Foreign Private Plaintiffs, Global Conspiracies and the Extraterritorial Application of U.S. Antitrust Law

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By WOLFGANG WURMNEST*

I. Introduction

Outside the United States, private antitrust enforcement is either virtually non-existent or still in the fledging stages. Effective remedies for recovering antitrust injuries are rare, even in other industrialized countries where the task of enforcing antitrust law has often been vested in public authorities. In developing and transition countries, even law enforcement by public bodies is less than assured. International conspiracies profit enormously from these enforcement gaps. Recent studies provide evidence that global cartels have generated higher overcharges in countries without efficient antitrust enforcement regimes than in countries with active enforcement organs. Moreover, global conspiracies export a significant amount of goods into developing countries with weak enforcement systems without fear of fines or damages claims. These deficiencies, in contrast to the U.S. system of plaintiff-friendly liberal discovery procedures, treble damages, and jury trials, make U.S. courts extremely attractive for foreign plaintiffs.

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2. See Margart Levenstein & Valerie Y. Suslow, Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy, 71 ANTITRUST L. J. 801, 801-52 (2004).

3. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 (1981). In more direct language, Lord Denning observed once that “foreign litigants are drawn to the United States as a moth is drawn to the light.” Smith Kline & French Labs Ltd. v. Bloch, 1 W.L.R. 730 (C.A. 1982). Foreign plaintiffs win substantially more often than domestic litigants before federal courts
In the wake of the detection of several high profile global price-fixing cartels in the 1990s, the number of private antitrust actions brought on behalf of foreign plaintiffs before U.S. courts skyrocketed, raising fears that U.S. courts would be flooded by disputes from all over the world. These cases did not touch upon the question of whether U.S. courts can hear Sherman Act claims brought by foreign plaintiffs involved in U.S. commerce. That issue had already been answered in the affirmative in *Pfizer v. Government of India*. In *Pfizer*, the Supreme Court held that denying foreign plaintiffs injured by an antitrust violation the right to sue in the United States would "lessen the deterrent effect of treble damages" and would not deprive violators "of the fruits of their illegality."

This deterrence argument also played a crucial role in the latest round of cases. Antitrust suits were brought by foreign plaintiffs against foreign defendants participating in global price-fixing conspiracies. The plaintiffs claimed damages for overcharges which they paid in transactions in foreign markets. Many litigants came from countries which either had no antitrust law or lacked efficient (private) enforcement mechanisms, *i.e.* from jurisdictions where conspirators are often not held accountable for their wrongdoing. Circuit courts were split as to whether foreign plaintiffs injured in wholly foreign transactions should be allowed to recover under the Sherman Act to deter cartels, an issue that touches upon the boundaries of the extraterritorial reach of U.S. antitrust law.

The legal question raised by the recent cases centered on an inelegantly worded provision of the Foreign Trade Antitrust...
Foreign Private Plaintiffs

Improvements Act of 1982 (FTAIA),\textsuperscript{11} which for many years after its enactment laid "mostly unnoticed in the dusty pages of the United States Code."\textsuperscript{12} The FTAIA was intended to clarify the reach of U.S. antitrust law by excluding restrictive practices directed at foreign markets from antitrust scrutiny. According to section 6a of the FTAIA,\textsuperscript{13} the Sherman Act shall not apply to cases where non-import trade is concerned unless (i) the conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. trade or commerce, and (ii) "such effect gives rise to a claim" under the Sherman Act. The substantive impact on the U.S. market was apparent in the cases which concerned worldwide conspiracies, drawing the courts' attention to whether the FTAIA's second prong ("gives rise to a claim") bars jurisdiction to adjudicate claims stemming from wholly foreign transactions.\textsuperscript{14}

\textsuperscript{11} See \textit{id.}

\textsuperscript{12} Makan Delrahim, Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications, Address at the American Bar Association, Section of Antitrust Law (Sept. 18, 2003), at <www.usdoj.gov/atr/public/speeches/201509.htm#N4> (visited Oct. 6, 2004) (observing: "For many years after the FTAIA was enacted in 1982, it lay mostly unnoticed in dusty pages of the United States Code; few lawsuits invoked it, and almost none were successful").

\textsuperscript{13} 15 U.S.C.A. § 6a (2004). The statute provides as follows:
Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless
\begin{itemize}
\item [(1)] such conduct has a direct, substantial, and reasonably foreseeable effect
\begin{itemize}
\item [(A)] on trade or commerce which is not trade or commerce with foreign nations, or
\item [(B)] on import trade or import commerce with foreign nations;
\end{itemize}
\item [(2)] such effect gives rise to a claim under the provisions of sections 1 to 7 of [the Sherman Act], other than this section.
\end{itemize}

[Proviso:] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

The Supreme Court granted certiorari in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.* (*Empagran*)\(^{15}\) to clarify the meaning of the FTAIA’s second prong. *Empagran* concerned a class action brought by foreign plaintiffs against foreign firms that participated in the worldwide vitamins cartel. This cartel consisted of a series of price-fixing conspiracies concerning vitamin products and was described as the most pervasive and harmful antitrust conspiracy ever uncovered.\(^{16}\) The plaintiffs alleged that the defendant’s price-fixing conspiracy raised the price of vitamin products for customers in the United States and in foreign countries. They claimed damages for injuries stemming from overcharges that occurred in transactions taking place in Australia, Ecuador, Ukraine, and Panama.\(^{17}\) The debate on the jurisdictional reach of U.S. antitrust law was closely monitored by many trading partners of the United States. Seven foreign governments,\(^{18}\) most of them representing countries in which cartel

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17. *Empagran*, 124 S. Ct. at 2364. Later, one of the Australian plaintiffs (Windridge Pig Farm) dropped out of the suit to become a member of a class action initiated before Australian courts. Oral Argument at 7 (Shapiro) & 30 (Goldstein), *Empagran*, (No. 3-724), available at 2004 WL 1047902.

members were incorporated and none representing the plaintiffs' home
countries, intervened in Empagran as amici curiae. They urged the Court
not to allow such claims, arguing that the application of U.S. antitrust law
to remedy injuries sustained in foreign markets would undermine the
principle of comity since it would interfere with their sovereign right to
regulate their own economies. The Supreme Court ruled that U.S.
antitrust law cannot be applied to remedy injuries stemming from wholly
foreign transactions, provided that the adverse foreign effects were
independent of any anticompetitive effects felt on the U.S. market. However, the case was remanded for further proceedings since the lower
court had not addressed the question of whether domestic effects were
present.

This article analyzes the impact of the Empagran decision with
particular attention to acknowledged antitrust law enforcement gaps in the
international arena. Part II provides a brief overview of the problems and
pitfalls of an extraterritorial application of U.S. antitrust law. Part III
highlights the core findings of the Empagran decision in more detail. It is
argued that the Court was right in rejecting the claims of foreign purchasers
even though antitrust law enforcement deficiencies in many parts of the
world do not permit foreign plaintiffs to recover their antitrust injuries.
Finally, Part IV addresses the question of whether the Department of
Justice could take international enforcement gaps into consideration when
assessing the fines for cartel participants.

Kingdom of the Netherlands as Amici Curiae in Support of Petitioners of Feb. 3, 2004,
Empagran, available at 2004 WL 226597. The United States government also
intervened on the side of the petitioners. Brief for the United States as Amicus Curiae

20. Empagran, 124 S. Ct. at 2366.
21. Id. at 2372. On remand the D.C. Circuit ruled that the plaintiffs adequately
preserved their antitrust claims and instructed the parties to submit full merit briefs on
whether the nature of the alleged link between the foreign injury and the domestic effects is
legally sufficient to trigger application of the FTAIA's domestic-injury exception.
II. Extraterritoriality of U.S. Antitrust Law: Problems and Pitfalls

A. The Effects Doctrine and Its Perception Abroad

Since Judge Learned Hand's ruling in United States v. Alcoa,22 which was cited with approval by the Supreme Court in Hartford Fire Insurance Co. v. California,23 the extraterritorial application of U.S. antitrust law has been based on the "effects test": U.S. antitrust law applies to cases when "the activities of the defendant had an impact within the United States and upon its foreign trade."24 The effects doctrine has caused severe friction25 with foreign sovereigns who used to cling to a more territorial approach.26 Over the years, however, the international hostility against the effects test has subsided. Today, application of antitrust law against conduct substantially affecting a given market is widely accepted in the international arena. It is common sense that in global commerce, a strict territoriality principle cannot adequately protect competition. It does not capture anticompetitive conduct occurring entirely abroad that affects a domestic market. Therefore, many states have adopted the effects

22. United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945). This case silently buried the strict territorial approach taken by Justice Holmes in American Banana Co. v. United Fruit Co., according to which the Sherman Act applies only to anticompetitive conduct that occurred on U.S. soil, see Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356-57 (1909).


25. The vigorous opposition of foreign states to the extraterritorial application of U.S. antitrust law some decades ago is still remembered. Many states, such as Australia, France, the United Kingdom, the Netherlands, and New Zealand, reacted to the broad application of U.S. antitrust laws, especially with respect to courts' orders to produce documents in a considerable amount of states, by enacting blocking legislation. See OECD, COMPETITION LAW ENFORCEMENT: INTERNATIONAL CO-OPERATION IN THE COLLECTION OF INFORMATION 44-50 (1984).

26. The United Kingdom was particularly hostile toward the effects test. See Note no. 196 of the British Embassy at Washington, D.C., presented to the United States Department of State on July 27, 1978, 49 BRIT. Y.B. INT'L L. 390, 391 (1978) (stating: "HM Government consider that in the present state of international law there is no basis for extension of one country's antitrust jurisdiction to activities outside that country by foreign nationals").
principle, among them member states of the European Community,\textsuperscript{27} New Zealand,\textsuperscript{28} and some Latin American countries.\textsuperscript{29} The European Community (E.C.) has adopted an approach similar to the effects test. The European Court of Justice (E.C.J.) held in the \textit{Wood Pulp} case that conduct carried out by a foreign corporation outside the E.C. may still be subject to E.C. antitrust law if the restrictions of competition are to be implemented within the common market (so-called "implementation theory").\textsuperscript{30} Furthermore, the E.C.J. assumes that there is a sufficient territorial connection between an acting company established and incorporated in a non-member state and the E.C. if a subsidiary of that company, although having a distinct legal personality, is established in the E.C.\textsuperscript{31} The Court of First Instance (C.F.I.) went one more step toward the embracement of the pure effects test by holding in the \textit{Gencor}-merger case that the European Commission has jurisdiction where activities, though carried out outside the E.C., "have the substantial effect of creating or strengthening a dominant position as a result of which effective competition or a substantial part thereof will be significantly impeded."\textsuperscript{32} Even the United Kingdom,

\begin{itemize}
\item [27.] Among the first was Germany; see \textsc{Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Antitrust Act]} sec. 130(2) (F.R.G.), unofficial translation into English available at <www.bundeskartellamt.de/wEnglisch/CompetitionAct/CompAct.shtml?navid=9> (visited March 25, 2005). Moreover, one can now name, \textit{inter alia}, Austria, Greece, France, Spain, Sweden, Switzerland and Poland. See Ivo E. Schwartz & Jürgen Basedow, \textit{Restrictions on Competition, in} III-35 \textsc{Int'l. Encycl. Comp. L.} 1, 134-39 (1995); and Jürgen Basedow & Stefan L. Pankoke, \textit{General Report, in Limits and Control of Competition with a View to International Harmonization (Section III.A.2 of the XVIIth International Congress of Comparative Law)} 27-29 (Jürgen Basedow ed., 2002).

\item [28.] Andrew Matthews, \textit{New Zealand, in Limits and Control of Competition with a View to International Harmonization (Section III.A.2 of the XVIIth International Congress of Comparative Law)} 324-25 (Jürgen Basedow ed., 2002).


\item [32.] Case T-102/96, Gencor v. Commission, 1999 E.C.R. II-753, 785: "[a]pplication of
one of the most ardent opponents of the pure effects principle, recently adapted its competition law to the implementation theory.\textsuperscript{33}

\textbf{B. Modern Regulatory Conflicts}

Although one can witness a general convergence in certain core areas of antitrust law,\textsuperscript{34} in many areas of substantive law remarkable divergences remain between different legal orders.\textsuperscript{35} Thus, the effects test inevitably leads to interference with policy choices of foreign nations. With regard to enforcement through antitrust authorities, tensions have lessened considerably through the adoption of international antitrust enforcement cooperation agreements. These agreements oblige enforcement authorities to consider the interests of foreign nations in international cases and require them to evaluate whether enforcement should be left to the authorities of a foreign state.\textsuperscript{36}

\footnotesize{\textsuperscript{[the E.C. merger Regulation] is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community." It must be noted, however, that the C.F.I. did not rule against the implementation doctrine set forth by the E.C.J. in \textit{Wood Pulp} because the foreign merging companies carried out business within the E.C. The \textit{Gencor} court emphasized:

According to \textit{Wood Pulp}, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that \textit{Gencor} and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter.

\textit{Id.} at 784.

\textsuperscript{33} See Competition Act sec. 2(3) (1998) (U.K.), available at <\texttt{www.hmso.gov.uk/acts/acts1998/80041--a.htm#2}> (visited March 25, 2005) (stating that the act "applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom").

\textsuperscript{34} Many states are opposed to horizontal price fixing, geographical and other market sharing agreements, bid rigging, and resale price maintenance. See Basedow & Pankoke, \textit{supra} note 27, at 3-9 and 30-35. This study takes into account the antitrust laws of Argentina, Australia, Denmark, the European Community, France, Germany, Italy, Japan, MERCOSUR, the Netherlands, New Zealand, Poland, Spain, Switzerland, and the United States.

\textsuperscript{35} One example is the assessment of vertical restraints. See \textit{id.} at 36-39.

\textsuperscript{36} See, \textit{e.g.}, Agreement between the United States government and the European Community regarding the application of their competition laws, art. VI, 1995 O.J. (L 95) 45. It confers the duty upon national authorities to take into account the important interests of the other party at all stages of enforcement activities. See also Antitrust Enforcement Guidelines for International Operations, sec. 3.2 (Dept. of Justice and the Federal Trade Commission, April 1995), available at <\texttt{www.usdoj.gov/atr/public/guidelines/internat.htm}> (visited March 25, 2005) ("In enforcing the antitrust laws, the Agencies consider international comity . . . . Thus, in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected").}
But these bilateral agreements do not affect private antitrust litigation. Since private litigants, not bound by prior enforcement policy or political constraints, may tread where the government would not, they constantly test the limits of the extraterritorial reach of U.S. antitrust law in an attempt to benefit from the attractive availability of treble damages. Outside the United States private enforcement of antitrust law is often non-existent, highly disputed, or underdeveloped. This holds even true for the industrialized world; e.g., Japan and the E.C. have not yet developed efficient private antitrust enforcement schemes, although one must concede that private antitrust litigation before European courts has slowly begun to


40. See, e.g., J. Mark Ramseyer, The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan, 94 YALE L.J. 604, 643 (1985) (concluding “institutional barriers to litigation in Japan have, it appears, all but eliminated private antitrust damage suits); Harry First, Antitrust Enforcement in Japan, 64 ANTITRUST L.J. 137, 182 (1995) (stating that private actions remain “undeveloped, with no reported case of an affirmed antitrust damages award in the [Japanese Antimonopoly] Act's history.”); James D. Fry, Struggling to Teethe: Japan's Antitrust Enforcement Regime, 32 LAW & POL'Y INT'L BUS. 825, 852-53 (2001) (emphasizing that “private damage actions brought under the [Antimonopoly Act] have shown to be weak.... Although the [Act] provides for such claims, practically none of Japan's antitrust suits have been brought in the form of private actions; when they are brought, the claimant never prevails.”).

41. Over the last four decades only very few damages actions against violations of E.C. antitrust law were brought before European courts. See Jürgen Basedow, Who Will Protect Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation, 2 EUR. BUS. ORG. L. REV. [EBOR] 443, 461 (2001); Donncadh Woods et al., Private Enforcement of Community Competition Law: Modernisation and the Road Ahead, 2/2004 COMPETITION POL'Y NEWSL. 31, 32. A recent study commissioned by the European Commission counted only twelve successful damages awards for violation of E.C. antitrust law since 1962. This study also highlights that the number of damages awards for breach of national antitrust law was similarly low. See Study on the conditions of claims for damages in case of infringement of EC competition rules (2004), available at <europa.eu.int/comm/competition/antitrust/other/private_enforcement/index_en.html> (visited March 25, 2005).
increase.\textsuperscript{42} Above all, foreign states regularly limit the civil liability of those engaging in anticompetitive conduct to compensatory damages thus depriving consumers from recovering punitive or treble damages.\textsuperscript{43}

These differences in private action remedies are the key factor in conflicts arising from the extraterritorial application of U.S. antitrust law.\textsuperscript{44} In the past, foreign states have enacted "blocking" or "claw back" statutes in response to the extraterritorial enforcement of U.S. antitrust law in the post-\textit{Alcoa} world.\textsuperscript{45} The old treble damages dispute got a new twist with the widespread adoption of leniency programs. These programs seek to balance the interests of disclosure, deterrence, and punishment by rewarding the "whistle blower."\textsuperscript{46} The first company to provide decisive


\textsuperscript{43} For example, European states limit damages for infringement of antitrust law to compensatory damages. Even in countries such as England that generally allow for exemplary damages in certain contexts, courts have not awarded punitive damages in antitrust cases. \textit{See}, e.g., Crehan \textit{v. Inntrepreneur Pub Co.} [2004] EWCA Civ 637 (C.A.).


\textsuperscript{45} Whereas "blocking statutes" prohibit national authorities from co-operating in extraterritorial pre-trial discovery proceedings and from enforcing treble damages awards, "claw-back statutes" give defendants in U.S. antitrust actions a cause of action to "claw back" from the (former) plaintiff any excess over actual damages paid in a treble damages judgment. For examples of statutes and laws in various countries in response to U.S. treble damages awards, see A. V. LOWE, \textit{EXTRATERRITORIAL JURISDICTION} 79-225 (1983).

\textsuperscript{46} The OECD jurisdictions that have adopted leniency programs include Australia, France, Germany, Hungary, Ireland, South Korea, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, the European Union, and the United States. \textit{See} OECD, \textit{POLICY BRIEF: USING LENIENCY TO FIGHT HARD CORE CARTELS} 2 (2001), available at
information about a cartel and cooperate fully with the authorities receives amnesty from fines and criminal prosecution.\textsuperscript{47} These amnesty programs have proven to be very effective in the fight against hard-core cartels.\textsuperscript{48} It was argued that their success would be impaired if plaintiffs injured in foreign transactions could sue before U.S. courts, because potential leniency applicants would weigh the benefits (amnesty) against the costs (civil liability) before leaving a cartel. The risk of paying treble damages, not only for U.S. transactions but also for those occurring entirely outside the United States, would be an overwhelming disincentive to cooperate with antitrust authorities.\textsuperscript{49} Yet it must be noted that conflicts stemming from treble damage remedies could be substantially lessened in the near future, at least with regard to Europe. The E.C. plans to revise its enforcement system in the near future. Some voices favor the introduction of “double damages” to remedy antitrust law infringements,\textsuperscript{50} and this

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\textsuperscript{48} See R. Hewitt Pate (Acting Assistant Attorney General), Anti-Cartel Enforcement: The Core Antitrust Mission, Address before the British Institute of International and Comparative Law at the Third Annual Conference on International and Comparative Competition Law (May 16, 2003), available at <www.usdoj.gov/atr/public/speeches/201199.htm> (visited March 25, 2005) (“[t]he rate of amnesty applications [in the U.S.] is at an all time high — in the first six months in this fiscal year, we have averaged three applications per month”). For the E.C., see Bertus van Barlingen, A View from the Inside: The European Commission’s 2002 Leniency Notice After One Year of Operation, 17-SPG Antitrust 84 (“[i]n the first year [after the new leniency program came into force] more than twenty applications for immunity were received in separate cases. For cartels, this is a huge number. By comparison, during the six years of operation of the 1996 Notice, leniency was requested in a total of sixteen separate cases”). For reform proposals, see Donal Mc Elwee, Should the European Commission Adopt “Amnesty Plus” in Its Fight Against Hard-Core Cartels?, 2004 EUR. COMPETITION L. REV. 558.

\textsuperscript{49} See, e.g., Brief for the Government of Canada at 11-16, Empagran, supra note 18; Brief for the Governments of the Federal Republic of Germany and Belgium at 29-30, Empagran, supra note 18; Brief for the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands at 9-13, Empagran, supra note 18; Brief for the United States as Amicus Curiae at 6, Empagran, supra note 18.

\textsuperscript{50} See MONOPOLKOMMISSION, DAS ALLGEMEINE WETTBEWERBSRECHT IN DER SIEBENTEN GWB-NOVELLE [GENERAL COMPETITION LAW IN THE SEVENTH AMENDMENT TO THE ANTITRUST ACT] 40, 67 (2004) (recommending the introduction of double damages as a remedy under German law for breaches of E.C. antitrust law). See also Basedow, supra note 41, at 466 (arguing that “if the Commission want to use private initiatives for enforcing competition laws in the public interest, it should consider the U.S. model of a private
would bring U.S. and E.C. antitrust law further into line. A recent amendment of U.S. law missed its chance to further reduce tensions: Congress adopted the Antitrust Criminal Penalty Enhancement and Reform Act, limiting antitrust damages awards to compensatory damages for defendants who have participated in U.S. leniency programs.51 However, defendants who have participated in foreign leniency programs do not benefit from this “de-trebling.”52

It is noteworthy that the observations above on regulatory conflicts primarily concern industrialized countries that have robust antitrust laws. Outside the industrialized world, effective antitrust enforcement is not assured despite the widespread enactment of such laws.53 A recent OECD study states bluntly that although “sanctions have increased significantly in some countries in recent years, they are, on the whole, still inadequate.”54 Two key problems can be named: smaller states’ inability to enforce their antitrust laws abroad and inefficiencies resulting from their national legal framework. Developing countries in particular lack credible deterrence power to control the anticompetitive acts of multinational corporations.55 Whereas the industrialized countries zealously argue for a very limited reach of U.S. antitrust law, none of the countries with a weak antitrust enforcement system has openly voiced these concerns.

III. Global Cartels and the Reach of U.S. Antitrust Law

In Empagran, the U.S. Supreme Court denied foreign plaintiffs the ability to recover damages sustained in foreign transactions when their harm occurred independently from effects on the U.S. market. The Court warned that to open the courthouses for such claims would confer

attorney general who is spurred to enforce the law by expectation of treble damages”).

55. Fox, supra note 53, at 916.
worldwide jurisdiction "to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign’s provisions for private antitrust enforcement." However, the above-demonstrated division of the world into countries which enforce their antitrust laws and countries without such laws or without efficient enforcement mechanisms leads to the question of whether U.S. courts should adopt a flexible solution to mark the limits of the extraterritorial reach of U.S. antitrust law. It was argued that foreign plaintiffs injured in foreign markets without effective antitrust enforcement schemes should be entitled to bring Sherman Act claims, while claims for injuries stemming from markets with strong enforcement mechanisms should be barred. Such an approach would ensure that the conspirators would also be held accountable for their wrongdoings in markets where efficient antitrust enforcement is not assured. But it is doubtful whether assessing the limits of the extraterritorial reach of U.S. antitrust law in such a manner would be the right task for a court.

A. The Limits of the Extraterritorial Reach of U.S. Antitrust Law

The discussion of “flexible solutions” revives the old debate of appropriate boundaries of the reach of U.S. antitrust law. When pronouncing upon the effects test, Judge Learned Hand already observed that U.S. courts shall respect “the limitations customarily observed by nations upon the exercise of their powers” and emphasized that U.S. antitrust laws shall not be used to “punish all whom [U.S.] courts can catch.” In later decisions, a jurisdictional rule of reason credited to Kingman Brewster emerged to limit the extraterritorial reach of antitrust laws. Relying on international customary law, some courts have engaged in interest balancing to evaluate whether international cases should be adjudicated before U.S. courts. This approach was strengthened by the

56. Empagran, 124 S. Ct. at 2367 (citing Areeda & Hovenkamp, supra note 14, ¶ 273, 51-52 [Suppl. 2003]).
58. Aluminium Co. of Am., 148 F.2d at 443.
59. Id.
60. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976) (citing Kingman Brewster, Antitrust and American Business Abroad 446 (1958)).
62. See, e.g., Timberline Lumber, 549 F.2d at 611-12; Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979); Industrial Investment Development Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 (5th Cir. 1982); Montreal Trading Ltd. v. Amex, Inc., 661 F.2d 864, 869-70 (10th Cir. 1981). Cf. Metallgesellschaft...
adoption of the American Restatement of Foreign Relations Law (Third). 63

According to section 403 of this restatement, courts shall balance various
domestic and foreign interests of both public and private natures to
determine whether the exercise of jurisdiction over a person or activity is
reasonable. 64 But this comity-based approach to limiting the reach of U.S.
antitrust laws had never been undisputed. Some circuit courts rejected it
bluntly 65 and scholars also voiced concerns about the soundness of interest
balancing in private cases by pointing out that a sovereign’s interest in
enforcing its regulatory rules is of a different order than the “interest,”
meaning social policy, underlying the rules of torts and contracts. 66 It is
further argued that the balancing approach is not the most economically
efficient approach to extraterritorial antitrust regulation as it may lead to
underregulation. 67

The Supreme Court’s criticized 68 decision in Hartford Fire Insurance
Co. v. California 69 was widely regarded as a near death blow to comity. 70


64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2) (1987).

65. See, e.g., Laker Airways Ltd. v. Sabena, 731 F.2d 909, 948-49 (D.C. Cir. 1984)
(“These [Timberlane] types of factors are not useful in resolving the controversy.”); In re
Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980) (holding a “failure to
consider Timberlane test did not constitute an abuse of discretion”).

66. See Russell J. Weintraub, The Extraterritorial Application of Antitrust and
REV. 1799, 1818 (1992); Larry Kramer, Extraterritorial Application of American Law After
the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble, 89 AM. J.

67. See William S. Dodge, An Economic Defense of Concurrent Antitrust Jurisdiction,
38 TEX. INT’L J. 27, 33-40 (2003); Andrew T. Guzman, Choice of Law: New Foundations,
90 GEO. L.J. 883, 926-27 (2002) (emphasizing that the “objective of achieving a globally
efficient choice-of-law regime is best served through application of the presumption against
extraterritoriality” and that a case-by-case determination by courts comes “with significant
costs”).

68. See Andreas F. Lowenfeld, Conflict, Balancing of Interests, and the Exercise of
42, 45-47 (1995); Herbert Hovenkamp, Antitrust as Extraterritorial Regulatory Policy, 48
ANTITRUST BULL. 629, 643 (2003) (“After half of a century of debate over the meaning of
comity in international Sherman Act adjudication, the Supreme Court gave the doctrine an
extraordinarily narrow meaning in the Hartford Fire case.”).


70. See Spencer Weber Waller, The Twilight of Comity, 38 COLUMB. J. TRANSNAT’L L.
563, 564 (2000); Buxbaum, supra note 44, at 234 (“In Hartford Fire, the U.S. Supreme
In *Hartford*, the plaintiffs alleged that a group of U.S.- and U.K.-based re-insurers and their brokers had violated section 1 of the Sherman Act by agreeing among themselves not to reinsure any general liability insurer that sold insurance policies not complying with the policies the defendant insurers wanted to sell. The British defending companies moved to dismiss, citing the principle of international comity and arguing that U.S. antitrust law could not be applied to their agreement made and executed entirely in the United Kingdom and legal under the laws thereof. Justice Souter, delivering the judgment for the majority of the Court, rejected these arguments. Relying on the Restatement of Foreign Relations Law (Third), he held that the Court did not need to decide whether a court may decline to exercise Sherman Act jurisdiction over foreign conduct, because, even assuming that a court may do so, there must be a "true conflict between domestic and foreign [antitrust] law." The court concluded that no such conflict existed because British law did not require the defendants to act in a matter prohibited by U.S. law. In dissent, Justice Scalia, writing also for three other justices, argued that the majority had "completely misinterpreted" the provisions of the restatement and emphasized that the Court should refrain from exercising jurisdiction in order to avoid unnecessary conflicts with its closest trading partners.

In *Empagran*, the Supreme Court re-animated the reasonable standard as a yardstick to measure the reach of U.S. antitrust law. Justice Breyer, writing for the Court, observed with reference to section 403 of the Restatement of Foreign Relations Law (Third) that the Supreme Court ordinarily construes ambiguous statutes, in the case at hand section 6a of the FTAIA, in accordance with international law to avoid "unreasonable interference with other nations' sovereign authority." He stressed that "this rule helps the potentially conflicting laws of different nations work together in harmony. A harmony that is particularly needed in today's highly interdependent commercial world." And he emphasized that

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72. *Id.* at 799.

73. *Id.* at 821.

74. *Id.* at 820.

75. *Empagran*, 124 S.Ct. at 2361.

76. *Id.* at 2366.

77. *Id.*
Congress would not have tried to impose U.S. antitrust laws "in an act of legal imperialism, through legislative fiat" onto foreign nations. But the rule of non-interference with foreign interests is not absolute. Courts may apply U.S. antitrust law when it is "reasonable, and hence consistent with prescriptive comity principles" to do so. This finding certainly signals a renewed interest on the part of the Supreme Court in using principles of comity to confine the extraterritorial reach of U.S. antitrust law. It seems the Court silently wanted to correct the majority's stand in the Hartford Fire case. The reasoning in Empagran comes close to the dissent in Hartford Fire. The Court not only recognized that there are "dramatic" differences of opinion in the world about appropriate remedies, but also noted that foreign citizens would be permitted to bypass less generous remedial schemes if they could recover antitrust injuries sustained in foreign transactions before U.S. courts. Further, the general anti-hegemonic statement that Congress did not intend to impose U.S. antitrust laws "in an act of legal imperialism, through legislative fiat" makes clear that the Supreme Court is fully aware of the need for sound limitation criteria to confine the international reach of U.S. antitrust law.

B. Balancing Foreign Regulatory Policy?

Although the Supreme Court firmly established comity considerations to determine the reach of U.S. antitrust law in Empagran, it declined to delve into a classical interest analysis by balancing different connecting factors. The foreign plaintiffs supported by the amici curiae law professors Michaels, Buxbaum, and Muir Watt had argued for adopting a

78. Id. at 2369.
79. Id.
81. See Michaels & Zimmer, supra note 52, at 457.
82. Empagran, 124 S. Ct. at 2368.
83. Id.
84. However, it must be noted that the Supreme Court confined its holding in Empagran to cases where the anticompetitive conduct resulted in independent foreign harm. Thus, it is clearly distinguishable from the situation in Hartford Fire where the anticompetitive effect was felt in the U.S. alone. It is therefore arguable that Empagran does not suggest that comity must be considered in the more common cases involving foreign conduct which causes domestic effects and domestic injuries. See Buxbaum, supra note 80, at 1103.
86. Empagran Brief of Amici Curiae Law Professors Michaels, Buxbaum & Muir Watt,
case-by-case solution, taking into consideration different factors, most notably whether the foreign country in which the plaintiff had suffered his injuries efficiently regulates cartels and whether the exercise of U.S. jurisdiction over the plaintiff’s claim would cause a conflict with that country’s regulatory efforts. In turn, the Supreme Court stated straightforwardly that the consideration of comity considerations on a case-by-case basis is “too complex to prove workable.”

Convinced that antitrust issues are complex by nature, the Court did not want to confer upon U.S. courts the burden of comparing solutions of foreign antitrust law with U.S. regulation, which would only lead to “lengthier proceedings, appeals and more proceedings – to the point where procedural costs and delays could themselves threaten interference with a foreign nation’s ability to maintain the integrity of its own antitrust enforcement system.”

Observing that even in a simple price-fixing case such as Empagran, competing briefs reached different conclusions on whether the potential treble damages liability would strengthen (through increased deterrence) or weaken (by impairing amnesty programs) the enforcement of the widespread ban on price fixing, Justice Breyer did not see how a court could simply and expeditiously assess the impact of U.S. jurisdiction on foreign interests.

This finding merits approval. Assessing whether the foreign law effectively regulates cartel conduct would confer upon U.S. courts the task of determining whether a foreign sovereign has adequate antitrust laws and whether it enforces its laws efficiently.

It is hard to see how a court could fulfill such a mission, especially with regard to jurisdictions in transition states. Typically those countries have recently enacted antitrust statutes and designed enforcement authorities. Panama and Ukraine, where some of the plaintiffs in Empagran sustained their injuries, may serve as an illustrative example.

supra note 57, at *19-23.

87. Empagran, 124 S. Ct. at 2368.
88. Id. at 2369.
90. See Empagran briefs, supra note 49.
91. Empagran, 124 S. Ct. at 2369.
92. Today, over ninety states have adopted antitrust laws. See Diane P. Wood, International Harmonization of Antitrust Law: The Tortoise or the Hare?, 3 CHICAGO J. INT’L L. 391, 392 n.6 (2002). This development was fostered in the eighties and nineties by the collapse of the socialist countries in Eastern Europe and the pressure of donors and international institutions on developing countries to introduce market-friendly competition policies.
Panama enacted its Competition Act in 1996.\(^9\) It reads like a robust competition law: it not only prohibits horizontal price fixing conspiracies,\(^9\) it also provides for a damage remedy entitling injured parties to seek treble damages,\(^9\) and allows enforcement authorities to impose harsh fines.\(^9\) Panama’s Competition Authority (Commission de la Libre Competencia y Asuntos de Consumidor) lists some activities on its website, including some reports on cases in which it sanctioned anticompetitive conduct.\(^9\)

A similar picture is presented in the law of Ukraine, which enacted its Limitation of Monopolism and Prevention of Unfair Competition Act in 1992.\(^9\) This act has been frequently amended and, in 2001, became the Law of Ukraine on Protection of Economic Competition.\(^9\) It prohibits horizontal price-fixing agreements\(^\text{100}\) and provides for a damages

\(^9\) See Ley no. 29, de 1 febrero de 1996 (Pan.), available at <http://www.globalcompetitionforum.org/regions/n_america/Panama/PANAMA.pdf>.

\(^9\) Cf. id. at art. 11(1) (stating: Prácticas Monopolísticas Absolutas. Son prácticas monopolísticas absolutas, cualesquiera combinaciones, arreglos, convenios o contratos, entre agentes económicos competidores o potencialmente competidores, entre sí, cuyos objetos o efectos sean cualquiera de los siguientes: 1. Fijar, manipular, concertar o imponer el precio de venta o compra de bienes o servicios, o intercambiar información con el mismo objeto o efecto; . . .).

\(^9\) Cf. id. at art. 27 (stating: Condenas. En todos los casos en que se infrinjan las prohibiciones contenidas en este título, los tribunales de justicia creados por esta Ley, mediante acción civil interpuesta por el agravado, podrán imponer a favor de éste o los afectados, condena al agente económico, equivalente a tres (3) veces el monto de los daños y perjuicios causados como resultado del acto ilícito, además de las costas que se hayan causado. No obstante, el tribunal que conozca de la causa correspondiente podrá limitar el monto de la condena al importe de los daños y perjuicios causados, o reducirlo a dos veces el importe de tales daños o perjuicios, en ambos casos con la condena en costas, cuando compruebe que el agente económico condenado ha actuado sin mala fe o sin intención de causar daño).

\(^9\) Cf. id. at art. 27 (stating: Sanciones. Los actos que constituyan prácticas monopolísticas absolutas no tendrán validez jurídica, y los agentes económicos que los realicen serán sancionados conforme a esta Ley, sin perjuicio de la responsabilidad penal que les corresponda. Estos actos serán sancionados, aun cuando no se hayan perfeccionado o no hayan surtido sus efectos).

\(^9\) See <http://www.clicad.gob.pa>.


\(^9\) An unofficial English translation of the current version is available at <http://www.globalcompetitionforum.org/europe.htm#Ukraine>.

\(^9\) Cf. supra note 99, at art. 6(2)(1) (stating: Concerted actions shall be considered as anticompetitive ones if they, in particular, concern: the setting of prices or other conditions
remedy. Furthermore, Ukraine has also established a Competition Authority which may impose fines on companies or individuals. The Ukrainian Competition Authority has, at least in one case, fined a company for anticompetitive conduct in a monopolization case. Commentators note that, though competition policy in Ukraine is in its infancy, the “competition laws are firmly in place with 27 regional offices and a total staff of 700.”

It is difficult to see how a judge shall proceed when confronted with such a situation. The problems of assessing the “adequacy” and “efficiency” of foreign regulatory policy and practice respectively are manifold. First, setting a threshold for “adequacy” of foreign legal norms is already a thorny problem. It is hard to see how U.S. courts can rate foreign antitrust enforcement schemes which are, as pointed out above, often very distinct from U.S. law. Second, with regard to the “efficiency” of foreign enforcement practices the question arises whether U.S. courts should consider only the foreign “law in the books”, or whether they have to investigate the “law in action” and determine whether there is a steady practice by foreign courts or competition authorities respectively to enforce their antitrust rules.

These troubles have led U.S. courts in forum non conveniens cases to refrain from engaging in a detailed analysis comparing U.S. and foreign law for good reasons: any rating of foreign legal systems inevitably leads to diplomatic friction. Even though developing countries have not yet raised objections against the extraterritorial application of U.S. antitrust laws with respect to the purchase or sale of products; . . .).

101. Cf. id. at art. 55 (1) (stating: Persons who suffer damage resulting from a violation of the laws on the protection of economic competition may apply to a court of justice, a court of arbitration for the reimbursement for damages).
102. Cf. id. at art. 52 (1) (stating: Bodies of the Antimonopoly Committee of Ukraine shall impose fines on associations, economic entities; legal persons; natural persons; such a group of economic entities being legal and (or) natural persons that in accordance with Article 1 of the present Law is considered as an economic entity in the cases provided for by Part 4 of the present Article).
103. See Murphy, supra note 98, at 418 Annex A (DAE-case).
104. Id.
105. See infra pp. 108-110.
106. See Piper Aircraft Co., 454 U.S. at 251 (stating: “The doctrine of forum non conveniens, however, is designed in part to help courts avoid conducting complex exercises in comparative law”); Gulf Oil Corp. v. Gilbert, 67 S. Ct. 839, 842 (1947) (stating: “There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.”).
law, it is likely that a state having enacted antitrust laws would protest against U.S. court decisions openly labeling enforcement mechanisms of that state as "non-efficient." To avoid such clashes, U.S. courts have generally been very cautious to pronounce judgment on the "quality" of foreign sovereigns' policy choices. For example, in the *Bhopal* case concerning tort claims of victims from a disastrous gas leak at a chemical plant in Bhopal, India, Judge Keenan was very hesitant to evaluate whether Indian courts were able to manage such a complex mass tort case. He dismissed the action brought by Indian plaintiffs against the American tortfeasor, despite the fact that a litigation before Indian courts would be more burdensome, emphasizing that to retain litigation in this forum "would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules on a developing nation." The underlying rationale of this prudent jurisprudence must also apply when assessing the international reach of U.S. antitrust law. Therefore, judges should not take into account the state of antitrust enforcement in foreign jurisdictions.

### C. Loophole: Global Markets

Closing U.S. courthouse doors to plaintiffs who have sustained antitrust injury in wholly foreign transactions means that cartel members may keep profits generated in markets with severe enforcement gaps. Those profits are not negligible and might be used to offset damages to be paid under U.S. law. Furthermore, confining jurisdiction to injuries sustained in domestic markets means that no court has jurisdiction to adjudicate the entire damage. The prospect of litigating in various courts all over the globe will keep injured parties from initiating recovery proceedings.

Against this background, the Supreme Court seemed to be aware that there might be cases where foreign plaintiffs should be allowed to bring

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108. *Id.* at 867.

109. See Margaret Levenstein et al., *International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies*, POLITICAL ECONOMY RESEARCH INSTITUTE WORKING PAPER SERIES (2003). (According to this study, in 1997 developing countries imported $54.7 billion of goods from nineteen industries with an international price-fixing conspiracy in the 1990s. These imports represented 5.2% of total imports and 1.2% of GDP in developing countries).


their claims. In the vitamins litigation, it was argued that vitamins were fungible and readily transportable. If the U.S. market had been excluded from the global price-fixing conspiracy, the cartel would have collapsed due to the very likely possibility of arbitrage, proving that the foreign effects were inextricably intertwined with the domestic harm felt in the United States.\textsuperscript{112} The Supreme Court left it open whether foreign plaintiffs have a Sherman Act claim if the foreign injury is intertwined with domestic harm\textsuperscript{113} by confining its ruling to the fact that the foreign harm was independent of the cartel’s effects on the U.S. market.\textsuperscript{114}

Intertwined effects are not uncommon in international cartel cases. In \textit{Kruman v. Christie’s International PLC},\textsuperscript{115} the price-fixing conspiracy concerned auction houses controlling 97\% of the market for fine arts, antiques, and collectibles. One can argue that such a market is truly global because sellers and buyers are the same worldwide at auctions for such select items.\textsuperscript{116} The same can be assumed in \textit{Den Norske Stats Oljeselskap AS v. HeereMac VOF}.\textsuperscript{117} In this case, the conspiracy concerned services for heavy lift barges; only seven existed and they were deployed worldwide.\textsuperscript{118}

Hence, foreign plaintiffs unable to seek redress in their countries still have a chance to recover for antitrust injuries under U.S. law if they can prove that their injuries are intertwined with domestic harm. There are some arguments for allowing foreign plaintiffs to sue before U.S. courts. It seems that in truly global markets, the number of market participants is relatively small. Unlike a vitamins cartel, where literally thousands of consumers bought vitamin products worldwide, the art auctioning and the lift barge cases concerned only a small group of injured foreign customers. As a consequence, there are not so many potential foreign plaintiffs that it

\textsuperscript{112} Empagran Brief for Respondents, 2004 WL 533935, at *9.
\textsuperscript{113} Michaels & Zimmer, \textit{supra} note 52, at 454; Buxbaum, \textit{supra} note 80, at 1103.
\textsuperscript{114} Empagran, 124 S.Ct. at 2372. The case was remanded for further proceedings to the D.C. Circuit Court. This court has ordered the parties to submit briefs addressing, \textit{inter alia}, the issues (i) whether the domestic effects of the appellees’ anticompetitive conduct were in fact linked to the foreign injury the appellants claim to have suffered, and (ii) whether the nature of that link is legally sufficient to trigger application of the FTAIA’s domestic-injury exception. \textit{See Empagran} court order, \textit{available at} 2004 WL 1398217.
\textsuperscript{115} Kruman v. Christie’s International PLC, 284 F.3d 384 (2d Cir. 2002).
\textsuperscript{117} 241 F.3d 420 (5th Cir. 2001).
\textsuperscript{118} \textit{Id}. 
would absorb U.S. judicial resources.

IV. Adjustment of Fines in Governmental Actions

Finally, it is arguable that fines imposed on cartel members in governmental actions should reflect that international cartels generate profits in many Third World countries without effective antitrust law enforcement. In other words, those fines should be higher if the cartel had substantial activities in countries where the cartelists do not have to fear any punishment for their anticompetitive conduct. A passage in Empagran might suggest that the Supreme Court is not generally opposed to such an idea. Justice Breyer observed that "a government plaintiff has broader powers" than a private plaintiff "to protect the public from further anticompetitive conduct and to redress anticompetitive harm." But it would go too far to conclude from this general finding that the United States may impose fines to punish anticompetitive effects in foreign markets. Enforcing U.S. antitrust law in cases where the relevant adverse effect occurred abroad might conflict with the principle of state sovereignty. According to this long-standing principle of public international law, each individual state has the power to enact and enforce laws within its own territory. Although public international law is evolving and exceptions to this traditional rule of law are gaining ground, thus further reducing the territorial links deemed necessary to establish jurisdiction over anticompetitive conduct, a state cannot impose fines for anticompetitive effects on foreign markets. Thus, under the law as it stands, fines in governmental actions cannot reflect injuries occurring in foreign territories. Things would be different if a bilateral "positive comity" agreement empowered U.S. authorities upon the request of foreign states to fine antitrust law violations that have an effect on a given foreign

119. Empagran, 124 S.Ct. at 2370.
120. Id.
123. See, e.g., Case T-224/00, Archer Daniels Midland Company v. Commission of European Communities, 2003 E.C.R. II-2597, 2647 (arguing that a U.S. judgment imposing fines which related to the application of the cartel or its effects other than in the U.S., e.g., for effects felt in the European Economic Area, "would clearly have encroached on the territorial jurisdiction" of the European Commission).
market. However, if the gains in foreign countries also have adverse effects on the domestic market, those effects can be reflected in the amount of the fines.

V. Conclusion

The recent Supreme Court decision in Empagran made abundantly clear that the United States is not the antitrust police force of the world. A statement applauded by many foreign nations. But the Court declined to address whether foreign plaintiffs may invoke the Sherman Act when a market is truly global. Courts will now have to develop a workable definition of "intertwined effects" for today's interdependent world economy, in which everything affects everything else.

The latest controversy surrounding the extraterritorial reach of U.S. antitrust law has further proven that national law solutions are not sufficient to tackle conspiracies operating in globalized markets. National tools are not a fitting remedy for the shortcomings of other jurisdictions. This finding calls for renewed international efforts to control abusive private business practices and to foster efficient international antitrust enforcement.

The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws).
125. AREEDA & HOVENKAMP, supra note 14, at ¶ 270(b), 336.