-modality, *Innovation*, <http://www.co3-project.eu/innovation/> (last visited Feb. 27, 2015).

²⁰ See Burkeen, *supra* note 12, at 247–48 (arguing that “third-party monitoring and collaborative programs are essential to the legitimacy and efficacy of any corporate code program”); Jette Steen Knudsen, *The Growth of Private Regulation of Labor Standards in Global Supply Chains: Mission Impossible for Western Small- and Medium-Sized Firms?*, 117 J. BUS. ETHICS 387, 395 (2013) (suggesting that small- and medium-sized firms collaborate with similar entities to share costs and share information); cf. Richard M. Locke, Fei Qin and Alberto Brause, *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 INDUS. & LABOR RELATIONS 3, 20–21 (2007) (finding that monitoring of factories by Nike produced mixed results for workers, results mirrored by other participants in multi-stakeholder initiatives). “In short, monitoring alone is not producing the large and sustained improvements in workplace conditions that many had hoped it would.” *Id.* at 21.

²¹ Emma V. Kambewa, et al., *Stretching Corporate Social Responsibility Upstream: Improving Sustainability in Global Supply Chains*, in *GLOBAL CHALLENGES IN RESPONSIBLE BUSINESS*, (N. Craig Smith, et al., eds.) 217, 218 (2010) (noting the particular damage on common resources created by the need to produce short-term profits).

²² See Joseph Sullivan, *Harvesting Cooperatives and U.S. Antitrust Law: Recent Developments and Implications* 5–6 (2000), available at <http://oregonstate.edu/dept/IIFET/2000/papers/sullivan.pdf> (describing favorable antitrust rulings for harvest share arrangements that facilitated increased harvest and reduced by catch).

²³ See Shirley Sagawa & Eli Segal, *Common Interest, Common Good: Creating Value through Business and Social Sector Partnerships*, 42 CAL. MGMT. REV. 105, 108 (2000) (calling for greater collaboration between private and social sector entities); Huijstee, *supra* note 1, at 83 (noting that for these reasons, “companies can gain a competitive advantage through partnering”).

²⁴ Collaborating for a Sustainable Future, *supra* note 18, at 12.

²⁵ Collaboration for a Sustainable Future, *supra* note 18, at 9.

marketing, distribution, and services.”²⁶ Companies will often collaborate at certain stages of the production process while competing at others.²⁷

A few of the common types of collaborative agreements include collective standard setting; commodity roundtables; and bilateral supply chain contracting.²⁸ Other common types of arrangements include agreements between competitors to engage in joint research and development or share facilities.²⁹

1. Standards, Certification, and Codes of Conduct

Perhaps the most common type of collaborative partnership is one in which various organizations join together to create standards, certifications, or codes of conduct for services and production of goods.³⁰ One example of such a collaboration is the Sustainable Apparel Coalition (SAC), a collaboration of organizations including Nike, Walmart, and Patagonia that seeks to “reduce the environmental and social impacts of apparel and footwear products around the world.”³¹ The primary focus of the SAC has been the development of the Higg Index, a “sustainability assessment tool” that seeks to “help organizations standardize how they measure and evaluate environmental performance of apparel products across the supply chain at the brand, product, and facility levels.”³² By providing a standard measurement tool, the Higg Index is intended to spur companies to compete both internally and externally to improve their ranking by reducing their environmental footprint, increasing energy efficiency, and reducing waste.³³ Notably, the SAC boasts membership of more than a third of the global apparel and footwear market.³⁴

A highly successful example of a certification system is LEED, the sustainability scale for “green” building practices developed by the U.S. Green Building Council (USGBC), a non-profit organization that includes members as diverse as medical giant Kaiser Permanente, chemical company BASF, Starbucks, and the banking company Wells Fargo.³⁵ Another example

²⁶ Arghya Ghosh & Hodaka Morita, *Competitor Collaboration and Product Distinctiveness*, 30 INT’L J. INDUS. ORG. 137, 137 (2012) (demonstrating that competitor collaborations can provide value under specific conditions, and antitrust authorities should therefore consider benefits to consumers based on individual circumstances).

²⁷ *Id.*; see also LOWITT, supra note 1, at 194-196 (describing various types and stages of collaborations).

²⁸ See Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 148–51, 152–53, 156–58 (2013) (describing new model of governance in which private environmental activities and standards affect environmental behavior of major corporations).

²⁹ See Ghosh & Morita, *supra* note 26, at 138; Vandenbergh, *supra* note 28, at 148–51. The website ecolabelindex.com reports to track over 400 ecolabels in 197 countries. See Ecolabel Index, *Home*, <http://www.ecolabelindex.com> (last visited Feb. 28, 2015).

³⁰ See Ingrid J. Visseren-Hamakers, *Partnerships and Sustainable Development: The Lessons Learned from International Biodiversity Governance*, 23 ENVTL. POL’Y & GOVERNANCE 145, 154 (2013) (analyzing 24 partnerships in the areas of forests, fisheries, conservation, and climate change, and finding efficacy varies and is limited to a small number of “gems” that perform substantial governance functions); Bitzer, *supra* note 15, at 278.

³¹ Sustainable Apparel Coalition, *Home*, <http://www.apparelcoalition.org/> (last visited Feb. 28, 2015).

³² Sustainable Apparel Coalition, *The Higg Index*, <http://www.apparelcoalition.org/higgoveryview/> (last visited Feb. 28, 2015).

³³ Nidumolu et al., *supra* note 1, at 4 (describing development of the SAC and import of the Higg Index).

³⁴ Sustainable Apparel Coalition, *Home*, <http://www.apparelcoalition.org/> (last visited Feb. 28, 2015).

³⁵ U.S. Green Building Council, *Community*, <http://www.usgbc.org/community> (last visited Feb. 28, 2015); see Jessica Alfano, *Can We (Anti)trust LEED?: An Analysis of the Antitrust Implications for the Green Building Movement*, 41 B.C. ENVTL. AFF. L. REV. 427, 448–51 (2014) (concluding that USGBC can avoid antitrust liability

is the Forest Stewardship Council (FSC), which promotes environmentally sound management of forests through its certification system, and claims to have certified over 35 million acres of forests in the United States alone.³⁶

Industries can also develop codes of conduct, such as the American Chemistry Council's (ACC) Responsible Care code, which is a requirement for membership in the ACC,³⁷ and the Electronic Industry Citizenship Coalition (EICC) Code of Conduct, which seek to promote safety and human rights for workers, and prevent environmental harm.³⁸ In commodity markets, collaborations generally fall into categories of industrial coordination, where quality is established through inspection, verification, monitoring; domestic coordination, which identifies origin of commodities to establish quality or product characteristics; and civic coordination, which identifies societal benefits.³⁹ An example of civic coordination is the Fair Trade certification, which is intended "to ensure equitable trade practices at every level of the supply chain" and includes monitoring and auditing of labor, quality, and environmental standards.⁴⁰

While the most notable collaboratives involve a multitude of organizations, bilateral or multi-lateral agreements within supply chains also occur. For example, Hewlett-Packard, Dell and IBM have written a joint code of conduct for suppliers, while retailers Mattel and Hasbro require suppliers to meet International Council of Toy Industries standards.⁴¹

These standard-setting collaboratives are an example of what Verena Bitzer and colleagues have called the new "global audit culture" in which businesses strive toward transparency through inspection, measurement, and certification.⁴² They also reflect a trend toward what Professor Michael Vandenbergh has described as "private environmental governance," in which agreements among private entities "generate many of the environmental requirements that affect corporate and household behavior, and ultimately environmental quality," and replace "the standard setting, implementation, monitoring, enforcement, and adjudication roles traditionally played by public regulatory regimes."⁴³

Scholars differ as to whether this trend is positive. In her analysis of the use of partnerships as a means of encouraging sustainable development, Ingrid Visseren-Hamakers notes, "Certification standards have become the most important product of market-orientated partnerships; moreover, several of the analyzed partnerships, such as FSC, have made a significant contribution to the institutionalization of certification as a tool for sustainable development."⁴⁴ However, others have argued that this trend toward private standard setting may

by implementing certain strategies, including public involvement in standard setting, and creating a neutral decision-making process).

³⁶ Forest Stewardship Council, *Home*, <https://us.fsc.org/> (last visited Feb. 28, 2015).

³⁷ American Chemistry Council, *Responsible Care*, <http://responsiblecare.americanchemistry.com/?gclid=CNLwxcKVqMICFRFhfgodaWkAcg> (last visited Feb. 28, 2015).

³⁸ The EICC Code of Conduct is "a set of standards on social, environmental and ethical issues in the electronics industry supply chain. The standards set out in the Code of Conduct reference international norms and standards including the Universal Declaration of Human Rights, ILO International Labor Standards, OECD Guidelines for Multinational Enterprises, ISO and SA standards and many more." Electronic Industry Citizenship Coalition, *Code of Conduct*, <http://www.eiccoalition.org/standards/code-of-conduct/> (last visited Feb. 28, 2015).

³⁹ See Bitzer, *supra* note 15, at 274.

⁴⁰ Fair Trade USA, *Certification*, <http://fairtradeusa.org/certification> (last visited Feb. 28, 2015).

⁴¹ See Rackoff, *supra* note 9, at 1041.

⁴² Bitzer, *supra* note 15, at 278.

⁴³ Vandenbergh, *supra* note 28, at 133.

⁴⁴ Visseren-Hamakers, *supra* note 30, at 154.

actually result in reduced enforcement of public standards, as governments rely too heavily on their private counterparts to police industry.⁴⁵ Commodity certifications, like Fair Trade, can increase product differentiation and make commodity producers more competitive, but can also lead to confusion for customers and the potential for greenwashing.⁴⁶

2. Commodity Markets

In global commodity markets, certification and standard setting have been a common tool for companies interested in becoming more sustainable or socially responsible. For example, partnerships between producers, government agencies, and NGOs to set labor and environmental standards proliferate in the coffee market. Worldwide coffee partnerships include the Common Code for the Coffee Community (4C) and Utz Certified, while regional partnerships include The Sustainable Coffee Project and the Rainforest Alliance.⁴⁷ These collaborations are often governed by a purportedly neutral standard setting or certification entity, like Oxfam International.⁴⁸ However, so-called “roundtables” in which producers, buyers, and consumers form collaborative organizations to promote sustainable development of a particular commodity, have also become popular. Examples of these roundtables include the Global Roundtable on Sustainable Beef⁴⁹ and the Roundtable on Sustainable Palm Oil.⁵⁰

Within commodity markets, collaborations may also include attempts to stabilize prices through some form of market management or allocation of market share, as has been successfully utilized in certain fisheries.⁵¹ For reasons that will be described more fully in Part III.B.1, these types of collaborations are the most likely to be found in violation of antitrust laws.

3. Joint Projects

Perhaps the most high-profile collaborations emerge from competitors working together on joint projects. In 2013, competitors Coca-Cola, Pepsi, and Nestle joined with other five other organizations, including the World Wildlife Federation (WWF), to form the Bioplastic Feedstock Alliance (BFA), which focuses on the development of plant-based plastics and the development of sustainable bioplastic feedstocks.⁵² General Motors and Honda have partnered to develop an

⁴⁵ See Saadoun, *supra* note 10, at 295–99.

⁴⁶ The term greenwashing refers to advertisers making “false or misleading claims regarding environmentally friendly products, services, or practices.” Eric L. Lane, *Consumer Protection in the Eco-Mark Era: A Preliminary Survey and Assessment of Anti-Greenwashing Activity and Eco-Mark Enforcement*, 9 J. MARSHALL REV. INTELL. PROP. L. 742, 742 (2010). A number of articles have explored the confusion that can result from the current proliferation of ecolabels and certifications in the market. See, e.g., Megan S. Houston, *Ecolabel Programs and Green Consumerism: Preserving a Hybrid Approach to Environmental Regulation*, 7 BROOK. J. CORP. FIN. & COM. L. 225, 237 (2012) (describing confusion that can result from ecolabels); Bitzer, *supra* note 15, at 278.

⁴⁷ See 4C Association, *Home*, <http://www.4c-coffeeassociation.org/> (last visited Feb. 28, 2015); UTZ Certified, *Home*, <https://www.utzcertified.org/> (last visited Feb. 28, 2015); Bitzer, *supra* note 15, at 273 (analyzing twelve partnerships active in the coffee industry).

⁴⁸ See Bitzer, *supra* note 15, at 273; for more about Oxfam International, see Oxfam International, *About*, <http://www.oxfam.org/en/about> (last visited Feb. 28, 2015).

⁴⁹ See Global Roundtable for Sustainable Beef, *Home*, <http://grsbeef.org/> (last visited Feb. 28, 2015).

⁵⁰ See Roundtable on Sustainable Palm Oil, *How We Work*, <http://www.rspo.org/about/how-we-work> (last visited Feb. 28, 2015).

⁵¹ See Bitzer, *supra* note 15, at 274; Sullivan, *supra* note 22.

⁵² See Mike Hower, 8 Major Consumer Brands and WWF Form Alliance to Promote Plant-Based Plastics (2013), http://www.sustainablebrands.com/news_and_views/green_chemistry/mike-hower/8-major-consumer-brands-

automobile fuel cell, technology that is considered “zero emissions” and is expected to play an important part in meeting increasing fuel economy standards.⁵³

The purpose of competitor collaborations vary. For Honda and General Motors, collaboration is expected to bring fuel cell technology to market faster and more cheaply, and putting fuel cell vehicles on the road gives each company extra credit toward newer, more stringent federal fuel economy standards.⁵⁴ Thus collaboration can provide cost benefits, assist the company in meeting regulatory requirements, and improve public image.

In 2004, Coca-Cola initiated a partnership with Unilever and McDonald’s to develop more environmentally friendly refrigerants after being targeted by Greenpeace for the damage caused by fluorinated gases, which are commonly used in vending machines and refrigerators.⁵⁵ Pepsi subsequently joined the effort, now dubbed *Refrigerants, Naturally!*, to bring alternatives to market.⁵⁶ One may speculate that Pepsi’s efforts are both to avoid negative public relations comparisons with Coca-Cola, and to meet the demands of retailers who want to phase out the use of fluorinated gases.⁵⁷

Finally, in the highly competitive field of apparel design and retail sales, competitors may engage in information sharing in order to reduce human rights violations in shared factories. In 2004, after numerous reports of factories utilized by U.S. companies maintaining inhumane and unsafe factory conditions, the Fair Factories Clearinghouse (FFC) was formed to provide a safe means for sharing information about factories and as an efficient way to conduct group audits of factory adherence to labor standards and basic human rights.⁵⁸ The FFC, which includes as members LL Bean, Nike, Patagonia, REI and adidas Group,⁵⁹ focuses on the use of technology to share information across competitors, including a factory audit database and software that allows participants to connect with other companies to discuss audit results or sharing costs for remediation and compliance.⁶⁰

4. Creative Collaborations Across Industries

While most collaborative efforts fall into recognizable commercial categories focusing on one market sector, product, or commodity, some creative collaborations take different paths. The

[partner-wwf-form-organization-promote-pl](#). For more information about the BFA, see Bioplastic Feedstock Alliance, *Home*, <http://www.bioplasticfeedstockalliance.org/> (last visited Feb. 28, 2015).

⁵³ See Lindsay Brooke, For G.M. and Honda, a Fuel-Cell Partnership, N.Y. TIMES, Jul. 2, 2013, <http://www.nytimes.com/2013/07/03/business/for-gm-and-honda-a-fuel-cell-partnership.html> (last visited Feb. 28, 2015).

⁵⁴ *Id.*

⁵⁵ See Oliver Balch, *Why Rivals Like PepsiCo, Coca Cola, Unilever and P&G Are Joining Forces*, THE GUARDIAN, Oct. 23, 2014, <http://www.theguardian.com/sustainable-business/2014/oct/23/pepsioco-coca-cola-unilever-proctor-gamble-partner-business> (last visited Feb. 28, 2015).

⁵⁶ The partnership also includes Red Bull, and is supported by Greenpeace and the United Nations Environment Program (UNEP). See *Refrigerants, Naturally!, Who We Are*, at <http://www.refrigerantsnaturally.com/about-us/who-we-are.htm> (last visited Feb. 28, 2015).

⁵⁷ See WINSTON, *supra* note 1, at 214–15. Winston notes that the UK-based supermarket MNC Tesco is phasing out HFC refrigerants, creating an even greater market incentive for the collaborate effort to find a replacement.

⁵⁸ See Fair Factories Clearinghouse, *Vision & Mission*, <http://www.fairfactories.org/what-we-do/Mission.aspx> (last visited Feb. 28, 2015).

⁵⁹ See Fair Factories Clearinghouse, *Our Members*, <http://www.fairfactories.org/our-community/OurMembers.aspx> (last visited Feb. 28, 2015).

⁶⁰ See Fair Factories Clearinghouse, *An Introduction to Our Organization*, http://www.fairfactories.org/pdf/An_Overview_of_FFC_Software_Solutions_PDF.pdf (last visited Feb. 28, 2015).

Sustainable Enterprise Executive Roundtable (SEER), which was initiated by researchers from the University of Southern California Center for Sustainable Cities, brought together key personnel from companies along the value chain of consumer goods produced for U.S. markets.⁶¹ While the organizers of SEER welcomed anyone who wanted to participate, they consciously sought representation from companies with a record of achieving sustainability projects.⁶² Once assembled, the SEER group was encouraged to imagine ways to redesign key systems to become sustainable.⁶³ Ultimately, the group decided to focus on ways to reduce carbon throughout the “goods movement system,” with ideas ranging from consolidating trucking routes in China to reconsidering cargo shipping routes.⁶⁴

Another creative collaboration, known as Launch, was founded by NASA, Nike, the U.S. Agency for International Development (USAID) and the U.S. Department of State.⁶⁵ Launch seeks to bring together innovative thinkers on a worldwide scale to “positively [transform] the system of materials and manufacturing” and create systemic improvements in global sustainability.⁶⁶ Launch’s innovation efforts have included the areas of textiles, waste recovery, and energy, and are currently focused on green chemistry.⁶⁷

III. The Problem of Antitrust

A. What harm does antitrust law seek to address?

The Sherman Act prohibits “[e]very contract, combination...or conspiracy, in restraint of trade or commerce.”⁶⁸ Of course, every contract restrains trade in some way, yet the intent of the Act was clearly not to prohibit all contracts. This contradiction has left courts struggling to discern precisely what Congress *did* intend to prohibit.

In the seminal case *Standard Oil Co. v. United States*,⁶⁹ the Court considered the origin and history of the phrase “restraints on trade” and concluded that it reflected an anti-monopolistic sentiment focused on “contracts or acts” that were thought to “unduly diminish competition and hence to enhance prices.”⁷⁰ Rather than prohibiting all contracts, the Court found that the Sherman Act was intended to prohibit only those agreements “which were *unreasonably* restrictive of competitive conditions, [and which] had...been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce.”⁷¹ The *Standard Oil* court construed its responsibility as one of engaging in an “exercise of judgment” as to whether this standard had been breached.⁷²

If this “unreasonably restrictive” standard sounds vague, it is. Scholars and courts have struggled in the century since *Standard Oil* to apply this interpretation and determine precisely

⁶¹ Hilary Bradbury-Huang, *Sustainability by Collaboration: The SEER Case*, 39 ORGANIZATIONAL DYNAMICS 335 (2010).

⁶² See *id.* at 336.

⁶³ See *id.* at 338.

⁶⁴ *Id.* at 339.

⁶⁵ See Launch, *About Launch*, <http://www.launch.org/about> (last visited Feb. 28, 2015).

⁶⁶ *Id.*

⁶⁷ See Launch, *Challenges*, <http://www.launch.org/challenges> (last visited Feb. 28, 2015).

⁶⁸ Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

⁶⁹ 221 U.S. 1 (1911).

⁷⁰ *Id.* at 57.

⁷¹ *Id.* at 58 (emphasis added).

⁷² *Id.* at 60.

what type of conduct Congress would have found “unreasonably restrictive.” At the heart of this debate is a question of the basic purpose of the statute, which has been linked to the protection of competition, consumer welfare, and economic efficiency.⁷³

Beginning with consumer welfare, we find that it can be nearly impossible to define these terms without creating contradictions and inconsistencies.⁷⁴ Protecting consumer welfare could mean ensuring lower prices, but could also mean encouraging innovation, enhancing quality, or increasing variety.⁷⁵ At times, moreover, consumer welfare may require trading off price for innovation, or quality for variety. In *Jacobs v. Tempur-Pedic Int'l*,⁷⁶ for example, the Eleventh Circuit found that a minimum resale price agreement between a mattress manufacturer and retailers carrying its products was permissible, even though such agreements might have the result of increasing prices. “Higher prices alone are not the ‘epitome’ of anticompetitive harm...Rather, consumer welfare...is the animating concern of the Sherman Act.”⁷⁷

Chicago School scholars assert that the goal of antitrust should be the promotion of efficiency and economic welfare.⁷⁸ However, this standard is no less susceptible to multiple meanings, particularly when considering whether to prioritize long or short term efficiencies, and whether to look at individual product markets in isolation, or in connection with other industries.⁷⁹

The most commonly cited purpose of antitrust by courts and personnel within the Department of Justice is, quite simply, the preservation of competition.⁸⁰ As the Court stated in

⁷³ See Felix Oberholzer-Gee & Dennis A. Yao, *Antitrust: What Role for Strategic Management Expertise?*, 90 BOSTON U. L. REV. 1457, 1475 (2010) (“[O]n the most fundamental level, antitrust law is primarily concerned with consumer welfare.”); see also Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 570 (2012) (noting that prior to 1975, courts had never identified consumer welfare as a goal of antitrust law). See also *supra* notes 78, 80-85, and accompanying text.

⁷⁴ See *id.* at 573 (2012) (“[T]he way in which the consumer is defined leads to different interpretations of the consumer welfare standard.”).

⁷⁵ See *id.* at 573–76.

⁷⁶ 626 F.3d 1327 (11th Cir. 2010).

⁷⁷ *Id.* at 1339.

⁷⁸ See Stucke, 53 B.C. L. REV. at 563 (2012). It can be difficult to summarize the key principles of the Chicago School, which is characterized by empirical evidence, a faith in free markets, and a distaste for government intervention. See Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School’s Influence on Antitrust*, 5 COMPETITION POL’Y INT’L 1, 5–6 (2009) (defining the approach of the Chicago School of Economics). The Chicago School adherents used economic data to prove that practices previously considered anticompetitive were in fact efficient and pro-competitive. *Id.* at 6. See also William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1254 (1989) (“[D]espite the assertions of the Chicagoans to the contrary, the Court has never expressly adopted the standard of economic efficiency as the sole goal of antitrust.”).

⁷⁹ As Professor Christopher Leslie points out, the term “efficiency” is capable of two meanings, but only one has been endorsed by the Supreme Court. Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 CAL. L. REV. 243, 253 (1993). Productive efficiency, which has been recognized as a legitimate goal of antitrust law, refers to “efficiency within a single industry, involving the minimization of unit costs of goods and services within individual firms and the exploitation of economies of scale.” *Id.* Allocative efficiency, on the other hand, refers to efficiency across industries. See *id.* Importantly for the topic at hand, short-term gains in productive efficiency may diminish long-term allocative efficiency, as it does not allow for consideration of where aggregate societal resources should be allocated.

⁸⁰ “At a minimum it is plain that the antitrust laws were intended to promote and preserve competitive markets.” William K. Jones, *Concerted Refusals to Deal and the Producer Interest in Antitrust*, 50 OHIO ST. L.J. 73, 88 (1989). “[A]ntitrust enforcement preserves the kind of competitive environment that requires firms to innovate in both product offerings and business models in order to prosper. Competition is the bedrock of our economy, and we should be dubious of attempts to avoid it.” Varney, *supra* note 9, at 777. See also Leslie, *supra* note 79, at 256 (“To

National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma,⁸¹ “Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.”⁸² Or, as stated in *Northern Pacific Railway v. United States*,⁸³ “[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . .”⁸⁴ Anticompetitive agreements include those that “reduce output, raise price, or diminish competition with respect to quality, innovation, or consumer choice.”⁸⁵

The problem with applying this standard is determining a fair definition of competition. Some define competition as the unrestrained freedom of market forces.⁸⁶ Yet the very nature of antitrust law constitutes government interference into market forces, preventing agreements that might result in harm to consumers. Moreover, on notable occasions, courts have been willing to sacrifice competition to broader notions of consumer welfare or efficiency.⁸⁷

In *Appalachian Coals, Inc. v. United States*,⁸⁸ a collaborative agreement by coal producers that was clearly a restraint on market forces and limitation to competition among the members of the agreement was not found to be unreasonable. In that case, the Court stressed the failure of the market to ensure adequate compensation to coal producers, and the flexibility of the statute in such circumstances:

“The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness [T]hey do not seek to establish a mere delusive liberty [] by making impossible . . . the adoption of reasonable measures to protect . . . commerce . . . from injurious and destructive practices”⁸⁹

The history of antitrust jurisprudence reveals that courts trade off the goals of free market forces, efficiency, competition, and consumer welfare as they deem necessary. In *United States v. Brown University*,⁹⁰ a group of colleges made agreements about how to share financial aid in a manner that the district court characterized as price fixing. However, on review, the Third Circuit did not presume that the presence of a price fixing agreement, though clearly a restriction on market forces, constituted an antitrust violation, particularly where it could be seen that the presence of the agreement could result in benefits to consumers.⁹¹ In *NCAA v. Board of Regents*, the Court declined to reject per se a price fixing restraint that limited competition within the

the extent that competition and efficiency come into conflict, efficiency is irrelevant because competition is the sole decision variable.”); Maurice E. Stucke, *Reconsidering Competition*, 81 MISS. L.J. 107, 111 (2011) (citing treatises identifying the promotion of competition as the general goal of antitrust laws).

⁸¹ 468 U.S. 85 (1984) [hereinafter NCAA v. Board of Regents].

⁸² *Id.* at 104.

⁸³ N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

⁸⁴ *Id.* at 4.

⁸⁵ Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1264 (2008).

⁸⁶ See Stucke, *supra* note 80, at 112–16.

⁸⁷ Leslie, *supra* note 79, at 257, 264–67 (pointing to *Broadcast Music* and *NCAA v. Board of Regents* as examples of cases in which courts have explicitly favored efficiency over competition).

⁸⁸ 288 U.S. 344 (1933).

⁸⁹ *Id.* at 360.

⁹⁰ 5 F.3d 658 (1993).

⁹¹ *Id.* at 675.

context of college athletics because it found that the absence of such an agreement could result in a product (televised athletic events) not being available at all.⁹²

Although consumer welfare, efficiency, and competition dominate antitrust jurisprudence, they are not the sole aims of antitrust policy.⁹³ Lawyers and scholars have long recognized alternative social and political goals of antitrust, including decentralization of power.⁹⁴ Complicating matters further, scholars have also recognized that competition does not always create desired outcomes for consumers or markets.⁹⁵ Antitrust policies promoting consumer surplus can favor short-run price reductions over long-run efficiency gains, which may be counter to the interests of consumers.⁹⁶

As a result of this complex web of antitrust goals, courts must constantly assess the real world impacts of collaborative agreements to determine if they promote consumer welfare, enhance competition, and/or improve economic efficiency, bearing in mind that these goals may be traded against each other according to the fact scenario at hand. The obvious benefit of such a flexible legal regime is that it is able to respond to changing circumstances and assess the actual economic impacts of collaborative agreements. The downside is that it leaves judges without clear rules to be applied to their assessment of what constitutes an “unreasonable” restraint on trade, and puts courts in the dubious position of acting as experts on the economic outcome of business arrangements. Perhaps because of the very openness of the legal landscape, courts have developed a system of interpretation that categorizes agreements as “per se” violations of the Act, or those subject to the “rule of reason.” These categories of analysis are explained next.

B. Application of Antitrust Policies

As noted above, the Sherman Act proscribes “unreasonable” restraints on trade, without providing much detail as to what should or should not be considered reasonable. For a number of reasons, including a need for judicial economy and a desire to keep judges from being forced to speculate as to the real world results of business arrangements, courts have developed a legal scheme dividing agreements in to those that are considered *per se* unacceptable, and those that must be examined under the so-called “rule of reason.”

This division is important for the investigation of the application of antitrust laws to socially responsible collaborations because agreements that fall into the *per se* category are deemed impermissible without consideration of the particular facts at issue. When a court considers an agreement under the rule of reasonable approach, on the other hand, it will consider all relevant facts, including whether the agreement at issue achieves a procompetitive outcome. As we will see in Part IV.A, efforts to avoid *per se* categorizations are one of the driving forces that guide the development of socially responsible collaborations.

⁹² See *NCAA v. Board of Regents*, 468 U.S. at 101. While ultimately finding that the NCAA’s practices had anticompetitive effects, the Court noted, “a joint selling arrangement may be so efficient that it will increase sellers’ aggregate output and thus be procompetitive,” and “a restraint in a limited aspect of a market may actually enhance marketwide competition.” *Id.* at 103.

⁹³ See Stucke, 81 MISS. L.J. at 112–16 (“[E]nhancement of consumer choice is a traditional objective of the antitrust laws.”).

⁹⁴ See Stucke, 53 B.C. L. REV. at 564–65.

⁹⁵ See Stucke, 81 MISS. L.J. at 128.

⁹⁶ See Dennis W. Carlton, *Does Anti-trust Need to Be Modernized?*, 21 J. ECON. PERSP. 155, 157, 156-158 (2007) (analyzing the difference between a “consumer surplus” and a “total surplus” and arguing that focusing on consumer surplus can lead to long-term inefficiencies).

1. Per se Rule

The per se rule was explained in some depth in *Northern Pacific Railway v. United States*.⁹⁷ In that case the Court considered a tying agreement⁹⁸ whereby Northern Pacific required those to whom it granted certain land rights to ship commodities produced on those lands over its lines.⁹⁹ In holding the tying arrangement per se invalid, the court explained that, despite the seeming flexibility of the Sherman Act, certain agreements would be categorically rejected, without an elaborated inquiry into the arrangement.

“[C]ertain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the types of restraints which are proscribed by the Sherman Act more certain . . . it also avoids the necessity for an incredibly complicated and prolonged economic investigation . . . to determine . . . whether a particular restraint has been unreasonable.”¹⁰⁰

The per se rule recognizes that courts aren’t always good at figuring out complicated economic impacts of agreements and furthers judicial economy, eliminating a need for courts to extensively review the purpose and potential economic impact of every questionable agreement.¹⁰¹ Agreements generally subject to the per se rules are price fixing,¹⁰² tying arrangements,¹⁰³ group boycotts,¹⁰⁴ and market division.¹⁰⁵ In some cases, courts have applied the per se rule in cases of joint efforts by firms to systematically disadvantage competitors.¹⁰⁶

Despite the seeming clarity of the per se rule, the Court has the ability to interpret and classify conduct in a manner to avoid per se determination, or indeed to change its mind

⁹⁷ 356 U.S. 1, 5 (1958).

⁹⁸ A tying agreement is one in which a producer agrees to sell a product on the condition that the buyer also purchases a different “tied” product. *See id.* at 6.

⁹⁹ *See id.* at 2.

¹⁰⁰ *Id.* at 5.

¹⁰¹ See Frank H. Easterbrook, *Anticipating Antitrust’s Centennial: Comparative Advantage and Antitrust Law*, 75 CAL. L. REV. 983, 984 (1987) (describing purpose of *per se* categorization); cf. Lemley & Leslie, *supra* note 85, at 1211 (suggesting that courts waste substantial administrative time deciding which category to place cases in).

¹⁰² *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224 (1940) (finding oil companies’ buying programs created a pricing floor in the market, which constituted price fixing and was a *per se* violation of the Sherman Act). *See also Nat’l Macaroni Manufacturers Ass’n v. Fed. Trade Comm’n*, 345 F.2d 421, 427 (1965) (finding association’s recommendation to reduce the percentage of durum wheat in macaroni product constituted illegal price fixing).

¹⁰³ *See N. Pac. Ry. Co.*, 356 U.S. at 5.

¹⁰⁴ *Fashion Originators’ Guild v. Fed. Trade Comm’n*, 312 U.S. 457 (1941) (agreement by members of fashion guild to boycott stores selling copies of certain designs forbidden under Sherman Act).

¹⁰⁵ *See N. Pac. Ry. Co.*, 356 U.S. at 5 (citing *U.S. v. Addyston Pipe & Steel Co.*, 337 U.S. 293, 305-306 (1949)); *see also* Jeffrey J. Jarmuth, *Characterizing Horizontal Market Division Agreements Under the Ancillary Restraints Doctrine*, 16 LOYOLA UNIV. CHICAGO L.J. 775, 776-777 and accompanying notes (1985) (setting forth basic rules for analysis of market division agreements).

¹⁰⁶ Systematic disadvantage can come from “either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.” *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985). *See also Toys “R” Us, Inc. v. Fed. Trade Comm’n*, 221 F.3d 928, 936-37 (7th Cir. 2000) (explaining factors that are considered in determining if firm has used market power to disadvantage a competitor).

regarding whether per se determination should be applied to a particular arrangement.¹⁰⁷ In *State Oil Company v. Barkat U. Khan*,¹⁰⁸ despite settled precedent holding that price fixing is a per se violation, the Court refused to apply the per se rule to a maximum price fixing arrangement between an oil company and gas station operators, where it believed the agreement had the potential to result in lower prices for consumers.¹⁰⁹

Today, the Court has stated a “reluctance” to apply the per se rule unless the impact of challenged activities is clear.¹¹⁰ A new “quick look” category of analysis has been described, in which a court will take an abbreviated look at the facts of a case before determining whether to categorize it as per se or not.¹¹¹ However, the court has been clear that social welfare concerns cannot, in and of themselves, save a challenged practice, whether it is applying a per se analysis or the rule of reason.¹¹²

2. Rule of Reason

The alternative to a per se case is one analyzed according to the rule of reason. In these cases, the plaintiff bringing the complaint has the initial burden to show “adverse, anti-competitive effects within the relevant product and geographic markets.”¹¹³ They can do this either with proof of “actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services...[or] proof of the defendant’s ‘market power’ instead.”¹¹⁴ Then the burden shifts for the plaintiff to show that the “challenged conduct promotes a sufficiently pro-competitive objective.”¹¹⁵

A rule of reason cases involves a factual deep dive into the specific industry involved and the nature and purpose of the agreement. “[T]he court must ordinarily consider the facts peculiar to the business . . . its condition before and after the restraint . . . the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.”¹¹⁶

¹⁰⁷ See Leslie, *supra* note 79, at 248–49.

¹⁰⁸ 522 U.S. 3 (1997).

¹⁰⁹ See *id.* at 15 (“Consumers benefit from low prices, however those prices are set, so court is cautious not to object to practices that lower prices.”).

¹¹⁰ *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (“[W]e have expressed reluctance to adopt per se rule...‘where the economic impact of certain practices is not immediately obvious.’” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997))).

¹¹¹ See Lemley & Leslie, *supra* note 85, at 1215–16.

¹¹² See *United States v. Brown University et al.*, 5 F.3d 658, 669 (3d Cir. 1993) (“A restraint on competition cannot be justified solely on the basis of social welfare concerns.”).

¹¹³ See *United States v. Brown University et al.*, 5 F.3d 658, 668 (3d Cir. 1993).

¹¹⁴ *Id.* at 668.

¹¹⁵ *Id.* at 669 (emphasis added).

¹¹⁶ *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1981). In the Antitrust Guidelines for Collaborations Among Competitors, the U.S. Department of Justice and Federal Trade Commission outline the key questions they ask when undertaking a rule of reason analysis: “Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.” U.S. Dep’t of Justice and Fed. Trade Comm’n, Antitrust Guidelines for Collaborations Among Competitors 1 (1999), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors/ftcdojguidelines.pdf> [hereinafter Competitor Collaboration Guidelines].

Unfortunately, a lack of consistency in the application of the per se/rule of reason analysis has left the legality of cooperative arrangements unclear. For example, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*¹¹⁷ the Court reviewed a decision by the Ninth Circuit that a cooperative buying group's expulsion of a member constituted a group boycott, and was therefore required to be rejected under a per se analysis.¹¹⁸ After acknowledging significant confusion over the proper treatment of group boycotts, the Court made it clear that, although it would continue to categorize *some* such practices as per se forbidden, others would be analyzed differently:

"[N]ot every cooperative activity involving a restraint or exclusion will share with the per se forbidden boycotts the likelihood of predominantly anticompetitive consequences."¹¹⁹ While the exclusion of a member of a buying group *could* have been considered a concerted refusal to deal, the Court found the specific facts of the case suggested the cooperative buying arrangement at issue would actually *increase* efficiency and competition.¹²⁰ Also, because the cooperative lacked market power or "exclusive access to an element essential to effective competition," the Court found that the practice of expelling the member from the cooperative did not raise competitive concerns.¹²¹

Although the Court has signaled a willingness to examine the facts underlying some previously forbidden practices, defendants cannot seek to show that competition itself is unreasonable, only that the particular arrangement will not unreasonably restrain competition.¹²² This, of course, creates the difficult task of determining what a court might find "procompetitive." Some price fixing arrangements have been found procompetitive where they result in a product being available that would otherwise not be available,¹²³ where necessary to

¹¹⁷ 472 U.S. 284 (1985).

¹¹⁸ See *id.* at 288.

¹¹⁹ *Id.* at 295.

¹²⁰ See *id.* at 295. The Court identified economies of scale in purchasing and warehousing, ready access to goods that might otherwise not be available, cost savings, and order-filling guarantees as examples of the ways the arrangement would increase efficiencies and benefit customers. *Id.*

¹²¹ *Id.* at 294–95, 298 ("The mere allegation of a concerted refusal to deal does not suffice because not all concerted results to deal are predominantly anticompetitive."). In the conclusion of the case, the Court adds the following requirement to future, similar cases: "When the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition." *Id.* at 298. The proper characterization of buying groups remains challenging. Michael Lindsey argues that a buying group is permissible if it increases economic efficiency (a la Northwest Stationers), but not okay if it becomes powerful enough to exert monopsony power. Michael A. Lindsay, *Antitrust and Group Purchasing*, 23(3) ANTITRUST 66, 66 (Summer 2009), available at http://www.dorsey.com/files/upload/antitrust_group_purchasing.pdf. Based on Business Review Letters (BRLs) issued by the U.S. Department of Justice Antitrust Division, Lindsey suggests that a purchasing share of 35% is unlikely to raise concern, but 60% or more likely to raise concern. *Id.*

¹²² See Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 695–96 (1978).

¹²³ See *NCAA v. Board of Regents*, 468 U.S. 85, 95, 102 (1984) (defining the relevant product as "live college football television" and stating that the NCAA "enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.").

remedy market failures that make it impossible for producers to establish reasonable prices,¹²⁴ or where they result in lower prices for customers.¹²⁵

On the other hand, courts have rejected calls for consideration of the social value or social purpose of a collective agreement in the rule of reason analysis. In *Federal Trade Commission v. Wallace*,¹²⁶ a group of retail coal dealers worked in concert to prevent so-called “irregular” coal dealers from receiving supplies from wholesalers and producers, in an effort to protect customers. Rejecting without consideration claims of customer welfare, the court notes, “[I]t is not the prerogative of private parties to act as self-constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to enforce by drastic measures their conceptions thus informed.”¹²⁷ Although the intent behind an agreement may be relevant to a court’s determination of its likely consequences, an agreement that restrains competition will not be saved because it was motivated by ethical concerns or social responsibility.¹²⁸

After reviewing recent rule of reason jurisprudence, antitrust scholars have aptly concluded that 1) there has been a trend away from per se analyses toward rule of reason approach; and 2) “the Court can manipulate standards to remove the per se label.”¹²⁹ This increased flexibility, however, does not come without a price. Professor Stucke argues the vagueness of the rule of reason approach leads to confusion in lower courts and changing notions of the policy objectives sought to be achieved by an application of antitrust policies.¹³⁰ Judge Easterbrook of the Seventh Circuit Court of Appeals suggests that the reliance on a rule of reason approach puts courts in the position of judging the economic outcome of business practices, a role they are ill-equipped to handle.¹³¹ For businesses, the increased reliance on the rule of reason *could* allow for the pursuit of agreements that would otherwise been prohibited under a per se approach. But for organizations seeking to avoid potential antitrust liability, the increased flexibility is unlikely to encourage more risky behavior.¹³²

The impact of the interaction between the per se and rule of reason approaches can be seen in the following hypothetical. Imagine a coffee-roasting cooperative wants to expel a

¹²⁴ See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933) (“the existing situation prompted defendants to make, and the [Sherman Act] did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce”), *overruled in part on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

¹²⁵ See *State Oil Company v. Barkat U. Khan*, 522 U.S. 3, 15 (1997) (concluding that maximum resale prices are legal if they satisfy the rule of reason and that “[L]ow prices, we have explained, benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition” (citation and internal quotation marks omitted)).

¹²⁶ 75 F.2d 733 (8th Cir. 1935).

¹²⁷ *Federal Trade Comm’n v. Wallace*, 75 F.2d 733, 737 (8th Cir. 1935).

¹²⁸ See *Chi. Bd. of Trade*, 246 U.S. at 238 (noting that the Court questions intent, “not because a good intention will save an otherwise objectionable regulation . . . but because knowledge of intent may help the court to interpret facts and to predict consequences”).

¹²⁹ See *Leslie*, *supra* note 79, at 247–48, 248 (1993); see also *Lemley & Leslie*, *supra* note 85, at 1225 (“[O]ne of the problems with categorical analysis is that the boundaries of categories shift without logic or warning.”).

¹³⁰ See *Stucke*, *supra* note 73, at 618–21 (arguing that courts trade off policy goals and legal rules when applying antitrust laws, and that the shifting nature of that trade-off is confusing and inefficient).

¹³¹ See *Easterbrook*, *supra* note 101, at 983, 984.

¹³² The potentially chilling effect of antitrust policy was recognized by the U.S. Department of Justice and Federal Trade Commission in the *Antitrust Guidelines for Collaborations Among Competitors*: “[A] perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.” Competitor Collaboration Guidelines, *supra* note 116, at 1.

member that has been found to engage in certain practices that violate human rights, such as the use of child labor. Imagine the cooperative also wants to refuse to deal with such (former) member in the future. Under the *per se* approach, a group boycott of an individual roaster—a direct competitor—would likely be prohibited, regardless of the ethical motivation of the other cooperative members. On the other hand, under the rule of reason approach, a court could look more closely at the market power of the cooperative and consider if the expelled member would be restricted from access to the relevant market. The court might also consider what administrative process had been applied, the reason for the expulsion, the motives of the other cooperative members, and the impact on the relevant market.

Although under the rule of reason the decision of the cooperative might have been permitted, given the risk of *per se* treatment and the lengthy and complex litigation that would likely result in either case, it would be far easier for the cooperative not to expel the member at all, or to continue to deal with the member after expulsion. This tendency to “chill” certain practices by socially responsible collaboratives is discussed in more detail in Part IV.A.

C. Why Not Simplify and Standardize Antitrust Jurisprudence?

The barriers to the simplification and standardization of antitrust jurisprudence are significant. First, as the statutory language of the Sherman Act and the foregoing discussion makes clear, any agreement or contract has the potential to restrain competition and trade, and it may not be immediately apparent what the effect of various agreements would be. The first step to developing standards to apply to these complex business and legal arrangements, particularly those rooted in socially responsible business practices, would be to determine the policy goals to be achieved. Yet as discussed in Part III.A, identifying and prioritizing policy goals can be challenging.

Even if we assume, as courts often do, that the purpose of antitrust law is to promote competition and protect consumers, development of bright-line standards remains difficult because the operations of markets is enormously complex. For example, take one of the most basic antitrust trust assumptions: collaborative agreements that tend to lower prices are beneficial for customers.¹³³ While examining this assumption, researchers Arghya Ghosh and Hodaka Morita discovered that collaborative arrangements may lower prices for some consumers, but may also raise prices for consumers of non-collaborating firms, and may ultimately allow collaborating firms to increase prices through collusion.¹³⁴ At the same time, however, Ghosh and Morita’s research demonstrates that, when viewed at the aggregate level, competitor collaborations can increase consumer surplus and total surplus, therefore benefitting consumers.¹³⁵

Other econometric analyses reveal similarly complicated results. Contrary to the common assumption that production cartels increase industry profits and lower consumer welfare, research from the late 1980s and early 1990s suggested that when firms colluded in some stages of product development but competed in others, consumers benefited.¹³⁶ Research conducted by

¹³³ See *State Oil Co. v. Barkat U. Khan & Khan & Associates, Inc.*, 522 U.S. 3, 15 (1997) (“Consumers benefit from low prices, however those prices are set, so court is cautious not to object to practices that lower prices.”).

¹³⁴ See Ghosh & Morita, *supra* note 26, at 138.

¹³⁵ See *id.* at 138.

¹³⁶ See Andrew Brod & Ram Shivakumar, *Advantageous Semi-Collusion*, 47 J. INDUS. ECON. 221, 230 (1999); Akihiko Matsui, *Consumer-Benefited Cartels Under Strategic Capital Investment Competition*, 7 INT’L J. INDUS. ORG. 451, 467 (1989) (arguing that larger consumer surplus may arise from a producers’ cartel if output is

Andrew Brod and Ram Shivakumar, however, finds an even more complicated result. When firms collaborate at the research and development stage and technological information is transmitted between firms, collusion can either *benefit* both firms and consumers or *hurt* both firms and consumers, depending on the extent of the information shared and the types of products developed. As the study authors explain, “Cartel members and consumers benefit when [information] spillovers are moderate to large and the products are relatively but not perfectly good substitutes. Cartels hurt both firms and consumers when spillovers are small and the products are moderately substitutable.”¹³⁷

When it comes to product development, there is similarly no lack of argument by experts over the appropriate role of antitrust policies. Some recommend little intervention, to protect nascent innovation, while others believe less regulation of competitive markets will produce greater innovation.¹³⁸ Professors Katz and Shelanski recommend that courts take a deep dive into the facts of cases involving innovation.¹³⁹ Similarly, Brod and Shivakumar suggest that antitrust policy would be most effective “when authorities have information about the extent of [information] spillovers and the degree of product differentiation.”¹⁴⁰ Yet the suggestion that prosecutors and courts apply such detailed analyses to collaborative agreements seems naïve, at best. As Judge Easterbrook points out, courts lack the training and incentives to adequately forecast or analyze the outcome of complex economic relationships.¹⁴¹ Moreover, it strains the purpose and expertise of the court system to ask judges to become fact-finding economists with little policy guidance other than a vague notion of maximizing consumer welfare or protecting competition.

In sum, antitrust law requires judges and prosecutors to consider competition, consumer welfare, economic efficiency, and consumer choice, but provides little direct guidance about how to do so, what factors to prioritize, or even what time scale should be considered. In addition, the complexity of economic markets makes it enormously difficult for courts to predict the outcome of collaborative agreements. While these intricacies may be frustrating to legal scholars and judges, the glaring lack of legislative guidance allows courts to guide economic policy in a manner that evolves to meet changing policy needs. Antitrust policy is not static, and does not have to be. The difficulty lies in shaping a policy that is predictable and accords sufficient weight to existing precedent, while at the same time being responsive to changing conditions.

IV. Examining the Impact of Antitrust on Socially Responsible Collaborations

allocated on the basis of capital equipment) (1989); Chaim Fershtman & Neil Gandal, *Disadvantageous Semicollusion*, 12 INT'L J. INDUS. ORG. 141, 141 (1994) (“[C]ollusion in the product market may yield lower overall profits because it intensifies competition in the other dimensions of the interaction.”).

¹³⁷ Brod & Shivakumar, *supra* note 136, at 230. The authors here use the term “information spillovers” to mean “the transmission of useful technological information from one firm to others.” *Id.* at 222.

¹³⁸ See Oberholzer-Gee & Yao, *supra* note 73, at 1466.

¹³⁹ Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1 (2007) (page number not available) (“[A]ntitrust law’s presumption that greater competition...brings improved market performance and increased consumer benefits...is reasonably well-accepted for consumer welfare effects due to changes in short-term price and output levels [but] it is much less accepted for consumer welfare effects due to changes in innovation, the flow of new products, and other long-term benefits. In some instances, innovation may be greatest when concentration is greater.”).

¹⁴⁰ Brod & Shivakumar, *supra* note 136, at 230.

¹⁴¹ See Easterbrook, *supra* note 101, at 984 (“After all, judges are not selected for business acumen and are not penalized for bad decisions.”).

As we have seen, antitrust law broadly prohibits restraints on trade. Courts have refined this broad prohibition to be limited to those agreements that have an unreasonable impact on competition, customer welfare, or economic efficiency. They have further enumerated certain types of agreements that are considered per se unreasonable, and others that will be examined on a case-by-case basis. The question addressed in this part is the extent to which this legal regime directly inhibits socially responsible collaborations.

A. Businesses are Unlikely to Engage in Agreements Categorized as Per se Prohibited

Part III.B.1 describes those practices considered by courts to be per se prohibited under antitrust law. When faced with one of these agreements, courts are generally not expected to engage in any analysis of the facts of the case, or to consider the potential pro-competitive impact or consumer benefits that might result from the arrangement. Naturally, this strong prohibition has a chilling effect on businesses considering entering into any such agreements.

This is not to say that such agreements do not exist, perhaps because the Supreme Court has shown itself to be willing to apply the per se rule selectively.¹⁴² Witness the *Broadcast Music* case, in which organizations serving as clearinghouses for copyright owners created blanket licenses that appeared to the Second Circuit to be clear examples of price fixing, which required per se treatment and a finding of liability.¹⁴³ On review, the Supreme Court reversed the Second Circuit, refusing to apply a strict per se analysis and instead considering the “purpose of the practice” and whether that practice was simply a “naked restraint of trade with no purpose except stifling of competition” or if it in some way enhanced the operation of the market.¹⁴⁴ In *NCAA v. Board of Regents*, the Court similarly allowed a price-fixing agreement to proceed under a rule of reason analysis, based on the Court’s conclusion that in that case, significant cooperation and collaboration by competitors was necessary to preserve the market in question.¹⁴⁵

While the Supreme Court has demonstrated a willingness to examine certain cases under the rule of reason, the categorical per se analysis has by no means disappeared. As Professors Lemley and Leslie put it, “These separate categories continue to serve valid enforcement purposes and, in any event, authoritative Supreme Court decisions continue to recognize the distinction.”¹⁴⁶ As such, businesses will be extremely wary about undertaking agreements involving practices generally considered to obtain per se treatment—particularly price fixing, group boycotts, and exchanges of competitively sensitive price and output information. Unfortunately, the specter of per se treatment inhibits the precise kinds of socially responsible collaborations that could have the most impact.

1. Price Fixing

¹⁴² For example, in *State Oil Co.*, a case involving vertical maximum price fixing by an oil company, the Supreme Court similarly overruled a previous case applying per se analysis to such practices, noting that “[i]n the area of antitrust law, there is...[an interest] in recognizing and adapting to changed circumstances.” 522 U.S. 3, 21 (1997). It went on to hold that future cases of vertical maximum price fixing would be subjected to the rule of reason, to determine which situations amounted to “anticompetitive conduct.” *Id.* at 22.

¹⁴³ See *Broadcast Music*, 441 U.S. at 5–8.

¹⁴⁴ *Id.* at 19–20.

¹⁴⁵ See 468 U.S. at 117.

¹⁴⁶ Lemley & Leslie, *supra* note 85, at 1221.

Despite recent shifts in antitrust policy, the formal position on price fixing remains clear: “Horizontal price fixing represents the epitome of per se illegal conduct.”¹⁴⁷ While the edges of the doctrine may have become blurred by cases such as *Broadcast Music*, the Supreme Court’s decades-old opinion in the *Socony-Vacuum* case remains valid today: “a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.”¹⁴⁸

The basis for this categorical rejection is purportedly rooted in economics. Antitrust scholars state confidently that, “cartel agreements to fix a minimum price, and agreements to artificially reduce output,” have been empirically proven to “raise prices, thereby reducing consumer welfare and creating inefficiency.”¹⁴⁹ However, this argument assumes that, prior to the price-fixing agreement, markets were functioning efficiently and fairly, in non-monopoly conditions.¹⁵⁰ These basic assumptions simply cannot be made in global commodity markets.¹⁵¹ The international food sector, for example, has seen increasing consolidation, oligopolistic conditions in developing nations, and a rise in state trading enterprises.¹⁵² In the coffee commodity market, much has been written about the “coffee paradox,” in which prices paid to farmers continue to fall while prices to consumers rise, as a result of market imbalances and concentration in the hands of consuming nations and a small handful of multinational coffee roasters.¹⁵³ The situation for coffee farmers in developing nations can only be characterized as dire: the market is characterized by a lack of regulation, extreme environmental degradation, poor working conditions, high volatility of prices, smaller yields, and falling prices.¹⁵⁴ Meanwhile, the concentration of market power by coffee roasters has led to *increasing* retail prices for consumers.¹⁵⁵

¹⁴⁷ *Id.* at 1225.

¹⁴⁸ *Socony-Vacuum*, 310 U.S. at 223.

¹⁴⁹ Lemley & Leslie, *supra* note 85, at 1267.

¹⁵⁰ See Toys ‘R’ Us, Inc. v. Federal Trade Commission, 221 F.3d 928, 930 (7th Cir. 2000) (noting that antitrust laws “aim to preserve and protect competition in economically sensible markets”); Steve McCorriston, *Imperfect Competition and International Agricultural Commodity Markets* 134, 159, in *AGRICULTURAL COMMODITY MARKETS AND TRADE* (Alexander Sarris & David Hallam, eds., 2006) (“Most trade policy analysis of agricultural markets assumes perfect competition. This clearly conflicts with evidence relating to market structure in developed countries.”).

¹⁵¹ Note that the Sherman Act applies extraterritorially to conduct that has a “substantial effect” on U.S. commerce. *Hartford Fire Insurance v. California*, 509 U.S. 764, 796 (1993) (“[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”).

¹⁵² See McCorriston; *supra* note 150, at 137–39, 143–44, 158. State trading enterprises (STEs) may be privately owned, but they have been characterized as “state monopolies/monopsonies” because of exclusive trading rights accorded them by the associated state. *See id.* at 144.

¹⁵³ See Hyunsoo Kang & P. Lynn Kennedy, *Empirical Evidences from a Coffee Paradox: An Export Supply/Price Asymmetry Approach*, 32 J. RURAL DEV. 107, 108–09 (2009) (defining the “coffee paradox” and providing empirical data demonstrating the rise in retail price and decline in export price), available at <http://purl.umn.edu/90687>; see also Stefano Ponte, *The ‘Latte Revolution’? Regulation, Markets and Consumption in the Global Coffee Chain*, 30 WORLD DEV. 1099, 1104–10 (2002) (analyzing the global coffee supply chain and demonstrating the increasing concentration of market power in the hands of consuming countries, and more specifically, in the hands of the coffee roasters).

¹⁵⁴ See Verena Bitzer, Mara Francken & Pieter Glasbergen, 18 GLOBAL ENVTL. CHANGE 271, 271–72 (2008).

¹⁵⁵ See Kang & Kennedy, *supra* note 153, at 109; Frank Galtier, Giovanni Belletti & Andrea Marescotti, *Factors Constraining Building Effective and Fair Geographic Indications for Coffee: Insights from a Dominican Case Study*, 31 DEV. POL’Y REV. 597, 589 (2013) (attributing the “coffee paradox” to the value of coffee originating in

In a clearly failed market, should an agreement among producers to maintain certain environmental, labor, and price standards be seen as an “unreasonable” restraint on trade? What if such an agreement could increase the market power of the producers, decrease the market power of the buyers/roasters, and ultimately decrease retail prices to consumers? What if minimum pricing could decrease price volatility, and thereby reduce retail prices?¹⁵⁶

Of course, we have to speculate as to the economic effect of such agreements, because coffee growers have been repeatedly warned not to form such collaborations for fear of antitrust prosecution.¹⁵⁷ Existing partnerships that allow farmers to receive price premiums and stabilize prices through long-term contracts have been explicitly limited in scope in order to avoid antitrust concerns.¹⁵⁸ Producers have also tried to avoid antitrust problems by using flexible, negotiated price premiums associated with specific production standards.¹⁵⁹ Unfortunately, these techniques undermine the recoverability of costs associated with such standards, and may put farmers at disadvantage.¹⁶⁰ Meanwhile “[h]igh levels of concentrated, inequitable bargaining power, imperfect information, poor infrastructure and [the] public goods problems”,¹⁶¹ raise serious questions as to why we would blindly apply per se antitrust rules in such markets, where it appears that antitrust laws are affording protection to monopoly roasters and state commodity monopolies at the expense of small farmers and retail customers in the United States.

The purpose of a per se standard is to avoid lengthy, fact-specific analyses of practices with a “pernicious effect on competition and lack of any redeeming virtue.”¹⁶² Yet antitrust cases have also made it clear that the Court *can* consider the economic realities of an agreement, regardless of whether it involves a per se prohibited practice.¹⁶³ In *Appalachian Coals, Inc. v. United States*,¹⁶⁴ the Court stressed the importance of the notion of economic “freedom” and the role of the Sherman Act in affording protection from “the subversive or coercive influences of monopolistic endeavor.”¹⁶⁵ Accordingly, the Court did not find a combination of producers of

the roasting and blending of coffees, which encourages the cycle of decreasing commodity prices and increasing retail prices).

¹⁵⁶ See DAVIRON, *supra* note 5, at 197 (“The key to economic sustainability for organic conversation is to find a reliable minimum market year after year.”). Daviron explains that lack of a fixed premium for certain organic and ethically sourced coffee programs, including the Starbucks CAFÉ initiative, make it impossible for producers to be assured that they can make back the cost of working to meet the sustainability criteria. *Id.* at 197. See also JASON POTTS, MULTI-STAKEHOLDER COLLABORATION FOR A SUSTAINABLE COFFEE SECTOR: MEETING THE CHALLENGE OF U.S. ANTI-TRUST LAW 14–15 (2004) (noting predictability and security for producers could “reduc[e] . . . transaction costs” and increase market efficiency), available at http://www.iisd.org/pdf/2004/sci_multi-stakeholder_collaboration.pdf.

¹⁵⁷ See *id.* at 14.

¹⁵⁸ See Bitzer; *supra* note 15, at 277.

¹⁵⁹ See *id.* at 279.

¹⁶⁰ See *id.*

¹⁶¹ See POTTS, *supra* note 156, at 4.

¹⁶² *N. Pac. Ry. Co.*, 356 U.S. at 5.

¹⁶³ See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 14 (1979) (“The Sherman Act has always been discriminately applied in the light of economic realities.”); see also *NCAA v. Board of Regents*, 468 U.S. at 101 (rejecting per se analysis because the agreement involved an “industry in which horizontal restraints on competition are essential if the product is to be available at all”).

¹⁶⁴ 288 U.S. 344 (1933).

¹⁶⁵ *Id.* at 359.

coal that eliminated competition among the producers and had the result of stabilizing prices was an antitrust violation, despite clear potential to create some restraint in the market.¹⁶⁶

The language used by the Court in the *Appalachian Coal* case would be directly applicable in a case involving a combination of small coffee farmers seeking some measure of price stability and an increase in bargaining power against large buyers. “When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade.”¹⁶⁷

A slightly different type of price-fixing case took place in Europe but is nonetheless instructive.¹⁶⁸ In 2011, industry giants Unilever and Proctor and Gamble, were fined over \$400M by the European Commission for coordinating efforts to maintain market share during a transition to a new, more environmentally sustainable form of laundry detergent.¹⁶⁹ Because the new detergent was highly concentrated, the manufacturers were concerned that the container’s smaller size but similar or potentially higher cost would put off customers. Accordingly, they agreed to maintain prices while making the transition.¹⁷⁰ According to Unilever’s vice president for competitive policy, the arrangement arose in order to ensure that the companies did not lose

¹⁶⁶ See *id.* at 360–61 (“The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness [T]hey do not seek to establish a mere delusive liberty [] by making impossible . . . the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition on a sound basis.”).

¹⁶⁷ *Id.* at 372–74.

¹⁶⁸ For a comparison between U.S and European antitrust law, see generally Alden F. Abbott, A Brief Comparison of European and American Antitrust Law (2005) (lecture published by The University of Oxford Centre for Competition Law and Policy, The Competition Law and Policy Guest Lecture Programme, Paper (L) 02/05); Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe Is Different*, ANTITRUST BULLETIN (Spring 2014), available at

<http://bi.galegroup.com.ezproxy.proxy.library.oregonstate.edu/global/article/GALE|A373254827/>

¹⁶⁹ <http://bi.galegroup.com.ezproxy.proxy.library.oregonstate.edu/global/article/GALE|A373254827/850a5bb45bf0d785f692367df5a2b0d?u=s8405248>; The European model is generally agreed to have been shaped in large part by the influence of U.S. law. See LEE MCGOWAN, THE ANTITRUST REVOLUTION IN EUROPE 8 (2010) (“From the outset, the adoption of these domestic policies . . . were influenced indirectly and directly by the well-established US competition model.”). For a discussion of the international application of the European model of antitrust, see *id.*, at 176–95.

¹⁷⁰ See Jason Clay, *Precompetitive Behaviour—Defining the Boundaries*, THE GUARDIAN, June 2, 2011, <http://www.theguardian.com/sustainable-business/precompetitive-behaviour-defining-boundaries> (last visited Mar. 1, 2015) (discussing need to set clear boundaries between permissible and impermissible precompetitive collusion in light of Unilever and Proctor & Gamble case); *Unilever and Proctor & Gamble in Price Fixing Fine*, BBC NEWS, Apr. 13, 2011, <http://www.bbc.co.uk/news/business-13064928> (last visited Mar. 1, 2015).

¹⁷¹ See European Commission Decision C (2001) 2528, para. 25 (April 13, 2011) (COMP/39579: Consumer Detergents), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf. In a manner similar to the application of U.S. law, price-fixing behavior is treated as a per se type of infringement under the Treaty on the Functioning of the European Union, and the Agreement on the European Economic Area, and the Commission does not consider the actual effects of the agreement on the market. *Id.* at para. 44. While the European Union law does allow for an exception for a practice that “contributes to improving the production or distribution of goods or to promoting technical or economic progress,” the Commission found that the exemption did not apply in this case. Notably, the application of the exemption considers efficiencies that might be gained through the *practice* (i.e., the price fixing agreement) not the underlying product sought to be protected, which was expressly developed to increase efficiency.

competitive position as a result of the initiative, which clearly had important and positive environmental benefits.¹⁷¹

In this later case, many would argue that the behavior of the companies was precisely the sort of conduct antitrust law is designed to prevent. But this scenario raises important questions. Did Unilever and Proctor & Gamble have legitimate concerns about the financial impacts of implementing sustainability initiatives? Do consumers benefit from companies moving forward with an agenda of sustainability? If so, what can or should be done to alleviate Unilever and Proctor & Gamble's concerns? Could the DOJ have oversight of market divisions intended to forward socially responsible corporate initiatives, in order to ensure they were limited in scope and time? Could a creative combination of oversight and collaboration facilitate sustainable corporate initiatives, while enhancing consumer welfare and economic efficiency?

Traditional antitrust law has focused on providing low prices to consumers under a banner of competition and free markets. But a need for conservation of resources and expansion of global markets may require rethinking the assumptions that underlie these goals. We can no longer assume that freedom from price-fixing equates to lower prices, or that lower prices are always beneficial to customers. But until there is some signal that collaborations affecting price will not be rejected out of hand, such cooperative arrangements among producers are unlikely to exist.

2. Group Boycotts

Another practice that is traditionally subject to per se treatment is group boycotts.¹⁷² As the Supreme Court noted in *Klor v. Broadway-Hale Stores*,¹⁷³ “[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.”¹⁷⁴

This point was emphasized in *Federal Trade Commission v. Superior Court Trial Lawyers Association*,¹⁷⁵ in which a group of trial lawyers refused to accept representation of indigent criminal defendants until legislation was passed to increase their compensation. In finding the trial lawyer's action to be an antitrust violation, the Court made it clear that the reasonableness of the price the lawyers were requesting was not at issue, nor was the market power of the group.¹⁷⁶ “Respondents' boycott may well have served a cause that was worthwhile and unpopular. We may also assume that the preboycott rates were unreasonably low. . . . These assumptions do not control the case. . . . [R]espondents' boycott constituted a classic restraint of trade.”¹⁷⁷

¹⁷¹ See Clay, *supra* note 169.

¹⁷² See generally Donald L. Beschle, *Doing Well, Doing Good and Doing Both: A Framework for the Analysis of Noncommercial Boycotts under the Antitrust Laws*, 30 ST. LOUIS U. L.J. 385 (1986) (providing an analysis of various types of boycotts and their antitrust implications); see also *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457 (1941) (finding agreement by Guild members to refuse to deal with garment manufacturers and retailers who would not agree not to sell copies of designs was *per se* prohibited); *Toys 'R' Us, Inc. v. Fed. Trade Comm'n*, 221 F.3d 928, 934–36 (7th Cir. 2000) (holding agreement between toy retailer and various toy manufacturers in which manufacturers had to agree not to sell to warehouse club stores constituted impermissible horizontal conspiracy and *per se* prohibited group boycott).

¹⁷³ See 359 U.S. 207 (1959).

¹⁷⁴ *Id.* at 212.

¹⁷⁵ 493 U.S. 411 (1990).

¹⁷⁶ See *id.* at 424, 430–31.

¹⁷⁷ *Id.* at 422.

Despite this seeming clarity, certain types of group boycotts have been analyzed under the rule of reason. In *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*,¹⁷⁸ the Court considered the expulsion of a member of a cooperative for failure to follow the cooperative rules. In upholding the practice as legitimate, the Court found that “[c]oncerted refusal to deal may be lawful if reasonably ancillary to a legitimate joint venture.”¹⁷⁹ Other cases consider market power, whether the practice enhances efficiency and competition, and whether the boycott cuts a competitor off from necessary markets or supplies.¹⁸⁰

The problem with this category is that socially responsible industry certification standards, described in Part II.B.1, could easily look like an impermissible group boycott. As a result, organizations *developing* standards are likely to carefully limit the scope of their agreements so as not to trigger *per se* categorization.

Courts have generally found that competitors can agree not to deal with those who do not comply with an industry standard, as long as the process for setting the standard and determining compliance is reasonable, the program is not administered for an improper purpose, and the program does not unreasonably restrain competition.¹⁸¹ For example, in *Eliason v. National Sanitation Standards*,¹⁸² the plaintiff refrigerator manufacturer sued when it was denied certification for certain health and safety standards set by defendant, alleging that the refusal to certify the product amounted to a group boycott.¹⁸³ Analyzing the case under the rule of reason, the court held that, “Where the alleged boycott arises from standard-making or even industry self-regulation, the plaintiff must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anticompetitive and unreasonable.”¹⁸⁴ This was the case in *Radiant Burners, Inc. v. Peoples Gas Light & Coke*,¹⁸⁵ where the refusal of the American Gas Association to certify a particular manufacturer’s gas burner, and gas utilities’ refusal to sell gas to manufacturer was found to be unlawful group boycott because the standards were not based on objective measures, and were influenced by competitors.¹⁸⁶

Social and environmental standards have proliferated in areas of environmental and social responsibility.¹⁸⁷ But that may be precisely because organizations have been careful to make their standards voluntary and non-coercive, and they have deliberately avoided taking actions that might be considered a group boycott.

The case of the Designated Supplier Program (DSP) of the Worker Rights Consortium (WRC) is instructive in this regard. The WRC is an international labor rights organization that provides independent monitoring of labor conditions, primarily for universities and colleges that

¹⁷⁸ 472 U.S. 284 (1985).

¹⁷⁹ See Jones, *supra* note 80, at 82.

¹⁸⁰ See Lemley & Leslie, *supra* note 85, at 1229.

¹⁸¹ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (“When...private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition . . . those private standards can have significant procompetitive advantages.”); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

¹⁸² 614 F.2d 126 (6th Cir. 1980).

¹⁸³ See *id.* at 128–29.

¹⁸⁴ *Id.* at 129.

¹⁸⁵ 364 U.S. 656 (1961).

¹⁸⁶ See *id.* at 658–60.

¹⁸⁷ See *Vandenbergh*; *supra* note 28, at 148 (noting that more than 400 “ecolabeling” systems are now in existence throughout the world).

license the manufacturing of university apparel.¹⁸⁸ The WRC is governed by a board made up of representative from United Students Against Sweatshops (USAS),¹⁸⁹ representatives of universities, and labor rights experts.¹⁹⁰ The DSP was an attempt by the WRC to create mandatory standards for licensee factories that would require the payment of a living wage to factory employees and would also require licensee factories to permit employees freedom of association, and the right to engage in collective bargaining.¹⁹¹

After being told in 2008 that the DOJ would not issue a business review letter (BRL)¹⁹² stating an intention not to bring an antitrust enforcement action against the WRC for the proposed program, the WRC worked for years to remedy the Department's antitrust concerns.¹⁹³ Ultimately, the WRC had to modify the DSP to ensure that: the terms of the program would be individually considered and adopted by schools (i.e., schools were free to modify or adapt the DSP); actions taken against non-compliant suppliers would be purely voluntary by participating schools; and actions against non-compliant suppliers would not be taken collectively (i.e., would not amount to group boycotts of factories that did not meet DSP standards).¹⁹⁴ Rather than a uniform standard that would be adhered to by all designated factory suppliers, the DSP program became a voluntary set of conditions that could be inserted into individual contracts between universities and licensee factories.¹⁹⁵ Perhaps as a result, only a small number of universities affiliated with the WRC also participate in the DSP program.¹⁹⁶

Interestingly, in 2008—prior to the implementation of the DSP program—a controversial plant closing by Russell Athletics prompted an investigation by the WRC as to whether efforts by employees to organize or collectively bargain had motivated the closure.¹⁹⁷ After the WRC concluded that the evidence suggested Russell Athletics' move *had* been linked to the workers'

¹⁸⁸ See Worker Rights Consortium, *Mission*, <http://workersrights.org/about/> (last visited Mar. 1, 2015).

¹⁸⁹ See United Students Against Sweatshops, *Home*, <http://usas.org/> (last visited Mar. 1, 2015).

¹⁹⁰ See Sharis A. Pozen, Acting Assistant Attorney General, Letter to Donald I. Baker 1 (Dec. 16, 2011), available at <http://www.justice.gov/atr/public/busreview/278342.pdf>.

¹⁹¹ See *id.* at 2–3; see also Worker Rights Consortium, *Designated Suppliers Program*, <http://www.workersrights.org/dsp/> (last visited Mar. 1, 2015).

¹⁹² Under 28 C.F.R. § 50.6 (2015), the Antitrust Division of the Department of Justice is authorized to provide reviews of business practices that include a statement of the Division's enforcement intentions with regard to the practice. These reviews are commonly known as "business review letters" or BRLs. See Dep't of Justice, *Business Reviews*, <http://www.justice.gov/atr/public/busreview/index.html> (last visited Mar. 1, 2015).

¹⁹³ See Worker Rights Consortium, *WRC Memo*, <http://www.workersrights.org/university/memo/121611.html> (last visited Mar. 1, 2015).

¹⁹⁴ See *id.*

¹⁹⁵ See Letter from Benjamin C. Hensler, Re: Designated Suppliers Program for University-Licensed Products 3 (Dec. 15, 2011), available at <http://www.justice.gov/atr/public/busreview/request-letters/302113.pdf>. For a complete description of the program, see Worker Rights Consortium, *The Designated Suppliers Program—Revised*, <http://www.workersrights.org/dsp/DSP%20Program%20Description.%202012.pdf> (last visited Mar. 1, 2015). See also BRIAN CARTIER, THE NEWLY APPROVED DESIGNATED SUPPLIER PROGRAM: WHAT IT MEANS TO YOU AND YOUR STORE, available at <http://www.nacs.org/email/html/MyTake/MyTake-January2012.html>.

¹⁹⁶ The WRC does not maintain a list of colleges and universities that participate in the DSP program, and the voluntary nature of the program makes it difficult to verify which schools do participate. A Wikipedia entry names 45 universities as participating in the DSP. Wikipedia, *Designated Suppliers Program*, http://en.wikipedia.org/wiki/Designated_Suppliers_Program#cite_note-2 (last visited Mar. 1, 2015). The WRC lists 182 colleges and universities as affiliates. Worker Rights Consortium, *WRC Affiliated Colleges and Universities*, <http://www.workersrights.org/about/as.asp> (last visited Mar. 1, 2015).

¹⁹⁷ See Andrea Wilson, *Consumer Campaigns Against Exploitation and Slavery-Like Practices in Supply Chains* 3, available at <http://www.rcgglobal.net/docs/Consumer%20Action%20against%20ESLP%20in%20Supply%20Chains.pdf>.

exercise of their right to free association, the USAS called for a boycott of Russell Athletics' products by colleges and universities. Ultimately, 89 schools agreed to end or suspend licensing agreements with Russell Athletics, prompting the organization to rehire the workers it had fired.¹⁹⁸ While this voluntary effort by individual schools clearly had an important impact on the lives of the affected workers, it could not have been collectively organized or operated as a part of the DSP.¹⁹⁹ Indeed, given concerns for antitrust liability, one can speculate that if the DSP had been in operation at the time, affiliated schools may have been *less* willing to take the actions they did, because it would have looked more like a concerted effort to deny Russell Athletics access to the market, and less like a choice by individual schools not to deal with a single manufacturer.

The flexibility and non-coercive nature of certification standards may also create a race to the bottom.²⁰⁰ Imagine a cooperative calling itself Rainforest Now! creates a voluntary certification program for companies that agree not to engage activities that lead to deforestation of rainforests. Now imagine another organization calling itself Rainforests Forever! sets slightly lower standards for what it considers "deforestation." Both offer a voluntary certification program, a mark to attach to goods, and marketing for the program. Assuming the lower standards is cheaper, yet provides a similarly-attractive signal to concerned customers, companies are likely to gravitate toward Rainforests Forever!.²⁰¹ At the same time, given the potential for per se treatment, neither Rainforests Now! Or Rainforests Forever! is likely to take any kind of punitive action against business entities that either violate, or do not adopt their standards.

3. Output Limitations and Market Division

"[T]he application of *per se* rules in the context of resource conservation is a potential problem because what antitrust enforcers fear—agreements which restrain output—is precisely what conservation demands."²⁰²

In the above quote, Professor Adler neatly summarizes the largest challenge posed by antitrust policy when it comes to socially responsible collaboration. In a world of increasing resource

¹⁹⁸ See Steven Greenhouse, *Labor Fight Ends in Win for Students*, N.Y. TIMES, Nov. 17, 2009, <http://www.nytimes.com/2009/11/18/business/18labor.html> (last visited Mar. 1, 2015).

¹⁹⁹ Importantly, the boycott of Russell Athletics by colleges and universities did not have a clear economic motive, and could not be considered a boycott of a direct (horizontal) competitor. Group boycott cases distinguish between boycotts aimed at a competitor, which are likely to trigger a *per se* analysis, and those which are not aimed at a competitor and appear to be organized for non-economic motives. See Beschle; *supra* note 172, at 418. Although boycotts for non-economic reasons may still trigger antitrust concerns, particularly when their objective is to narrow competition by putting the target out of business, they are more likely to receive deference based on first amendment protection. *Id.* at 418–20. In addition, when a refusal to deal is not directly coordinated, but rather "consciously parallel," courts may require evidence of an agreement or conspiracy. *Id.* at 417. One might argue as to whether the USAS-organized boycott of Russell Athletics was consciously parallel, but ultimately individually directed by the various schools, or a coordinated effort led by USAS.

²⁰⁰ In a race to the bottom, standard setting organizations would attract businesses by setting progressively lower, cheaper, and/or easier-to-achieve standards. See Visseren-Hamakers, *supra* note 30, at 156 ("A race to the bottom may actually be enabled by depending solely on the market mechanisms to establish the dominant discourse for sustainability.").

²⁰¹ *See id.*

²⁰² Jonathan H. Adler, *Conservation Through Collusion: Antitrust As an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 23–24 (2004).

constraints and the potential for irrevocable harm to our climate and environment, our antitrust regime refuses to take into account market failures and per se rules against output limitation, and provides no avenue for collaborative conservation unless it is tied to some other increase in efficiency and production.

The problem is neatly illustrated by the challenge of marine conservation. As Professor Adler notes, oceanic fisheries are a prototypical example of the tragedy of the commons: a shared resource that creates incentives for each individual to overuse the common pool.²⁰³ A comprehensive plan for government management of fisheries and fish stocks has evolved over time to address threatened fish stocks.²⁰⁴ Although they are not without controversy, these federal efforts, which include annual catch limits based on maximum sustainable yield, appear to be yielding some improvement in the survival and yield of threatened fish stocks.²⁰⁵ Yet even within this highly managed market, in which it is clear that increased output of the resource would threaten its long-term availability, antitrust officials monitor for evidence of impermissible output-limiting agreements among fishermen. In 2000, members of fish harvesting cooperatives filed a series of BRLs with the DOJ to determine if joint harvesting agreements, which included share allocation among members, were permissible under antitrust law.²⁰⁶ Upon review, the DOJ did approve the agreements, but only did so based on the specific understanding that the agreements would *increase* the yield from the threatened fisheries. “To the extent that the proposed agreement allows for more efficient processing that increases the usable yield (output) of the processed Alaskan Pollock . . . it could have procompetitive effects.”²⁰⁷ Nowhere does the DOJ consider the threatened nature of the fisheries or the possibility that *reducing* the yield of fishermen might be necessary or beneficial to the ultimate preservation of fish stocks.

²⁰³ See *id.* at 9–10.

²⁰⁴ For an overview of the federal legislation, including the Fishery Conservation and Management Act of 1976, the Sustainable Fisheries Act of 1996, and the Magnuson Reauthorization Act (the combination of which are generally referred to as the Magnuson-Stevens Act), see Peter Shelley, *Taking Stock: The Magnuson-Stevens Act Revisited: Have the Managers Finally Gotten It Right? Federal Groundfish Management in New England*, 17 ROGER WILLIAMS U. L. REV. 21, 23–34 (2012) (describing history of federal legislation and response by conservation community).

²⁰⁵ See Shelley, *supra* note 204, at 56–64 (describing the mixed biological and economic impacts of recent amendments to the Magnuson-Stevens Act); BRAD SEWELL ET AL., NRDC, BRINGING BACK THE FISH: AN EVALUATION OF U.S. FISHERIES REBUILDING UNDER THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT (2013), available at <http://www.nrdc.org/oceans/files/rebuilding-fisheries-report.pdf> (concluding that federal law has had a positive impact on restoring overfished stocks, but areas of concern still remain); NOAA FISHERIES, STATUS OF STOCKS (2012),

http://www.nmfs.noaa.gov/stories/2013/05/docs/2012_sos_RTC.pdf (describing improvements in fish stocks and yields).

²⁰⁶ See Sullivan, *supra* note 22; see, e.g., U.S. Department of Justice, Antitrust Division, *Business Review Letter to Akutan Catcher Vessel Association* (Feb. 29, 2000), available at

<http://www.justice.gov/atr/public/busreview/4241.htm>; U.S. Department of Justice, Antitrust Division, *Business Review Letter to Offshore Pollock Catchers Cooperative* (Feb. 29, 2000), available at

<http://www.justice.gov/atr/public/busreview/4240.htm>; U.S. Department of Justice, Antitrust Division, *Business Review Letter to UniSea Fleet Cooperative* (June 21, 2000), available at

<http://www.justice.gov/atr/public/busreview/5023.htm>; U.S. Department of Justice, Antitrust Division, *Business Review Letter to Northern Victor Cooperative* (June 21, 2000), available at

<http://www.justice.gov/atr/public/busreview/5028.htm>.

²⁰⁷ U.S. Department of Justice, Antitrust Division, *Business Review Letter to Offshore Pollock Catchers Cooperative* (Feb. 29, 2000), available at <http://www.justice.gov/atr/public/busreview/4240.htm>.

One of the most dangerous impacts of a competitive market on scarce resources can be the rush to extract or harvest resources in order to prevent competitors from capturing their benefits. The negative impacts of such incentives can be seen in the case of oil fields. Under the “rule of capture,” the party that brings oil or gas to the surface is given ownership of it, regardless of where it lay underground.²⁰⁸ In such a system, every landowner has an incentive to drill a well on his/her land in order to extract the resources before their neighbor does. In Texas, early cooperative agreements to limit production and divide extraction rights could have furthered conservation of the resource and prevented overdrilling and reservoir depletion, yet concerns about antitrust laws appear to have chilled early development of these arrangements.²⁰⁹

“Competition can maximize output of products that eventually wipe out the economy.”²¹⁰ Antitrust officials and courts tell us that the essence of antitrust law is the protection of competition,²¹¹ and that in a rule of reason case, the one thing the court cannot consider is that competition itself might be flawed or injurious to consumers.²¹² Limitations on output have been strictly enforced as per se prohibited because of their presumed negative impact on competition. But if the law can recognize the potential benefit of practices such as vertical-price fixing and concerted refusals to deal,²¹³ could it not see the benefits of limiting the output and extraction of scarce resources? The Department of Justice claims, “[antitrust] law is highly unlikely to condemn or deter any arrangements necessary to bring desirable products to consumers”²¹⁴ yet argues strongly against creating any broadly-based exceptions that would “authorize even hard-core price fixing and output restrictions.”²¹⁵ While the attempt to present the “kindler, gentler” new face of antitrust may be helpful for collaborative arrangements that can be shown to increase output or lower prices, it has little to offer sustainable collaborations that may work in an opposing direction.

B. Not all Socially Responsible Collaboration is Forbidden

It bears noting that while this discussion has focusing on the chilling effect of antitrust, there are a number of practices that are allowed under current antitrust law. Where socially responsible collaboration yields traditionally pro-competitive benefits, such as lower prices or greater output, as in the case of market shares for certain fish stocks, it is likely to be allowed.²¹⁶

²⁰⁸ See Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture: An Oil and Gas Perspective*, 35 ENVTL. L. 899, 900–06 (2005) (describing rule of capture and early common law development of the rule).

²⁰⁹ See Adler, *supra* note 202, at 53–56 (describing effect of rule of capture on oil field development in the late nineteenth and early twentieth century). Adler notes that Texas passed legislation to protect the practice of voluntary unitization, exempting it from antitrust prosecution under state law, but such protection provided no relief from federal antitrust law. *Id.* at 52–53; *see also* Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1294 (noting state could pass legislation to protect resources, but could not immunize individuals from prosecution under antitrust laws).

²¹⁰ See Stucke; *supra* note 80, at 128.

²¹¹ See *supra* note 80-85 and accompanying text.

²¹² See *supra* note 122 and accompanying text.

²¹³ See Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007) (overruling previous cases analyzing vertical price-fixing under the per se standard and applying rule of reason because, *inter alia*, “minimum resale price maintenance can stimulate interbrand competition...by reducing intrabrand competition”); *supra* notes 117-121 and accompanying text.

²¹⁴ See Varney; *supra* note 9, at 783.

²¹⁵ See *id.* at 784.

²¹⁶ See, e.g., *supra* notes 88-91, 143-144, 206-207 and accompanying text;

Standard-setting organizations, certifications, and joint auditing programs, developed in a manner that appears objective and rational, which do not appear to raise price fixing or market share concerns and which are intended to serve consumers rather than reduce competition, are generally permitted.²¹⁷

IV. Conclusion

Antitrust law has the flexibility to allow for certain types of socially responsible collaborations, chief among them carefully structured agreements to create voluntary industry standards, certification or labeling programs for socially responsible practices, and the sharing of information related to audits of shared facilities. On the other hand, antitrust continues to chill arrangements that would receive traditional *per se* treatment, such as 1) resource conservation agreements that would limit output; 2) non-voluntary programs with strict enforcement mechanisms that might resemble group boycotts; 3) agreements that might lead to stabilization and maintenance of prices in flawed markets.

The flexible nature of antitrust policy, while certainly a challenge to practitioners and businesses alike, allows for considerable room to make the kind of broad policy changes that would recognize and address these concerns. Without calling for legislative reform, Professor Stucke advocates for an antitrust policy that enhances shared economic value, including economic and social conditions, profits obtained through collaboration, and sustainability.²¹⁸ Simply recognizing that antitrust's goals look beyond low prices and the maximization of output could provide comfort to businesses engaging in creative sustainable collaboration.

Currently, antitrust cases focus on the economic impact of collaborative behavior on a single market. But regulators are not *legislatively* confined to such a narrow analysis. When weighing the cost versus benefit of a collaborative restraint, courts could instead “consider the economy-wide costs and benefits” of the practice.²¹⁹ When considering an agreement like the one negotiated in the Unilever case, for example, the costs of the price-fixing arrangement could be weighed against the efficiency gained through the long-term market transformation, including the energy efficiency that customers would gain through the use of cold water detergents and the lower transportation costs associated with a smaller product.

A similar analysis could consider the impacts of otherwise prohibited collaborations on system-wide environmental value; an output limitation on the harvesting of threatened tropical trees would consider not only the impact on customers of the threatened species, but on other consumers as well. In their recent article, “The Collaboration Imperative,” Ram Nidumolu and colleagues argue that business and society alike would benefit from a collaborative approach to resource management. “Tropical forests . . . support 50% of the earth’s terrestrial biodiversity. And, along with oceans, they are the world’s most important global carbon sinks . . . [Yet] poor management has led to the disappearance of half of these forests in the past century . . . This is a

²¹⁷ See e.g., See Thomas O. Barnett, Assistant Attorney General, Letter to Robert M. Langer, et al. (Jun. 19, 2006) (indicating no intent to challenge Fair Factories Clearinghouse information sharing programs), available at <http://www.justice.gov/atr/public/busreview/216720.pdf>; Joel I. Klien, Assistant Attorney General, Letter to Kenneth A. Letzler (Apr. 7, 2000) (indicating no intent to challenge Apparel Industry Partnership proposal to create a workplace code of conduct regarding factory labor conditions), available at <http://www.justice.gov/atr/public/busreview/4513.pdf>; POTTS, *supra* note 156, at 17-19 (discussing practices likely to support a finding that a collaborative agreement does not violate antitrust standards).

²¹⁸ See Stucke, *supra* note 73, at 612.

²¹⁹ See Paton; *supra* note 16, at 168.

classic case of sacrificing system value in favor of profits reaped by a few individual companies.”²²⁰ But without protection from antitrust laws, producer collaboratives cannot limit output, even to preserve critically threatened resources.

The very existence of antitrust statutes demonstrates that legislators know unfettered competition does not always result in increased efficiency or improved consumer welfare. Where assumptions underlying free market models prove inaccurate, competition may work in the opposite direction. Professor Leslie argues that there should be a “market failure defense,” to antitrust laws that would allow for collusion in imperfect markets.²²¹ Current court doctrine has never recognize such an exception, but the flexibility demonstrated in other areas suggests that there is no reasons it cannot evolve in such a direction.²²² Given the clear economic inequality and instability in global commodity markets, courts must have the flexibility to approve collaborative agreements that seek to restore balance and protect both consumers and producers. Where socially responsible collaborative agreements act as a “corrective force” for market failures, they should not be presumed per se prohibited by antitrust policies.²²³

Antitrust policy is complex and tangled, yielding many questions and few answers. Yet it is in its very flexibility that there is possibility for improvements. Businesses are responding to a need for creative collaborations to solve problems of sustainability, resource depletion and climate change. Our antitrust policies must remain vigilant gatekeepers, preventing the worst sort of market abuses, but must also be flexible enough to let businesses use their power to make positive change.

²²⁰ See Nidumolu et al., *supra* note 1.

²²¹ Leslie, *supra* note 79, at 271–72.

²²² See *id.* at 273–74.

²²³ See POTTS, *supra* note 156, at 4.