



1-1-2003

It's a Small World After All: Proposed Solutions for Global Antitrust in a System of National Laws

Jennifer R. Johnson

Follow this and additional works at: <http://digitalcommons.law.scu.edu/scujil>

Recommended Citation

Jennifer R. Johnson, *It's a Small World After All: Proposed Solutions for Global Antitrust in a System of National Laws*, 1 SANTA CLARA J. INT'L L. 118 (2003).

Available at: <http://digitalcommons.law.scu.edu/scujil/vol1/iss1/3>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

IT'S A SMALL WORLD AFTER ALL: PROPOSED SOLUTIONS FOR GLOBAL ANTITRUST IN A SYSTEM OF NATIONAL LAWS

JENNIFER R. JOHNSON*

I. INTRODUCTION

As business continues to expand on a multinational level, global business organizations increasingly have a need for antitrust law that transcends national borders.¹ At the same time, States increasingly seek to apply their domestic antitrust laws to any company whose practices affect their domestic market, whether these companies are foreign or domestic.² The issue that results from the combination of these factors, namely what to do when both sets of law apply, has been the subject of much academic debate.

The European Union and the United States are the two largest economies in the world.³ As such, they provide an excellent model for studying the conflicts that arise when two sets of laws apply to the same activity, one set of laws domestically and one extraterritorially. Unfortunately, the self-interest that motivates antitrust laws nationally produces a global antitrust climate that is less than optimal and discourages cooperation.⁴

Academics and policy makers alike have suggested several possible models to ease these multinational tensions. However, each

* J.D. Candidate, Santa Clara University School of Law, Spring 2003. The author would like to thank George J. Alexander for his encouragement, support, and guidance.

¹ See William Sugden, Note, *Global Antitrust and the Evolution of an International Standard*, 35 VAND. J. TRANSNAT'L. L. 989, 991 (2002).

² See *id.* at 1007.

³ See Krysztof Kuik, *Recent Developments in EU/US Trade Relations*, 79 U. DET. MERCY L. REV. 433, 434 (2002).

model fatally assumes an oversimplified picture of international antitrust, proposing overly simplistic solutions. In addition, each fails to recognize the role that emerging technology plays in the antitrust landscape.

This article presents the issues raised by the application of domestic laws in an international context through the lens of the two world antitrust superpowers, the United States (U.S.) and the European Union (EU). Part II reviews the statutory basis for the antitrust laws in both the United States and the European Union. Part III discusses the extraterritorial application of domestic laws by the United States and the European Union and the key differences between the two sets of laws. Part IV illustrates the difficulties that arise when domestic laws intersect in a global economy. Part V analyzes various proposed solutions to the world antitrust problem, demonstrating their strengths and weaknesses. Finally, Part VI proposes a new model that, while imperfect, solves several problems presented by the previously proposed solutions, integrates several aspects of those proposals, and considers the critical role of innovation and new technology in the search for a solution.

II. THE STATUTORY BASIS FOR ANTITRUST LAW

A. U.S. Statutory Law

United States antitrust laws are comprised of a series of statutes intended to promote free enterprise and fair competition by preventing business activity that results in unreasonable restraints on competition such as the formation of monopolies or certain unfair or undesirable business practices.⁵ Several federal statutes cover antitrust issues including

⁴ See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U.L. REV. 1501, 1504 (1998).

⁵ See Stuart M. Reynolds, Jr., *The Relationship of Antitrust Laws to Regulated Industries and Intellectual Property in the New Marketplace*, 4 TUL. J. TECH. & INTELL. PROP. 1, 2 (2002).

the Sherman Act,⁶ the Clayton Act,⁷ the Robinson-Patnam Act,⁸ and the Federal Trade Commission Act.⁹

Under the Sherman Act, Sections 1 and 2 are the most commonly cited. Section 1 prohibits “contract[s], combination[s] . . . [and] conspiracy[ies], in restraint of trade or commerce.”¹⁰ Section 2 prohibits monopolies, “attempt[s] to monopolize, or combinat[ations] or conspiracy[ies].”¹¹ Under the Clayton Act, Section 3 prohibits some exclusive dealing agreements and refusal to deal agreements.¹² Section 7 prohibits mergers, acquisitions, and joint ventures tending to monopoly.¹³ Section 1 of the Robinson-Patnam act prohibits price discrimination between purchasers.¹⁴ Finally, section 5 of the Federal Trade Commission Act empowers the Federal Trade Commission (FTC) “to prevent persons, partnerships, or corporations” from “unfair methods of competition” and “unfair or deceptive acts or practices.”¹⁵ In addition, most states have

⁶ See 15 U.S.C. §§ 1-7 (Matthew Bender 2002). Congress added Section 6a to the Sherman Act through the Foreign Trade Antitrust Improvement Act of 1982, noting that the Sherman Act would not apply to trade with foreign nations unless “such conduct has a direct, substantial, and reasonably foreseeable effect” on internal U.S. trade or commerce or U.S. exports to foreign nations giving rise to a claim under the Act. *Id.*

⁷ See 15 U.S.C. §§ 12-27a.

⁸ See 15 U.S.C. § 13.

⁹ See 15 U.S.C. §§ 41-58.

¹⁰ 15 U.S.C. § 1. However, in *United States v. Standard Oil*, the Supreme Court limited the literal reading to “unreasonable” restraints on trade for most categories under the statute to avoid the potential problems due to the fact that the statute appears on its face to prohibit all restraints of trade. See 221 U.S. 1, 62 (1911). This rule has been termed the “rule of reason,” and is contrasted with the stricter standard used for certain categories of clear antitrust violations, such as price fixing - “per se” – literally, as a matter of law. See Bryan A. Garner, Ed., *Black’s Law Dictionary* 479 (Pocket Ed. West 1996). (See Case)

¹¹ 15 U.S.C. § 2.

¹² See 15 U.S.C. § 14.

¹³ See *id.* at § 18.

¹⁴ See *id.*

¹⁵ See *id.* at § 45.

enacted antitrust, unfair competition, and deceptive trade practice laws that are largely consistent with the federal statutes.¹⁶

B. EU Statutory Law

The European Union is divided into three relevant institutions dealing with antitrust regulation.¹⁷ The Treaty Establishing the European Community (the EC Treaty)¹⁸ established the European Commission as the executive branch of the Community, which proposes legislation and monitors compliance.¹⁹ The EC Treaty also established the European Court of Justice (ECJ), which consists of fifteen judges with jurisdiction over such issues as failure to fulfill a treaty obligation and interpretations of Community law.²⁰ The third institution is the Court of First Instance (CFI), which was created to ease the burden of the ECJ.²¹ The CFI is also made up of fifteen judges, whose focus is upon more complex factual situations.²²

The majority of the antitrust law for the European Union can be found in Articles 81 and 82 of the EC Treaty; treaty law rather than a legislative or parliamentary action governs antitrust law in the European Union.²³ The goal of the EC Treaty is to promote agreements to strengthen

¹⁶ See Reynolds, *supra* note 5, at 3.

¹⁷ See Justin O'Dell, Note, *Trouble Abroad: Microsoft's Antitrust Problems Under the Law of the European Union*, 30 GA. J. INT'L & COMP. L. 101, 119 (2001).

¹⁸ The EC Treaty is also known as the Treaty of Rome. See Treaty Establishing the European Community (Treaty of Rome), Part Three Community Policies, Title VI Common Rules on Compensation, Taxation, and Approximation of Laws, Chapter 1 Rules of Competition, Section 1 Rules Applying to Undertakings, Articles 81 (formerly Article 85) and 82 (formerly Article 86) (1997)[hereinafter EC Treaty].

¹⁹ See O'Dell, *supra* note 17, at 119 (citing Scott M. Kareff, *Terta Pak International SA v. Commission: The European Approach to Monopoly Leveraging*, 28 LAW & POL'Y INT'L BUS. 549, 564 (1997)).

²⁰ See O'Dell, *supra* note 17, at 119 (citing Kareff, *supra* note 19, at 565-66).

²¹ See *id.* The ECJ is also the appellate court for the CFI. See *id.*

²² See *id.*

²³ See O'Dell, *supra* note 17, at 120 (citing James B. Kobak, Jr., *Running the Gauntlet: Antitrust and Intellectual Property Pitfalls on the Two Sides of the Atlantic*, 64 ANTITRUST L.J. 341, 352 (1996)).

the Community, thus arrangements that restrict Community commerce or maintain economic boundaries between States are restricted or prohibited by the EC Treaty.²⁴ Article 81(1) prohibits all agreements between undertakings²⁵ that may affect trade between member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the common market.²⁶ Article 81(3) gives the Commission the power to exempt individual agreements that may restrict competition, but nonetheless serve other important goals of the European Community.²⁷ Thus, the two-step inquiry consists of an initial determination of whether Article 81(1) applies, followed by an inquiry into whether the activity nonetheless is exempted under Article 81(3). Article 82 covers unilateral acts of dominant firms, prohibiting various abuses of an undertaking's dominant position if it has an indirect or direct, actual or potential effect on trade in the relevant market or markets.²⁸

III. EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS

The United States and the European Union both seek to apply their respective domestic antitrust laws to any company whose practices “affect” their domestic market, whether that company is foreign or

²⁴ See O’Dell, *supra* note 17, at 121.

²⁵ The Treaty of Rome applies to all “undertakings,” Eurospeak for companies or business entities. See MILTON HANDLER ET AL., *TRADE REGULATION CASES AND MATERIALS* 23 (4th ed. 1997).

²⁶ See Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 *ANTITRUST L.J.* 55 (1992). See EC Treaty, *supra* note 18, at Article 81. The language “effect on trade between member states” is defined broadly, requiring only a potential effect on trade and allowing agreements between undertakings in the same member state to fall under the purview of the Article if they affect competition. See Waller, *supra* note 26, at 59 n.21-22 and accompanying text.

²⁷ See Waller, *supra* note 26. Parties to agreement can also seek a “negative clearance” (formal binding decision that an agreement does not impinge Article 81) or a “comfort letter” (informal non-legally-binding notification to ascertain the intentions of the Commission). See *id.* at 61 n.36-38 and accompanying text.

²⁸ See EC Treaty, *supra* note 18, at Article 82. For a detailed description of the various elements of Article 82, see O’Dell, *supra* note 17, at 121-28.

domestic.²⁹ When such application is to a foreign company, it is termed “extraterritorial.”³⁰ While a State’s extraterritorial application of its domestic law is often a question of degree, some States are willing and able to regulate conduct abroad and some are not.³¹

A. Extraterritorial Application of U.S. Laws

The first time the United States considered the issue of extraterritorial application of its laws was in *American Banana Co. v. United Fruit Co.*,³² wherein the U.S. Supreme Court held that U.S. courts had no jurisdiction because the actions at issue occurred abroad.³³ More specifically, although both the plaintiff and defendant in the case were U.S. corporations, the actions at issue took place in Panama and Costa Rica.³⁴ Therefore, the Court declared that “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”³⁵ However, the question of extraterritorial application arose again in *United States v. Aluminum Co. of America (Alcoa)*,³⁶ with a different result. Under the holding of *Alcoa*, business enterprises with no direct connection to the U.S., so long as they had an intended and actual effect on the U.S. market, were subject to U.S. jurisdiction.³⁷ This holding came to be known as the “intended effects” doctrine. After *Alcoa*, the United States could apply its laws extraterritorially, and was the only country in a position to do so at the time.³⁸

²⁹ See Sugden, *supra* note 1, at 1007.

³⁰ See Guzman, *supra* note 4, at 1506. Likewise, “territoriality” is the situation in which a country’s laws apply only to national activity. See *id.*

³¹ See *id.* at 1508.

³² 213 U.S. 347 (1909). (See Case)

³³ See *id.* at 358-59.

³⁴ See Guzman, *supra* note 4, at 1506 (citing 213 U.S. at 356).

³⁵ 213 U.S. at 357.

³⁶ 148 F.2d 416 (2d Cir. 1945). (See Case)

³⁷ See *id.* at 443-44.

³⁸ See Guzman, *supra* note 4, at 1536.

The Alcoa doctrine was revised in *Timberlane Lumber Co. v. Bank of America*,³⁹ wherein the intended effects analysis was transformed by the court into the initial step in the consideration, to be followed by an inquiry into international comity⁴⁰ factors raised by the issue.⁴¹ A few years later, the U.S. Congress also spoke on the propriety of the Alcoa test by enacting the 1982 Foreign Trade Antitrust Act, under which there must be a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce by the activity at issue to assert U.S. antitrust jurisdiction.⁴² Then in *Hartford Fire Ins. Co. v. California*,⁴³ the U.S. Supreme Court returned to the comity dialogue, affirming the principles of the 1982 Act.⁴⁴ However, the Court also reexamined the *Timberlane* test, and held that comity should only be considered when there is a “true conflict” between foreign law and U.S. law.⁴⁵ As a basis for this holding, the Court cited the Restatement of Foreign Relations Law premise that no conflict exists when the laws of two nations can be complied with simultaneously.⁴⁶ As a result, the role of comity in U.S. antitrust law was reduced in favor of a

³⁹ 549 F.2d 597 (9th Cir. 1976). (See Case)

⁴⁰ *See* *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). “[Comity] is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” (See Case)

⁴¹ Specifically, the comity factors to consider 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; (6) the extent to which there is explicit purpose to harm or affect American commerce; (7) the foreseeability of such effect; and (8) the relative importance of the violations charged of conduct within the United States compared with conduct abroad. *See* *Timberlane*, 549 F.2d at 613-15.

⁴² *See* Sherman Act, 15 U.S.C. § 6a (Matthew Bender 2002). *See also supra* note 6.

⁴³ 509 U.S. 764 (1993).

⁴⁴ *See id.*

⁴⁵ *See id.* at 798.

⁴⁶ *See id.* at 799 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. e (1987)).

stronger emphasis on the domestic antitrust interests of the United States.⁴⁷

B. Extraterritorial Application of EU Law

European Union competition laws regulate behavior that “may affect trade” between member states or that has “an anticompetitive effect” on the European Community market.⁴⁸ This effect on trade must be more than de minimus, and can be direct or indirect, actual or potential.⁴⁹ Similar to U.S. law, comity concerns yield to enforcement of EU competition laws.⁵⁰ The European Union addressed the issue directly in the “Wood Pulp” decision,⁵¹ in which a U.S.-based wood pulp manufacturer argued that because the association was legal in the United States, it should be legal in the European Union as well.⁵² However, there was no requirement in U.S. law that the company, because it was legal in the United States., be exempt from EU law.⁵³ The ECJ rejected the defendant’s claims, reasoning that the principle of public non-interference only applied when the duties of one State were in conflict with those of another.⁵⁴ The European Union further narrowed their consideration of international comity in *IBM v. EC Commission*,⁵⁵ holding that comity should not even be considered until after a decision had been made.⁵⁶

⁴⁷ See Sugden, *supra* note 1, at 1011.

⁴⁸ See EC Treaty, *supra* note 18, at Article 81(1).

⁴⁹ See *id.*

⁵⁰ See generally Joseph P. Griffin, E.C. and the U.S. Extraterritoriality: Activism and Cooperation, 17 *FORDHAM INT’L L. J.* 353, 357 (1994).

⁵¹ See Case 89/85, *In Re Wood Pulp Cartel*: A. Ahlstrom Oy v. E.C. Commission, 1988 E.C.R. 5193.

⁵² See *id.*

⁵³ See Sugden, *supra* note 1, at 1013.

⁵⁴ See *id.* Note the similarity of this test to the American notion of the application of principles of comity. See *supra* notes 40-47 and accompanying text.

⁵⁵ See Case 60/81, *IBM v. EC Commission*, 1981 E.C.R. 2639.

⁵⁶ See *id.*

Later, in the Boeing-McDonnell Douglas⁵⁷ and GE-Honeywell⁵⁸ cases, the European Union made clear its intention to assert its jurisdiction to companies outside of Europe.⁵⁹

C. Key Differences Between U.S. and EU Antitrust Law

In many ways, European Community antitrust powers are lacking compared to U.S. enforcement standards.⁶⁰ Specifically, unlike the U.S. Justice Department, the EC does not have the power to split up a company that is violating antitrust laws, which may explain its heightened stringency against potentially problematic mergers.⁶¹ The content of the Sherman Act and EC Treaty is different as well. Unlike Section 1 of the Sherman Act, EC Treaty Article 81(1) contains a partial list of prohibited anticompetitive agreement types and reaches concerted conduct not rising to the level of Sherman Act contract, combination, or conspiracy.⁶² Article 81(3) of the EC Treaty expressly permits the consideration of the kind of health, safety, and societal concerns that the U.S. Supreme Court has held to fall outside the scope of the rule of reason.⁶³

In addition, the process under an EC Treaty Article 81 or 82 analysis is different from that under the Sherman Act. Specifically, under

⁵⁷ See Commission Begins Investigation of the Boeing/McDonnell Douglas Merger, Official Press Release of the Eur. Union IP/97/236 (Eur. Comm'n, Brussels, Belg.), Mar. 19, 1997, at 1.

⁵⁸ See EU Commission Prohibits GE's Acquisition of Honeywell (July 3, 2001), available at <http://www.eurunion.org/news/press/2001/2001052.htm>.

⁵⁹ See Sugden, *supra* note 1, at 1015.

⁶⁰ See Jeffrey M. Peterson, Comment, *Unrest in the European Commission: The Changing Landscape and Politics of International Mergers for United States Companies*, 24 HOUS. J. INT'L L. 377, 400 (2002).

⁶¹ See *id.* at 400 (citing Anita Raghavan & Brandon Mitchener, U.S. Executives Learn the Hard Way About Mario Monti, WALL ST. J. EUR., Oct. 2, 2000, at 1); see also Kuik, *supra* note 3, at 442 ("Their traditionally higher willingness to actively pursue alleged competition law violations is justified by the generally limited availability of effective private enforcement.").

⁶² See Waller *supra* note 26, at sect. II, comparing Cooperatieve Vereniging 'Suiker Unie' UA v. Commission (SUGAR), 1975 E.C.R. 1663, 1942 with Theatre Enters v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954).

⁶³ See Waller *supra* note 26, at n.47 and accompanying text. See also *supra* note 10.

U.S. law which standard applies and whether the conduct is in violation of the statute are determined in a one-step process.⁶⁴ However, under EU laws, the Commission and the ECJ would not get to the issue of whether an exemption should be allowed under Article 81(3) unless the agreement was deemed anticompetitive under Article 81(1).⁶⁵

As a result, certain anticompetitive agreements will pass unscathed through EU antitrust law that the United States might consider per se unreasonable.⁶⁶ On the other hand, EC Treaty Article 81 provides for much stricter treatment of vertical agreements compared to U.S. law.⁶⁷ Therefore, European and U.S. antitrust law can come into conflict when both sets of law apply, one domestically and one extraterritorially. The key differences between the United States and the European Union in practice concern application and practices and the extent to which antitrust laws should protect competitors from competition.⁶⁸ The issue of what to do when both sets of law apply has been the subject of much academic debate.

IV. NATIONAL ANTITRUST LAWS IN A GLOBAL ECONOMY

⁶⁴ See Waller *supra* note 26, at n. 43-44 and accompanying text.

⁶⁵ See *id.* at n. 45 and accompanying text.

⁶⁶ See *supra* note 10.

⁶⁷ See Waller, *supra* note 26. A further complication in the EU involves the fact that individual Member States cannot agree on how much and what authority the EU should have. See Peterson, *supra* note 60, at 408. Although some hope that the structure of the United States could be reborn under the EU, this is unlikely because the EU is starting from the “opposite direction.” See *id.* at 408-09 (explaining that the U.S. took settled colonies and united them, but the EU is trying to start with separate countries and make them cooperate).

⁶⁸ See Address by William J. Kolansky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, U.S. and E.U. Competition Policy: Cartels, Mergers, and Beyond (Jan. 25, 2002), available at <http://www.asdoj.gov/atr/public/speeches/9848.htm> [hereinafter Kolansky Address]. Some have argued that sometimes competitors need to be protected not just for their own sake, but for the preservation of competition. See *id.*

A National Laws, Multinational Corporations

As businesses continue to expand into multinational corporations, global business organizations increasingly have a need for global antitrust.⁶⁹ This result stems from the very problem that antitrust laws seek to solve: antitrust policy is intended to restrain the behavior of monopolistic firms to increase the welfare of consumers.⁷⁰ Because firms and consumers are distributed unequally across States, governments do not have identical interests.⁷¹ Therefore, the United States and the European Union have become, globally, the equivalent of the type of monopolies that they try to prevent nationally. Under both sets of laws, if either the United States or the European Union were corporations, they would consider themselves an illegal monopoly.⁷² However, no global antitrust authority exists to prevent either from unfairly using their dominant position to increase their power. Further, being the historical world leaders in antitrust law, they aren't likely to want to change their position.⁷³

B. Current U.S.-EU Relations

The European Union and the United States are the two largest economies in the world, jointly account for 50% of the world economy, and share the world's largest bilateral trading and investment relationship.⁷⁴ However, the growing interdependence in EU-U.S. trade relations has not been met with equal cooperation.⁷⁵ Despite this fact, they have made steps to ease the tensions between the two sets of laws.

⁶⁹ See Sugden, *supra* note 1, at 991.

⁷⁰ See Guzman, *supra* note 4, at 1548.

⁷¹ See *id.*

⁷² In fact, the Treaty of Rome was meant to include "States" as well as "undertakings." See EC Treaty, *supra* note 18, at Article 81(1).

⁷³ See generally Guzman, *supra* note 4, at 1507.

⁷⁴ See Kuik, *supra* note 3, at 434.

⁷⁵ See *id.* at 435.

The United States and the European Union reached a regional agreement in 1991, which 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.”⁷⁶ The agreement embodies the intention to make the nonbinding recommendations by the Organization for Economic Cooperation and Development (OECD)⁷⁷ binding on relations between the United States and the European Union; specifically, the recommendations of a negative comity clause, a notification clause, and information exchange.⁷⁸ Yet the most “innovative feature” of the U.S.-EU agreement is a “positive comity” clause that permits either jurisdiction to request that the other pursue a particular case, and imposes a duty to make a good faith decision on whether to pursue action.⁷⁹ In addition, the joint merger working group between the United States and the European Union is working to “cooperate” and “bring us even closer together.”⁸⁰ As globalization increases and it becomes more difficult for any single antitrust authority to enforce its antitrust laws without coordinated information sharing,

⁷⁶ See Sugden, *supra* note 1, at 1005 (citing Laura E. Keegan, *The 1991 U.S./EC Competition Agreement: A Glimpse of the Future Through the United States v. Microsoft Corp. Window*, 2 J. INT’L LEGAL STUD. 149, 159 (1996)).

⁷⁷ The OECD is a multilateral organization that provide the basis for cooperative policies between national agencies. See Handler et al., *supra* note 25, at [46] Recent OECD recommendations include notification by one country when an antitrust enforcement issue may affect important interests of that country or its nations and cooperative consultation to minimize differences. See *id.* at [47] n.49 and accompanying text (citing Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. No. c(86)44 (Final) (May 21, 1986)).

⁷⁸ See Sugden, *supra* note 1, at 1005 (citing 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, 1491).

⁷⁹ See Sugden, *supra* note 1, at 1006.

⁸⁰ See Kolansky Address, *supra* note 68.

agreements such as the informationsharing agreements between the United States and the European Union are likely to increase.⁸¹

C. Extraterritoriality in Practice: The GE-Honeywell Case

In the GE-Honeywell case, the parties wanted to combine GE (aircraft engine manufacturer) with Honeywell (avionics and other aircraft components), arguing that the combined firm could offer a more comprehensive range of products to customers. The United States accepted this view and approved the merger,⁸² believing that lower prices and an improved portfolio would benefit consumers.⁸³

However, the European Union prohibited the transaction, fearing that the new company would undermine its competitors by use of the same advantages the United States applauded.⁸⁴ As the result of the case, the United States gained a strong reaffirmation by the European Commission that it shares the ultimate goal of sound competition through focusing on consumer welfare, which competition advances through lower prices, higher output, and enhanced innovation.⁸⁵

The agreement between the United States and the European Union detailed above, although helpful to U.S.-EU relations, is merely an information sharing agreement, and could not prevent the events that transpired in the GE-Honeywell case. This run-in between U.S. and EU antitrust law serves as a stark example of a worldwide problem occurring when domestic antitrust laws “overlap.” Academics, commentators, and

⁸¹ See Sugden, *supra* note 1, at 999.

⁸² From Reuters, GE Plans to Offer EC Facts in Merger, at B3, LOS ANGELES TIMES (from Reuters)(May 29, 2001).

⁸³ See Abbott B. Lipsky, Jr., *The Evolving Architecture of International Law: The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, 26 FLETCHER F. WORLD AFF. 59, 63 (2002).

⁸⁴ See *id.* See also *supra* note 58.

⁸⁵ See Kolansky Address, *supra* note 68.

national agencies have suggested several possibilities to help ease these multinational tensions.

V. ANALYSIS OF PROPOSED SOLUTIONS

Commentators and policy makers have suggested several possibilities to help ease the multinational tensions raised by the extraterritorial application of domestic laws. As the following will demonstrate, these suggestions represent widely divergent views about how to solve the problems currently associated with antitrust on a global level. To date, no viable solution has emerged from the debate. In addition, each model espouses an oversimplified view of the international antitrust structure, and thus proposes overly simplistic solutions. Finally, each of these models ignores one aspect of the current world antitrust regime that is germane to the success of any proposal.

A. *Global Antitrust Adjudication Forum*

The European Community has proposed that the World Trade Organization (WTO) house a global antitrust authority, whose goals would include requiring member States to enact and maintain minimal competition laws; mandating transparent, nondiscriminatory enforcement; providing for cooperation between antitrust authorities; and aiming for the gradual convergence of national practices.⁸⁶ However, commentators question the ability of the WTO to accomplish this goal for several reasons.⁸⁷ First, the WTO is a statutory and adjudicatory body designed for negotiations and quasi-political-judicial proceedings between member States, and is therefore not equipped to police private conduct by

⁸⁶ See Sugden, *supra* note 1, at 1002 (citing Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 478 (2000)).

⁸⁷ See *id.*

organizations.⁸⁸ Second, the fact-intensive case law that has evolved from the antitrust statutes is more suited to interpretation by lawyers and judges, as such specificity does not exist within the WTO regulations.⁸⁹ Also, the judicial procedures of the WTO are more suited for adjudicating issues involving international norms than involving private corporations.⁹⁰ In addition to these difficulties, the WTO and other existing global agencies are diplomatic in nature, focusing on advocating policies between States, and are thus incompatible with the adjudicative role that would need to be played by an international antitrust authority.⁹¹

Another problem with this model is that it assumes that States possess equal power, but in actuality States have differing amounts of leverage in the global market to impose their views of optimal antitrust on others.⁹² For example, a State's limited ability may result from a small fraction of the foreign business taking place in that State, whereas an unlimited regulatory ability may be the result of substantial assets and large proportions of business in that State.⁹³ In turn, this power disparity produces different opinions about what constitutes optimal levels of antitrust.⁹⁴ Therefore, the only way that those with large amounts of antitrust "bargaining power" would be willing to engage in an agreement with those with less power is if those States compensate the more powerful in some way for the loss they will suffer under the agreement.⁹⁵

⁸⁸ See Sugden, *supra* note 1, at 1002-03 (citing Tarullo, *supra* note 86, at 483-89).

⁸⁹ See Sugden, *supra* note 1, 1003.

⁹⁰ See *id.* Similarly, the OECD is ill-equipped to adjudicate global antitrust issues, as it is inherently cooperative, whereas enforcement is inherently adversarial. See *id.* at 1004.

⁹¹ See *id.*

⁹² See Sugden, *supra* note 1, at 996 (citing Guzman, *supra* note 4, at 1528-29).

⁹³ See Guzman, *supra* note 4, at 1506-07.

⁹⁴ See *id.*

⁹⁵ See Guzman, *supra* note 4, at 1527.

Unfortunately, the States that would need to make such payment are unlikely to have the resources to do so.⁹⁶

The European Community's suggestion is that member States of the WTO agree on a competition "code" that will be binding on those States.⁹⁷ Disagreement over what that code might contain aside, this concept would likely fail to gain worldwide acceptance, based upon a more well-known, lengthy, historical, and heretofore failed attempt to subject all States to mandatory adjudication of issues – the International Court of Justice (ICJ).⁹⁸ In fact, one commentator called further efforts to develop a global antitrust authority "a fruitless waste of time."⁹⁹ The United States has also directly rejected this concept.¹⁰⁰

Finally, agreements that address enforcement and require minimum standards are likely to be difficult to negotiate or enforce.¹⁰¹ This is so because some States have difficulty enforcing their own laws, as exemplified in the United States, due to antitrust enforcement through private parties, states, and various federal agencies, as well as state authority to create exceptions from federal compliance.¹⁰²

⁹⁶ See *id.* This is one reason that this commentator advocates the multi-subject negotiation model. See *infra* text accompanying notes 141-43.

⁹⁷ See Peterson, *supra* note 60, at 406.

⁹⁸ The United States has been one of the few hold outs to the "World Court." Ironically, the concept of the World Court has been deemed the "American plan" because the idea was the result of a peaceful arbitration between the U.S. and the English over the attacks by the English ship called The Alabama and many of the ideas for the structure and function of the Court were based upon the U.S. Supreme Court, which had successfully (save the Civil War) settled the differences of the thirteen original, independent colonies. Jennifer Johnson & Ami Mudd De Celle, Book Review, *The World Court in Action: Judging Among the Nations* by Howard N. Meyer, 43 SANTA CLARA L. REV. (forthcoming 2003).

⁹⁹ See Sugden, *supra* note 1, at 1017.

¹⁰⁰ See Peterson, *supra* note 60, at 406; see also *supra* note 98 (mirroring the attitude of the U.S. concerning the World Court).

¹⁰¹ See Guzman, *supra* note 4, at 1541.

¹⁰² See Guzman, *supra* note 4, at 1541 n.124-125 (citing Joseph P. Griffin, United States Antitrust Laws and Transnational Business Transactions: An Introduction, 21 INT'L LAW. 307, 312-14 (1987) (describing federal, state, and private antitrust enforcement

*B. Continued Bilateral Agreements and Strengthening Extraterritorial
Application*

On the flip side, those who see an international antitrust authority as an idealistic, albeit unrealistic, goal suggest measures more in keeping with the current trend.¹⁰³ One student commentator has suggested two potential remedies: (1) continued development of bilateral agreements; and (2) continued and strengthening extraterritorial application of domestic antitrust laws.¹⁰⁴ He cites the U.S.-EU resolution of the Boeing-McDonnell Douglas case as an example of why this system is likely to be successful.¹⁰⁵ In the case, a merger that the United States deemed to be permissible was held to be against the antitrust interests of the European Union.¹⁰⁶ The United States and the European Union eventually found terms that both could agree upon.¹⁰⁷ Therefore, the premise of this argument is that both U.S. and EU antitrust laws evolved as a result of extraterritorial enforcement, causing the two sets of laws to converge.¹⁰⁸

However, other commentators have questioned “whether the existing model of . . . separate laws in each jurisdiction . . . [with] each [jurisdiction] proceeding according to its own rules and agendas, subject to coordination with other jurisdictions only at the margins – is viable.”¹⁰⁹ In fact, some believe that following our current system to its logical conclusion means that it is only a matter of time before the type of

procedures) and *Parker v. Brown*, 317 U.S. 341, 362 (1943) (granting California right to control its domestic industries even though doing so might affect interstate commerce)).

¹⁰³ See Sugden, *supra* note 1, at 1017-20.

¹⁰⁴ See *id.* at 1017-18.

¹⁰⁵ See *id.* at 1018.

¹⁰⁶ See *id.* See also *supra* note 57.

¹⁰⁷ See Sugden, *supra* note 1, at 1018.

¹⁰⁸ See *id.* at 1019.

¹⁰⁹ See Lipsky, *supra* note 83, at 65.

standoffs seen in the GE-Honeywell case¹¹⁰ are common in international economic and diplomatic relations.¹¹¹

In addition, the effect of any bilateral or multilateral agreements needs to be considered, not just their likelihood.¹¹² For example, an agreement between two States, such as the United States and European Union, is likely to occur because both entities are pursuing a similar policy independently.¹¹³ For agreements between several States, the cooperation is likely to favor the welfare of the negotiating parties, and this result may not coincide with global welfare because only a small subset of the world participates.¹¹⁴ In his discussion of positive comity, one commentator noted that while enforcement authorities in such agreements are not obligated to take action, they are expected “to investigate and make a good faith enforcement decision on the basis of its competition law and not on the basis of the nationality of the alleged victim or respondent.”¹¹⁵ However, other commentators have spent intensive amounts of energy on methods that assume that this model is naïve. For example, one commentator who focuses on the economic model starts with the assumption that, due to national interests, States are unlikely to pursue the most optimal level of global regulation.¹¹⁶

An example can be seen through the U.S. exemption for export cartels. The U.S. Webb-Pomerene Act of 1918¹¹⁷ exempts from the reach

¹¹⁰ See *supra* note 58.

¹¹¹ See Lipsky, *supra* note 83, at 66. The commentator that made this statement believes that these standoffs will be on a smaller scale, but that the prerogatives of antitrust enforcers will be pushed beyond acceptable limits. See *id.*

¹¹² See Guzman, *supra* note 4, at 1526.

¹¹³ See *id.* at 1525.

¹¹⁴ See *id.* at 1526.

¹¹⁵ See Spencer Weber Waller, *Can U.S. Antitrust Laws Open International Markets?*, 20 NW. J. INT’L L. & BUS. 207, 230 (2000)(emphasis added).

¹¹⁶ See Guzman, *supra* note 4, at 1504 for an excellent, extensive analysis under the economic model.

¹¹⁷ See Pub. L. No. 65-126, 40 Stat. 516 (1918) (codified at 15 U.S.C. §§ 16-66 (1994)).

of the Sherman Act trade associations formed “for the sole purpose of engaging in export trade.”¹¹⁸ The theory behind this exemption, from a national perspective, is that as long as the welfare loss from anticompetitive activities is largely or wholly borne by foreign consumers, the optimal antitrust policy is no policy at all.¹¹⁹ These types of exemptions allow exporters to engage in behavior that would be prohibited if it occurred within the country.¹²⁰

In short, this proposal suggests that we let the system work itself out, largely continuing down the road we are currently taking. However, William J. Kolansky, Deputy Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice has stated that that division of our government itself is against the idea of just ‘leaving things be’: “What is needed therefore is not that we stop talking about these important issues, but that we move beyond talking and begin taking steps to address them.”¹²¹

C. The International Competition Network (ICN)

In October 2001, the antitrust authorities of thirteen States came together to form the International Competition Network (ICN), which is the only multilateral government organization to discuss “all competition, all the time.”¹²² It is uniquely independent of other agendas pursued by international organizations.¹²³ As of Fall 2002, a total of fifty-six authorities have joined.¹²⁴ Premised on the understanding that “sound

¹¹⁸ See Guzman, *supra* note 4, at 1533 (citing 15 U.S.C. § 62).

¹¹⁹ See *id.* at 1514.

¹²⁰ See *id.* at 1534.

¹²¹ Kolansky Address, *supra* note 68.

¹²² See Lipsky, *supra* note 83, at 65.

¹²³ See *id.* Such agendas include issues such as trade and development, often discussed along with competition issues. However, some argue that discussion of competition in isolation will hinder, not help, the progress of global antitrust. See also *infra* notes 141-43 and accompanying text.

¹²⁴ See Lipsky, *supra* note 83, at 65.

antitrust enforcement requires a deep and shared ‘culture of competition,’” the first step for the ICN is understanding each other’s law, institutions, and economic principles.¹²⁵ William Kolansky was recently quoted as saying about the ICN:

“The goal of the ICN was twofold. First, to provide support for new competition agencies both in enforcing their laws and in building a strong competition culture in their countries. Second, to promote greater convergence among these authorities around sound competition principles by working together and with stakeholders in the private sector, to develop best practice recommendations for antitrust enforcement and competition advocacy that could then be implemented voluntarily by the member agencies.”¹²⁶

However, the world already has an agency to recommend voluntary guidelines that States can choose to follow at their discretion.¹²⁷ In addition, ineffectiveness resulting from the non-compulsory nature of the early World Court can again serve as an example of why such a system is unlikely to bring any significant change. The original Court was “an international dispute resolution body, but it left arbitration by the Court a voluntary matter, and left the U.S. Senate free to veto U.S. participation in individual cases.”¹²⁸ As history illustrates, recommendations are not likely to be universally adopted if States are free to follow them or not as they see fit.

¹²⁵ See Kolansky Address, *supra* note 68.

¹²⁶ See DOJ Official Discusses ICN Before IBA Competition Conference, BNA Vol. 83, No. 2075 (Sept. 27, 2002)(Antitrust and Trade Regulation)(emphasis added).

¹²⁷ That agency is the Organization for Economic Cooperation and Development. See also *supra* note 77 and accompanying text.

¹²⁸ See Johnson and DeCelle, *supra* note 98.

D. The Leadership Model

One commentator suggests that a new paradigm “leadership model” may emerge out of the current global antitrust chaos.¹²⁹ Such a model would include the largest industrialized States attempting to adopt a common enforcement approach and asking other jurisdictions to follow.¹³⁰ However, he questions whether developing States will simply defer to the rule of the most successful jurisdictions.¹³¹ By contrast, another commentator suggests that developing States already defer to the most successful jurisdictions.¹³² In addition, the problem of a small group of States tending to their domestic economies rather than acting upon recognition of globally optimal conditions discussed under the bilateral agreement/extraterritorial application model applies here as well.¹³³

E. The Expert Negotiation-Government Implementation Model

Recognizing that legal reform requires legislation, some have acknowledged the success of experts working together to propose uniform law instead of direct negotiations between governments.¹³⁴ Looking to the National Conference of Commissions of Uniform State Laws (NCCUSL) as its model, the Uniform Commercial Code (U.C.C.) is a clear example of the success of this method on the national level.¹³⁵ The NCCUSL is a non-profit group formed in 1897 in response to the perceived need for uniform state law approaches to U.S. commerce, and consisted of expert commissioners, including private legal practitioners, law professors,

¹²⁹ See Lipsky, *supra* note 83, at 66.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See Guzman, *supra* note 4, at 1524. In a world with extraterritoriality, “the toughest law is the binding law because ... that country can prevent the activity through extraterritorial application of its laws.” See *id.*

¹³³ See *supra* note 114 and accompanying text.

¹³⁴ See Lipsky, *supra* note 83, at 67.

¹³⁵ See *id.*

judges, and legislators.¹³⁶ This “expert negotiation-government adoption” model could be translated to international antitrust issues.¹³⁷

An example of this model currently in practice can be seen in the joint merger working group between the United States and the European Union.¹³⁸ The group is comprised of twenty U.S. attorneys and economists, and similar members from the European Union working together to examine issues germane to antitrust law and discuss cooperation.¹³⁹ In addition, the Antitrust Division of the Department of Justice, in conducting a thorough review of where they can improve, convened a roundtable last November consisting of the senior in-house counsel of various large U.S. companies for their input on how to improve in the area of merger review.¹⁴⁰

However, one commentator predicts that single-topic negotiations are unlikely to lead to an agreement.¹⁴¹ He suggests that negotiations of unrelated issues should take place simultaneous with those of antitrust issues.¹⁴² Despite the fact that this makes negotiations more complex, it also puts other issues “on the table,” allowing potential ‘losers’ in the antitrust bargain other areas and benefits with which to bargain, making agreement more likely.¹⁴³

In addition, the successes of the U.C.C. and joint merger working group may be lesser accomplishments than they appear. When the U.C.C. was adopted, it was largely a revision of existing laws. The joint merger working group, while discussing cooperation between the United States

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See* Kolansky Address, *supra* note 68.

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See* Guzman, *supra* note 4, at 1545.

¹⁴² *See id.*

¹⁴³ *See id.* at 1545-46.

and the European Union, is working with the laws of two States with roughly the same resources and the same goals. It would be naïve to think that such cooperation could be as easily achieved between two (or more) less similar States.

F. The Oversimplification Problem

One problem with each of the proposed solutions above is that they assume an oversimplified international antitrust context. For example, the global antitrust authority model assumes that States of varying levels of antitrust enforcement, economic resources, and international clout will drop their self-interest in favor of internationally optimal conditions.¹⁴⁴ The bilateral agreement-extraterritorial application model takes this into consideration, but therefore sees global cooperation in any form as untenable.¹⁴⁵ A viable solution lies somewhere between these two views. The ICN model recognizes the problem of mandatory adjudication under the global antitrust authority model, but its proposed alternative, voluntary implementation,¹⁴⁶ is likely to be just as ineffective. Likewise, the expert negotiation-government implementation model recognizes that self-interest may prevent governments from working together effectively, but fails to recognize that States hold unequal bargaining power,¹⁴⁷ and thus, some countries may not have anything to bargain with. In addition, each model fails to recognize the role of emerging technologies in the global antitrust landscape, ignoring an important element of any viable solution.¹⁴⁸ In short, the issue of global antitrust regulation is complex, and thus is unlikely to be solved by a simplistic model.

¹⁴⁴ See *supra* notes 92-96 and accompanying text.

¹⁴⁵ See *supra* text accompanying note 103.

¹⁴⁶ See *supra* text accompanying note 126.

¹⁴⁷ See *supra* text accompanying notes 142-43.

¹⁴⁸ One commentator suggests that innovation and new technology serves a “critical role” in antitrust rule formulation, and is “by far the most important source of long-run productivity growth.” See Lipsky, *supra* note 83, at 67.

VI. PROPOSAL

In considering a new model, one should not discard prior incomplete ideas that have fractional utility. Instead, any new proposal should take full advantage of the strengths and weaknesses of the models that have come before it. To begin with, the model for building viable global antitrust regime should begin with what appears to be most successful – the expert negotiation-government implementation model. This proposal, while imperfect, cures some of the deficiencies of its predecessors, taking a step toward a truly workable international system. As seen through the successes of the U.C.C. and the joint merger working group of the Department of Justice Antitrust Division,¹⁴⁹ this model begins with a structure designed by those who are experts in their respective fields. On the multinational level, this group would certainly include participants from several different nationalities, but would not necessarily include experts in international or comparative law. Instead, experts in domestic antitrust law, economists, corporate attorneys, and those versed in emerging technologies and intellectual property transactions would better serve the purpose of designing a system for the future of global commerce. A panel of experts in their respective fields solves two problems raised by the Global Antitrust Adjudication Forum model. First, experts can rely on their experience to include specificity in the norms and standards that result from the group, an aspect lacking in previous multinational regulations.¹⁵⁰ Second, by including in the group those involved in business and economics, the standards that result from the group are more likely to be applicable to private companies in addition to States, something that the global antitrust authority proposed by the

¹⁴⁹ See *supra* text accompanying notes 135-38.

European Community would not be able to do.¹⁵¹ In this way, the use of experts as the core of this model brings it closer to the goal of international cooperation.

In forming this group, cooperation will need to move beyond bilateral agreements to the multilateral arena.¹⁵² Having said this, however, a group with representatives from all States is unlikely to reach any resolution efficiently. Therefore, the number of nationalities to include must be somewhere between two (total) and one per member State. This model proposes that a group of four to eight nationalities would be ideal. This number is large enough to overcome the weaknesses of ineffective, uncompromising bilateral agreements, yet small enough to find common ground. In addition, a group this size is large enough and diverse enough to include probable “leaders” for a large number of States. Therefore, when States become part of the group, each can follow the model of the founding State that is most similar to their own. This group will be referred to as the “founding group.” A group of this size solves two problems raised by the Bilateral Agreement model. First, it reduces the number of standoffs that result from States’ attempts to proceed according to their respective domestic laws and coordinating only when essential.¹⁵³ Second, the group is small enough to be able to find some common ground, yet large enough for that ground to be more internationally optimal than if each country simply protected its own interests.¹⁵⁴ Thus the size of the group proposed by this model makes realistic international cooperation more likely.

¹⁵⁰ See, e.g., *supra* text accompanying note 89.

¹⁵¹ See *supra* notes 86-88 and accompanying text.

¹⁵² See *supra* text accompanying notes 112-114.

¹⁵³ See *supra* notes 109-11 and accompanying text.

¹⁵⁴ See *supra* notes 114 and 116 and accompanying text.

Emerging technology may be the key to the success of this model, as it often serves as an accurate predictor of where commerce is going.¹⁵⁵ In addition, the inherent tension between intellectual property-imposed ‘monopolies’ and antitrust law requires that any new scheme consider intellectual property issues if it is to achieve long-term success.¹⁵⁶ However, the inclusion of technology also further complicates the discussion. Nonetheless, the incidence and extent of Internet involvement in business transactions have brought society to a point in history where technology considerations cannot be ignored, regardless of how they confuse the issue.

Once the founding group is formed, it could serve as the “leadership” that other jurisdictions could eventually be asked to follow.¹⁵⁷ To overcome the issues associated with forming an organization of the most powerful jurisdictions and simply asking the rest to comply, the member States of this group should vary in size and bargaining power. Because the United States and the European Union are the “experts” in antitrust thus far in global history, they should both be included.¹⁵⁸ However, the remaining members of the group should include States with less developed antitrust enforcement regimes and those with none currently in place. This structure would open up dialogue addressing respective concerns that the diverse groups have concerning their dealings with the States with systems unlike their own.

States and corporations will not have models to follow without initial government and corporate buy-in by those represented by the founding group. Thus, the governments of the States that opt to be part of

¹⁵⁵ See Lipsky, *supra* note 83, at 67. See also *supra* note 148 and accompanying text.

¹⁵⁶ See Lipsky, *supra* note 83, at 67.

¹⁵⁷ See *supra* text accompanying notes 129-33.

¹⁵⁸ While the European Union is not a “State,” I will treat it as one for the purposes of this discussion, as it has its own body of cohesive antitrust law.

the founding group will need to commit to a sincere effort to adopt the norms and standards that the group produces. Therefore, the representatives of each State should understand the State's domestic goals. In addition, the group should include representatives from at least one large corporation, or at a minimum, a State whose "economy" functions much like a traditional corporation. In so doing, corporations as well as States will have a model for smoother international relations. This proposal envisions a system similar to that of the Good Housekeeping Institute's seal of approval.¹⁵⁹ Moreover, when a State or corporation adopts the norms and standards produced by the founding group, they would be able to advertise as such, attracting others who support those standards. At the very least, the founding group work product will be a set of minimal standards that can assist States that currently have little or no established antitrust law. This aspect of the model also solves the optional compulsory tension implicit between earlier proposals.¹⁶⁰ Since founding group members will opt to be bound (compulsory), while non-founding members can later join by following these models (a non-compulsory), the group begins with a foundation that, if successful, is likely to expand.

Although it will introduce exponential complexity into the bargaining, multi-topic negotiations should be the group's goal. In so doing, States with relatively little bargaining power in the antitrust area may be able to cross-negotiate in exchange for concessions in an area in

¹⁵⁹ The Good Housekeeping Seal of Approval is an assurance on products that they comply with certain quality standards. *See* Good Housekeeping, Good Housekeeping Institute Standards for Certification of Advertiser Websites, *at* http://www.ghcertificate.com/prog_info.html (2000). Here, States and companies could similarly use a symbol to indicate that its practices have been approved by the organization formed by the founding group.

¹⁶⁰ Compare *supra* notes 97-100 and accompanying text with *supra* notes 127-28 and accompanying text. In short, a binding standard is unlikely to be adopted, yet a non-compulsory standard may prove useless.

which they have more “clout.”¹⁶¹ One area to consider is emerging technology. In addition to being indicative of future commerce, exchange of assets is commonplace in the intellectual property context. Crosslicenses are commonplace between corporations in competition with each other, and can serve as a model for efficient exchange that enhances and strengthens all participants. However, it is likely that the same States that have antitrust bargaining power may have technology bargaining power. The founding group should consider other areas of negotiation, such as raw materials only available in States that lack technological resources. This aspect of the model eliminates two barriers raised by the Global Antitrust Adjudication Forum model. First, it reflects the reality that States do not have equal bargaining power, and thus may not agree as to what level of international antitrust cooperation is “optimal.”¹⁶² Second, because States that have lower bargaining power in antitrust issues will be able to leverage their potential in other areas, the resulting standards are more likely to address their needs. Through this model, participating States have the incentive of accruing national benefits in at least one negotiated area while promoting global antitrust norms that are more optimal internationally, thereby increasing the likelihood that such negotiations will be successful.

While this proposal does not cure the myriad problems inherent in earlier proposals, it takes some clear steps toward a realistic system by eliminating some of the barriers thereto. Constructing an international antitrust system out of a complex of competing national laws is a delicate and exhaustive undertaking, as the shortcomings of former proposals, and the limitations of this model illustrate.¹⁶³ However, as this model has built

¹⁶¹ See *supra* text accompanying notes 141-43.

¹⁶² See *supra* notes 92-96 and accompanying text.

¹⁶³ I am indebted to George J. Alexander for this insight and commentary.

on those provided by others; perhaps later models will also expand upon it.

VII. CONCLUSION

As global business expands, so does the need for antitrust law that transcends national borders.¹⁶⁴ As a result, extraterritorial application of domestic laws has come under increased scrutiny.¹⁶⁵ The European Union and the United States, the two largest economies in the world, provide an excellent model for studying the effect of the conflicts that arise in such contexts. Although many academics have proposed several models of change, each model assumes an oversimplified problem and proposes an oversimplified solution, as well as fails to recognize the role that emerging technology plays in the antitrust landscape.

The new proposal takes advantage of the strengths and weaknesses of the models that have come before it, combining the best aspects of the expert negotiation-government implementation and leadership models, and adding multi-topic negotiations and emerging technology to create a small, but diverse founding group to serve as its foundation. While imperfect, this structure is large enough to overcome the weaknesses of ineffective, uncompromising bilateral agreements, yet small enough to find a common ground and serve as the leadership that other jurisdictions could eventually be asked to follow, mimicking the model of the founding State that is most similar to their own. In addition, this model makes the connection between theory and practice by advocating governmental and corporate buy-in. By providing national incentives to all participants, this model is a positive step toward achieving global cooperation.

¹⁶⁴ See Sugden, *supra* note 1, at 991.

¹⁶⁵ See *id.* at 1007.