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Global Antitrust and the Evolution of an International Standard

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Global Antitrust and the Evolution of an International Standard

ABSTRACT

This Note explores recommendations for developing a global antitrust regime and ultimately rejects those suggestions in favor of more traditional nationally-based applications of antitrust rules. Part II introduces an economic model of global antitrust to show the systemic difficulties inherent in creating a global regime. Part III contrasts the difficulties in creating a global regime with the greater historical success of developing regional antitrust authorities. Part IV tracks the history of the extraterritorial application of antitrust laws by the United States and the European Union. Part V argues that the path to effective global antitrust lies not in the creation of a single global regime, but in the continued extraterritorial application of national antitrust laws and the further creation of regional antitrust regimes.

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I. INTRODUCTION

At a conference to celebrate the tenth anniversary of European Union merger regulation, then-U.S. Assistant Attorney General in charge of the Antitrust Division of the Justice Department, Joel Klein, opened a new round in the long push towards coordination of international antitrust efforts by calling for the creation of a global organization similar to the Organisation for Economic Cooperation and Development (OECD) to help coordinate international competition law convergence and enforcement.¹ This declaration signaled a new opening to develop effective international competition law enforcement in an increasingly global business environment, particularly between the European Union and the United States.² The plan Klein envisions is a body separate from existing global organizations, though similar in structure to many.³ His recommendation for a separate body is in direct opposition to proposals made by EU officials to place such an international organization under the auspices of the WTO.⁴

These new attempts mark the sixth major effort to achieve a truly international antitrust regime.⁵ Each prior attempt failed to

1. *DOJ's Klein Calls for Initiative to Set Up Global Competition Organisation*, AFX.com, Sept. 14, 2000, available in LEXIS, News Library, Individual Publications, AFX.com file.

2. Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 349-52 (1997) (discussing past attempts to achieve a true international competition law).

3. Joel Klein & Robert Pitofsky, Press Conference at the International Bar Association 10th Anniversary Merger Control Conference (Sept. 14, 2000), available at <http://www.useu.be/issues/klein0918.html>. In the news conference, Klein specifically rejected using any existing global body to coordinate antitrust efforts because "the global issues in competition policy are much broader than any [international] organization is now looking at." *Id.*

4. *See id.* Klein's opposition to the EU proposal stems from his belief that international antitrust is an issue broader than one that the WTO can effectively handle. He sees the role of the WTO as one that looks at issues "affecting world trade and trade liberalization," whereas international competition law concerns issues such as multi-jurisdictional merger review that are separate from the trade issues the WTO confronts. *Id.*

5. *See Waller, supra* note 2. The prior five attempts have been: (1) during the formation of the League of Nations; (2) after World War II with the creation of the International Trade Organization; (3) the development of the United Nations Economic and Social Council in the 1950s; (4) the formation of the Organization for Economic Cooperation and Development (OECD); and (5) the development of the non-

one degree or another.⁶ Persuasive commentators have suggested that the primary cause of the past failures has been a difference of expectations on the part of the relevant state actors.⁷ Other measures of the failure to achieve effective international antitrust can be seen by contrasting the highly-developed national antitrust schemes with the near-total lack of an effective international antitrust regime.⁸

These failed attempts to standardize international antitrust regimes have taken on multiple hues. Some proposals, like ones that presently exist between the United States and the European Union, call for cooperation between existing national and regional antitrust enforcement authorities.⁹ Such agreements call for antitrust authorities to respect the antitrust jurisdictions of competing authorities and, where possible, share information and theories on antitrust liability and enforcement.¹⁰ Other proposals call for coordination of antitrust enforcement among different authorities.¹¹ For example, the international coordination agency proposed by Klein would aid multiple antitrust authorities in bringing joint antitrust actions against defendants.¹² The most radical solutions call for harmonization of the antitrust laws of different countries.¹³ These proposals would require countries to standardize their antitrust laws to a single global norm.¹⁴

There is a major impetus to develop effective global international antitrust regimes. Primarily, global business organizations have a need for effective global antitrust.¹⁵ The present system, in which global business entities must seek antitrust approval from a variety of enforcement authorities to merge, imposes enormous deadweight costs on these organizations¹⁶ that could be alleviated if there were a

binding rules of the United Nations Conference on Trade and Development (UNCTAD). *Id.*

6. *Id.* at 349.

7. *See, e.g., id.* at 351. Professor Waller believes that, on the one hand, developed countries have come to the bargaining table seeking to establish real antitrust law, whereas less-developed countries sought rules about economic development and control of multinational corporations. *Id.*

8. *See id.* at 347-48.

9. *Id.* at 368-70.

10. *Id.* at 371.

11. *Id.* at 358, 368.

12. *See Klein & Pitofsky, supra* note 3.

13. Waller, *supra* note 2, at 346-47.

14. *Id.*

15. *Id.* at 385-89.

16. While outside of the antitrust merger realm, the case of Microsoft is instructive. To alleviate the costs of conducting separate antitrust proceedings Microsoft agreed to permit the United States and the European Union to share confidential information in the proceedings that led to a 1995 consent decree. *See, e.g.,* Laura E. Keegan, *The 1991 U.S./EC Competition Agreement: A Glimpse of the Future*

global standard for antitrust compliance.¹⁷ Furthermore, these failures in the antitrust arena stand in sharp contrast to more successful efforts to standardize international business law in other areas.¹⁸

This Note explores past failures to achieve effective global antitrust standards and proposes a method to develop, over the long run, an effective global antitrust regime. Part II employs an economic analysis to explain why there are systemic difficulties in adopting global antitrust norms and why regional efforts to coordinate antitrust policy are, all else being equal, more likely to succeed than global efforts. Assuming that each national antitrust authority is a rational utility-maximizer of its country's interests, it will seek the mix of antitrust enforcement that maximizes its constituents' total welfare. From this premise, the economic model of antitrust draws numerous conclusions. First, a workable global antitrust system like the one proposed by Klein is not a feasible solution to global antitrust issues because it is unlikely that the parties could ever agree on such a system. Second, the model suggests that regional antitrust agreements between authorities in competing jurisdictions provide a more workable scenario for international antitrust agreement. Finally, the model shows that in the absence of a single global antitrust authority, the most likely scenario for exercising an efficient level of antitrust is through the extraterritorial application of antitrust laws to companies in foreign jurisdictions.

Part III contrasts past failures to develop a global antitrust regime with the more successful, albeit more modest, success achieved in brokering regional antitrust agreements. Efforts to develop a single global system under the auspices of both the WTO and OECD, along with an entirely separate body to consider only global antitrust matters, are analyzed, criticized, and ultimately rejected. These systems are then contrasted with regional agreements, both within the larger context of NAFTA and separately, as is the case with U.S.-EU agreements on antitrust. The section concludes that the economic model of antitrust is a powerful tool to analyze global versus regional antitrust agreements.

Part IV explores the extraterritorial application of U.S. and EU antitrust law. Over the last half-century the United States has taken a strong stand in applying its antitrust laws to both domestic and

Through the United States v. Microsoft Corp. Window, 2 J. INT'L LEGAL STUD. 149, 167-73 (1996).

17. The costs imposed on business stem from compliance with multiple different antitrust standards and laws in different countries. See Waller, *supra* note 2, at 385-86. Often these standards are not in harmony; occasionally they are in direct conflict.

18. See, e.g., William P. Connolly, Note, *Lessons to be Learned: The Conflict in International Antitrust Law Contrasted with Progress in International Financial Law*, 6 FORDHAM J. COMP. & FIN. L. 207 (2001).

foreign corporations.¹⁹ The European Union, more recently, has followed suit.²⁰ This section considers the possibility that other countries and regional antitrust alliances will adopt the U.S. and EU standards of extraterritoriality within the framework of the economic model developed in Part II.

Part V argues that, over the short-term, the path to effective international antitrust lies in developing and enhancing stronger regional antitrust regimes that adopt the U.S. standard of rigorous extraterritorial enforcement. It then argues for forbearance by national and regional antitrust enforcers when a competing antitrust authority seeks to apply its antitrust laws extraterritorially to a domestic defendant. Over time, developing strong regional antitrust regimes and prosecuting alleged antitrust offenders wherever they may be found will lead to a world convergence of antitrust standards. Once global antitrust standards distill to a few strong regional policies applied extraterritorially, a world consensus may develop over what antitrust policy should be. At that point, and only at that point, will it be possible to develop an effective global organization for prosecution of antitrust laws.

II. THE ECONOMIC ANALYSIS OF GLOBAL ANTITRUST

Seen through the eyes of an economist, there is a globally-efficient level of antitrust.²¹ The globally-efficient level is that "amount" of antitrust enforcement that maximizes overall world welfare by balancing (1) the efficiency gains from economies of scale that are created by larger firms against (2) the output reduction associated with allowing larger firms to exercise market power.²² As a prescriptive ideal, the economist seeks to achieve that level of global antitrust where the marginal costs of additional size are just equal to the marginal benefits.²³

19. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Second Circuit sitting as a court of final appeal on certification from the U.S. Supreme Court).

20. See *infra* notes 183-221 and accompanying text (exploring the circumstances under which the European Union has sought to apply its competition rules extraterritorially).

21. For an excellent and detailed exposition of the economic view of international antitrust, see Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998); see also Jeffrey L. Danoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999).

22. *Id.* at 1509-10.

23. Generally, the efficient level of "production" of any product is that level where the social cost of producing the last unit is just equal to the social benefit derived from producing that unit. For a general explanation of the role of marginal analysis in economic theory, see ROBERT H. FRANK, *MICROECONOMICS AND BEHAVIOR* (1996).

The obstacle to achieving effective international antitrust, according to the economist, is political.²⁴ World antitrust is played out largely along national lines, where national officials pursue national antitrust policies that maximize the welfare of their national constituents.²⁵ In pursuing a national antitrust policy on a worldwide scale, the global "amount" of antitrust policy is skewed from its efficient level—some nations will pursue too much antitrust policy; others will pursue too little.²⁶

The simplified economic model of international antitrust assumes a world of two countries, one that only produces a particular good and the other that only consumes that good.²⁷ Each country will pursue an antitrust policy that maximizes the welfare of its constituents.²⁸ Thus, the producer country will adopt an antitrust policy that maximizes the welfare of producers—it will seek to maximize producer profit.²⁹ The consumer country, on the other hand, will seek to maximize the welfare of consumers by adopting antitrust policies designed to keep the price of the good as low as possible—it will try to minimize producer profits and transfer the surplus to consumers.³⁰

International antitrust problems arise when two firms in the producer country seek to merge.³¹ Imagine a merger between the two firms that would lead to both an increase in productive efficiency and an increase in the market power of the combined firm. If the increase in efficiency leads to reduced costs of one hundred and fifty dollars, but also to increased market power that will reduce production by fifty dollars, world surplus from the proposed merger would increase by one hundred dollars.³² Therefore, from a global perspective, the merger is desirable. However, because antitrust policy is conducted on a national level, the worldwide efficient solution—allowing the merger to proceed—may not be achieved. Instead, while antitrust

24. What is meant by political is that there are many different competing values to be considered beyond the economist's preoccupation with efficiency. In the world of political reality, efficiency in law may not be the only value—it may not even be the most important one.

25. Guzman, *supra* note 21, at 1510-12.

26. *Id.* at 1548.

27. *Id.* at 1512.

28. That government antitrust enforcers will pursue welfare-maximizing policies for their constituents is an assumption of the economic model of international antitrust. *Id.* at 1510-12. Obviously, this assumption may not be entirely correct. For example, capture theory might suggest that government enforcers may be beholden to particular sub-constituencies. Others might argue that officials pursue a policy that maximizes their own bureaucratic self-interest.

29. *Id.* at 1512-14.

30. *Id.* at 1514-15.

31. *Id.* at 1517.

32. *Id.* The world gain from the merger is equal to the gains from increased efficiency (\$150) less the production loss due to market power (\$50), a net world gain of \$100.

authorities in the producer country will seek to permit the merger because it increases the welfare of its producers, the antitrust authorities in the consumer country would seek to block the merger because it reduces the welfare of its consumers. The ultimate resolution of the issue will depend on the power of the consumer country's antitrust authorities to block the merger through the extraterritorial application of its antitrust laws in the producer country.³³ This implies that any global antitrust agreement between these two countries is unlikely.³⁴ The interests of the consumer country directly conflict with the interests of the producer economy, and any benefit to one country will be offset by costs to the other.

A more nuanced view of the world economy sees a world with many countries that are both producers and consumers of many different goods. If there is a proposed merger between firms in one country, how will other countries react in order to maximize their own welfare? Assuming that the proposed merger leads to both greater efficiency and more market power, but increased market power enables the firm to reduce quantity and therefore impose a higher price, the antitrust authorities in the producer country will inevitably be at odds with the antitrust authorities in all consumer countries.³⁵ Even if the merger would be desirable from a global welfare perspective, it is unlikely that the two authorities will reach an agreement on the fate of the merger.

Taken at a greater level of generality, one can conclude that:

A country whose firms are responsible for $x\%$ of global production will take into account $x\%$ of the change in global producer surplus generated by a particular activity. A country whose consumers account for $y\%$ of global consumption will take into account $y\%$ of the total change in global consumer surplus generated by the activity.³⁶

That is, in shaping and enforcing its antitrust laws, an enforcement agency will only take into consideration that amount of the total relevant global activity that occurs within its borders.³⁷ Thus, the globally efficient level of antitrust will be achieved only when the total amount of domestic consumption of a particular good is equal to the total amount of domestic production. Any deviation from this, however, would lead one to predict that the actual amount of

33. See *id.* at 1523-24. The power of the consumer country to block the merger will depend on the power it has to affect the producer country negatively. If, for example, the consumer country is the only consumer of the producer country's good and if it can make a credible threat that it will ban the import of the producer's good if the merger is consummated, it is likely that the producer country would block the merger because it would then have no market in which to sell its goods and producer welfare would fall. See *id.*

34. *Id.* at 1524.

35. *Id.* at 1519-21.

36. *Id.* at 1520.

37. *Id.*

antitrust regulation sought is different from the globally optimal amount.³⁸

The general conclusion follows that net-importer countries will tend to over-regulate antitrust enforcement while net exporters will tend to under-regulate enforcement.³⁹ This model of rational antitrust behavior suggests that each of these countries will tend to be far apart in what they see as the ideal level of enforcement.⁴⁰ Therefore, each will have little incentive to cooperate in their antitrust proceedings; cooperation can only hurt each of them. Economic analysis thus demonstrates that international antitrust cooperation will be difficult, if not impossible, to achieve.⁴¹

A. *The Rational Antitrust Authority and Extraterritoriality*

The economic model of international antitrust assumes that countries possess equal amounts of power to impose their views of optimal antitrust policy on others. In reality, different countries have different degrees of leverage in the market for antitrust enforcement.⁴² The difference in power leads to different conclusions about the "natural" amount of antitrust enforcement.⁴³ Countries that are more "powerful" will have a greater ability to impose their antitrust laws on others than will less "powerful" countries.

The power to enforce laws extraterritorially depends on the relative attractiveness of a country's domestic market to foreign producers.⁴⁴ If a country seeks to apply its laws extraterritorially, the only power of compulsion that it has against foreign firms is denial of

38. *Id.* at 1519. Again, the globally efficient level of antitrust is that level which maximizes total global welfare by balancing the increased efficiency of a merger on the one hand against the increased market power (*i.e.*, the power to reduce output and cause the price to rise) on the other. If a country produces more than it consumes, there will be an incentive for the rational antitrust authority to pursue a less than ideal "amount" of antitrust enforcement because the authority will predominantly weigh the interests of the merging businesses and will want them to be able to merge to increase market power and profits. Likewise, in a country that consumes more than it produces, the rational antitrust authority will pursue more than the globally efficient level of antitrust because that country will seek to avoid a potential merger where the increased market power of the firm will raise prices and thus reduce the consumer welfare of the consuming country's constituents. It follows, then, that the only time when a national antitrust authority will pursue globally optimal antitrust policies is when its consumption of the relevant good equals its production. *See id.*

39. *Id.* at 1520. Net importers are those countries that consume more than they produce and net exporters are countries that produce more than they consume. *See id.* at 1525.

40. *Id.* at 1520.

41. *Id.* at 1525.

42. *Id.* at 1528.

43. *See id.* at 1528-29 (discussing the implications of an imbalance of power on any resulting agreement).

44. *Id.* at 1529.

market access.⁴⁵ If the country seeking to enforce its laws extraterritorially has a large domestic market, and if foreign firms are greatly dependent on that market, there is a better chance that the country will succeed in applying its laws extraterritorially⁴⁶ than if the country were small with relatively unattractive domestic markets.⁴⁷ Where the cost to the company of the country's antitrust regulation is greater than the benefit provided by participating in that market, the firm will decline to participate in the market and the country will have no power to enforce its laws extraterritorially.⁴⁸ Similarly, when the country is large enough, the market broad enough, and the need of the company to be in the market great enough, the country will be able to enforce its antitrust laws extraterritorially.⁴⁹ The country has that ability where the cost to the affected foreign firm of antitrust compliance is less than the value of being in that country's market.⁵⁰ At that point, a rational firm will accept the country's antitrust laws because the benefits are greater than the costs.⁵¹ Thus, the general conclusion is that the degree to which a country can impose its antitrust laws extraterritorially is a function of the country's size and the attractiveness of its marketplace to foreign firms.⁵²

Consider the case of the country that cannot ever apply its antitrust laws extraterritorially and assume that, for a particular good, there are two producers, one inside and one outside of the country. If the country is unable to apply its antitrust laws extraterritorially then it will only be able to apply them to the domestic producer. Assume further that both the domestic firm and the foreign firm seek to merge with separate third parties and that these mergers would produce a net global welfare loss. From the global perspective, it is optimal to have the country block the one merger that it can—the merger of its domestic firm. From the country's perspective, however, that may not be optimal. If it were to block the merger, then only the foreign merger will proceed. The foreign merger will reduce consumer welfare through higher prices, because the foreign firm will increase in size and market power. Meanwhile, the domestic firm will be harmed because it now occupies a weaker competitive position relative to the potentially merged foreign firm. In order to increase its own welfare, the country will

45. *Id.*

46. *Id.* at 1507.

47. *Id.* at 1506.

48. *Id.*

49. *Id.* at 1507.

50. *Id.*

51. *Id.*

52. *Id.*

seek to aid the domestic firm⁵³ by approving the merger of the domestic firm. It will do so despite the fact that, from a global perspective, the merger is welfare reducing, because the new, larger domestic firm will have greater scale to compete with the newly merged foreign firm.

From the above example, one can conclude that countries without the power to enforce their antitrust laws extraterritorially will regulate antitrust matters less than the globally optimum level. Were they to block domestic mergers that reduced global welfare, they would be hurt because they bear the full cost of reduced profits for the domestic firm, but they only share a portion of the benefits of increased consumer welfare through lower prices and higher output. Thus, "strict domestic [antitrust enforcement] policy without extraterritoriality tends to prevent local firms from engaging in profit-increasing anticompetitive activities but does not prevent foreign firms from reducing domestic consumer surplus."⁵⁴ As countries are rational utility-maximizers, where a country does not have the power to assert its antitrust laws extraterritorially, one would expect that country to adopt antitrust policies that are substantially more lenient than the globally optimal antitrust policy.⁵⁵ One can then conclude that, where possible, extraterritorial application of antitrust laws is "good" policy when it more closely aligns domestic and global antitrust interests and leads to antitrust enforcement at a level that is closer to the ideal global level than when there is no extraterritoriality.⁵⁶

B. *Suggestions for Achieving Effective Global Antitrust with a Rational National Antitrust Authority*

The economic analysis of global antitrust enforcement further suggests that agreements to harmonize antitrust laws and enforcement across countries will be difficult, because one country's gain from antitrust enforcement is often another country's loss.⁵⁷ The economist concludes, therefore, that the present level of antitrust

53. Assume for purposes of the analysis that the welfare of the country will increase if the domestic merger is consummated. That is, the increase in profit to the merged firm outweighs the loss in consumer welfare to domestic consumers.

54. *Id.* at 1523.

55. *Id.* at 1524.

56. It may be the case that where countries can assert extraterritorial application of their antitrust laws they will regulate antitrust more than the globally optimal level. *Id.* However, extraterritorial application of antitrust laws comes closer to meeting the global ideal than no extraterritoriality because the country has more of an incentive and ability to consider the global impact of possible antitrust enforcement.

57. See *supra* notes 27-34 and accompanying text.

enforcement is not globally optimal.⁵⁸ There are different levels of enforcement, however, that will increase global welfare.⁵⁹ It would seem possible that agreements could be brokered to overcome these inherent difficulties and achieve a level of antitrust enforcement closer to the global ideal.

The economic model suggests that net importers will over-regulate antitrust enforcement and net exporters will under-regulate it.⁶⁰ It also suggests that an international antitrust agreement will not be in many countries' interests.⁶¹ Modest proposals should be suggested instead. First, the model suggests that agreement is more likely where the proposals do not substantively change the underlying antitrust laws.⁶² Information-sharing arrangements such as those that already exist between the United States and the European Union or the United States and Canada are examples of such agreements.⁶³ These agreements generally call for (1) notification to one antitrust authority from the other where there is a contemplated action that may affect the other's interests, and (2) sharing of non-confidential information.⁶⁴ These types of agreements are likely to proliferate because, as globalization increases, it will be more difficult for any single antitrust authority to enforce its antitrust laws without coordinated information sharing.⁶⁵ Such information sharing merely provides for better enforcement under existing laws and would not hurt any country's vital enforcement interests.⁶⁶

Another possible solution suggested by the model is to make transfer payments from countries that would benefit from a joint antitrust agreement to countries that are hurt by the joint agreement.⁶⁷ The transfer payments need not be monetary.⁶⁸ For

58. See *supra* notes 39-41 and accompanying text (concluding that countries tend to over-regulate or under-regulate depending on their status as a net importer or a net exporter).

59. See *supra* note 56 and accompanying text (explaining how extraterritoriality leads to antitrust enforcement that is closer to the global ideal).

60. Guzman, *supra* note 21, at 1542.

61. *Id.*

62. See *id.* at 1542-43.

63. For more on information sharing agreements, see *infra* notes 126-33 and accompanying text (considering the agreement between the United States and the European Union on information sharing).

64. Guzman, *supra* note 21, at 1543.

65. *Id.*

66. *Id.*

67. *Id.* at 1544.

68. *Id.* at 1545. The only requirement, from an economic standpoint, is that countries that are made better off by joint antitrust agreements provide some value to countries that are made worse off by the agreement. For example, the country made better off could make trade concessions to the country made worse off by the agreement. Because international antitrust agreements are not zero-sum interactions, such transfer payments can be Pareto efficient—*i.e.*, they can make all

example, countries can negotiate on a wide range of topics, including joint antitrust enforcement itself.⁶⁹ Countries that benefit from joint antitrust could make concessions in other areas of international trade to countries that are hurt by the agreement.⁷⁰

The model also suggests that agreements between countries of fundamentally similar import-export backgrounds are the most likely to succeed.⁷¹ Net importers tend to over-regulate and net exporters tend to under-regulate antitrust.⁷² Therefore, for example, a joint antitrust agreement between net importers will be more likely to succeed than an agreement between a net importer and a net exporter.⁷³ As there is less of a difference between net importers than a net importer and a net exporter, such an agreement between net importers would require a "smaller . . . compensatory transfer payment . . . from countries that benefit from the agreement to countries that do not."⁷⁴

Finally, the model cautions that any proposal for worldwide joint antitrust is likely to fail and those agreements that succeed are likely to be negotiated among small groups of countries, perhaps even between only two countries.⁷⁵ This is so because the smaller the negotiating group, the less the difference will be among them on what an optimal antitrust policy should look like. According to the model, bilateral agreements are most likely to succeed; however, if multilateral agreements are sought, they should be among the smallest number of countries possible.⁷⁶

In sum, the economic model postulates a model of rational behavior on the part of world antitrust authorities.⁷⁷ Based on the varying trade balances of different countries, the model predicts that international antitrust coordination agreements will be difficult to broker.⁷⁸ To overcome this problem, the model recommends that, if possible, countries should seek to make bilateral or regional antitrust agreements.⁷⁹ Authorities should make agreements part of wide-

participants better off without making any worse off. *See also infra* note 69 and accompanying text.

69. *Id.* "Wide ranging negotiations" are one means of achieving Pareto-efficient solutions. By widening the spectrum of topics to be discussed, it is possible for countries that benefit from international antitrust agreements to make concessions on other matters to countries that would be hurt by such antitrust agreements. *Id.* at 1545-46; *see also supra* note 68 and accompanying text.

70. Guzman, *supra* note 21, at 1546.

71. *Id.*

72. *Id.* at 1520.

73. *Id.* at 1546.

74. *Id.*

75. *Id.*

76. *Id.* at 1547.

77. *See supra* notes 24-26 and accompanying text.

78. Guzman, *supra* note 21, at 1548.

79. *See supra* notes 75-76 and accompanying text.

ranging negotiations that cover the full gamut of international trade policy issues. If need be, countries should be willing to make transfer payments to secure agreement on a world antitrust solution. The model also recommends, where possible, countries should apply their antitrust laws extraterritorially, as the extraterritorial application of the laws brings the total level of enforcement closer to the optimal level of enforcement, from a global perspective.⁸⁰

III. REGIONAL VERSUS GLOBAL ANTITRUST AGREEMENTS AND REGIMES CONSIDERED

The current dim prospects for developing a global authority to oversee the enforcement of antitrust policy stand in sharp contrast to the relative success of regional antitrust agreements. This section first examines the global regimes that have been proposed. It then contrasts them with regional regimes.

A. *Global Regimes*

Proposals for a global authority to oversee antitrust enforcement take two forms. First, there are proposals, made mostly by the European Union, to house a global antitrust authority inside an existing global institution such as the OECD or the WTO.⁸¹ Other proposals, such as the one embraced by Klein, suggest the creation of a new global body responsible for the adoption of global antitrust standards.⁸² Due to institutional structures and dynamics, in addition to the underlying structure of the international system, it is doubtful that an effective global antitrust authority could be developed under either model.⁸³

Commentators have been critical of proposals to house a new global antitrust authority within an existing institution,⁸⁴ arguing that such institutions are structured poorly to manage global antitrust enforcement successfully.⁸⁵ These criticisms focus on the institutional structure presently in place in organizations like the WTO and the OECD and contrast it with the ideal institutional characteristics of a global antitrust authority.⁸⁶

80. *Id.* at 1523.

81. *See, e.g.,* Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 *AM. J. INT'L L.* 478, 478 (2000).

82. Klein & Pitofsky, *supra* note 3.

83. *See infra* notes 87-117 and accompanying text (describing the institutional structure and dynamics of the WTO and OECD).

84. *See* Klein & Pitofsky, *supra* note 3 and accompanying text.

85. *See, e.g.,* Tarullo, *supra* note 81, at 479.

86. *Id.*

The WTO is an institution set up to focus on global trade practices.⁸⁷ There is a tension and a difference between global trade policy and global competition policy.⁸⁸ The norms of global competition policy are incompatible with the norms of global trade policy.⁸⁹ This is the crux of the argument for not permitting the WTO to house a global antitrust authority. Trade policy is based on a government's efforts to encourage its domestic industries to export.⁹⁰ In contrast, competition policy is concerned with industry structures and practices that reduce output and thereby raise price.⁹¹ Stated differently, trade policy promotes the interests of an individual competitor while competition policy promotes the interests of competitive markets.⁹²

In proposing that the WTO house a global antitrust authority, the European Commission suggested goals and proposals for such an organization within the WTO that include:

- (1) [M]andating that Member States enact and maintain domestic competition laws that include at least core prohibitions against cartels and monopolization; (2) requiring that the legislation be enforced based on the principles of nondiscrimination and transparency; (3) providing for cooperation between competition and antitrust authorities; and (4) aiming for the gradual convergence of different national practices.⁹³

Commentators do not dispute these goals; they only question whether an organization such as the WTO can achieve them.⁹⁴ The WTO is set up as a statutory and adjudicatory body⁹⁵ where Member States negotiate detailed regulations to restrain unfair trade practices of governments, specifically the erection of unreasonably high tariffs.⁹⁶ To vindicate these rights, a quasi-political-judicial proceeding is held where there are not only legal findings, but also diplomatic efforts to resolve disputes between contesting governments.⁹⁷

An organization with these attributes is not well suited to police global competition issues. First, competition laws ordinarily seek to prevent or remedy conduct by private organization, not governments.⁹⁸ An institution set up to police interference with trade

87. See generally *id.* at 479-85.

88. *Id.* at 483.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Tarullo, *supra* note 81, at 485.

94. *Id.*

95. *Id.* at 487.

96. *Id.* at 484-88.

97. *Id.* at 480. Over time, the dispute resolution process has taken on more of a judicial "flavor;" however, there is still a significant political proceeding to try to resolve the contested issues. *Id.*

98. *Id.* at 483.

flows is not institutionally arranged to switch easily to policing the conduct of private organizations with no control over trade barriers.⁹⁹

Second, antitrust statutes, such as the Sherman Act and the Clayton Act in the United States and Articles 85 and 86 of the Treaty of Rome, are written in general terms and depend on lawyers and judges to provide far more interpretation and meaning to them than the specific trade regulations that are the product of the WTO.¹⁰⁰ Thus, there is established around the antitrust statutes a significant body of case-specific, fact intensive, interpretive common law, which does not exist with WTO regulations.¹⁰¹

Finally, the judicial procedures within the WTO are not well suited to adjudicate cases that would arise under a global antitrust authority.¹⁰² The quasi-diplomatic nature of the proceedings in the WTO is tailored to deal with disputes between countries where the norms of international relations predominate.¹⁰³ Antitrust proceedings, which invariably involve one or more private corporations, do not involve the same international relations concerns.¹⁰⁴ A judicial system set up under the norms of the WTO to enforce a global antitrust regime is likely to fail because of the difference between the norms of the institution and the needs of the system.¹⁰⁵

Institutional concerns may also undermine the effectiveness of the OECD as an enforcement arm for a global antitrust regime. Unlike the WTO, the OECD is set up as an organization for cooperation and discussion for all major areas of economic policy.¹⁰⁶ As such, there is no single organizing, unifying theme in the OECD and it lacks a well-defined constituency at the national level.¹⁰⁷ This has led some to describe the OECD as the "overlooked sibling"¹⁰⁸ of world organizations, relative to the WTO and the IMF.¹⁰⁹ The OECD's basic organizational weakness means that, in practice, it does not and cannot play the regulatory and adjudicatory role that the WTO plays.¹¹⁰ Instead, it has been used as an organization to develop relationships among regulators around the world.¹¹¹ It has been most effective in the past at developing sets of recommendations

99. *Id.* at 489.

100. *Id.* at 498.

101. *Id.*

102. *Id.* at 491.

103. *Id.*

104. *See, e.g., id.*

105. *See id.*

106. *Id.* at 494-95.

107. *See id.* at 494.

108. *Id.* at 495.

109. *Id.*

110. *Id.*

111. *Id.*

for nations to follow; however, it does not possess the power to enforce or mandate those recommendations.¹¹² For example, one of the great successes of the OECD has been the Competition Law and Policy Committee, which developed suggestions for regulatory convergence of antitrust laws.¹¹³ No matter how effective the suggestions may be, however, the Committee lacks the power of enforcement.¹¹⁴

The OECD has a role to play in the development of global antitrust, but it is institutionally incompetent to serve as the regulator of a global antitrust regime. Such an enforcement role is inherently adversarial; whereas, the OECD is cooperative.¹¹⁵ It does not have the regulatory or adjudicatory processes to consider competing global antitrust policies properly, nor does it have the means to apply them to individual cases.¹¹⁶ Furthermore, turning to the OECD as the body to enforce global antitrust norms risks undermining the positive role that it currently plays in coordinating world economic development, turning it from a consensus building, non-adversarial, policy-advising body to an adversarial dispute-resolver with the power to make binding decisions.¹¹⁷

In sum, suggestions to house a global antitrust authority within an existing global institution should be met with a skeptical eye. In addition to these inherent structural problems in reaching any global antitrust agreement, there are additional concerns over the institutional competencies of existing global authorities to consider global antitrust issues properly. Existing global agencies are premised on adjudicating disputes and advocating policies among countries.¹¹⁸ The diplomatic-style missions of these agencies are incompatible with the regulatory and adjudicative role that a global antitrust regime must play.¹¹⁹ Thus, even assuming the inherent problems of global antitrust could be overcome, it would be unwise to turn to existing global organizations to develop and apply that global antitrust policy.

B. Regional Regimes

Regionally based efforts to standardize antitrust proceedings and enforcement have been more successful. Efforts to coordinate antitrust enforcement among regional antitrust peers are nearly a

112. *Id.* at 494-96.

113. *Id.* at 495.

114. *Id.* at 498.

115. *See id.* at 494, 497.

116. *Id.* at 497.

117. *See supra* note 114 and accompanying text.

118. *See, e.g.,* Tarullo, *supra* note 81, at 488-89 (discussing this premise, using the example of the WTO).

119. *See id.* at 489.

century old.¹²⁰ The United States alone has negotiated regional antitrust agreements with many nations, including the European Union, Canada, and Australia.¹²¹ The entire European Union is itself a regional antitrust authority.¹²² The economic model predicts that these types of regional agreements should be easier to broker and implement because the regional parties have relatively more aligned antitrust interests.¹²³ The model also holds that authorities should make agreements through wide-ranging negotiations on a series of international economic issues that will allow for transfer payments on non-antitrust issues to nations that are hurt by the regional agreements.¹²⁴ In practice, the United States has sought out such regional antitrust arrangements, both as part of wide-ranging negotiations and as stand-alone agreements.¹²⁵

The regional agreement that has attracted the most attention from commentators is the agreement reached between the United States and the European Union in 1991.¹²⁶ The agreement, while not the product of wide-ranging negotiations, aims to overcome (1) conflicts between competition authorities, (2) obstacles to information gathering in foreign jurisdictions, and (3) differing rules under which firms must abide.¹²⁷ The agreement is fashioned after the 1986 OECD Recommendations.¹²⁸ The parties sought to make binding on themselves these otherwise non-binding recommendations.¹²⁹ It includes standard clauses for such regional agreements, such as a notification clause, an information exchange clause, and a negative

120. One of the earliest known coordination efforts occurred between the United States and Canada in 1901. The investigation involved alleged price fixing in the Canadian market in the newsprint industry. Investigators coordinated evidence gathering in Montreal, Toronto, and New York and successfully prosecuted the price fixing case. From the fruits of the initial joint investigation came additional prosecutions in the United States. Lawson A.W. Hunter, Q.C. & Susan M. Hutton, *Where There Is a Will, There Is a Way: Cooperation in Canada-U.S. Antitrust Relations*, 20 CAN.-U.S. L.J. 101, 101-02 (1994).

121. See *id.* at 112 (outlining cooperation between the countries' antitrust enforcers).

122. That is, the European Union is a regional association of countries that have negotiated a system of competition laws that are applicable throughout the European Union and have been applied extraterritorially. See Guzman, *supra* note 21, at 1537-38.

123. *Id.* at 1546.

124. *Id.* at 1545.

125. See *id.* at 1537.

126. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-Eur. Comm., 30 I.L.M. 1491 [hereinafter Agreement].

127. Keegan, *supra* note 16, at 159.

128. Agreement, *supra* note 126, at 1491.

129. Keegan, *supra* note 16, at 162.

comity clause.¹³⁰ It also includes what many have called its most innovative feature—a positive comity clause that permits either jurisdiction to request that the other consider prosecuting a particular case.¹³¹ It further imposes a duty on the jurisdiction that receives a request to make a good faith decision on whether or not to pursue the proposed action.¹³² Antitrust regulators have applauded the agreement and noted that, in part because of the agreement, cooperation between the two authorities is at an all-time high.¹³³

The economic model of international antitrust lends support to the strong arrangements that exist between the United States and the European Union. The model suggests that even more progress could have been made had the agreement been part of negotiations across a wider array of international economic subjects.¹³⁴ The success of the agreement, which is praised on both sides of the Atlantic, underlines the degree of inefficiency inherent in a system where antitrust is based solely on national borders.¹³⁵

The U.S. International Antitrust Enforcement Assistance Act of 1994 has aided efforts to increase the number and quality of regional antitrust agreements.¹³⁶ The Act delegates to the Antitrust Division of the Justice Department the power to negotiate binding bilateral agreements between the United States and other jurisdictions over antitrust enforcement matters.¹³⁷ These agreements provide for the exchange of information between authorities where confidentiality laws might otherwise prohibit the exchange.¹³⁸ Agreements under the Act also include provisions that permit antitrust authorities in one country to have access to information and evidence to aid a pending case or investigation.¹³⁹

130. The negative comity clause states that each jurisdiction should take heed of the prerogatives of the other jurisdiction when prosecuting cases that might implicate their jurisdiction. While this is a part of the formal legal agreement, the degree to which either the United States or the European Union practices the tenets of negative comity in reality is questionable. See *infra* note 173 and accompanying text; see also Keegan, *supra* note 16, at 163.

131. *Id.* at 165.

132. *Id.*

133. See Klein & Pitofsky, *supra* note 3.

134. For a discussion of the value of wide-ranging negotiations, see *supra* note 123 and accompanying text.

135. The agreement is presumably Pareto-efficient, otherwise neither authority would have an incentive to enter into the agreement. That each could be made better off by the agreement and neither be made worse off indicates that there are efficiencies that can be “wrung out” of the present system. For a discussion of Pareto efficiency, see *supra* notes 68-69.

136. 15 U.S.C. §§ 6201-12 (1994).

137. *Id.* § 6202(b) (1994).

138. *Id.*

139. *Id.*; see also Charles S. Stark, *International Antitrust Cooperation in NAFTA: The International Antitrust Assistance Act of 1994*, 4 U.S.-MEX. L.J. 169, 175 (1996).

Authorities have also pursued efforts to adopt bilateral agreements with other jurisdictions through wide ranging negotiations, such as within the NAFTA framework. The United States and Canada have long had a close working relationship in antitrust enforcement. More recently, the United States has engaged Mexico within the NAFTA framework to come to joint understanding on the application of antitrust laws.¹⁴⁰ While the engagement is only in a nascent stage, it is these types of bilateral agreements, where antitrust agreements are part of broader negotiations over international economic policy, that the economic model predicts will be most successful in bringing about substantive harmony between competing antitrust jurisdictions.¹⁴¹

IV. THE UNITED STATES, THE EUROPEAN UNION, AND ASSERTIONS OF EXTRATERRITORIAL APPLICATION OF ANTITRUST LAWS

This section considers efforts by the two superpowers of world antitrust regimes, the European Union and the United States, to apply their antitrust legislation extraterritorially. It begins by examining the extraterritorial application of U.S. antitrust law, and then turns to EU efforts to apply their antitrust laws extraterritorially. It concludes that while both groups initially sought to minimize extraterritoriality, subsequent cases have pushed both regimes further toward international extraterritorial application of antitrust laws.

A. *The Extraterritorial Application of U.S. Antitrust Law*

The history of the extraterritorial application of antitrust laws is marked by shifting standards and general confusion.¹⁴² Major world antitrust authorities, particularly the United States and the European Union, generally seek to apply their antitrust law to any firm, either domestic or foreign, that "affects" their domestic market.¹⁴³ This general global antitrust jurisdiction doctrine is marked more by its exceptions than its consistencies, however.

140. Stark, *supra* note 139, at 175.

141. See *supra* notes 75-76 and accompanying text.

142. See, e.g., James S. McNeill, *Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction*, 28 CAL. W. INT'L L.J. 425 (1998).

143. See generally *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945). Learned Hand adopted the "effects" rule in the *Alcoa* case. *Id.* Under the basic rule, a court may assert jurisdiction in an antitrust case over any firm, either foreign or domestic, where that firm has intended to affect and actually has affected that jurisdiction's domestic market. *Id.*

The U.S. Supreme Court first considered the extraterritorial application the U.S. antitrust laws in *American Banana Co. v. United Fruit Co.*¹⁴⁴ where the Court held that U.S. courts had no jurisdiction over the alleged Sherman Act antitrust violation, because the actions did not occur within the United States.¹⁴⁵ In Justice Holmes' formulation, "the character of an act as lawful or unlawful must be determined wholly by the law in the country where the act is done."¹⁴⁶ More generally, arguments of national sovereignty swayed the Court.¹⁴⁷ In the Court's view, the interest in applying antitrust laws to activity that occurred outside of the United States did not outweigh the interest in preserving principles of comity¹⁴⁸ in the international sphere.¹⁴⁹ Under *American Banana*, the Sherman Act can only be applied to activity that occurred on U.S. soil and could never be applied to activity occurring outside the United States, even where all of the relevant participants are U.S. corporations.¹⁵⁰

Despite its apparent parsimony, *American Banana* hinted at many of the jurisdictional issues and problems that would mark later extraterritorial U.S. antitrust litigation.¹⁵¹ These issues broke into full view in *United States v. Alcoa*.¹⁵² The issue before the court in *Alcoa* was whether Congress intended U.S. antitrust laws to apply to parties located outside the United States.¹⁵³ Judge Learned Hand declared that, "It is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily

144. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). In *American Banana*, the plaintiff, a U.S.-based banana trader in Costa Rica, claimed the defendant, also a U.S.-based banana trader in Costa Rica that held a virtual monopoly in the market, violated the Sherman Antitrust Act by engaging in anticompetitive practices in the Costa Rican banana trading market. *Id.* at 354-55.

145. *Id.* at 358-59.

146. *Id.* at 356.

147. *Id.* at 357-58.

148. The concept of comity is that, in applying its laws, a country should consider the interests and impacts on other sovereigns by applying those laws. *See, e.g.,* *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Generally speaking, comity means respect and deference to other countries in applying laws where there may be a detrimental effect on that other sovereign.

149. *American Banana*, 213 U.S. at 358.

150. *Id.* at 357.

151. The jurisdictional difficulty that the Court confronted was whether considerations of comity should outweigh the Court's interest in applying the antitrust laws to the case before it. *Id.* at 357-59. The Court resolved this conflict by stating that comity concerns should be paramount and that courts should not consider the interests of applying the antitrust laws where comity issues arose. *Id.*

152. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945). *Alcoa* concerned an agreement formed outside the United States by two non-U.S. companies that limited the imports of aluminum ingot into the United States. *See id.* at 439-41.

153. *Id.* at 443.

recognize."¹⁵⁴ From this general proposition Judge Hand derived the "intended effects" doctrine, which holds that U.S. courts may properly assert antitrust jurisdiction over any firm whose activity is intended to affect, and actually did affect, the U.S. domestic market.¹⁵⁵ This standard for application of U.S. antitrust law is very broad and nearly a complete rejection of the *American Banana* rule.¹⁵⁶ Under *Alcoa*, the United States could assert jurisdiction over wholly foreign entities pursuing business enterprises with no direct connection to the United States so long as there was an intended and actual effect on the U.S. market because of those actions.¹⁵⁷ The U.S. Supreme Court recognized the *Alcoa* rule as the law in *Continental Ore Co. v. Union Carbide & Carbon Corp.*¹⁵⁸ The actual scope of the *Alcoa* test—just how substantial the effect had to be to impose U.S. antitrust scrutiny to the conduct—was left unresolved.¹⁵⁹

Since *Alcoa*, U.S. lawmaking bodies have focused on the scope of the power of the United States to enforce the effects doctrine. In 1976, the Ninth Circuit partially rolled back the effects doctrine in *Timberlane Lumber Co. v. Bank of America*,¹⁶⁰ reasoning that the effects test of *Alcoa* was an incomplete statement of the law because it did not consider international comity and the impact that U.S. jurisdiction would have on other nations' interests.¹⁶¹ To balance the interests of other countries, the Ninth Circuit adopted a "jurisdictional rule of reason"¹⁶² where the interests of the United States in applying its antitrust law under the effects doctrine is weighed against the injuries to the foreign jurisdiction in being subject to the extraterritorial application of U.S. antitrust law.¹⁶³

154. *Id.*

155. *Id.* at 444.

156. See, e.g., Jalil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191, 204-05 (1999).

157. *Alcoa*, 148 F.2d at 443-44.

158. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 704-05 (1962).

159. Dean Brockbank, *The 1995 International Antitrust Guidelines: The Reach of U.S. Antitrust Law Continues to Expand*, 2 J. INT'L LEGAL STUD. 1, 9 (1996).

160. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976).

161. *Id.* at 611-12.

162. Joseph P. Griffin, *E.C. and the U.S. Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353, 363 (1994).

163. The factors that a court should weigh in a *Timberlane* comity analysis were adapted from the Second Restatement of Foreign Relations Law and include:

1. The degree of conflict with foreign law or policy;
2. The nationality or allegiance of the parties;
3. The locations or principal places of business of the corporations;
4. The extent to which enforcement by either state can be expected to achieve compliance;
5. The relative significance of effects on the United States as compared to those elsewhere;

Under *Timberlane*, in order to assert jurisdiction in an international antitrust case, a court must first perform an *Alcoa* effects analysis to determine whether there is a prima facie case to assert jurisdiction.¹⁶⁴ If there is, the court must then find that there is an actual injury and consider the comity factors enunciated in *Timberlane*.¹⁶⁵ There has been dispute in the federal courts as to the wisdom of *Timberlane*.¹⁶⁶

Congress has also weighed in on the propriety of the *Alcoa* effects test and the *Timberlane* interpretation of it. The 1982 Foreign Trade Antitrust Act stated that, under the *Alcoa* test, to assert antitrust jurisdiction over export commerce or wholly foreign conduct there must be a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce from the activity in question.¹⁶⁷ Thus, post-*Alcoa*, U.S. lawmaking bodies have sought to limit the scope of extraterritorial antitrust jurisdiction by increasing the degree to which a court must consider comity and the degree to which foreign conduct affects the U.S. domestic market.¹⁶⁸

Responding to the other lawmaking branches, the U.S. Supreme Court considered the scope of the comity analysis and the *Alcoa* effects test in *Hartford Fire Ins. Co. v. California*.¹⁶⁹ In *Hartford Fire*, the Court first noted the standard set forth in the 1982 Foreign Trade Antitrust Act, accepting that it was "well established . . . 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."¹⁷⁰ The Court then turned to the question of whether international comity concerns were a bar to asserting jurisdiction against the foreign insurance companies.¹⁷¹ The Court affirmed the Ninth Circuit, holding that comity did not serve as a bar to

6. The extent to which there is explicit purpose to harm or affect American commerce;
7. The foreseeability of such effect;
8. The relative importance to the violations charged of conduct within the United States compared with conduct abroad.

Timberlane, 549 F.2d at 613-15 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 40).

164. *Id.* at 613.

165. McNeill, *supra* note 142, at 437 n.103.

166. The Third, Fifth, and Tenth Circuits have cited *Timberlane* approvingly and accepted its method of inquiry into international comity issues. The Seventh Circuit and the D.C. Circuit have questioned the validity of *Timberlane*. Griffin, *supra* note 162, at 363-64.

167. *Id.* at 364.

168. See 15 U.S.C. § 6(a) (2002).

169. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). In *Hartford Fire*, nineteen state Attorneys General, along with numerous private litigants, brought suit against various U.S. and foreign insurance companies, alleging that the insurance companies had agreed to alter terms of insurance coverage sold through the United Kingdom in violation of the Sherman Antitrust Act. *Id.*

170. *Id.* at 796.

171. *Id.* at 798-99.

enforcement of the Sherman Act against the foreign insurance companies.¹⁷² The Court then went on to consider the applicability of the *Timberlane* comity test and the degree to which comity should generally be a bar to enforcement of the Sherman Act.¹⁷³ The Court held that comity should only be a consideration where there is a "true conflict" between U.S. and foreign law.¹⁷⁴ Citing Section 403 of the Third Restatement of Foreign Relations Law of the United States, the Court held that "no conflict exists . . . 'where a person subject to regulations by two states can comply with the laws of both.'"¹⁷⁵

The Court's decision in *Hartford Fire* threw the law into confusion.¹⁷⁶ What is clear, however, is that subsequent to the decision, the role of comity in deciding jurisdiction in antitrust enforcement cases has been substantially reduced.¹⁷⁷ Under the decision, courts are only to consider the issue when there is a direct conflict of laws—that is, where the laws of one jurisdiction compel action that is illegal in another jurisdiction.¹⁷⁸ What is nearly undisputed is that the *Timberlane* analysis that focused on international comity is reduced in significance.¹⁷⁹ While some courts, most notably the Ninth Circuit,¹⁸⁰ continue to follow the *Timberlane* comity analysis, others have effectively rejected the comity analysis in considering jurisdictional issues after *Hartford Fire*.¹⁸¹ However, *Hartford Fire* indicates a greater willingness on the part of the U.S. Supreme Court to reject much of the comity analysis and focus more narrowly on U.S. national antitrust interests and their application and enforcement extraterritorially.¹⁸²

172. *Id.* at 799.

173. *Id.* at 797-99.

174. *Id.* at 798.

175. *Id.* at 799 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 403 cmt. e (1987)).

176. *See, e.g., Mehra, supra* note 156, at 192.

177. *See id.* at 195.

178. McNeill, *supra* note 142, at 440.

179. *Id.*; *see also* Brockbank, *supra* note 159, at 12; John H. Chung, Comment, *The International Antitrust Enforcement Assistance Act and the Maelstrom Surrounding the Extraterritorial Application of the Sherman Act*, 69 TEMP. L. REV. 371, 398-99 (1996); Varun Gupta, Note, *After Hartford Fire: Antitrust and Comity*, 84 GEO. L.J. 2287, 2299 (1996).

180. *Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 846 (9th Cir. 1996) (holding that the *Timberlane* comity analysis was still appropriate, even considering the holding in *Hartford Fire*).

181. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997); *Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464 (S.D.N.Y. 1997).

182. *Hartford Fire*, 509 U.S. at 797-98 (1993).

B. *The EU and Extraterritorial Application of European Competition Law*

The competition laws in the European Union regulate behavior that "may affect trade between Member States"¹⁸³ or that "has an anticompetitive effect 'in the Common Market.'"¹⁸⁴ In this sense, the European Union is the rough equivalent of the United States in its formulation of comity and extraterritorial application of competition law.¹⁸⁵ Similar to the 1982 Foreign Trade Antitrust Act in the United States, the European Union also includes a provision that requires that challenged trade practices between Member States have more than a *de minimis* effect on trade,¹⁸⁶ though it can be "direct or indirect, actual or potential."¹⁸⁷

In practice, the EU reaction to jurisdictional matters in antitrust enforcement proceedings has been similar to that of the United States—international comity concerns take a back seat to enforcement of EU competition laws.¹⁸⁸ The *Wood Pulp* decision¹⁸⁹ is indicative of the European response to jurisdictional issues.¹⁹⁰ In the case, the wood pulp defendants claimed that the European Court of Justice had no jurisdiction over them because they were not located within the Union.¹⁹¹ They further claimed that applying EU competition rules to them would be a violation of the public international law duty of non-interference.¹⁹² They argued that one U.S.-based wood pulp manufacturer was organized as a Webb-Pomerene export association¹⁹³ and because the association was legal in the United States, it should not be illegal under EU competition

183. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 85(1), 298 U.N.T.S. 11, 47-48 [hereinafter EEC Treaty].

184. *Id.*

185. The jurisdictional issues in Europe and the United States are roughly equivalent, except that the Sherman Act specifically prohibits practices in trade or commerce "with foreign nations." 15 U.S.C. §§ 1-2. There is no counterpart to this language in the Treaty. Griffin, *supra* note 162, at 354.

186. *Id.*

187. *Id.*

188. Compare *infra* notes 189-202 and accompanying text, with Griffin, *supra* note 162, at 357.

189. Case 89/85, *In Re Wood Pulp Cartel: A. Ahlstrom Oy v. E.C. Commission*, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1998). In the case, the Commission alleged that a number non-EU producers of wood pulp conspired to fix prices of wood pulp within the European Union in violation of the Union's competition laws. Griffin, *supra* note 162, at 355.

190. Griffin, *supra* note 162, at 356.

191. *In Re Wood Pulp*, 4 C.M.L.R. at 939.

192. *Id.* at 940.

193. The Webb-Pomerene Act of 1918 exempts export associations from the reach of the Sherman Act where the association is formed "for the sole purpose of engaging in export trade." 15 U.S.C. § 62 (2002).

law.¹⁹⁴ The European Court of Justice rejected both of these claims.¹⁹⁵ According to the court, the decisive factor that permitted the European Union to assert jurisdiction was that “[t]he producers implemented their pricing agreement within the common market.”¹⁹⁶ Furthermore, the court found that “[i]t is immaterial whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.”¹⁹⁷ This has been called the implementation doctrine.¹⁹⁸ Similarly, the court rejected the defendant’s non-interference claims, reasoning that the public international duty of non-interference only applied where the duties in one country were prohibited by the laws of another.¹⁹⁹ Here there was no such conflict.²⁰⁰ Even though the Webb-Pomerene export association was statutorily exempt from the antitrust laws within the United States, there was no requirement under U.S. law that they be exempt from EU competition laws.²⁰¹ Therefore, there was no breach of the duty of non-interference in applying EU laws to the association.²⁰²

On strict issues of international comity, the EU takes a narrow view.²⁰³ The European Union has formally adopted the 1986 OECD Recommendation for extraterritorial application of competition laws.²⁰⁴ The Recommendation focuses on “the need . . . to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of cooperation in the field of restrictive business practices.”²⁰⁵ In practice, however, the European Court of Justice has adopted a view of international comity more consistent with the limited view adopted by the U.S. Supreme Court in *Hartford Fire*. In this regard, *IBM v. Commission*²⁰⁶ is instructive. In *IBM*, the head of the Antitrust Division of the U.S. Justice Department asked that the Commission refrain from imposing remedies against IBM because “they would constitute a ‘quasi-confiscatorial’ action that would be highly unfavorable to the

194. *In Re Wood Pulp*, 4 C.M.L.R. at 940.

195. *Id.* at 941.

196. *Id.*

197. *Id.*

198. Griffin, *supra* note 162, at 356.

199. *In Re Wood Pulp*, 4 C.M.L.R. at 941-42.

200. *Id.* at 942.

201. *Id.*

202. *Id.*

203. *See, e.g.*, Griffin, *supra* note 162, at 361.

204. *Id.* (citing Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting Trade, OECD Doc. No. C (86) 44 (Final) (May 21, 1986)).

205. *Id.*

206. Case 60/81, *IBM v. EC Commission*, 1981 E.C.R. 2639, 3 C.M.L.R. 635 (1981).

U.S. trade position.”²⁰⁷ On appeal, IBM claimed that the decision should be overturned because issues of international comity had not been considered.²⁰⁸ The European Court of Justice rejected this comity claim holding that issues of international comity should not even be considered until after a “decision” had been made.²⁰⁹ This holding by the court has narrowed the scope of international comity within the Common Market.²¹⁰

The Directorate General IV (DG-IV)²¹¹ has taken a similar position on international comity in merger control regulation. Most notable was the politically charged merger consideration of Boeing and McDonnell Douglas.²¹² The first and third largest airplane manufacturers in the world, both U.S. companies with no production facilities in Europe, sought to merge.²¹³ Given the scope of the proposed merger, the U.S. Federal Trade Commission decided to investigate.²¹⁴ Concluding that the merger would not “substantially lessen competition,” the Commission gave its approval for the merger.²¹⁵ However, the DG-IV also investigated the case to determine whether the merger complied with EU competition law, despite the fact that neither company had production facilities in Europe.²¹⁶ Allegations that the European Union was attempting to protect its domestic industry, Airbus, from legitimate competition with the combined Boeing and McDonnell Douglas were made and, for a time, there was talk of a trade war between the United States and the European Union over the merger.²¹⁷ Eventually, after Boeing made merger concessions to the European Union, the DG-IV eventually approved the merger.²¹⁸

Even though the Boeing-McDonnell Douglas merger secured EU approval, the longer-term impact for international antitrust

207. Griffin, *supra* note 162, at 357.

208. IBM, 3 C.M.L.R. at 658.

209. *Id.* at 662.

210. Griffin, *supra* note 162, at 359.

211. The DG-IV is the body charged with the enforcement of Articles 85 and 86 of the Treaty of Rome, the principal competition statutes of the European Union. It plays a role similar to the role that the Antitrust Division of the Department of Justice plays in the United States.

212. An excellent analysis of the issues, both legal and political, presented in the Boeing-McDonnell Douglas merger is Amy Ann Karpel, Comment, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-E.U. Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029 (1998).

213. *Id.* at 1030.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 1031-32. For a cogent discussion of the broader potential impact of trans-Atlantic civil aircraft competition and the political consequences arising therefrom, see Daniel I. Fisher, Note, “*Super Jumbo*” Problem: Boeing, Airbus, and the Battle for the Geopolitical Future, 35 VAND. J. TRANSNAT'L L. 865 (2002).

218. *Id.* at 1034.

jurisdiction was dramatic because of the simple assertion of jurisdiction by the European Union. From this point on one could reasonably assume that the European Union would, in future merger cases, continue to assert jurisdiction over companies outside of Europe. Such assertions of jurisdiction arguably took on even greater significance in the European review of the proposed GE-Honeywell merger in 2001.²¹⁹ There, EU review of the case went one step beyond Boeing-McDonnell Douglas when the European Union formally sought to block the merger.²²⁰ This ultimately scuttled the deal.²²¹

The European response in the *Wood Pulp Case*, *IBM*, *Boeing-McDonnell Douglas*, and *GE-Honeywell* is emblematic of the similarities in perceived jurisdiction and international comity between the European Union and the United States. Both jurisdictions have confronted the problems of extraterritorial application, and each initially took a relatively territorial approach to enforcement of their antitrust laws.²²² However, as each jurisdiction has confronted additional cases, each has seen the need to move away from strict territoriality toward extraterritorial application in some form.²²³ The United States has adopted the "effects" test and the European Union has formulated the "implementation" doctrine.²²⁴ Commentators have emphasized the similarity between the two standards. A former Assistant Attorney General in charge of the Antitrust Division noted that the European Union's implementation doctrine is "very close to, if not indistinguishable from, the so-called 'effects' test as applied by U.S. courts."²²⁵

There has been a similar convergence between the United States and the European Union on the issue of international comity. Stated simply, as the two authorities widen their jurisdiction to claim power to consider extraterritorial antitrust matters, there has been a consequent narrowing of their consideration of international comity.²²⁶ This is a natural and almost necessary outcome and there is a direct correlation between the degree of extraterritoriality that a jurisdiction perceives within its laws and the scope of deference it will

219. See *EU Commission Prohibits GE's Acquisition of Honeywell* (July 3, 2001), available at <http://www.eurunion.org/news/press/2001/2001052.htm>.

220. *Id.*

221. *Id.*

222. See *supra* notes 143, 188 and accompanying text.

223. See generally *supra* notes 142-221 and accompanying text.

224. See *supra* note 219 and accompanying text.

225. Griffin, *supra* note 162, at 170 (quoting Asst. Atty. General Charles F. Rule, The Justice Department's Antitrust Enforcement Guidelines for International Operations—A Competition Policy For the 1990s, Address Before the International Trade Section and Antitrust Committee of the District of Columbia Bar, Washington D.C. (Nov. 29, 1998)).

226. See *supra* notes 142-218 and accompanying text.

give to international comity concerns. In this trade-off, both the United States and the European Union have expanded extraterritoriality at the expense of international comity.²²⁷

The United States and the European Union are the two superpowers in world antitrust regimes. While there are other significant bodies and countries with antitrust laws, no other authority approaches either the United States or the European Union in influence or the degree to which their respective antitrust regimes have evolved, both in this scope of their antitrust jurisprudence and their assertions of the extraterritorial application of their antitrust laws.²²⁸ Furthermore, as globalization advances, it may be that other countries will continue to develop their own sets of antitrust laws and will turn to either the U.S. or the EU model for guidance. Thus, over time, some have suggested that there will appear two competing blocks of antitrust laws, one based on the U.S. antitrust ideals of open and competitive markets and the other based on the EU model of integrated European and world markets.²²⁹ As each of these blocks of antitrust law evolve, they should continue on the path of increased extraterritoriality and decreased comity. This is consistent with the nature of a globalized world economy. With a more globally integrated world, business decisions that may appear at first blush to have a purely domestic impact will be shown, upon deeper analysis, to have a more global impact. In such a case, the foreign antitrust authority arguably should have standing to bring actions against the domestic firm for such decisions, based solely on justifications of national sovereignty. If it were otherwise, the domestic firm would be allowed to make decisions that impact the foreign economy without that foreign government having any effective oversight. Such an outcome would fly in the face of any traditional understanding of national sovereignty.

With the increased world acceptance of extraterritoriality, the underlying economies in which these antitrust laws are applied will begin to converge. The Boeing-McDonnell Douglas merger is the classic example of this. As Boeing made concessions to the European Union to win acceptance of the merger, the combined company evolved in a manner that is acceptable under both U.S. and EU antitrust law. This type of strong extraterritoriality with major antitrust regimes suggests a remedy to the problems of global antitrust.

227. *See id.*

228. There are many different antitrust regimes outside of the United States and the European Union aside from the ones discussed above. Among them are Korea, Japan, and China. However, these other regimes have not evolved to the advanced stages of the U.S. and the EU regimes.

229. Waller, *supra* note 2, at 343-50.

V. USING THE ECONOMIC MODEL OF GLOBAL ANTITRUST TO EXPLAIN
PAST INTERNATIONAL ANTITRUST PROBLEMS AND TO PREDICT FUTURE
SUCCESS

The economic model of international antitrust is a powerful tool to explain difficulties inherent in attempting to develop an international body responsible for enforcing global antitrust standards or to house such a body within an existing global institution. It posits that some countries would bear disproportionate burdens if they were to join such an organization.²³⁰ It further suggests, however, that there is a path to coordination of the different antitrust laws of various jurisdictions through the forging of bilateral agreements.²³¹

Historical evidence supports the economic model of international antitrust. Not only have global efforts failed, but regional efforts have also flourished.²³² The agreements between the European Union and United States and the agreements within the NAFTA nations are but two examples of bilateral agreements that work to establish mutually acceptable international antitrust standards. According to the model, the most advantageous path for the future continues to be the development of workable bilateral agreements.²³³ Furthermore, the model cautions against further efforts to establish a global antitrust authority. Such efforts are likely to be a fruitless waste of time.

Problems remain even if suggestions for a single global antitrust authority are eschewed. Most notably, different antitrust laws in different jurisdictions pose enormous costs for international corporations. This is evident not only in the duplication of efforts to get international mergers approved by multiple jurisdictions applying multiple sets of laws, but also in day-to-day antitrust compliance.

The path to alleviate or eliminate these continuing problems should be the guiding long-term goal of antitrust coordination efforts. Two potential remedies seem attractive. First, the continued development of bilateral agreements similar to those already in place should be pursued. Through these agreements, there has already been a reduction in business costs attributable to antitrust compliance. Microsoft is but one example.²³⁴ Microsoft consented to joint information sharing between the United States and the European Union in their cases against the company.²³⁵ This joint

230. See *supra* notes 57-80 and accompanying text.

231. See *supra* notes 71-76 and accompanying text.

232. See *supra* notes 81-141 and accompanying text.

233. See *supra* notes 75-76 and accompanying text.

234. Keegan, *supra* note 16, at 176.

235. *Id.*

effort led to a joint consent decree that benefited all parties by reducing the cost of compliance.²³⁶

The other, more radical and longer-term solution to alleviate the high business costs associated with international antitrust compliance is continued and stronger extraterritorial application of domestic antitrust laws. The *American Banana* doctrine of strict territoriality is not only dead, it is also unworkable in a global economy.²³⁷ Strictly territorial application of domestic antitrust laws makes those laws useless against multinational corporations.²³⁸ Furthermore, countries have a vital interest in seeing that their antitrust laws are enforced against defendants whose conduct affects their markets.²³⁹ Both U.S. and foreign courts recognize this basic fact and have interpreted their antitrust laws to give effect to the principles of extraterritoriality.²⁴⁰ In the United States, starting with the effects doctrine, continuing with the *Timberlane* rule of reason, and culminating in the adoption of the *Hartford Fire* rule, courts have de-emphasized the principles of comity and adopted strong-form principles of extraterritoriality.²⁴¹ The same basic principle is at work in the European Union with the implementation doctrine.²⁴²

Over the long run, global adoption of extraterritoriality will help antitrust laws and underlying economies evolve together. This was the result in the Boeing-McDonnell Douglas merger dispute before the European Union. To the United States, the proposed merger posed no problem; however, this was not the case in the European Union. Applying its antitrust laws extraterritorially, the European Union deemed the merger as it was originally announced to be against its own antitrust interests. While there were obvious political overtones to the dispute, eventually the United States and Boeing recognized the interests of the European Union in participating in merger scrutiny.²⁴³ Ultimately, the bargain that was struck made the

236. *Id.* at 171.

237. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 605 (9th Cir. 1976); *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

238. *See, e.g., Alcoa*, 148 F.2d at 416. With purely territorial application of antitrust laws, no country could assert regulatory powers over a multinational corporation in the full scope of its activities. Arguably, then, such a multinational corporation could be said to exist above the laws of any one jurisdiction. At the very least, this contradicts the fundamental understanding in Western liberal democracies that business is always subject to the regulatory oversight of government.

239. If countries do not have the power or authority to regulate those activities that "affect" their market, much of the traditional concept of national sovereignty is undercut. Control of the national marketplace is the essence of sovereignty.

240. *See supra* Part IV.

241. *See supra* notes 142-82 and accompanying text.

242. *See supra* Part IV.B.

243. This should be politically obvious, as no trans-Atlantic trade wars started as a product of EU scrutiny of the merger.

merger acceptable under both U.S. and EU law.²⁴⁴ Thus, the underlying U.S. economy evolved also, albeit only slightly and very slowly, through the extraterritorial application of EU antitrust law to U.S. corporations. Over the long run, as extraterritoriality becomes settled precedent, there is likely to be less political backlash against such antitrust enforcement and a quickening of the convergence between rival economies and rival sets of antitrust laws.²⁴⁵

The evolution of international antitrust will not be smooth—the Boeing-McDonnell Douglas merger example proves this. Indeed, countries will find it a breach of their own sovereignty when another country seeks to assert jurisdiction over its domestic companies.²⁴⁶ This has certainly been the case in the post-*Hartford Fire* world.²⁴⁷ To thwart the holding in *Hartford Fire*, some other countries have passed blocking statutes, meant to block discovery outside of the United States in the foreign jurisdiction.²⁴⁸ By passing such blocking statutes, the foreign government introduces a “true conflict”²⁴⁹ as understood in *Hartford Fire*. When there is such a true conflict, *Hartford Fire* requires that courts give deference to the principles of comity.²⁵⁰ Going forward, if the United States—or any other jurisdiction—seeks to continue to adhere to principles of extraterritoriality, there should be an expectation of at least some foreign resistance to the endeavor.

Governments can respond to foreign objections in two ways. First, they can reject *Hartford Fire*-style extraterritoriality, and re-adopt a doctrine more deferential to international comity. Such an approach is dangerous, however. Extraterritoriality can serve as one of the foundations of a truly global antitrust system. Reverting to older standards that give more deference to international comity concerns undermines this path to global antitrust. Furthermore, given the near impossibility of setting up one global organization for antitrust enforcement, extraterritoriality is an attractive option for evolving towards shared global antitrust solutions.

Rather than recoil at resistance to extraterritoriality, the United States and other jurisdictions could instead respond to it. When other jurisdictions pass blocking statutes to thwart extraterritoriality and invoke comity, courts could instead seek alternative means to avoid

244. If the merger had not been acceptable under either jurisdiction's antitrust law, then the merger would have been challenged in court.

245. Obviously, as the GE-Honeywell example shows, such a pacific reception to extraterritorial jurisdiction may only occur over the very long-term.

246. Joseph P. Griffin, *Jurisdiction and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 505 (1998).

247. *Id.* at 514.

248. *Id.* at 522.

249. See *Hartford Fire*, 509 U.S. at 798.

250. *Id.* at 794-99.

true conflicts. Courts could, for example, impose a good faith test on potential foreign conflicts. Only where a court determines that foreign blocking statutes were passed in good faith and represent a national interest beyond avoiding U.S. extraterritoriality should the conflict be given *Hartford Fire* true-conflict deference. Where such conflicts are only erected as a barrier to U.S. jurisdiction, the conflict could be disregarded. Obviously, this may be putting "the fox in charge of the hen house," as U.S. courts may be predisposed to find jurisdiction. However, the U.S. interest in applying its laws against any plaintiff whose conduct affects U.S. markets is too great to be thwarted by blocking statutes. Such an interpretation of a true conflict under *Hartford Fire* would pay due deference to international comity concerns while still permitting the United States the power to apply its antitrust laws extraterritorially.

Efforts to globalize antitrust enforcement have a long history. Unfortunately, that history is marked more by failure than success. Idealistic goals of a single antitrust authority continue to butt up against the realities of a global system still based on interactions among nation-states. Suggestions like those made by Klein, and supported in one form or another by other antitrust authorities, should be disregarded as unworkable and unachievable in practice. Instead, the path to true global antitrust should be pursued through bilateral agreements and application of extraterritoriality to multinational corporations. Such efforts will ultimately lead to the evolution of a true global antitrust system that will benefit all parties.

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