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A Comparative Study on the Question of Extraterritorial Application of the Competition Law

Il Hyung Jung*

“Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.”

John Maynard Keynes

“The General Theory of Employment, Interest, and Money”

I. Introduction

A. Globalization

This world is, maybe too unnecessarily, getting smaller. A strong tenet of Capitalism, to achieve prosperity based on free trade,¹ is already prevalent since the collapse of the Soviet Communism. We are now in the so-called era of globalization.

Globalization, however, is one of the most controversial concepts of recent times. The term is not very well defined. It is

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1. Every state trades with others on the assumption that it could lead itself to economic growth under the theory of comparative advantage. According to this theory, country A may import product X even though it can produce the product more efficiently than country B. Country A can have a comparative advantage in producing some other specialty like product Y rather than producing both X and Y. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 901-4 *13th ed. 1989).

neither “universality,” nor “homogeneity.”² It term also does not have the same meaning as “world-wide.”³ Some scholars define it as “the growth and interconnection in trade and financial markets across—and often irrespective of—national boundaries, which is facilitated by the increasing ability to use and disseminate technology rapidly and widely.”⁴ In addition, this phenomenon is not limited to a single area. It includes politics,⁵ sociology,⁶ economics (rather, political economy),⁷ and law.⁸ Thus, we have an assumption that this global phenomenon influences various fields without any geographical limit.⁹

2. Alfred C. Aman, Jr., *An Introduction in Symposium: The Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform*, 1 IND. J. GLOBAL LEGAL STUD. 1 (Fall 1993).

3. It could be local or regional. *Id.*

4. Adelle Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 60 n.14 (1998).

5. See generally JOHN DUNNING, *REVIEW OF INTERNATIONAL POLITICS* (1997); SUSAN STRANGE, *THE RETREAT OF STATE* (1996); LINDA WEISS, *THE MYTH OF THE POWERLESS STATE* (1996).

6. See generally SAMIR AMIN, *CAPITALISM IN THE AGE OF GLOBALIZATION*, (1997); DANI RODLICK, *SENSE AND NONSENSE IN THE GLOBALIZATION DEBATE, FOREIGN POLICY* (Summer 1997).

7. See generally ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987); ALEX E. FERNANDEZ JILBERTO AND ANDRE MOMMEN EDS., *REGIONALIZATION AND GLOBALIZATION IN THE MODERN WORLD ECONOMY*, (1996); MICHAEL VESETH, *SELLING GLOBALIZATION*, (1998).

8. Globalization is in fashion. It spreads into the every field of law. Martin Shapiro, *The Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform*, 1 IND. J. GLOBAL LEGAL STUD. 37 (Fall, 1993). Eleanor M. Fox, *Globalization and Its Challenges for Law and Society*, 29 LOY. U. CHI. L.J. 891 (Summer, 1998). Miguel De La Madrid H., *National Sovereignty and Globalization in Symposium International Law in Latin Americas: Rethinking National Sovereignty in an Age of Regional Integration*, 19 HOUS. J. INT'L L. 553 (Spring 1997). Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429 (1997).

9. We have already experienced the global financial crisis, which started from Thailand in 1997 and spread throughout the world, including the developed nation such as Japanese recession. It could mean a sign of the “New World Disorder.” See John Cassidy, *The New World Disorder*, NEW YORKER, Oct. 26 & Nov. 2, 1998, at 198-207 (advocating to solve world chaos by adopting Keynes propositions). Regarding what would be the best solution to manage this crisis, see Justin Fox, *What in the world Happened to Economics?*, FORTUNE, Mar. 15, 1999, at 91-102 (introducing five forefront American economists in solving this crisis). See also “Responsible Globality: Managing the Impact of Globalization,” the slogan adopted in the World Economic Forum, held in Davos, Switzerland in February 1999. Some texts may be available by visiting its website at www.weforum.org. See also the argument as a third alternative between Lee Kwan Yew and Kim Dae Jung in Foreign Affairs.

B. Examples in the Legal Arena of the Competition Law

The following three examples support the assumption that globalization has also influenced the area of competition (antitrust) law. Samsung Electronics Co., one of the conglomerates in South Korea, was fined by the European Union ("EU") Commission, charging that Samsung's acquisition of AST Research Inc., a California-based computer manufacturer, would have an impact on the EU market under the EU merger regulation, even though the neither company is European.¹⁰ Somewhere in the US, on the other hand, the directors of a Japanese company, Nippon Paper Industries, Co. Ltd., could be imprisoned in the near future, because the First Circuit decided that the company violated Section One of the Sherman Act by conspiring to fix prices of fax papers sold in the US with its American subsidiary partners.¹¹

There is a more well-known case, which is not strictly an antitrust law case. Kodak sought Section 301 remedies for its denial of access to the Japanese film market against the Japanese government's "unreasonable toleration" of anti-competitive trade practices by Fuji.¹² When Fuji denied all those allegations, the United States Trade Representative ("USTR") instituted a formal dispute resolution proceeding in the dispute settlement panel of the World Trade Organization ("WTO").¹³ The panel of the WTO rejected the US claim.¹⁴ It is interesting to see, however,

10. NAT'L L.J., Feb. 23, 1998.

11. *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997). One commentator calls it a "hydrogen bomb in global trade wars where US companies feel threatened by unfair foreign competition." John Gibeaut, *Sherman Goes Abroad*, ABA J., July 1997, at 42.

12. Frank J. Schweitzer, *Flash of the Titans: A Picture of Section 301 in the Dispute between Kodak and Fuji and a View toward Dismantling Anti-competitive Practices in the Japanese Distribution System*, 11 AM. U. J. INT'L L. & POL'Y 847 (1996).

13. *U.S. Launches Broad WTO Cases Under GATT, GATS Against Japan on Film*, INSIDE U.S. TRADE, June 14, 1996, at 22.

14. *WTO's Kodak Ruling Heightens Trade Tensions*, WALL ST. J., Dec. 8, 1997, at A3. On this "thorny issue of internal barriers" in Japan, the WTO did not recognize the US claim under the unilateral Section 301 to "change Japan's closed system," which have been common in many Asian countries. Thus, besides the applicability of Section 301 on the anti-competitive foreign activities, there are many issues, including the extraterritorial applicability of the Sherman Act to such circumstance and the degree of international recognition (or, other relevant legal justifications) over such "closed system" that should sufficiently outweigh criticism or legal interests over the unilateral and extraterritorial application of the US federal law.

whether Kodak will choose another option, as one commentator demonstrates that the question of extraterritorial application of the Sherman Act can be applicable “to this extreme case—where the complained of conduct occurs abroad and the only effects felt in the US are intangible [denial of the foreign market access] when compared to other cases . . . [where] a US exporter has lost potential sales.”¹⁵

These three examples clearly demonstrate the very nature of this globalized world economy. A critical legal issue that this paper will explore in this complex world context, is so-called extraterritorial application of competition (antitrust) law. There are certainly many relevant sub-issues even in this extraterritorial application of competition law. In order to narrow down the topics of this paper among the sub-issues, the following two points should be considered. First, extraterritoriality is neither new nor limited to competition law. It is well established in international law that a state can also have its extraterritorial jurisdiction in five principles in order to protect its public national interests.¹⁶ In addition, extraterritoriality is also very popular in many areas of law other than competition law, such as environmental law, labor law, investment law, bankruptcy law, etc.¹⁷ This extraterritorial application in almost every area of law undoubtedly results from the rampantly globalized economy.¹⁸

Second, under this circumstance, the unilateral extraterritorial application of the law of one nation, like the Sherman Act and the EU merger regulation, has been adopted with frequency, convenience, and popularity despite concerns and controversies.¹⁹ As shown in *Hartford Fire Insurance Co. v.*

15. Renee Hardt, *Kodak v Fuji: A Test Case for the Extraterritorial Application of the Sherman Act*, 15 B.U. INT'L L.J. 309, 312 (1997). Kodak did not claim this issue of extraterritorial application of the Sherman Act to the Japanese anti-competitive practices, as discussed above; Hardt only hypothesizes what would happen if Kodak sued Fuji under the Sherman Act.

16. These public national interests are territory, nationality, protective principle, passive personality, and universal jurisdiction. CARTER AND TRIMBLE, *INTERNATIONAL LAW* 725-789 (1995). For a general discussion on extraterritorial application of the US federal laws based on the territorial doctrine, see Gary B. Born, *Appraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (Fall 1992).

17. These are the so-called post-Uruguay Round agendas.

18. See *supra* note 8.

19. This is not limited to the Sherman Act. Another example is Section 301 of the 1974 Trade Act. For comparing extraterritorial application of US antitrust law with the Trade Act of 1974, see Aubry D. Smith, *Bringing Down Private Trade Barriers—An Assessment of the United States' Unilateral Options: Section*

*California et al.*²⁰ and *Ahlstrom Osakeyhto et. al. v. Commission* (“Wood Pulp”)²¹ cases, unilateral extraterritorial application of competition law (or, antitrust law) is now the law in the US and the EU. However, this unilateral extraterritorial application of competition law has received many thorny criticisms.

Combining these two preliminary considerations, it is very unpredictable where this controversial unilateral extraterritorial application of competition law will end up. It seems unavoidable that this unilateral extraterritoriality will be accepted. However, to the extent that this unilateral extraterritoriality raises many legal questions, other less controversial alternatives ought to be sought, as the issue of extraterritorial application of antitrust law has been sufficiently surfaced as an important issue in this era of post-Uruguay Round.²²

C. Organization of This Article

This paper will focus on the question of how less controversial alternatives can be achieved. In other words, which model is more appropriate or desirable to follow for achieving such an international harmonization of competition law. It is true that there is no consensus on competition law that will satisfy every nation at this point. However, this paper does not seek to have such a universal competition law code. Rather, it advocates the necessity to negotiate and develop such an effort for an international competition law in this era of globalization, while discussing the other limited alternatives.

There are three different approaches to be compared. They are unilateral, bilateral, and multilateral approaches. The United States and the European Union, both of the powerful entities in the area of competition law, already had their highest courts rule on their unilateral applications of competition laws extraterritorially. In part II, this paper explains the two famous cases in

301 of the 1974 Trade Act and Extraterritorial Application of U.S. Antitrust Law, 16 MICH. J. INT'L L. 241 (Fall 1994).

20. *Hartford Fire Insurance Co. v. California et al.*, 509 U.S. 764 (1993).

21. 1998 E.C.R. 5193.

22. David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSN'L L.11, 31-35 (1995). Since the general purpose of any antitrust law is to regulate anti-competitive acts hindering free and fair competition, which will eventually further free trade between countries, it is very much related to the post World War II free trade frameworks. For a discussion of the relationship between antitrust and trade, see Daniel J. Gifford, *Antitrust and Trade Issues: Similarities, Differences, and Relationships*, 44 DEPAUL LAW REV. 1049 (1995).

the US and the EU. It also provides many criticisms on the decisions and discusses the defects of this unilateral approach.

Despite the argument of regional success, the bilateral approach is also limited. It simply means the expansion of the unilateral approach under the name of “cooperation.” However, since bilateral effort between the US and the EU was very significant, considering the models of each entity still remains a possible example to substitute for the multilateral approach, although it was, at least, partially cracked down. In part III, this paper will provide further details on this argument.

In part IV, the multilateral approach will be introduced and explained. The so-called “Draft in International Antitrust Code (DIAC)” model and the GATT/WTO model will be described.

It is true that none of these approaches is dominant in this argument of international competition law. Nevertheless, as every economist agrees on the advance of the era of globalization, every competition lawyer agrees that there is a need to set forth an international competition law. But, as every economist still argues what globalization is, every competition lawyer also debates what kind of competition law. Fortunately, however, we are on the right track to achieve a consensual international competition law in this era of globalization. Part V of this paper will be premised on this ideological jurisprudence with my views of the argument on the international competition law amidst this globalization. Then, the defects of the unilateral and bilateral approaches will be reviewed and discussed in this context. The article will especially argue the present three possible models, unilateral, bilateral, and multilateral approaches, which will be the substantive arguments. Lastly, the forum argument will be discussed. In other words, this will provide a forum to use in this argument of international competition law that may support the multilateral approach.

II. Unilateral Extraterritorial Application of Competition Law

A. *In the United States*

1. *Before Hartford Fire*—Section one of the Sherman Act provides that:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in

any combination or conspiracy hereby declared illegal shall be deemed guilty of felony and, on conviction thereof, shall be punished by fine . . . , or by imprisonment . . . , or by both said punishment, in the discretion of the court.²³

There are generally two competing theories on the topic of extraterritorial application of US antitrust law. The one is a strict territorial approach, also known as “vested rights” theory, as held in the 1909 case of *American Banana Co. v. United Fruit Co.*²⁴ American Banana, an Alabama corporation, sought treble damages under the Sherman Act by alleging that its banana plantation had been confiscated and damaged by Costa Rica at the instigation and conspiracy of United Fruit, a New Jersey corporation.²⁵ The court held that the Sherman Act could not regulate the alleged monopolization scheme by reasoning that the seized plantation was within the *de facto* jurisdiction of Costa Rica and the injury complained of had occurred outside the US.²⁶ Justice Holmes stated: “The general and almost universal rule is 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.”²⁷

The opposite theory, the balance of interest approach, also known as “intent/effects theory,” was adopted in *United States v. Aluminum Co. of America (Alcoa)*.²⁸ In *Alcoa*, the US government sought to challenge Alcoa’s monopolization of interstate and foreign commerce and its related conspiracy with its Canadian subsidiary (“Limited”).²⁹ A quota agreement was made between the Limited and several European corporations, together forming an international cartel called the “Alliance.”³⁰ Although the agreement was silent regarding the US market, and Alcoa was not a member of the Alliance, the controlling group in the Limited owned nearly forty-nine percent of Alcoa stocks.³¹

After citing *American Banana*’s traditional territorial approach “for conduct which has no consequences within the

23. 15 U.S.C. § 1.

24. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

25. *See id.* at 349, 354-55.

26. *See id.* at 357-58.

27. *Id.* at 356 (*quoting* *Slater v. Mexican Nat’l R.R.*, 194 U.S. 120, 126 (1903)).

28. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

29. *Id.* at 421.

30. *Id.* at 442.

31. *See id.* at 439, 442-43.

United States,”³² Judge Learned Hand stated 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.”³³ Then, he held that the Sherman Act would be applicable to the agreements abroad if they were intended to, and did have, some effects on foreign trade or commerce of the United States.³⁴

The court in *Timberlane Lumber Co. v. Bank of America et al.* held that the effects test of *Alcoa* was incomplete because it failed to consider other nations’ interests.³⁵ The Ninth Circuit adopted a tripartite test to determine whether courts should exercise extraterritorial jurisdiction: first, there must be some effect—actual or intended—on American foreign commerce in the alleged restraint; second, the effect must be sufficiently large to present a cognizable injury; and finally, the court should determine whether the interests of the United States were sufficiently strong over those of other nations to justify an assertion of extraterritorial authority.³⁶ The court detailed seven factors for the third prong of the test.³⁷

2. *Hartford Fire*—In *Hartford Fire*, the Supreme Court considered whether the principle of international comity should preclude the exercise of jurisdiction over British reinsurance companies that were alleged to have conspired with American insurance companies to limit certain forms of insurance coverage.

32. *Id.* at 443.

33. Aluminum Co. of America, 148 F.2d 416, 443.

34. *See id.* at 444.

35. *Timberlane Lumber Co. v. Bank of America et al.*, 549 F.2d 507, 612.

36. *See id.* 613.

37. *See id.* at 614. The seven factors are: (1) the degree of conflict with foreign law or policy; (2) the nationality or allegiance of the parties and the locations or principal places of business of corporations; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the United States as compared with those elsewhere; (5) the extent to which there is an explicit purpose to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the United States are compared with conduct abroad. *Id.* Another court provides 10 factors in considering the reasonableness of exercising extraterritorial jurisdiction. Three factors are added to the seven *Timberlane* factors. The additional three factors are: whether the court can make its order effective; whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; whether a treaty with the affected nations has addressed this issue. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979).

The Court upheld the extraterritorial jurisdiction of US courts over foreign or multinational corporations that violated US antitrust law while operating in the US market without considering the interests of the foreign sovereign nation.

The Court ruled that the jurisdictional requirement of the first prong was satisfied by stating that: "Although the proposition is not always free from doubt,³⁸ the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effects in the United States."³⁹

As for the second prong of the comity test, Justice Souter noted that when enacting the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"), "Congress expressed no view on the question whether a court with the Sherman Act jurisdiction should ever decline to exercise such jurisdiction on the grounds of international comity."⁴⁰ But, under Justice Souter's international comity analysis, "the only substantial question in this case is 'whether there is in fact a true conflict between domestic and foreign law.'"⁴¹ The Court stated that: "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws,' even where the foreign state has a strong policy to permit or encourage such conduct."⁴² He further wrote that: "no conflict exists 'where a person subject to regulation by two states can comply with the laws of the both.'"⁴³ That is, Justice Souter seemed to find such a true conflict only where there was a direct conflict between domestic and foreign laws. Therefore, he held that: "Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is

38. *Hartford Fire*, 509 U.S. at 795-6 citing *American Banana*.

39. *Id.* at 796. Although this opinion tries to answer for the jurisdiction prong, it is unclear whether it affirms the intent/effects test of *Alcoa* or the direct, substantial, and reasonably foreseeable test of *Timberlane* and the Restatement. See Penny Zagalis, *Hartford Fire Insurance Company v. California: Reassessing the Application of the McCarran-Ferguson Act to Foreign Reinsurers*, 27 CORNELL INT'L L.J. 241, 249-56, 259-60 (1994). Nevertheless, as Justice Souter also noted, this jurisdiction prong was adopted by the Supreme Court in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986). In this sense, the jurisdiction prong seems less controversial than the comity prong.

40. *Hartford Fire*, 509 U.S. at 798.

41. *Id.*

42. *Id.* at 799, quoting Restatement § 415, cmt. j.

43. *Id.* quoting Restatement § 403. cmt. e.

otherwise impossible, . . . we have no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity.”⁴⁴

In his dissent, Justice Scalia argued that “under the Restatement, a nation having ‘some basis’ for jurisdiction to prescribe law should nonetheless refrain from exercising ‘with respect to a person or activity having connections with another state when the exercise of such jurisdiction would be unreasonable.’ ”⁴⁵ After mentioning the factors in the Restatement, he further stated that: “Rarely would these factors point more clearly against application of the United States law . . . [Therefore, it is] unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume that Congress has made such an assertion.”⁴⁶

Justice Scalia contended that the majority’s no true conflict analysis⁴⁷ would be “breathhtakingly broad” and would “bring the Sherman Act into sharp and unnecessary conflict with legitimate interests of other countries—particularly our closest trading partners.”⁴⁸ He further stated that the majority misinterpreted Comment e to § 403 of the Restatement⁴⁹ by skipping subsection (3)⁵⁰ of § 403 “on the authority of Comment j⁵¹ to 415 of the Restatement.”⁵² He reasoned that: “subsection (3) of 403 comes

44. *Id.*

45. *Hartford Fire*, 509 U.S. at 818.

46. *Id.* at 819.

47. The majority concludes that “no ‘true conflict’ counseling nonapplication of the United States law (or rather, as it thinks, the United States judicial jurisdiction) exists unless compliance with the United States law would constitute a violation of another country’s law.” *Id.* at 820.

48. *Id.*

49. *Id. supra* note 42. Comment e more precisely reads: “Subsection (3) applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible. It does not apply ‘where a person subject to regulation by two states can comply with the laws of the both,’ . . .” *Hartford Fire*, 509 U.S. at 821, *citing* Restatement § 403, cmt. e.

50. “A state should defer to another state if that state’s interest is clearly greater.” *Id.*, *citing* Restatement § 403 (3).

51. *Id.* at 799, *citing* Restatement § 415, cmt. j.

52. *Hartford Fire*, 509 U.S. at 821, n.11. Justice Scalia stated that: Comment j to § 415 “makes clear that ‘[a]ny exercise of [legislative] jurisdiction under this section is subject to the requirement of reasonableness’ set forth in § 403 (2).” *Id.*, *citing* § 415, cmt. a. However, after characterizing Justice Scalia’s contention as “putting the cart before the horse,” Justice Souter stated, “whatever the order

into play only after subsection (1)⁵³ of 403 has been complied with.”⁵⁴

3. *After HARTFORD FIRE*

a. Criticism of Hartford Fire—After discussing the precedent cases before *Hartford Fire*, one commentator, Penny Zagalis, agrees with the majority’s conclusion on the question of whether international comity should limit the extraterritorial application of the US antitrust law.⁵⁵ However, she contends that *Hartford Fire* failed to determine three important legal issues: (1) whether the direct, substantial, and reasonably foreseeable effects test of the FTAIA amends the effects test of *Alcoa*; (2) whether judges have authority to decline jurisdiction due to comity consideration; (3) whether the comity balancing test should be applied only after the jurisdiction has been established.⁵⁶ Zagalis concludes that the Supreme Court failed to formulate a clear legal standard for lower courts to follow, and that it should have rejected the comity test in favor of the pure effects test for determining jurisdiction because the majority’s test is highly discretionary and unpredictable.⁵⁷

Professor McGuire agrees with Justice Souter’s decision, by reasoning that state law cannot deal with huge multinational insurers in an effective manner in order to protect consumers and states because they are “too large, too complex, and too powerful.”⁵⁸ However, he does not discuss and give details on the comity question. He merely seems to determine that necessity or

of cart and horse, conflict in this sense is the only substantial issue before the Court.” *Id.* at 799, n.25.

53. Subsection one says that “a nation having some ‘basis’ for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction ‘with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable’ ” *Hartford Fire*, at 818, citing Restatement § 403 (1).

54. *Id.* at 821.

55. Zagalis, *supra* note 39, at 249-56, 259-60.

56. *See id.* at 266.

57. *See id.* at 268-69. Despite such unanswered legal questions, I do not think the Court intended to adopt the pure effects test such as in *Alcoa*, simply because the Court also tried to provide conditions, which the Court called “true conflict,” before applying the international comity prong. While the Court did not clearly abandon this comity prong, most opposing opinions argue on the basis of Justice Souter’s definition of true conflict.

58. Charles R. McGuire, *Regulation of the Insurance Industry after Hartford Fire Insurance v. California: The McCarran-Ferguson Act and Antitrust Policies*, 25 LOY. U. CHI. L. J. 303, 355 (1994).

the interest in protecting domestic consumers outweighs that of huge foreign insurers.

Burr contends that the result of the decision was necessary although the reasoning would be questionable.⁵⁹ He argues that Justice Souter's definition of true conflict was too narrow and would rarely be found.⁶⁰ Thus, until clear guidelines are addressed either by court or by Congress, he provides three categories based upon the degree of impact the challenged conduct has on US commerce.⁶¹

Burr's test says that first, the court should not apply US antitrust law extraterritorially in cases where the challenged conduct has virtually no or a *de minimus* effect on US commerce.⁶² Second, the court should apply the law regardless of the outcome under an interest balancing analysis in cases where the challenged conduct has a "direct, substantial, and reasonably foreseeable" effect.⁶³ Finally, the court should take an interest balancing analysis and apply the law if relevant factors favor the United States in cases where the challenged conduct has more than a "minimal" but less than a "substantial" effect.⁶⁴ His three categories are praiseworthy, especially considering that neither the *Hartford Fire* Court nor the 1995 Guideline⁶⁵ by the DOJ provided a clear test for the lower courts to follow.

Gupta argues that the *Hartford Fire* decision can be justified under principles other than comity.⁶⁶ He contends that the US interests in international comity can be protected under principles such as the "intended effects" test and the doctrine of personal jurisdiction, foreign sovereign immunity, act of state, and foreign sovereign compulsion, since he believes that economic and political situations under which the *Timberlane* comity analysis was made have changed dramatically.⁶⁷

59. Scott A. Burr, *The Application of U.S. Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity?*, 15 U. PA. J. INT'L BUS. L. 221, 257 (1994).

60. *See id.* at 244.

61. *See id.* at 256.

62. *Id.*

63. *Id.*

64. Burr, *supra* note 59, at 256.

65. United States Department of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operation* § 3.2 (1995).

66. Varun Gupta, *After Hartford Fire: Antitrust and Comity*, 84 GEO. L.J. 2287 (June 1996).

67. *See id.* at 2288-89, 2305-18.

Gupta asserts that the US Supreme Court had an essential role in preserving free and fair competition in the US, which was a “unique American phenomenon,” while most foreign countries considered industrial concentration “a means for strengthening the national economies.”⁶⁸ For political reasons, on the other hand, he argues that “in a divided world with Cold War . . . the US interest in preserving good international relations with its trading partners was paramount. [Therefore,] It was reasonable and necessary for courts to discount the economic interests of private US litigants when faced with the prospect of disruptions in the never ending task of the executive to keep free nations aligned with the American block.”⁶⁹ In consideration of those reasons, he argues that *Timberlane* was correct in adopting the comity analysis.⁷⁰

However, since such economic and political reasons are now absent, or at least weakened, Gupta argues that *Timberlane* is no longer necessary and appropriate. That is, many countries such as the European Community (EC) and international organizations such as the WTO, the EU, and the North American Free Trade Association (NAFTA) “have further encouraged diverse nations to abandon their parochial concerns for favored domestic industries and submit to the international order that allocates industries to nations according to theories of comparative advantage.”⁷¹ He also provides the end of bipolar Cold War for the political reason.⁷²

There are many opposing opinions, for various reasons. One extremist calls it “Yankee’s ‘jurisdictional jingoism.’”⁷³ However, the opponents generally agree with Justice Scalia’s call for avoiding “unnecessary conflict with legitimate interest of other countries.”⁷⁴ Pelini argues that Justice Souter’s true conflict test was so narrow as to eliminate the international comity

68. *Id.* at 2307.

69. *Id.* at 2308.

70. *See id.*

71. Gupta, *supra* note 66 at 2309. He also disregards other nations argument that “the extraterritoriality permits the US to unjustifiably ‘mold the international economic and trading world in its own image.’” *Id.*

72. *See id.* at 2311.

73. John B. Sandage, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L. J. 1693, 1698 (1985). Although this article was published before *Hartford Fire*, this extreme call can be understandable when *Hartford Fire* implicitly adopted the *Alcoa*’s intent/effects test.

74. *Hartford Fire*, 509 U.S. at 820.

consideration from the extraterritoriality analysis which “severely harms US diplomatic relationship.”⁷⁵ Reuland contends that prohibition of the comity analysis “invites further disruption in international relations over extraterritorial exercise of United States jurisdiction.”⁷⁶ Highet also contends that the majority opinion should have considered comity.⁷⁷ He argues that “the majority opinion not only fails to analyze the factors of ‘reasonableness’ other than the narrowly defined ‘conflict of law’ principle but also fails to consider the possible difference in conflict-of-law analysis arising from the fact the plaintiffs [in *Hartford Fire*] are private suitors.”⁷⁸

On the other hand, Professor Dam argues that the comity analysis should be a policy choice since the Sherman Act does not specify its extraterritorial reach and the Supreme Court cases do not provide a conclusive answer.⁷⁹ While he advocates that the comity analysis should be workable especially in private treble damage actions where foreign policy considerations play no role in the private decision to bring the action, Professor Dam also provides another alternative to accept ‘Justice Scalia’s canon of statutory construction’⁸⁰ as an international law limitation on the Sherman Act.⁸¹

Cotter⁸² also argues, besides the narrowness of the true conflict test, that the majority opinion has caused US trading partners to enact “blocking statutes,” due to aggressive behavior by

75. Mary C. Pelini, *The Extraterritorial Jurisdiction Analysis in Light of Hartford Fire Insurance Co. v. California: How Peripheral Has the International Comity Notion Become?*, 55 OHIO ST. L.J. 477, 490 (1994).

76. Robert C. Reuland, *Hartford Fire Insurance Co., Comity, and Extraterritorial Reach of United States Antitrust Laws*, 29 TEX. INT’L L.J. 159, 208 (1994).

77. Keith Highet et. al., *International Decision*, 88 AM. J. INT’L L. 109, 114 (1994).

78. *Id.*

79. Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 321.

80. “An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . . Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to proscribe.” *Hartford Fire*, 509 U.S. at 818.

81. See Kenneth W. Dam, 1993 SUP. CT. REV. 289, 326-28.

82. Jeffrey L. Cotter, *Extraterritorial Jurisdiction: The Application of U.S. Antitrust Laws to Acts Outside the United States—Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993), 20 WM. MITCHELL L. REV. 1109, 1132-41 (1994).

US plaintiffs.⁸³ In addition, he contends that the majority opinion fails to provide a clear test for the courts to follow and it should have developed an international comity test based on the *Timberlane* case.⁸⁴

Rhatican⁸⁵ contends that Justice Souter's approval of extensive international antitrust enforcement could make the United States a "commercial pariah" in the area of world trade.⁸⁶ He warns that the effects test can be regarded as a form of "judicial imperialism" if the US continues to enforce extra-territorial application of its antitrust law for the purpose of protecting American interests abroad.⁸⁷ Instead, he contends that the US, as a "commercial police officer," should consider comity since there is "neither consensus on the treatment of antitrust law, nor a prevailing set of international rules of prescriptive jurisdiction."⁸⁸

He explains that such an extraterritorial application of US antitrust law could be unpersuasive. First, such an unusually powerful and independent punitive sanctions remedy in the US antitrust law, treble damages, is alien to most US trading partners, thus causing them to enact "claw-back" provisions in the blocking statutes.⁸⁹ Second, he argues that most nations only have "fledgling" antitrust laws while "the US antitrust law are far more pro-competitive than those that exist in other nations."⁹⁰ Thus, he is concerned that the US may run the risk of alienating foreign trading partners, as Justice Scalia warned.

b. 1995 Guideline—After *Hartford Fire*, the DOJ, in conjunction with the Federal Trade Commission, issued a set of guidelines in 1995.⁹¹ However, the 1995 Guidelines also follow the true conflict test in *Hartford Fire* by stating that "no conflict exists for purposes of an international comity analysis in the courts if the person subject to regulation by two states can comply with the laws of both."⁹² The 1995 Guidelines provide two cases where there can be no existence of true conflict: (1) "there may be 'no

83. *Id.* at 1133-34.

84. *See id.* at 1135-41.

85. James P. Rhatican, *Hartford Fire Insurance Co. v. California: A Mixed Blessing for Insurance Antitrust Defendants*, 47 RUTGERS L. REV. 905, 955 (1995).

86. *Id.* at 955-56.

87. *Id.*

88. *Id.* at 956.

89. *Id.* at 957.

90. Rhatican, *supra* note 85, at 957.

actual conflict' between the antitrust enforcement interests of the United States and the laws or policies of a foreign sovereign, [because] more countries [increasingly] adopt antitrust or competition laws that are 'compatible with' those of the US;⁹³ (2) if the laws or policies of a foreign nation are 'neutral,'⁹⁴ it is again possible for the parties in question to comply with the US prohibition without violating foreign law."⁹⁵

B. *In the European Union*

1. *Competition Law in General*—The most important European competition law rules are found in Article 85 and 86 of the Treaty of Rome, or the "EC Treaty," the Treaty Establishing the European Community, formerly known as the "European Economic Community" or the "EEC Treaty."⁹⁶ While Article 85 regulates agreements between businesses, Article 86 prohibits abuses of dominant position.⁹⁷ The European Community competition law has three distinctive features: (1) "Community

91. See United States Department of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operation § 3.2 (1995). The 1995 Guidelines retreat from the earlier position in favor of a *Timberlane* analysis, despite implicit rejection of *Timberlane* comity prong in *Hartford Fire*. The relevant factors, provided by the DOJ in the 1995 Guidelines, include: "(1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect US consumers, markets, or exporters; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; (6) the degree of conflict with foreign law or articulated foreign economic policies; (7) the effect on foreign enforcement; and (8) the effectiveness of foreign enforcement." *Id.* Thus, the 1995 Guidelines note that "in disputes between private parties, many courts are willing to undertake a comity analysis," although the purpose of the Guideline is to guide the DOJ for its prosecutorial discretion. *Id.*

92. *Id.*

93. However, this statement is unclear whether: (1) many countries are sufficiently following the US antitrust law; (2) the model to follow should be the US antitrust law; (3) if they are following the US antitrust law, their competition laws are compatible with the US antitrust law.

94. This is also vague. Perhaps Burr's three categories are more useful.

95. United States Department of Justice & Fed. Trade Comm'n, *supra* note 91.

96. See Stephen Johnson, *EU Competition Law* at 341, in RALPH H. FOLSOM, RALPH B. LAKE, VED. P. NANDA, EDS., EUROPEAN UNION LAW AFTER MAASTRICHT: A PRACTICAL GUIDE FOR LAWYERS OUTSIDE THE COMMON MARKET (1996).

97. See *id.*

competition law aims at ensuring that the Common Market works effectively; (2) Article 85 has been built into a procedure for declaring inapplicable the Article's prohibitions against agreements which restrict competition where certain efficiency and consumer benefits arise; (3) Community analysis is somewhat less driven by hard economic theories than analysis found in the US decisions in recent years."⁹⁸

The Commission, the administrative body of the EU, has the primary power of applying and enforcing the competition rules under the Council Regulation 17 procedure.⁹⁹ It also has exclusive power in granting exemptions under Article 85 (3). As mentioned above, while Article 85 (1) prohibits agreements that may affect trade between Member States, such anticompetitive agreements may be brought to the Commission to apply for exemption under Article 85 (3) or "negative clearance." Negative clearance is a determination that Article 85 (1) or Article 86 does not apply.¹⁰⁰ Alternatively, the Commission may issue a "comfort letter," which means that the Commission does find any necessity for action with regard to the notified agreement under the circumstances.¹⁰¹ The work of the Commission in applying and enforcing the competition rules is supervised by the Court of First Instance (CFI) and the Court of Justice (ECJ).¹⁰² All decisions taken by the Commission can be challenged in the CFI, and further appeals are in turn subject to judicial review of the ECJ.¹⁰³

2. *Dyestuffs Case*—Although the basic competition rules are established in Articles 85 and 86 of the EC Treaty, it does not explicitly describe its jurisdictional limit. European evolution on this issue of extraterritoriality is similar to that of the US.

In *Imperial Chemical Industrial Ltd. v. Commission* ("Dyestuffs"), the ECJ neither accepted traditional law principles of sovereignty nor applied the so-called "effects doctrine" to this thorny issue of extraterritoriality.¹⁰⁴ Instead, it adopted the economic unit doctrine. The Imperial Chemical Industrial Ltd. ("ICI"), a U.K. firm then outside the Community, was charged with the dyestuffs cartel by the Commission which imposed fines

98. *Id.*

99. *See id.* at 343.

100. *Id.* at 345.

101. Johnson, *supra* note 96, at 346.

102. *Id.* at 349.

103. *See id.*

104. 1972 E.C.R. 619.

on ICI. ICI contended that the Commission was not empowered to impose fines on it under the international law principle of sovereignty and under the Treaty itself. When the Commission rejected ICI's contention under the effects theory, the ICI sued the Commission for annulment.

The Court determined that decision on the extraterritorial issue was unnecessary because a subsidiary of the ICI was located within the Community. The Court further determined that the jurisdiction over the ICI's alleged antitrust conduct was appropriate through the control of its subsidiary in the Community because "the applicant was able to exercise decisive influence over the policy of the subsidiaries as regards selling prices in the Common Market and in fact used this power upon the occasion of the three price increase in question."¹⁰⁵

3. *Wood Pulp Case*—The two doctrines were not in confrontation because the results from them were "exactly the same."¹⁰⁶ However, this peaceful coexistence was no longer possible when a case arose "in which the economic unit theory, for its elasticity, could not be stretched to cover truly 'non-European' actors, whose actions outside the Community affect EC competition."¹⁰⁷

In the *Wood Pulp* case, the Commission charged many non-European firms with price-fixing of wood pulp sold to buyers in the Community under Article 85 of the Treaty.¹⁰⁸ Finding that the Community had been affected by such alleged conduct, the Commission concluded that: "The effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was primary and direct result of the agreements and practices."¹⁰⁹

On the question of extraterritoriality, the Court stated that: "[A]n infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted

105. *Id.*

106. James J. Freidberg, *The Convergence of Law in an Era of Political Integration: the Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289, 318 (Winter 1991).

107. *Id.*

108. 1988 E.C.R. 5193.

109. *Id.* at 5232.

practice and the implementation thereof. . . . The decisive factor is therefore the place where [the agreement] is implemented.”¹¹⁰ The Court further determined that: “The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contracts with purchasers within the Community.”¹¹¹ The Court did not explicitly accept the Commission’s effects doctrine. One commentator calls it a “modified effects doctrine.”¹¹²

On the issue of international comity, the Court took a controversial position. The Court stated that it would be unnecessary to consider international comity, because “it suffices to observe that it amounts to calling in question the Community’s jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected.”¹¹³ One commentator argues that: “the Court’s cursory treatment of international comity in its jurisdictional inquiry also gives cause for concern,” because it apparently rejected the second prong of the jurisdictional rule of reason set forth by the US courts.¹¹⁴

C. *Defenses and Defects*

Now that the Wood Pulp cases in the EU and *Hartford Fire* in the US are the laws in each jurisdiction, they should govern the question of extraterritorial application of competition law. The highest court in each jurisdiction clearly did not accept the comity prong in applying the competition rule extraterritorially. As discussed before, however, this disregard or cursory treatment of comity has invoked many criticisms in both countries.¹¹⁵ It is interesting to note that the Wood Pulp case first rejected the comity prong, which may also have caused the disregard of comity in *Hartford Fire*.

110. *Id.* at 5243.

111. *Id.*

112. Freidberg, *supra* note 106, at 321.

113. 1988 E.C.R. 5193, 5244.

114. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT’L L. 1, 37 (Fall 1992).

115. See section A.3 of part II in this article.

While there is no international consensus on the issue of extraterritorial application of competition law, the responses outside the US, since the *Hartford Fire* decision, have been seeking retaliation or at least disharmony.¹¹⁶ This may lead both the US and the EU to a dilemma arising from such an unappealing extraterritorial application of competition law. Therefore, while the US is seeking to enforce its antitrust law as a desirable model for the rest of the world to follow by the *Hartford Fire* decision, another effort to achieve an international competition law in order to lessen the controversial nature of the extraterritorial application question has been alternatively or simultaneously sought and discussed.

III. Bilateral Approach

A. Introduction

The bilateral approach emphasizes cooperation based on regionalism and functionalism.¹¹⁷ But, it seems the expansion of the unilateral approach, particularly considering the limited success of the bilateral approach.¹¹⁸ Despite many other regional success examples,¹¹⁹ the United States-European Union Agreement contains its symbolic importance in the bilateral approach argument. Thus, this paper will focus on the Agreement.

B. *The United States-European Union Agreement*

The US Government and the European Commission (“Parties”) signed an agreement regarding the application of their competition laws (“Agreement”) on September 23, 1991, “recognizing that the world’s economies are becoming increasingly interrelated, . . . ; noting that [the Parties] share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and trade between them; noting that the sound and effective enforcement of the Parties’ competition laws would be enhanced by cooperation and, in appropriate cases,

116. An example of this is a claw-back provision in the blocking statutes.

117. See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U.L. REV. 343, 352-74 (Apr. 1997); Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 288-97.

118. See generally part V, especially section D, of this article.

119. See Waller, *supra* note 117, at 352-74.

coordination between them in the application of those laws; noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both parties.”¹²⁰

The purpose of the Agreement was “to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.”¹²¹ Items of major importance in the Agreement include information exchange, cooperation, comity, and confidentiality of information. Parties agreed to notify each other whenever their respective competition authorities became aware that “their enforcement activities may affect important interests of the other party.”¹²² They also agreed to exchange all relevant information on a regular basis in furtherance of better understanding of their respective competition law.¹²³ Article VI provided for the traditional negative comity, by agreeing that the Parties would “consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate.”¹²⁴

Positive comity and confidentiality of information are among the most arguable and significant aspects of the Agreement. Besides this negative form of comity, Article V provided the concept of positive comity: “If a Party believes that anti-competitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party’s competition authorities initiate appropriate enforcement activities.”¹²⁵ In contrast with these comity provisions, “neither Party is required to provide information to the other Party if disclosure of that information to the other requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party

120. 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, 30 I.L.M. 1487 (1991).

121. *Id.* at Article I(1).

122. *Id.* at Article II (1).

123. *Id.* at Article III.

124. *Id.* at Article VI.

125. Agreement, *supra* note 120, at Article V (2).

possessing the information.”¹²⁶ Therefore, questions may arise about how to construe these conflicting provisions.

C. *Strengths and Defecets*

In contrast to the unilateral approach, the bilateral approach is less controversial and regionally successful.¹²⁷ However, as long as the two most influential entities, the United States and the European Union, are in competition to gain a “hegemony,”¹²⁸ the regional success tends to be limited. Therefore, it is very significant whether the US and the EU can cooperate and avoid conflicts in applying their competition laws. Unfortunately, however, thus far despite Judge Wood’s eulogies,¹²⁹ the results have been retaliation, or at least disharmony, as seen in *Wood Pulp* and *Hartford Fire*.

Although it is evident that the Agreement may contribute in promoting mutual understanding of the differences between the US and EU’s competition laws, the Agreement remained questionable by containing conflicting provisions, especially between positive comity and confidentiality of information.

In this context, it is interesting to review some major cases determined after the Agreement on the basis of this conflicting relationship between positive comity and confidentiality of information. There are two important cases after the Agreement in the US and the EU. First, as discussed before, Justice Souther’s decision in *Hartford Fire* that there would be no comity concern when there is no true conflict between domestic and foreign laws invoked many criticisms. Besides the argument on the rationale of the decision, it is apparently contrary to the purpose of the Agreement. That is, a critical key role of the comity provision in the Agreement was disregarded by the US Supreme Court.

The response from the EU came one year after the *Hartford Fire* decision. France questioned the validity of the Agreement on

126. *Id.* at Article VIII.

127. See Waller, *supra* note 117, at 352-74. See also Wood, *supra* note 117, at 288-97. Judge Wood also reviews and criticizes the unilateral approach. See *id.* at 297-303.

128. Hegemony can be defined as a situation where “one state is powerful enough to maintain the essential rules governing interstate relations, and willing to do so.” ROBERT O. KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE* (2d ed. 1989).

129. Her admiration of the Agreement was demonstrated by her use of the words of “unprecedented” and “breakthrough.” Wood, *supra* note 117 at 295-97.

the basis of article 228 of the EC Treaty.¹³⁰ Under this article, France argued that the Agreement failed to meet the procedural requirements because the agreement between the EU and foreign states could be concluded by the Council, not the Commission, after consulting the European Parliament.¹³¹ The ECJ determined that the Commission had exceeded its power and subsequently voided the Agreement.¹³²

IV. Multilateral Approach

A. Introduction

The question of extraterritoriality of competition law may not arise if: there is no true conflict between the laws of the parties involved, as held in *Hartford Fire*; the US and the EU may sufficiently and cautiously consider international comity;¹³³ or there is an international competition law.¹³⁴ International competition law effort¹³⁵ is not a new idea. Many failed efforts have been made since the end of World War II to establish such a supranational law to integrate the national antitrust laws of each country.¹³⁶

Therefore, in combination with the extraterritoriality of competition law and the failure of the international competition law effort, some questions may arise. First, if the extraterritoriality of competition law is to be continued, despite many criticisms (since it is now the law in at least the US and the EU as a result of *Hartford Fire* and *Wood Pulp*), should we still need an international competition law effort despite previous failures? Second, if we should, how can we achieve such an ambitious goal? Third, what (country's) model should we follow?

130. See Case 327/91, *French Republic v. Commission*, 1994 E.C.R. 3641.

131. See EEC Treaty, Article 228 (1).

132. See Case 327/91, *supra* note 130 at 3678.

133. See *Wood*, *supra* note 117 at 297-303. See also Justice Scalia's dissenting opinion in *Hartford Fire*.

134. In this respect, both extraterritoriality of the Sherman Act and international antitrust law effort are related.

135. Some scholars call it "international harmonization of competition law." See Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557 (1994).

136. For discussion of five unsuccessful attempts for such an effort, see Waller *supra* note 117 at 349-52; *Wood*, *supra* note 117, at 281-88.

B. *A Brief History of International Competition Law Effort*

Since the end of World War II, many attempts have been made to achieve an international competition law. Five unsuccessful attempts were made by the League of Nations, the proposed International Trade Organization (ITO) or the "Havana Charter," the Economic and Social Council of the United Nations, the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD).¹³⁷

The reasons for failure can be attributed to the fact that the nations did not have sufficient necessities to have an international competition law.¹³⁸ In addition, it was impossible to reach the objectives of such an effort.¹³⁹ Professor Waller thus concludes that it failed because of "barren texts" and "false uniformity."¹⁴⁰

C. *GATT/WTO Model*

According to Professor Petersmann, there are three approaches in international competition law problems.¹⁴¹ They are: the intellectual property law approach,¹⁴² the competition law approach,¹⁴³ and the trade law approach.¹⁴⁴ Under the trade law approach, he advocates the integration of trade and competition

137. *See id.*

138. For example, in the case of League of Nations, the ITO. That is perhaps why the following efforts of the OECD and the UNCTAD were just hortatory and non-binding. *Id.*

139. For example, in the UNCTAD the developed and the developing never agreed to compatible objectives between them. *Id.*

140. Waller, *supra* note 117 at 404.

141. Ernst-Ulrich Petersmann, *International Competition Rules for Governments and for Private Business: A "Trade Law Approach" for Linking Trade and Competition Rules in the WTO*, 72 CHI.-KENT L. REV. 545, 546 (1996).

142. This approach focuses on " 'effective protection against unfair competition' without providing for international antitrust rules to protect freedom of competition." *Id.* at 545.

143. This approach "relies essentially on the extraterritorial application of domestic competition laws (notably of the US and EC) to anticompetitive practices abroad and on legally nonbinding multilateral guidelines (e.g., the 1980 UNCTAD Guidelines and 1986 OECD Guidelines) and a few bilateral agreements for the coordination of domestic competition laws." *Id.*

144. This approach (notably EC law) "integrates trade and competition rules so as to protect international market competition and cross-border transactions against both governmental market access barriers (e.g., in favor of public undertakings and enterprises with privileged positions) and private distortions (e.g., in the case of trade-restricting patent misuse and anticompetitive licensing agreements)." *Id.*

rules in the WTO and “linking negotiation” on the post-Uruguay Round agendas, including competition, environmental, and investment laws.¹⁴⁵

Professor Petersmann also recognizes the divergence by countries in their competition laws.¹⁴⁶ However, he also raises the possibility of “governmental intervention failures” to correct suboptimal results besides market failures.¹⁴⁷ Therefore, he argues that competition law “also requires rules on competition among government, similar to antitrust rules on competition among firms.”¹⁴⁸ In addition, he also appears to contend that because the competition regulations contain such a public/governmental factor that may cause international “external effects,” it should be discussed multilaterally in the GATT and the WTO (the already prepared and established forum), as an way to protect international “public goods.”¹⁴⁹ Professor Fox contends that this may be called the Agreement on Trade-Related Aspects of Antitrust Measures, or TRAMS.¹⁵⁰

D. International Antitrust Code Model

The International Antitrust Code Working Group, or so-called “Munich Group,” (“The Group”) strongly advocated antitrust harmonization by presenting its “Draft in International Antitrust Code (DIAC, or the “Draft”)” to the General Agreement on Trade and Tariffs (GATT) in 1993.¹⁵¹

1. Purpose and Reasons—The Group recognizes an uncertain new world order, the so-called globalization, which resulted from the end of the bipolar system since the breakdown

145. *Id.* at 546, 574-82. See also Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097 (1995).

146. See Petersmann, *supra* note 141, at 553-54. However, he contends to bring the international competition law argument in the WTO in contrast with the “impossible dream” argument of Judge Wood.

147. *Id.* at 554.

148. *Id.*

149. *Id.* at 554-65. He also provides necessity for additional WTO competition rules by providing legal, political, and economic reasons. Petersmann, *supra* note 141, at 565-68.

150. Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 2 (Jan. 1997).

151. International Antitrust Code Working Group, Draft International Code as a GATT-MTO-Plurilateral Trade Agreement, July 10, 1993, reprinted in 64 ANTITRUST & TRADE REG. REP. (BNA) No. 1628, S-1 (Aug. 19, 1993) (hereinafter referred to as the “DIAC”).

of the Berlin Wall as the beginning point for the International Antitrust Code (IAC). It contends that “[the GATT] does not—among other deficiencies—contain international competition rules that can be enforced through domestic courts so as to prevent that the opening of markets, resulting from the liberalization of governmental trade restriction is nullified or impaired by private restrictive business practices.”¹⁵²

Second, since such private restraints have often been “beyond the reach of even consensus principles of antitrust law, . . . an international regime could ensure enforcement and thus open up world markets.”¹⁵³ Third, an international regime should assure that “consensus wrongs” among private restraints are no longer escapable merely because they are beyond the jurisdictional reach.¹⁵⁴ Fourth, by setting forth certain common standards in this globalized economy, the disharmonies can be reduced.¹⁵⁵ Fifth, such a global regime or forum “should be in a position to give regards to all of the impacts of a transaction or behavior from the point of view of the citizen of the world.”¹⁵⁶ Finally, the process of developing such an international code should be consciously expanded beyond Europe.¹⁵⁷

2. *Five Principles*¹⁵⁸

a. Application of Substantive National Law—It is very important to note that the Group did not aim for an “Esperanto antitrust law.”¹⁵⁹ Instead, substantive national law can be applied for the solution of international cases.¹⁶⁰ The Group contends that: “Law can deal with international problems in various ways. The most radical, however often impractical, way is an international agreement or treaty on a uniform (or at least harmonized) law. The least radical way leaves the legal solution of international issues to national law, with its limits of impermissible extraterritoriality, eventually mitigated by a classical conflict of law approach. This Draft does not follow

152. *Id.* at section I of Introduction.

153. *Id.*

154. *Id.*

155. *See id.*

156. DIAC, *supra* note 151, at section 1 of Introduction.

157. *See id.*

158. The Group contends that the three principles of a, b, and c in the following are “Convention” principles that were already adopted in the Paris Convention of 1883 and the Berne Convention of 1886. *Id.*

either one of these models, the first appearing too ambitious, the second to ineffective.”¹⁶¹

b. National Treatment—The second principle of national treatment states that national competition law should treat foreigners and nationals without discrimination in its application. The Draft states that this national treatment principle should be regarded as “duties” of conduct.¹⁶² The GATT also adopts this principle.¹⁶³

c. Minimum Standards—This principle means that there should be an international minimum standard in the Draft as a guideline for establishing an international competition rule. One of the members in the Group contends that the new term for minimum standards is the “consensus wrongs,” which means, “antitrust offenses to which everybody can be reasonably expected to be opposed.”¹⁶⁴

d. International Procedural Initiatives—The Group adopts a new procedural principle to be taken by an international body such as the GATT or the WTO instead of self-execution principle as a fourth rule.¹⁶⁵ This principle can be called a principle of International Procedural Initiatives (“IPI”).¹⁶⁶

The Group also contends that this initiative is similar to the positive comity principle as in the example of the US-EU Agreement on antitrust cooperation.¹⁶⁷ Article 19 section 2 provides that the International Antitrust Authority should have: “(a) a right to ask for actions in individual cases . . . to be initiated by a national antitrust authority; (b) a right to bring actions against national antitrust authorities . . . before national law courts, whenever a national antitrust authority refuses to take appropriate measures against individual restraints of competition;

159. Wolfgang Fikentscher, *The Draft International Antitrust Code (“DIAC”) in the Context of International Technological Integration*, 72 CHI.-KENT L. REV. 533, 536-7 (1996).

160. See DIAC, *supra* note 151, at section VI of Introduction.

161. *Id.*

162. *Id.* An example of the duties of conduct is the prohibition of unfair trade practices in Article 10bis Paris Convention.

163. See Article III of the GATT.

164. Fikentscher, *supra* note 159, at 537.

165. See DIAC, *supra* note 151, at section VI of Introduction.

166. See *id.*

167. See *id.* at section VI of Introduction.

(c) a right to sue private persons and undertakings as alleged parties or initiators of a restraint of competition before national law courts asking for injunction against the execution of the restraint; (d) a right of national appeal even when it is not a party to the case but under the same conditions as parties to the case; (e) the right and duty to sue a Party to this Agreement before the International Antitrust Panel whenever it is of the opinion that this Party violates obligations under this Agreement.”¹⁶⁸

While this initiative may effectively enforce the national antitrust law internationally, it also respects national sovereignty.¹⁶⁹ This rule provides “a compromise between national and international interests,” and the national courts can play a decisive role under this article.¹⁷⁰

e. Cross-border Cases—The fifth principle is that the four principles above in the DIAC will be applicable only to cross-border cases.¹⁷¹ Merely national cases do not fall in this international authority but rather to national authorities and courts.

3. *Objections Against the DIAC*¹⁷²—While this code has received considerable praise and attention in Europe,¹⁷³ it has received a negative reaction in the US.¹⁷⁴ The objections against the DIAC can be summarized with two points. First, there are objections arising from jurisprudential reasons to govern the DIAC. As Professor Fikentscher points out in his article, there are arguments on what should be the governing jurisprudential theory on the scope of antitrust law.¹⁷⁵ Second, there are also

168. *Id.* at Article 19, section 2.

169. See Ulrich Immenga, *An International Antitrust Code in Perspective*, ANTITRUST REP. 13 (Aug. 1997).

170. *Id.*

171. See *id.*

172. Further discussions on the DIAC will be included in section D of part V of this article.

173. See Waller, *supra* note 117 at 347 n.18.

174. See *id.* at 347 n.19.

175. Professor Fikentscher is one of the members of the Munich Group. See Fikentscher, *supra* note 159, at 542. There are generally three different schools on market competition. First, the “structuralist school” focuses on market structure as the principal determinant for market performance. Second, the “contestability school” believes that by focusing on free entry to a market, the market will be competent as long as markets remain contestable. Third, the “Chicago school” regards monopolies as a sign of superior efficiency if: it is not due to from governmental barriers to market entry; monopoly profit is just

arguments regarding the substantive scope of the DIAC. That is, some people argue that the DIAC covers too many substantive antitrust principles,¹⁷⁶ while the other contends that the DIAC should cover more details.¹⁷⁷

V. Discussion: Should the Multilateral Approach be the One?

A. Introduction

This paper has discussed the defects and strengths of unilateral and bilateral approaches for resolving the problem of extraterritorial application of competition law. In addition, it also provided fundamental features of the multilateral approach on the basis of the DIAC and the GATT/WTO. In this part, this paper will discuss the answer to the question of whether, and why the multilateral approach can prevail over the other approaches as a better solution to extraterritorial application of competition laws.

B. *Can't Delay in This Globalized World*¹⁷⁸

International trade regulations are composed of two parts: regulations principally by the government of each state, and regulations by private parties. In this sense, antitrust is very much related to the basic consensual thesis that free trade is essential for prosperity of human society after World War II, e.g. the Havana Charter.¹⁷⁹ Therefore, appropriate agreement on private regula-

temporary and operates as an incentive." Petersmann, *supra* note 141, at 549.

176. Professor Fox, as a member of the Munich Group, contended that the DIAC should cover the "consensus wrong" only. DIAC, *supra* note 151, section VIII of Introduction.

177. See Fikentscher, *supra* note 159, at 543.

178. I will try to focus my argument here on the jurisprudential or ideological background in this international competition law argument.

179. See Wood, *supra* note, 117 at 281-83. However, it was rejected by the US. Judge Wood reasoned that: "[The rejection was] not the least because of the antitrust objections. This was somewhat awkward, since the Americans were, at the time, the greatest publicists for antitrust on the face of the globe, and it seemed peculiar for them to abandon an instrument that promised international coordination of competition rules. The principal obstacles, however, actually reflected that U.S. position: Congress was not ready to cede any antitrust jurisdiction to the international mechanisms established by the Charter, and furthermore, it found the language on restrictive business practices to be too weak, as compared with the prevailing U.S. standards on these matters. Half a loaf was not, under the circumstances, better than no loaf at all." *Id.* at 284. But, I think that half a loaf was better than no loaf at all. More importantly, this justification appears hardly compatible with her argument based on cooperation and functionalism. Later, she expressly endorsed the cooperation but under the

tions as well as public regulations for furtherance of free trade should be the bread and butter of the free market economy after the War.¹⁸⁰

As briefly explained above, it is unfortunate to have a stillborn international consensus on the appropriate agreement of private regulation of free trade. Theoretically, this world should have had a balanced consensus for free trade by appropriately agreeing to regulate the free trade barriers from both public and private sides. Although many reasons can be explained for such a failure, the most important reason that we should have now is that a well balanced agreement for free trade can be found in this very nature of “globalized economy” today.

For example, as briefly introduced in the beginning of this paper, there is no longer a geographical or physical limit in a private economic entity’s decision.¹⁸¹ In addition, the globalization may be self-conflicting because the apparently unbridled and rampant character of Capitalism has brought the argument of “globalization in question.”¹⁸² A necessary amount of restraints should be strongly suggested to “save” this globalized Capitalism. In this context, current efforts to have a balanced set of regulations in public and private sectors to preserve free trade should not be disregarded. While appropriately applying the public regulation measures, we now must also have private regulations for free trade as well.

If this world is left to continue as it is, it could mean “back to the *laissez-faire*,” as Keynes warned.¹⁸³ It may be true that we do

US model. See notes 188-93 in this article.

180. No competition lawyers seem to argue on this proposition in the international competition law argument.

181. I understand that this would mean “the players and the pressures for future changes” in Professor Waller’s words. See Waller, *supra* note 117 at 374-391.

182. Professor Petersmann calls it “external effects.” See Petersmann, *supra* note 141, at 554-65. By bringing the argument to protect international “public goods” (such as environmental protection), he contends that the international competition law problem should be solved in the WTO by linking with the other post-Uruguay round agendas. *Id.* at 574-82. See also Matsushita, *supra* note 145. Professor Fox’s illustrations are more vivid by providing many examples of “hybrid restraints” that resulted from this globalization. The unsuccessful transition to a market economy in the Eastern Europe and Russia, protectionism and xenophobia, “new undisciplined power” by multilateral corporations in the developing countries. Fox, *supra* note 8, at 894-99. See also notes 9 and 186 in this article. Professor Waller also recognizes these problems. See Waller, *supra* note 117, at 374-391. It is important to note that such restraints were caused by the “side effects” of the globalization.

183. Cassidy, *supra* note 9 at 201-7. As I discussed in section C of part I, since

not want “world disorder.” It is my view that this world is in an aimless multipolar system without clearly emerging as a hegemon, which is very unstable.¹⁸⁴ The same context is exactly applicable to the international competition law argument. I think that both unilateral and bilateral approaches are far from gaining/reaching either “consensus” or “hegemon.” If we do not experience this global crisis, this argument on the international competition law will never come to fruition. We want “responsible globality.”

C. *Sovereignty, Retaliation, and Comity*

Besides the ideological reasons for the multilateral approach, important legal reasons can easily be found in the defects of unilateral extraterritorial application of competition law as they were previously discussed. The nature of the argument on the unilateral application can be explained with three words: sovereignty, retaliation, and comity.

Sovereignty is one of the very traditional and critical international law principles present in almost every occasion of unilateral application or regulation of a rule of a country that can be inapplicable to another country, thus controversial, for any reason. As found in *Hartford Fire*, the responses from the countries being regulated are frequently retaliatory. Therefore, in order to compromise this conflict, the international comity principle is inevitable. However, when one party finds the principle unnecessary or irrelevant, maybe as Justice Souter did in *Hartford Fire*, the other party can choose nothing but retaliation.

One effort to avoid this vicious cycle of retaliation is the bilateral approach. The bilateral approach is skeptical about an international harmonization of competition law effort,¹⁸⁵ although Professor Fox contends that such an international harmonization effort may cure three problems: externalities, high transaction costs, and interdependence.¹⁸⁶ In addition, the bilateral approach

economists do not yet know how to manage this globalization problem, should competition lawyers also wait until the economists reach their consensus? Maybe not.

184. I don't see the US gained hegemony particularly since the collapse of the Soviet Union. Please refer to the definition of hegemony at footnote 119. According to Professor Waller, hegemony is one of the possible scenarios affecting successful harmonization. He also agrees that the US is not the hegemon for antitrust purposes. For details, see Waller, *supra* note 117, at 391-97.

185. Judge Wood also proposes similar obstacles. Wood, *supra* note 117, at 303-9.

186. See Eleanor M. Fox, *Harmonization of Law and Procedures in a*

also cannot escape from the unilateral fracture as seen in the Agreement cracked down between the US and the EU, after Wood Pulp, *Hartford Fire*, and the France's raising of the validity of the Agreement.¹⁸⁷

D. *The Model Debate*

It is important to note here that the unilateral approach and the bilateral approach have failed to solve this international competition law problem, as discussed before. The unilateral approach has invoked too many criticisms. On the other hand, the bilateral approach may have achieved limited success. However, its "limitedness" was revealed in the crack down of the Agreement between the US and the EU. Neither entity ever achieves hegemony as far as this international competition law problem is concerned, while they are probably struggling to obtain such a position.

Judge Wood characterizes such a supranational competition law or harmonization effort as an "impossible dream" because of: (1) substantially different economic conditions among the developing nations, Eastern Europe and Russia, and the Asian countries from those of the US or the EC; (2) the failure of convergence of competition laws between similar countries such as the US, Canada, and the EC.¹⁸⁸

Judge Wood seems to favor the US antitrust law model. The Judge argued that the question of effective antitrust rules and the enforcement of those rules is more crucial than internationalization of antitrust law.¹⁸⁹ The Judge further contended that it can be achieved "in a variety of ways: bilaterally, regionally, . . . and perhaps eventually through use of the new WTO as a forum for discussions . . ."¹⁹⁰ However, Judge Wood concluded, while pursuing this, "the US will continue to enforce the US antitrust law against conduct that harm US markets to the fullest extent of our ability."¹⁹¹ This approach suggests that "such a global competitive regime can be achieved [by continuing] strong enforcement of the US antitrust laws, whenever necessary effects

Globalized World: Why and How?, 60 ANTITRUST L.J. 593, 594-95 (1991). See also note 182 in this article.

187. See section C of part II and section C of part III in this article.

188. See Wood, *supra* note 117, at 278-81.

189. Diane P. Wood, *The Internationalization of Antitrust Law: Option for the Future*, 44 DEPAUL L. REV. 1289, 1298 (1995).

190. *Id.*

191. *Id.* at 1298-99.

on US commerce are present.”¹⁹² This approach seems to be consonant with *Hartford Fire*. As Judge Wood argued that the United States’ priorities are vigorous enforcement and cooperation rather than harmonization,¹⁹³ the US may continue to attempt to promote the Sherman Act abroad as a desirable model to follow for the time being.¹⁹⁴

On the other hand, Professor Fox asserts that the broader and more sophisticated version of the European Union’s competition law is more desirable and effective than the narrower, efficiency-emphasized vision of the US antitrust law.¹⁹⁵ She also praises the European Commission’s leadership in bringing the competition law argument to the WTO.¹⁹⁶

According to Professor Fox, there are four approaches to competition law and the world trading regime: (1) Munich code (in other words, the DIAC); (2) harmonization; (3) cooperation; (4) skeptical unilateralism and bilateralism.¹⁹⁷ She criticizes the Munich code as too ambitious, despite its complete articulation of the world code with a supra national enforcement body, and would be unacceptable to many countries.¹⁹⁸ Professor Fox also contends that the harmonization model would be unrealistic.¹⁹⁹ She also criticizes the fourth approach for downplaying multilateral solutions, disregarding the existence of “some hybrid public/private restraints,”²⁰⁰ and overemphasizing the extent to which national competition law can legitimately solve all antitrust

192. *Id.* at 1292-93.

193. *Id.* at 1298-99.

194. This argument is, therefore, related to the question of which model we should follow. For the application of the Sherman Act in the Eastern European countries, see Waller, *supra* note 117, at 569-71, 582-90. Professor Waller also discusses an important preliminary issue before “the Sherman Act for Sale” such as “the Transferability of National Law.” *Id.* at 562-69. He also deals with cultural issues in transferring the Sherman Act abroad under the title of “the Indigenous Roots of Foreign Competition Law.” *Id.* at 581-82.

195. Fox, *supra* note 150, at 4-12.

196. See *id.* at 8-9.

197. *Id.* at 13-19.

198. See *id.* at 15-16. However, in her another article, she claims to do some action against the “some hybrid public and private restraints” of the globalization. Fox, *supra* note 8, at, 894-900. Professor Petersmann also recognizes this problem when he raises the necessity to protect the “international public goods” such as environmental protection. I am going to argue further on this point later in this section. See generally note 182 in this article on this point.

199. *Id.* at 16-17. Professor Waller also agrees with this point. See note 181 in this article.

200. See *supra* note 182 regarding the “hybrid restraints.”

problems.²⁰¹ Professor Fox endorses the third option by expressly stating that nations can strengthen cooperation between competition authorities by first developing and refining bilateral agreements that would expand “progressively through a domino effect.”²⁰²

Professor Waller provides a cooperation approach similar to Professor Fox. However, he does not favor Professor Fox’s EU competition law model by contending that EU competition law is not of “fundamental attraction to its neighbors,” despite its many advantages.²⁰³ Professor Waller contends, based on the functionalist thesis,²⁰⁴ that “cooperation” between national antitrust enforcers, as a “natural alternative” to harmonization, should be adopted.²⁰⁵ After discussing international failures to achieve harmonization,²⁰⁶ he contends that limited success of cooperation by multilateral, regional, and bilateral agreements can be realized.²⁰⁷

It is significant to note that all four proponents, in some ways, seem to agree that the international competition law problem should be eventually solved multilaterally in a supra national body such as WTO.²⁰⁸ Except both extreme approaches of unilateralism and the DIAC, it can be said that all the forefront competition lawyers advocate that such an international competition law problem can be solved by both bilateral and multilateral approaches.²⁰⁹ Nevertheless, we have to start this argument in the world context of globalization. As most proponents recognize the

201. *Id.* at 17-19.

202. Fox, *supra* note 150, at 13-14.

203. Waller, *supra* note 117, at 392-97. One commentator notes that the EU has rule oriented dispute settlement mechanism that is less desirable than APEC style cooperation oriented/consensus based mechanism. Thus, it could be argued that the EU is a rather closed regime. Myung Hoon Choo, *Dispute Settlement Mechanisms of Regional Economic Arrangements and Their Effects on the World Trade Organization* (unpublished paper filed with author).

204. It means that “cooperation in small technical things will lead to cooperation and integration in larger, more overtly political activity.” Waller, *supra* note 117, at 348 n.24. For more details, see ERNST B. HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* 47-50 (1964).

205. *Id.* at 360-73.

206. *See id.* at 349-52.

207. *See id.* at 352-74. Also, his agenda arguments are very illustrating. *Id.* at 397-403.

208. *See* note 145 (Petersmann), 190 (Wood), 196 (Fox), and 207 (Waller) in this article.

209. However, the proportions of the two approaches in each scholar’s contention are distinctively different from each other.

“side effects” of the globalization, it is time that we must cure them.²¹⁰ It may be too late to correct such hybrid restraints, while refining the bilateral agreements under either the US or the EU competition law.

In this context, I think the DIAC approach is not located in the other extreme side in this argument. Remembering that every proponent agrees to bring this problem to the WTO, there is the further question of whether we should argue this problem only in the WTO; in other words, is the WTO the right forum to argue this international competition law problem? Noting Professor Petersmann’s argument of “linking negotiations” with the other post-Uruguay round agendas, it is useful to bring the argument of what is happening with the reconcilability argument between free trade and environmental protection. In that “green round” argument, it is not surprising that some scholars bring the argument of establishing a new international body that deals with this green round agenda.²¹¹ Therefore, it is also time to discuss more actively whether we should have a supra national enforcement body that may correct the side effects of the globalization as well as the general competition law arguments.

E. Divergence

The flip side of the question of what model or approach to adopt to avoid conflicts in the competition law is how the rest of the world can achieve a “compatible” competition law.²¹² This section deals with policy or jurisprudential, and even, cultural arguments in competition law. Besides the substantive divergence on what to include in the international competition law, regardless of the argument whether it should be the DIAC, there is no

210. See note 182 in this article.

211. For example, professor Esty calls for the “Global Environmental Organization.” DANIEL C ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT AND FUTURE* (1994). See also Jeffrey L Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 HARV. ENV’T L. REV. 241 (1995). For more details on the general green round argument, see Il Hyung Jung, *Reconcilability between International Free Trade and Environmental Protection: How has the US responded to the Tuna/Dolphin Decisions?* (unpublished paper filed with author).

212. As one of reasons for no true conflict, the 1995 Guideline provides that: “more countries adopt competition laws that are ‘compatible with’ those of the US. See section A of part V of this paper. However, this statement is not persuasive, because: there is no definite model to follow; if there is and if the model is the US model, it is not sufficiently recognized; the competition laws for the other countries are not clearly or sufficiently “compatible with” the US antitrust law despite many problems.

agreement as to what jurisprudential guidance to take besides the idiosyncratic differences of each country, including cultural differences.

For example, when two countries such as A and B agree on something, the agreement between them would be better considered by taking into account the many special and idiosyncratic differences and interests of both countries. However, this agreement cannot be applicable to another bilateral agreements between A and C even on the same topic that A and B agreed. That is, bilateral agreement on this conflict in competition law may bring stronger ties between those two countries. However, it is limited only to those two countries. Therefore, no matter how many bilateral agreements country A has on the conflict in competition law, it is far from having a single international competition law that may provide a guide to follow.

The competition laws of the US and the EC are still competing to gain "hegemony," which means no hegemon has yet emerged as an alternative to achieving harmonization of competition law.²¹³ Although there are articles discussing regional efforts on the bilateral level such as Canada,²¹⁴ Mexico,²¹⁵ Japan,²¹⁶ the Eastern European countries,²¹⁷ and the Less Developed Countries (LDCs),²¹⁸ it is questionable how the bilateral approach can resolve the problem, considering these limits. Nevertheless, because the issue of what to regulate in competition law has more common grounds in economics, it should be less controversial than

213. Waller, *supra* note 117, at 392-93. Other factors are "deep integration" and "shared visions and values." *Id.* at 394-97.

214. *See id.* at 356-60.

215. *See id.* *See also* Sergio Garcia-Rodriguez, *Mexico's New Institutional Framework for Antitrust Enforcement*, 44 DEPAUL L. REV. 1149 (1995).

216. *See* Lori B. Morgan & Helen S. Rosenbaum, *U.S. Department of Justice Antitrust Enforcement Policy*, 34 HARV. INT'L L.J. 192, 195 (1993) (discussing the DOJ's announcement on the progress of talks on the Structural Impediments Initiative with Japanese); Wood, *supra* note 117, at 279 n.7 (discussing the similarity of the Japanese Antimonopoly Law to its North American and European counterparts); Waller, *supra* note 117, at 571-74; Michael Peter Waxman, *Enforcing American Private Antitrust Decisions in Japan: Is Comity Real?*, 44 DEPAUL L. REV. 1119 (1995); Jiro Tamura, *U.S. Extraterritorial Application of Antitrust Law to Japanese Keiretsu*, 25 J. INT'L L. & POL'Y 385 (1993).

217. *See* Waller, *supra* note 117, at 569-71, 582-90.

218. *See* William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995).

the public regulations on trade that can be more discretionary and subjective.

F. Equity

This is the argument especially for the LDCs and other aggrieved countries. One of the limits of the bilateral approaches is the limited opportunity for the aggrieved party to recover in the case where the bilateral agreement goes wrong—for example, there is a total lack of dispute resolutions and unilateral abrogation of the agreement. The exact function of the WTO should be made in the area of competition law as well, like many disputes arising from the conflicts on public regulations of international trade dealt in the international forum.

G. In Parallel With Other Post-Uruguay Round Agendas

Nobody doubts the existence of the so-called post-Uruguay Round agendas, including the “green round” and the “blue round.” Professor Petersmann particularly advocates reciprocal “package deal negotiations,” including all post-Uruguay Round agendas such as environmental, labor, and investment laws, under the public choice theory.²¹⁹

VII. Conclusion

Things change. The law should appropriately follow so as not to lag behind. At the same time, this world has been already globalized. Under these two theses, we are not unfamiliar with the post-Uruguay Round issues. With the reasons presented here, the argument on the extraterritoriality of competition law should be solved “multilaterally and functionally” in an international world forum that may enforce to cure the side effects of the rampant globalization to avoid its vicious cycle of Capitalism that may lead to trade wars.

219. Petersmann, *supra* note 141, at 582.

