

# Note

## Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels

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## I. INTRODUCTION

The global vitamins cartel was “the most pervasive and harmful criminal antitrust conspiracy ever uncovered.”<sup>1</sup> From 1990 to 1999, multinational firms based in Canada, Germany, Japan, Switzerland, and the United States colluded to fix prices, rig bids, and allocate global market shares in their sale of vitamin products.<sup>2</sup> These products are critical for human and animal nutrition and affect more than \$5 billion of global commerce.<sup>3</sup> Reflecting the scope of the crime, the antitrust penalties imposed in the United States were staggering. Members of the cartel paid nearly \$1 billion in fines.<sup>4</sup> Hoffman-LaRoche, the cartel’s leader, paid a \$500 million fine, the largest criminal fine ever collected by the United States.<sup>5</sup> Six of the main conspirators settled a private class action lawsuit by domestic purchasers of vitamin products for \$1.05 billion, “the largest private anti-trust price-fixing settlement in history.”<sup>6</sup> Individual corporate executives were sentenced to prison in the United States. Other jurisdictions—including Europe, Canada, Japan, and Australia—levied both criminal and civil penalties against the conspirators.<sup>7</sup>

“Vitamins Inc.”<sup>8</sup> exemplified the durability, breadth, and harm of international cartels.<sup>9</sup> One study identified forty international cartels that operated in the 1990s; they had members in over thirty countries, operated in markets with annual sales of \$30 billion,<sup>10</sup> and survived an average of six years.<sup>11</sup> The Organization of Economic Cooperation and Development (OECD) estimated that over \$28 billion in total commerce was annually implicated in sixteen of the largest international cartels that were prosecuted between 1996 and 2000; the OECD estimated that the median amount of harm in each case was fifteen to twenty percent of the affected commerce.<sup>12</sup> For example, the graphite electrodes cartel of six American, German, and Japanese firms engaged in a five-year price-fixing conspiracy that affected

1. David Barboza, *Tearing Down the Façade of ‘Vitamins, Inc.’*, N.Y. TIMES, Oct. 10, 1999, § 3, at 1 (quoting Joel Klein).

2. See Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 712-22 (2001).

3. U.S. ATT’Y GEN. INT’L COMPETITION POLICY ADVISORY COMM. TO THE ATT’Y GEN. AND ASSISTANT ATT’Y GEN. FOR ANTITRUST, FINAL REPORT 174 (2000), available at [www.usdoj.gov/atr/icpac/finalreport.htm](http://www.usdoj.gov/atr/icpac/finalreport.htm) [hereinafter ANTITRUST FINAL REPORT].

4. Barboza, *supra* note 1, at 1. All corporate defendants pleaded guilty.

5. First, *supra* note 2, at 715.

6. *Id.* at 718.

7. ANTITRUST FINAL REPORT, *supra* note 3, at 174.

8. The cartel gave itself this nickname. See Barboza, *supra* note 1, at 1.

9. For this Note, “international cartels” are cartels with international effects. Their membership may be exclusively foreign, exclusively domestic, or a mix of the two. In contrast, “domestic cartels” are exclusively comprised of domestic firms with effects confined to their domestic market. “Domestic export cartels” are a subgroup of international cartels. They are exclusively comprised of domestic firms with effects exclusively in foreign markets.

10. Simon J. Evenett, Margaret C. Levenstein & Valerie Y. Suslow, *International Cartel Enforcement: Lessons from the 1990s*, WORLD ECON., Sept. 2001, at 1, 6.

11. *Id.* at 6. “Some of these cartels lasted for two decades before antitrust intervention. Other cartels lasted less than a year. Twenty-four of these forty cartels lasted for at least four years, certainly long enough to have had a significant effect on consumers.” *Id.* at 6-7.

12. ORG. FOR ECON. COOPERATION AND DEV., HARD CORE CARTELS: RECENT PROGRESS AND CHALLENGES AHEAD 8-10 (2003) [hereinafter HARD CORE CARTELS].

nearly \$1.7 billion in American sales alone.<sup>13</sup> The four-year citric acid cartel of American, German, Swiss, French, and Dutch firms involved a market of \$1.2 billion in worldwide sales.<sup>14</sup> The lysine cartel of American, Japanese, and Korean firms raised the product's price by seventy percent in a \$600 million global market.<sup>15</sup> These conspiracies, and many others, were well-organized operations that were fully aware of their criminality and attempted to conceal their efforts by meeting overseas, using code names, and destroying evidence of their efforts.<sup>16</sup>

Vitamins Inc. also illustrated key aspects of the fight against these harmful conspiracies. First, government amnesty policies are critical to identify and prosecute cartels.<sup>17</sup> Second, enhanced fines and prison sentences are necessary to deter what is extremely profitable criminal activity. Third, private litigation enhances the punishment, and therefore the deterrence, of international cartels. Fourth, enforcement of antitrust laws is a multi-national effort that is greatly strengthened by cooperation among international authorities.

However, Vitamins Inc. revealed weaknesses as well in the fight against international cartels. In particular, a series of cases in U.S. courts exposed latent tensions regarding the extraterritorial application of American antitrust laws and the difficulty of ensuring adequate global deterrence of international cartels. *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*<sup>18</sup> involved a lawsuit against the members of Vitamins Inc.—all foreign defendants—by foreign plaintiffs for harms caused by their foreign purchases of vitamins. (These will be referred to as “*Empagran*-type cases.”<sup>19</sup>) The case implicated the Foreign Trade Antitrust Improvements Act (FTAIA).<sup>20</sup> The Supreme Court was asked to decide whether U.S. courts could exercise jurisdiction over lawsuits by foreigners for antitrust injuries sustained abroad. Many governments,<sup>21</sup>

13. ANTITRUST FINAL REPORT, *supra* note 3, at 172.

14. *Id.* at 171.

15. *Id.* The OECD notes that at Archer Daniels Midland Company (ADM), the lysine cartel's leader, the “oft-quoted unofficial motto” was “[o]ur competitors are our friends; our customers are our enemies.” HARD CORE CARTELS, *supra* note 12, at 11.

16. First, *supra* note 2.

17. See ANTITRUST FINAL REPORT, *supra* note 3, at 174 (“The Antitrust Division's ability to crack the conspiracy turned on cooperation from a conspirator [Rhone Poulenc] which qualified for amnesty under the [U.S. Department of Justice's] Corporate Leniency Policy.”). Parallel public and private investigations uncovered the cartel. See First, *supra* note 2.

18. 542 U.S. 155 (2004).

19. An “*Empagran*-type case” is one in which foreign plaintiffs bring a case in U.S. court for violations of the anti-cartel provisions of America's antitrust laws for harms sustained in foreign transactions.

20. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2000).

21. See Brief of the Governments of the Federal Republic of Germany and Belgium in Support of Petitioners, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) [hereinafter Germany Amicus Brief]; Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) [hereinafter United Kingdom Amicus Brief]; Brief for the Government of Canada as Amicus Curiae Supporting Reversal, *F. Hoffman-LaRoche v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) [hereinafter Canada Amicus Brief]; Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) [hereinafter Japan Amicus Brief].

including the United States,<sup>22</sup> argued strongly that U.S. courts should not have jurisdiction in such cases in order to prevent forum shopping and to protect the amnesty programs that are critical to uncovering these cartels.

Instead of fully addressing this matter, the Supreme Court's *Empagran* decision focused on a more specific question. The Court asked whether U.S. courts had jurisdiction over lawsuits by foreigners for antitrust injuries sustained abroad when those injuries were independent of any injuries sustained domestically. The Court held that U.S. courts did not have jurisdiction "where the plaintiff's claim rests solely on the independent foreign harm."<sup>23</sup> The Supreme Court did not consider the plaintiff's contention that U.S. jurisdiction existed due to interdependence between the foreign and domestic harms, because the D.C. Circuit Court of Appeals had not addressed that argument. Instead, the Court remanded the case so the Court of Appeals could consider it.<sup>24</sup>

The Supreme Court's *Empagran* opinion was appropriately narrow, because the case involved complex policy questions better addressed by the political branches rather than the judiciary. By remanding the case, the Supreme Court gave the political branches an opportunity to craft a more nuanced policy response to the difficult problem posed by *Empagran*-type cases. In this Note, I explore what such a policy response might be.

This Note proceeds as follows. Part II provides general economic and legal background. The concurrent jurisdiction issues presented by the *Empagran* case must be considered in light of the economic concerns raised by international cartels and addressed by America's antitrust laws.

Part III discusses the more specific legal background regarding judicial interpretations of the FTAIA. Analyzing the Supreme Court's *Empagran* decision and the three lower court decisions that preceded it, I conclude that the Court attempted to redirect the U.S. judiciary to consider what plaintiffs must show to establish a sufficient connection to the United States to justify U.S. jurisdiction. The *Empagran* opinion hinted at the proper analytical frame for making this determination: 'inextricably linked' or intertwined foreign and domestic harms. Regrettably, the Court stepped back from fully articulating this economically sound basis for jurisdiction, and in remanding the case to the D.C. Circuit, it instead permitted that court to consider the conceptually unsatisfactory (in the cartel context) "but-for causation." As a result, a circuit split is emerging over whether inextricably linked or intertwined effects or some form of causation is the proper basis for considering jurisdiction in *Empagran*-type cases. I argue that the Supreme Court should fully endorse the concept of inextricably linked or intertwined effects as a basis of jurisdiction, thus ensuring U.S. jurisdiction over at least some *Empagran*-type cases.

The Supreme Court may be reluctant to endorse such a basis because of two significant concerns advanced by the United States and foreign governments in their amici briefs in *Empagran*, but left unresolved by the

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22. Brief for the United States as Amicus Curiae Supporting Petitioners, *F. Hoffman-LaRoche v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) [hereinafter United States Amicus Brief].

23. *Empagran*, 542 U.S. at 159.

24. *Id.* at 175. As discussed in Part II *infra*, the D.C. Circuit dismissed the plaintiffs' remaining claims. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005).

*Empagran* decision. The first concern is policy-based, that U.S. jurisdiction in *Empagran*-type cases will undermine the government amnesty programs that have become the primary means of identifying international cartels. The second concern is legal, that because the U.S. courts are perceived to be more favorable to plaintiffs, U.S. jurisdiction in *Empagran*-type cases will encourage foreign plaintiffs to engage in forum shopping. Such forum shopping could undermine the antitrust regimes of the foreign governments, clog the U.S. court system, and undermine cooperation between the United States and foreign governments. In Part IV, I provide a detailed discussion of these concerns.

In Part V, I turn to my proposed solution to these legal and policy concerns. I first emphasize that a satisfactory solution must achieve three U.S. foreign policy goals with respect to international antitrust: (1) maximum deterrence of international cartels, (2) a consistent and predictable national policy on jurisdiction that will reduce uncertainty regarding the cost of trading in U.S. commerce, and (3) harmonization of antitrust policies globally. With respect to the amnesty policies, I show that the problem posed by *Empagran*-type suits is one that depends on the specific structure of these policies. I argue that governments can ensure that U.S. jurisdiction over *Empagran*-type suits will strengthen use of these amnesty programs if they reciprocally agree to collaborate, in a predictable fashion, to mutually provide amnesty to the same member of a cartel.

Turning to the forum shopping concerns expressed by the governments, I first note that an effective policy response must distinguish *Empagran*-type suits that concern litigants based in countries with effective antitrust regimes, from suits that concern litigants based in countries with ineffective antitrust regimes. Within this perspective, I consider the various proposals that have been offered to make this distinction. I first review the often-proposed suggestion of interest-balancing comity analysis; I find it completely inadequate. I suggest that the doctrine of forum non conveniens provides the correct principles to address *Empagran*-type suits. However, I conclude that forum non conveniens is an unsatisfactory response as it still relies on a case-by-case judicial review that fails to provide a consistent, predictable national policy on jurisdiction and that fails to encourage international harmonization in antitrust policies. I next consider a proposal to allow the executive branch to recommend to individual U.S. courts when jurisdiction should not be exercised in *Empagran*-type suits. I still find this response inadequate due to its case-by-case approach and the discretion it affords the judiciary to ignore the executive branch's determination. I therefore propose congressional legislation that would empower the executive branch to annually limit U.S. court jurisdiction of *Empagran*-type cases. This legislation would embrace the principles of forum non conveniens by refusing U.S. jurisdiction over *Empagran*-type cases that involve litigants from countries that provide a more convenient, effective forum through which the plaintiffs can receive adequate relief. I argue that this legislation would achieve the three U.S. foreign policy goals with respect to maximum deterrence of cartels, facilitation of international trade, and harmonization of antitrust policies.

These legislative and policy changes will bring both consistency and nuance to America's treatment of *Empagran*-type suits. I further argue that they will promote harmonization of antitrust policies, which must precede any attempt to create an international regime to address the problem of international cartels. These proposals will also advance U.S. interests much more than will the broad, judicial response of closing the U.S. courts to all foreign plaintiffs who bring suit for foreign injuries—a measure I view as a judicial surrender of America's interest in protecting its consumers and enterprises from collusion, which the Supreme Court has declared the “supreme evil of antitrust.”<sup>25</sup>

## II. BACKGROUND

A core aspect of America's antitrust regime is its encouragement of private litigation as an enforcement device. Private litigation is thought to be particularly effective against cartels, as the consumers in a cartel market may often be among the first entities to detect the cartel's damaging collusive behavior, and awarding damages—particularly a multiple of the cartel's profits—may make the illegal conduct cost-prohibitive. Thus, private litigation is viewed as an important mechanism for achieving one of the fundamental goals of the antitrust acts: the maximum deterrence of cartels.<sup>26</sup>

Initially, the application of America's antitrust regime was contained within its borders. But as commerce became increasingly international after World War II, U.S. courts applied the antitrust laws extraterritorially. America's extraterritorial application of its antitrust laws created tension with its trading partners, who disagreed with the American approach of relying on private litigation and treble damages as an enforcement device. They viewed the extraterritorial application of U.S. law as an anticompetitive maneuver aimed at furthering U.S. trade objectives. In the late 1970s and early 1980s, many of these countries passed legislation to frustrate the extraterritorial application of America's antitrust laws. The U.S. Congress responded by passing the FTAIA. This law barred foreigners from using America's laws against American companies when American consumers were not harmed. The *Empagran* decision—and the governments' amici briefs—must be understood within this context of antitrust policy as trade policy.

### A. *The Sherman and Clayton Acts*

The Sherman and Clayton Acts are the statutory foundation for private antitrust litigation in the United States. The Sherman Antitrust Act outlaws “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”<sup>27</sup> Violations are

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25. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

26. See Donald I. Baker, *The Use of Criminal Law Remedies To Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 713 (2001) (“[D]eterrence is the critical issue in prosecuting those who participate in highly profitable covert activities that are clearly illegal.”).

27. 15 U.S.C. § 1 (2000).

felonies,<sup>28</sup> with corporations and individuals facing civil and criminal penalties, including imprisonment.<sup>29</sup>

To expand the enforcement of the antitrust laws and to facilitate the compensation of the victims of antitrust harms, Congress adopted the Clayton Act. Section 4 of the Clayton Act creates a private cause of action for individuals and companies harmed by antitrust violations,<sup>30</sup> and section 12 grants jurisdiction over these lawsuits to any district in which the defendant does business.<sup>31</sup> Plaintiffs in such lawsuits act as “private attorneys general,”<sup>32</sup> who help alert authorities to violations of the antitrust laws while also punishing those violations. The Clayton Act allows private litigants to sue for treble damages. Treble damages enhance deterrence in two ways—they encourage private suits, which raise the probability the cartel will be detected,<sup>33</sup> and they increase the penalty imposed on defendants found guilty of violating the acts.<sup>34</sup> The Clayton Act has succeeded in encouraging such suits.<sup>35</sup>

## B. Cartels—An Introduction

Cartels are “unambiguously bad”<sup>36</sup> and “the most egregious violations of competition law.”<sup>37</sup> The collusion they engage in the “supreme evil of

28. Originally, violations of the Sherman Act were misdemeanors. In 1974, Congress amended the act to make violations felonies. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 1708 (1974) (current version at 15 U.S.C. § 1 (2000)).

29. Congressional amendments in the summer of 2004 raised the maximum allowable criminal fines to \$100 million for organizations and \$1 million for individuals and the maximum allowable prison sentence to ten years. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665 (2004) (current version at 15 U.S.C.A. § 1 (West 2005)).

30. 15 U.S.C. § 15 (2000) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”).

31. 15 U.S.C. § 22 (2000) (“Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business.”). For a discussion of section 12’s historical development, see Jeremy C. Bates, Comment, *Home Is Where the Hurt Is: Forum Non Conveniens and Antitrust*, 2000 U. CHI. LEGAL F. 281.

32. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); see also Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT’L L. 219, 222 (2001) (“A private litigant acts as a private attorney general if the litigant asserts a cause of action not only to obtain compensation, but also to vindicate important public interests.”).

33. See Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 211 (2003) (quoting PHILIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* 149-50 (1978)) (“Such awards generate a powerful incentive for injured persons to detect, disclose, attack, and end violations of the antitrust laws.”).

34. See Baker, *supra* note 26, at 703 (“In most cases, the private recovery of treble damages under the Clayton Act continues to be an even bigger economic threat to a corporation than the amount of the Sherman Act fine.”); Buxbaum, *supra* note 32, at 223 (“This statutory framework [for damages] reveals Congress’s intention to motivate a level of private enforcement that would ensure significant compliance with the antitrust laws.”).

35. See Donald I. Baker, *Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?*, 16 LOY. CONSUMER L. REV. 379, 380 (2004) (“[The Sherman and Clayton Acts] have been broadly successful in encouraging active private antitrust enforcement.”); Buxbaum, *supra* note 32, at 223 (“In this, Congress was successful as private actions have constituted a substantial portion of antitrust litigation.”); Waller, *supra* note 33, at 210 (“The vast majority of antitrust enforcement comes through private damage suits.”).

36. HARD CORE CARTELS, *supra* note 12, at 15.

antitrust.”<sup>38</sup> A cartel is a group of firms in an industry that should be competitors but have instead agreed to coordinate their activities so that they can raise prices and earn profits above competitive market levels. Cartels utilize a number of mechanisms to coordinate their activities, including horizontal price fixing,<sup>39</sup> bid rigging, territorial division,<sup>40</sup> non-territorial customer division, and market-share agreements. In addition to harming the consumers of their products by charging supra-competitive prices, cartels also reduce economic efficiency by causing consumers to purchase less of a product than they otherwise would buy and by reducing the competitive pressures that member firms face to control costs and to innovate.<sup>41</sup>

A cartel must overcome four challenges to operate successfully. First, the cartel’s members must reach agreement to restrict the supply of a product and increase its price. A cartel restricts supply so that the loss from the lower quantity of sales is more than offset by the increase in the price of each remaining sale. The optimal cartel quantity and price is that of a monopoly producer, but cartels rarely achieve that optimal level because cheating by members and market entry by new producers increases market supply. Thus, a second challenge for a cartel is to ensure that its members follow the agreed course of action. Each cartel member has an incentive to sell more than the agreed quantity of the product—at the cartel price or one slightly below it—to gain even more profit.<sup>42</sup> Because cheating threatens the cartel’s viability, cartels must monitor their members and punish cheating.<sup>43</sup> But monitoring is difficult because of the third challenge inherent to cartels: their illegal actions force them to operate in secrecy to avoid detection.<sup>44</sup> Yet even if, while operating in secret, cartels are able to monitor and punish cheaters, they still must prevent entry by other firms into the market. Entrants will be enticed by the opportunity to earn profits due to the extra-competitive cartel prices, and their entry will drive down the cartel’s profits. To maintain its hold on the market, the cartel must prevent new entry, again without making the cartel visible. The complexity of addressing these four challenges leads many economists to conclude that cartels are “inherently unstable.”<sup>45</sup>

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37. ORG. FOR ECON. COOPERATION AND DEV., RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS 2 (1998) [hereinafter RECOMMENDATION OF THE OECD COUNCIL].

38. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

39. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Alston*, 974 F.2d 1206 (9th Cir. 1992).

40. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990); *United States v. Topco Assocs.*, 405 U.S. 596 (1972).

41. ORG. FOR ECON. COOPERATION AND DEV., FIGHTING HARD CORE CARTELS: HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES 71-72 (2002) [hereinafter CARTELS: HARMS AND SANCTIONS].

42. Evenett et al., *supra* note 10, at 3-4.

43. The OECD documents a variety of “elaborate enforcement and punishment mechanisms” that cartels have devised. In the citric acid and lysine cartels, “compensation schemes were devised, whereby a cartel member that exceeded its sales quota was required to purchase excess production from fellow cartel members the following year.” *See HARD CORE CARTELS*, *supra* note 12, at 12. *See generally* Evenett et al., *supra* note 10, at 4-45.

44. *Id.*

45. Christopher R. Leslie, *Trust, Distrust and Antitrust*, 82 TEX. L. REV. 515, 518 (2004).

Certain market characteristics are conducive to collusive activity. Cartels often operate in concentrated markets with few firms, permitting easier coordination and more reliable confidentiality.<sup>46</sup> Markets with high initial investment costs are also conducive to cartel activity. These costs deter other firms from quickly entering the market to take advantage of the cartel's artificially high prices.<sup>47</sup> Products that are homogenous and fungible also facilitate cartel activity.<sup>48</sup> Such products are usually uniformly priced, making it easier for cartels to monitor member prices. Finally, market structures, such as public disclosure laws regarding prices and quantities, can help cartels monitor their members' activities.

Market characteristics alone cannot sustain a cartel; cartel members must adopt a variety of practices to avoid detection and to enforce compliance. Cartels avoid detection by holding secret meetings, using code names, and creating legitimate-appearing trade associations to share information.<sup>49</sup> Generally, cartel members meet periodically to review public and private sales and price figures from prior periods. They also force members who exceed their quotas to compensate the other members.<sup>50</sup> Thus, cartels overcome their inherent instability by successfully providing supra-competitive profits to their members while maintaining the secrecy of their collusion and punishing any deviations. Indeed, based on the fact that twenty-four of the forty international cartels prosecuted in the 1990s had operated for at least four years, one study concluded, "market forces alone may be unable to quickly undermine attempts to fix prices, rig bids, allocate quotas, and market shares; perhaps implying a potential role for national anti-cartel enforcement."<sup>51</sup>

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46. HARD CORE CARTELS, *supra* note 12, at 10; *see also* Robert C. Marshall, Leslie M. Marx & Matthew E. Raiff, Cartel Price Announcements: The Vitamins Industry 26 (Feb. 11, 2005) (unnumbered working paper), available at <http://www.bateswhite.com/news/pdf/Cartel%20Price%20Announcements--The%20Vitamins%20Industry.pdf> [hereinafter Cartel Price Announcements] ("The vitamins industry is highly concentrated."). Table A.2, Appendix A of the paper lists the number of vitamins manufacturers by vitamin. *Id.* at 28.

47. For example, vitamins are produced through chemical or fermentation processes that require large capital expenditures, costly inputs, and substantial time before a plant is effective in producing a given vitamin. *Id.* at 26. Cartels also build artificial barriers to entry as explained by Evenett et al., *supra* note 10, at 5.

48. HARD CORE CARTELS, *supra* note 12, at 10; *see also* Cartel Price Announcements, *supra* note 46, at 26 ("A given vitamin product made by one firm is chemically identical to the same product made by another firm. . . . Purchasers are aware of the fact that vitamin products are homogenous.").

49. *See* William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Antitrust Compliance Programs: The Government Perspective, Speech Before the Corporate Compliance 2002 Conference (July 12, 2002) ("The most startling characteristic of the multinational cartels we have prosecuted is how cold blooded and bold they are. . . . they went to great lengths to cover-up their actions—such as using code names with one another, meeting in secret venues around the world, creating false 'covers'—i.e., facially legal justifications—for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy.").

50. For additional descriptions of how international cartels adopt these practices, see ANTITRUST FINAL REPORT, *supra* note 3. For a description specific to the vitamins cartel, see Cartel Price Announcements, *supra* note 46.

51. Julian L. Clarke & Simon J. Evenett, *The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel*, 48 ANTITRUST BULL. 689, 690 (2003).

### C. *International Cartels*

Certain characteristics of the global marketplace increase the ability of international cartels to monitor their members and maintain secrecy. The publication of official import and export data facilitates the cartel's monitoring of its members.<sup>52</sup> National differences in accounting, reporting requirements, and other legal mandates help cartels to hide their activities and profits.<sup>53</sup> National borders mask agreements to divide a product market among competitors,<sup>54</sup> and they can facilitate the punishment of cheaters.<sup>55</sup> Cartel members also frustrate the efforts of effective policing authorities by meeting and retaining records outside their jurisdictions.<sup>56</sup>

Almost invariably, any international cartel harms consumers in all of the countries in which its product is sold. If an international cartel does not raise prices everywhere, a product sold at a cheaper price in one country can be resold in another country where the price is higher. This arbitrage threat exists as long as transaction costs, including transportation costs, are low and the product is undifferentiated across the various countries. If the cartel's product is sold in the United States, the cartel must raise its price in the United States sufficiently so that it is not profitable to buy the product in the United States, ship it to another market, and sell it at or below the cartel price. Thus, because cartels must address the arbitrage threat by raising prices in all of the markets in which they operate, the harms caused by the cartels in those markets are interconnected.

To effectively deter cartels, the total expected penalty must at least equal the supra-competitive profits from participating in the cartel.<sup>57</sup> Because an international cartel enjoys supra-competitive profits from its sales in other countries, "[t]he relevant expected penalty depends on the sum of the expected penalties in each nation."<sup>58</sup> According to the OECD, sanctions against cartels "are, on the whole, still inadequate"<sup>59</sup> in most countries. Therefore, cartels will raise their prices in the United States even though doing so increases the likelihood of the cartel's detection due to the United States's more rigorous antitrust regime. The international cartel will still harm American consumers

52. Evenett et al., *supra* note 10, at 4.

53. Cartel members often must agree on mechanisms, such as a central body to collect information, outside these legal regimes to ensure that these same differences do not impede their monitoring activities. *HARD CORE CARTELS*, *supra* note 12, at 10.

54. *Id.* at 4.

55. See Evenett et al., *supra* note 10, at 17 ("As the number of markets in which a cartel operates increases, each cartel member can be more successfully deterred from cheating on the cartel agreement in *any one market* by the threat of retaliation by other members in *all the markets* in which the cartel operates.").

56. See *id.* ("[I]n 1994 the US case against General Electric, which along with DeBeers and several European firms were thought to be cartelizing the market for industrial diamonds, collapsed with the trial judge citing the inability of US enforcement authorities to secure the necessary evidence from abroad.").

57. See Brief of Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents at \*2-3, *F. Hoffman-LaRoche v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) [hereinafter *Amici Brief of Stiglitz and Orszag*] ("[E]ffective deterrence . . . requires that the total expected penalty (which is equal to the probability of detection and conviction multiplied by the penalty) be at least equal to aggregate profits from the [prohibited] activity . . .").

58. *Id.* at \*4.

59. *HARD CORE CARTELS*, *supra* note 12, at 3.

because it can offset its expected American losses with its supra-competitive profits from countries where it has little fear of penalty. As a result, “the deterrent required to prevent a global cartel from including the United States is generally larger than the deterrent required to prevent a purely domestic cartel from forming.”<sup>60</sup>

#### D. *Extraterritorial Reach of America’s Antitrust Regime*

To protect American consumers from the effects of international collusion, the United States has applied its antitrust laws extraterritorially. The basis for this extraterritorial reach is the “effects test,” first articulated in *United States v. Alcoa*.<sup>61</sup> Foreign participants in an international cartel can be prosecuted under American antitrust laws when their activities (1) were intended to affect domestic commerce, and (2) did affect domestic commerce.<sup>62</sup> “[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”<sup>63</sup>

America’s trading partners have vigorously opposed and acted to frustrate the extraterritorial application of U.S. antitrust law.<sup>64</sup> They view that application as an attempt to strengthen America’s trade position while imposing America’s economic policies on the rest of the world.<sup>65</sup> Canada was the first country to respond by enacting a “blocking statute” in 1947.<sup>66</sup> Other countries followed Canada’s example.<sup>67</sup>

The availability of treble damages in private actions greatly exacerbates foreign opposition to the extraterritorial reach of America’s laws.<sup>68</sup> In the

60. Amici Brief of Stiglitz and Orszag, *supra* note 57, at \*4.

61. 148 F.2d 416 (2d Cir. 1945).

62. See *id.* at 443 (“[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . .”).

63. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); see also *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (“But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable . . . insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.”).

64. See generally Joseph P. Griffin, *Foreign Government Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505 (1998).

65. In some cases, these views may have been quite accurate. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980); *In re Ocean Shipping Antitrust Litig.*, 500 F. Supp. 1235 (S.D.N.Y. 1980); see also Griffin, *supra* note 64, at 517-18 (stating that “[t]he subsequent U.S. government investigation and private treble damages litigation [in the Uranium Antitrust Litigation] outraged the foreign governments because the cartel was created as the result of the anticompetitive conduct of the U.S. government,” and noting that “[s]imilarly, the *Ocean Shipping* cases were viewed abroad as unilateral attempts by the United States to alter long-established internationally agreed-upon practices, which attempts, if successful, would do substantial harm to national and international ocean shipping”).

66. A blocking statute either makes it lawful for foreign citizens to refuse discovery in an American antitrust action, or makes it unlawful for non-citizens of those countries to make discovery requests of their citizens in support of an antitrust suit in the U.S. See Griffin, *supra* note 64, at 505 n.3 (“The first statute ‘blocking’ discovery was enacted by the Parliament of Ontario in response to a U.S. investigation of the Canadian newsprint industry in 1947.”); see also Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999).

67. Griffin, *supra* note 64, at 505-06.

68. See Buxbaum, *supra* note 32, at 251.

1980s, foreign frustration with the United States's unique treble damage awards resulted in passage by the United Kingdom, Australia, and Canada of frustration-of-judgments statutes<sup>69</sup> and "clawback" statutes<sup>70</sup> to prevent the United States from enforcing its treble damage judgments. Although the antitrust policies of the United States and other developed nations have converged over the past twenty years, "the availability of treble damages awards in private antitrust litigation is widely considered to be one of the most unacceptable aspects of U.S. regulatory law."<sup>71</sup>

#### E. *The Foreign Trade Antitrust Improvements Act*

Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA)<sup>72</sup> in 1982, when antitrust tensions between America and its trading allies were high. American companies complained that they could not participate in collusive export ventures that would not harm U.S. consumers for fear that foreigners would use America's antitrust laws against them. Congress therefore sought to "increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by . . . modifying the application of the antitrust laws to certain export trade."<sup>73</sup>

The resultant FTAIA states:

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—(1) such conduct has a direct, substantial, and reasonably foreseeable effect—(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section. If sections 1 to 7 of this title apply to such conduct only because of the operations 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.<sup>74</sup>

#### As explained by the Supreme Court:

This technical language initially lays down a general rule placing *all* (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, i.e., it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2)

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69. See Foreign Extraterritorial Measures Act of Canada, R.S.C., ch. F 29 (1985); Foreign Proceedings (Excess of Jurisdiction) Act, No. 3, 1984 (Austl.). Frustration-of-judgment measures allow government officials to refuse to recognize or enforce judgments against their citizens obtained in foreign courts. See Griffin, *supra* note 64, at 505.

70. A clawback statute "enables certain defendants who have paid multiple damage judgments in an overseas country to recover the multiple portion of that judgment from the successful plaintiff." Joseph E. Neuhaus, *Power To Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097, 1098 (1981).

71. Buxbaum, *supra* note 32, at 251.

72. 15 U.S.C. § 6a (2000).

73. Export Trading Company Act of 1982, Pub. L. No. 97-290, § 102(b), 96 Stat. 1234.

74. 15 U.S.C. § 6a (2000).

has an effect of a kind that antitrust law considers harmful, i.e., the “effect” must “giv[e] rise to a [Sherman Act] claim.”<sup>75</sup>

Congress intended the FTAIA to allow U.S. firms to profit from other countries’ less stringent competition laws by barring foreigners from suing such firms in the United States if the firm’s conduct was not harming the United States market. Over the past decade, U.S. courts have had to consider a different question: does the FTAIA bar U.S. courts from accepting jurisdiction over anti-cartel suits brought by foreign nationals for harms they suffered abroad when the cartel’s activity also harmed U.S. consumers?

### III. THE FTAIA CONTROVERSY

Nearly twenty years after the FTAIA was passed, three circuit courts of appeals considered whether the statute barred jurisdiction over claims by foreigners that they were harmed in foreign transactions involving international cartels. The circuit courts gave different interpretations of the FTAIA, ranging from the narrow view that jurisdiction exists only if the foreign harm directly arose from a domestic harm to the expansive view that jurisdiction exists over any foreign claim that alleged underlying conduct that could have also caused a domestic harm. In *Empagran*, the Supreme Court attempted to redirect the courts to consider what connection to a domestic harm is necessary for a foreign plaintiff to establish U.S. jurisdiction. The Court hinted at an economically satisfactory basis for such jurisdiction—intertwined foreign and domestic harms that are inextricably bound up in one another. However in remanding the case, the Court instead asked the D.C. Circuit to consider “but-for causation.” As a result, a new circuit split is emerging. District courts in two circuits have recognized that jurisdiction exists when the foreign and domestic harms are intertwined, but the D.C. Circuit held that the domestic harm must directly cause the foreign harm. I argue that the Supreme Court should fully endorse the view that jurisdiction exists when the foreign and domestic harms are inextricably linked, allowing the courts to then consider what a foreign plaintiff must show to establish that a domestic harm has occurred.

#### A. Den Norske

The first appeals case to interpret the FTAIA in this context was *Den Norske Stats Oljeselskap As v. Heeremac Vof*.<sup>76</sup> The case involved an alleged cartel among the world’s three heavy-lift barge services, which are crucial to off-shore oil drilling. The plaintiff, Statoil, was a Norwegian oil company that operated exclusively in the North Sea. Statoil alleged that the three barge services engaged in a territorial division of the North Sea, Far East, and Gulf of Mexico markets. One company received a higher allocation of North Sea projects in exchange for agreeing to stay out of the Gulf of Mexico, where the two other companies operated. Statoil contended that this conspiracy forced it

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75. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (quoting 15 U.S.C. § 6a (2000)).

76. 241 F.3d 420 (5th Cir. 2001).

to pay higher prices for barge services in the North Sea. It filed its lawsuit after the defendants plead guilty to criminal antitrust charges brought by the DOJ in 1998.<sup>77</sup> It argued that the U.S. courts had jurisdiction over the suit because the territorial division that caused its harm could only have been maintained by also harming American oil companies that purchased barge services in the Gulf of Mexico.<sup>78</sup>

The Fifth Circuit disagreed with Statoil, holding that “the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.”<sup>79</sup> The court acknowledged that the cartel’s territorial division had a direct, substantial, and reasonably foreseeable effect in the United States: higher prices paid by oil companies operating in the Gulf of Mexico.<sup>80</sup> However, the court viewed Statoil’s injury as arising from a foreign effect of the defendant’s conduct rather than from a domestic effect.<sup>81</sup> The court observed:

[W]hile we recognize that there may be a connection and an interrelatedness between the higher prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea, the FTAIA requires more than a “close relationship” between the domestic injury and the plaintiff’s claim; it demands that the domestic effect “gives rise” to the claim.<sup>82</sup>

Other courts also adopted this view.<sup>83</sup>

Judge Patrick Higginbotham dissented from the *Den Norske* holding. He argued that the FTAIA does not require that the domestic effect give rise to the plaintiff’s claim, but rather only to “a” claim.<sup>84</sup> “In other words, the effect on United States commerce must be sufficient to support a claim, an injury of some person in a way cognizable under the Sherman Act.”<sup>85</sup> Judge Higginbotham noted that the majority’s interpretation would undermine Congressional intent:

Under the majority’s view, an American cartel that fixes prices worldwide will be subject to Clayton Act suits by plaintiffs from around the world, but a foreign cartel that fixes prices worldwide will be subject to suit under the Clayton Act only from plaintiffs injured in American commerce. This interpretation of the FTAIA transforms a safe harbor for

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77. *Id.* at 422-23. The defendants were fined over \$49 million.

78. *Id.* at 422.

79. *Id.* at 428.

80. *Id.* at 426.

81. *See id.* at 427 (“The higher prices American companies allegedly paid for services provided by the McDermott defendants in the Gulf of Mexico does not give rise to Statoil’s claim that it paid inflated prices for HeereMac and Saipem’s services in the North Sea.”).

82. *Id.*

83. *See, e.g., In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 885 (W.D. Wis. 2000) (“Nothing . . . suggests that Congress intended that the scope of recovery would extend to persons injured overseas by effects other than those felt by American markets.”); *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C 97-3259 FMS, 1997 U.S. Dist. LEXIS 18585, at \*11 (N.D. Cal. Nov. 19, 1997) (“Because the relevant market is the United States domestic market, the more appropriate plaintiffs to bring suit against defendants are the consumers injured by defendants’ actions in the United States.”).

84. *Den Norske*, 241 F.3d at 432.

85. *Id.* at 432.

American exporters into a boon for foreign cartels that restrain commerce in the United States.<sup>86</sup>

Focusing on the deterrence goal of American antitrust law, Judge Higginbotham pointed out that:

Conspirators facing antitrust liability only to persons injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States. A world-wide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad.<sup>87</sup>

He therefore concluded, "[w]hether the harm felt in the United States is the source of the injury to the plaintiff is irrelevant; it is the effects on the United States that create[] jurisdiction."<sup>88</sup>

#### B. *Kruman v. Christie's*

The Second Circuit offered a different interpretation of the FTAIA in *Kruman v. Christie's Int'l, PLC*.<sup>89</sup> *Kruman* involved allegations that the world's two largest auction houses conspired to set the fees for their services. The case followed a DOJ investigation in which Christie's received amnesty conditional on its cooperation.<sup>90</sup> The plaintiffs were a class of foreign clients of the auction houses who "all made purchases or sold goods in auctions held outside the United States and claim that they were injured because they paid inflated commissions to the defendants."<sup>91</sup> The defendants argued that the FTAIA prevented U.S. courts from exercising jurisdiction over the plaintiffs' claims.

The Second Circuit held that the FTAIA "does not determine which plaintiffs can bring suit,"<sup>92</sup> and therefore U.S. courts have jurisdiction over lawsuits by foreign plaintiffs for antitrust injuries sustained abroad. The court pointed out that the FTAIA explicitly references the Sherman Act and not the Clayton Act. "The substantive provisions of the Sherman Act determine what conduct by the defendant is actionable. The Clayton Act determines what injury a plaintiff must suffer in order to bring suit. . . . The text of the FTAIA clearly reveals that its focus is . . . on the defendant's conduct."<sup>93</sup> Once foreign plaintiffs establish that the defendant engaged in conduct that had a direct, substantial, and reasonably foreseeable effect on U.S. commerce or U.S. export trade, they could sue for damages sustained anywhere in the world. The court believed its broad interpretation of jurisdiction accorded with the deterrence goal of the antitrust regime: "Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets

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86. *Id.* at 434.

87. *Id.* at 435.

88. *Id.* at 439.

89. 284 F.3d 384 (2d Cir. 2002).

90. HARD CORE CARTELS, *supra* note 12, at 13. Sotheby's was fined \$45 million, and its former chairman and its president and C.E.O. received criminal sanctions, including imprisonment.

91. *Kruman*, 284 F.3d at 389. A domestic class action lawsuit had previously settled. *Id.* at 391.

92. *Id.* at 402.

93. *Id.* at 398.

regardless of where it occurs and whether it is also directed at foreign markets.”<sup>94</sup>

### C. D.C. Circuit’s *Empagran* Opinion

A year later, the D.C. Circuit considered a case involving the vitamins cartel. The plaintiffs in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*<sup>95</sup> were foreign purchasers of vitamins.<sup>96</sup> The complaint alleged that the defendants—twenty foreign manufacturers of vitamins—“engaged in an over-arching worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins” that “affected virtually every market” where the defendants operated, with “adverse effects in the United States and in other nations.”<sup>97</sup> The defendants argued that the court lacked subject matter jurisdiction because “the injuries plaintiffs sought to redress were allegedly sustained in transactions that lack any direct connection to United States commerce.”<sup>98</sup>

The D.C. Circuit held that, for a U.S. court to have jurisdiction, “a plaintiff must show that the anticompetitive conduct violates the Sherman Act and that the conduct’s U.S. effect gives rise to someone’s claim under it.”<sup>99</sup> The D.C. Circuit disagreed with the *Kruman* and *Den Norske* opinions. It believed that the *Kruman* court “reach[ed] too far in its view of subject matter jurisdiction.”<sup>100</sup> The FTAIA’s reference to “a claim” could not refer to the defendant’s conduct; it had to implicate the plaintiff’s injury.<sup>101</sup> In contrast, the D.C. Circuit found the Fifth Circuit’s approach too restrictive for policy reasons that echoed Judge Higginbotham’s argument:

Suits only by those injured by the U.S. effects of a conspiracy may not provide sufficient deterrence; a conspirator could expect that illegal profits abroad would offset his liability in the U.S., leaving the conspirator with an incentive to engage in global conspiracy. Allowing suits by those injured solely in foreign commerce, where the anticompetitive conduct also harmed U.S. commerce, forces the conspirator to internalize the full costs of his anticompetitive conduct.<sup>102</sup>

The court found that the foreign plaintiffs had standing because they had brought suit alongside U.S. plaintiffs who had suffered actual injury in the United States. The defendants appealed the D.C. Circuit’s decision to the Supreme Court, which led to the *Empagran* decision.

94. *Id.* at 393.

95. 315 F.3d 338 (D.C. Cir. 2003).

96. The plaintiffs were corporations from Australia, Belgium, Ecuador, Indonesia, Mexico, Panama, Ukraine, and the United Kingdom. They originated their suit with two American plaintiffs as a “class action lawsuit on behalf of foreign and domestic purchasers of vitamins.” *Id.* at 342. After the district court dismissed the foreign purchasers’ claims, “the domestic plaintiffs . . . subsequently entered into a court-approved stipulation that transferred their claims to another action pending before the District Court, *Proctor & Gamble Co. v. BASF AG*, No. 99-3046 (M.D.L. No. 1285).” *Id.* at 343.

97. *Id.* at 340.

98. *Id.*

99. *Id.* at 351. The court wrote, “[t]o satisfy this requirement, the plaintiff must allege that some private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant’s violation of the Sherman Act.” *Id.* at 352.

100. *Id.* at 341.

101. *Id.*

102. *Id.* at 356.

#### D. *The Supreme Court's Empagran Opinion*

Rather than fully resolving the circuit split, the Supreme Court's opinion in *Empagran* was narrowly tailored. The Court said: "The issue before us concerns (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim."<sup>103</sup> Limiting its decision to this specific situation of an "independent foreign effect," the Supreme Court held that in that situation the U.S. courts did not have jurisdiction "where the plaintiff's claim rests solely on the independent foreign harm."<sup>104</sup> The Court declined to consider the plaintiffs' argument that jurisdiction existed due to an interdependence between the cartel's foreign and domestic harms, because the D.C. Circuit had not addressed that argument in its decision. The Supreme Court therefore remanded the case to the D.C. Circuit for consideration of that argument.<sup>105</sup>

The Supreme Court found little justification for the extraterritorial application of American laws to conduct that causes independent foreign harm because "application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."<sup>106</sup>

[T]he higher foreign prices of which the foreign plaintiffs here complain are not the consequence of any domestic anticompetitive conduct that Congress sought to forbid . . . . Rather, Congress sought to release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct [also] causes foreign harm. Congress, of course, did make an exception where that conduct also causes domestic harm. . . . But any independent domestic harm the foreign conduct causes here has, by definition, little or nothing to do with the matter.<sup>107</sup>

The Court based its analysis on the assumption that the foreign effect was independent, and it carefully limited its decision, acknowledging that "the underlying antitrust action is complex, potentially raising questions not directly at issue here . . . ."<sup>108</sup>

#### E. *Analysis of the Supreme Court's Empagran Opinion*

The Supreme Court's *Empagran* decision was intentionally narrow and potentially significant. The Court struck down the *Kruman* court's expansive interpretation of the FTAIA.<sup>109</sup> Federal courts do not have jurisdiction over antitrust suits by foreign plaintiffs for foreign harms solely because the

103. *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159 (2004).

104. *Id.*

105. *Id.* at 175. As discussed further in this Part, the D.C. Circuit dismissed the plaintiffs' remaining claims. The Supreme Court also remanded a Second Circuit case that was subsequently dismissed because the plaintiff had not properly pleaded this alternative theory. *See Sniado v. Bank Aus. Ag.* 378 F.3d 210, 213 (2d Cir. 2004) ("Sniado's amended complaint, liberally construed to the outer limits of reasonableness, still lacks the factual predicate to support his alternative theory of jurisdiction.").

106. 542 U.S. at 165.

107. *Id.* at 165-66.

108. *Id.* at 163-64.

109. *See, e.g., JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 176 (2d Cir. 2005) (noting that *Kruman* "has since been abrogated"); *Sniado*, 378 F.3d at 212 (noting that *Empagran* "abrogat[ed] this Court's holding in *Kruman*").

anticompetitive conduct also allegedly caused a domestic injury somewhere to someone. At a minimum, the *Empagran* decision requires foreign plaintiffs to demonstrate that their injury and the domestic injury are not independent.

The opinion then raises the question: What is an "independent" injury in the context of an international cartel? When a cartel raises the price of its product in one country, it faces the threat that arbitrage will drive the price back down unless it raises the product's price in every country in which it operates. A cartel can avoid this arbitrage threat if the product cannot be profitably resold between markets. This situation occurs if (1) high transaction costs prevent profitable shipment of the product between nations; (2) the products are sufficiently differentiated between markets so that the product suitable to one market cannot be profitably resold in the other market; or (3) legal barriers prevent moving the product from one market to the other. Product markets in which these circumstances hold are quite rare.<sup>110</sup>

If the foreign and domestic harms of most international cartels are not independent, then upon what basis would a U.S. court have jurisdiction over such claims? The Supreme Court did not explicitly address this question in its *Empagran* opinion, and it was silent as to whether it agreed with the *Den Norske* view that the domestic harm had to directly cause the foreign harm. However, the Supreme Court suggested that jurisdiction would exist when the foreign and domestic harms were intertwined or inextricably bound up with one another. In *Empagran*, the Court looked to see if, previous to passage of the FTAIA, U.S. courts exercised jurisdiction over *Empagran*-type suits. It noted that in a previous case, *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co.*,<sup>111</sup> "a district court permitted an Italian firm to proceed against an American firm with a Sherman Act claim based upon a purely foreign injury, i.e., an injury suffered in Italy."<sup>112</sup>

*Industria Siciliana's* plaintiff was an Italian petroleum-refining company that sought engineering bids to construct a new plant in Italy. An American firm submitted a bid that was substantially below that of a wholly-owned Exxon subsidiary, but the plaintiff was forced to contract with the Exxon subsidiary in exchange for a favorable refining contract from the Exxon parent company. The district court held that it had subject matter jurisdiction over the plaintiff's claim because "the required impact upon United States commerce is supplied by the allegation that trade in the export of design and engineering services was restrained."<sup>113</sup> The court noted that the alleged tying arrangement produced two simultaneous harms: one on the foreign purchaser who was forced to engage in a sub-optimal transaction and the other on the domestic seller who was prevented from engaging in the transaction. The court found that the foreign plaintiff was suing based, in part, on the domestic harm. "In so doing, the foreign plaintiff is not asserting the rights of third parties, but his own, since the 'imposition' which it has suffered is *inextricably bound up with* the domestic restraints of trade which have enabled the defendant *to enforce*

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110. Pharmaceuticals may be an example that falls under the third situation, but patent laws already provide substantial market power to pharmaceutical manufacturers.

111. No. 75 Civ. 5828-CSH, 1977 U.S. Dist. LEXIS 17851 (S.D.N.Y. Jan. 18, 1977).

112. 542 U.S. at 171.

113. *Industria Siciliana*, 1977 U.S. Dist. LEXIS 17851, at \*30-31.

the reciprocal transaction upon the plaintiff.”<sup>114</sup> The Supreme Court noted that *Industria Siciliana* involved a “foreign injury that was dependent upon, not independent of, domestic harm.”<sup>115</sup> The U.S. government subsequently endorsed *Industria Siciliana* as one of three “factual scenarios that, in its view, satisfy the narrow ‘domestic injury exception’” of the FTAIA.<sup>116</sup>

*Industria Siciliana* suggests two characteristics establishing jurisdiction due to inextricably linked foreign and domestic effects: (1) simultaneity and (2) interdependence between the foreign and domestic harms such that neither could have arisen absent the other. In the cartel context, as discussed previously, a cartel raises prices simultaneously in all of the markets in which it operates. The domestic and foreign harms thus arise simultaneously. Moreover, so long as arbitrage is possible, the foreign and domestic harms are interdependent. The foreign harm could not arise absent the domestic harm, and the domestic harm could not arise absent the foreign harm. As in *Industria Siciliana*, the foreign and domestic harms are intertwined,<sup>117</sup> inextricably bound up with one another such that a lawsuit to deter the foreign harm helps deter the domestic harm.

Regrettably, the Supreme Court stepped back from fully endorsing this basis for jurisdiction. It instead referenced “but-for causation” when it remanded the case to the D.C. Circuit Court:

Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangements and respondents would not have suffered their foreign injury. They add that this “but for” condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA’s exception. . .

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114. *Id.* at \*31 (emphasis added).

115. 542 U.S. at 172. The Supreme Court did not point out that the domestic harm was equally dependent upon the foreign injury. *Industria Siciliana* clearly establishes that the conduct that caused the inextricable domestic and foreign harms occurred in Italy when the foreign plaintiff accepted the terms of the tying arrangement. “[P]laintiff claims that [the defendants] thereupon conspired and combined to coerce [the plaintiff] into foregoing the more advantageous engineering proposal” through a tying arrangement. *Industria Siciliana*, 1977 U.S. Dist. LEXIS 17851, at \*3; *see also id.* at \*4 (describing the acceptance of the tying arrangement and the rejection of the American firm’s lower bid as a “condition precedent”); *id.* at \*5 (“Upon its signature to this contract, [the plaintiff] became irrevocably committed to [the defendant] and withdrew from further discussion with [the harmed American firm].”).

116. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267, 1269-70 (D.C. Cir. 2005). The government endorsed a second fact scenario in which a court found subject matter jurisdiction because the foreign and domestic harms were inextricably linked. In *Caribbean Broadcasting System Ltd. v. Cable and Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), the plaintiff was a foreign radio station operating in the Eastern Caribbean. It alleged that the defendants attempted to monopolize FM broadcasting in the Eastern Caribbean, particularly with respect to English-language advertising. The court found it had subject matter jurisdiction over the claims because American consumers (advertisers) suffered domestic harm from the attempted monopolization. “Paying higher prices is certainly a direct harm to customers. . . . In this context it appears that antitrust injury to [the plaintiff] is ultimately a harm to U.S. purchasers of radio advertising. By keeping [the foreign plaintiff] out of the market, [the defendants] denied such [domestic] purchasers the benefit of competition.” *Id.* at 1087.

117. Other commentators have referred to the intertwined effects. *See* Hannah L. Buxbaum, *National Courts, Global Cartels: F. Hoffman-LaRoche Ltd. v. Empagran, S.A.* (*U.S. Supreme Court 2004*), 5 GERMAN L.J. No. 9 1095, 1104-05 (2004), available at <http://www.germanlawjournal.com/article.php?id=494> (“The foreign plaintiffs in *Empagran* had argued that the cartel’s effects on U.S. commerce were in fact intertwined with the foreign injury.”); Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT’L & COMP. L. REV. 205, 225-26 (2005).

. The Court of Appeals may determine whether respondents properly preserved the argument, and, if so, it may consider it and decide the related claim.<sup>118</sup>

But-for causation with respect to the effects of international cartels is economically unsound. Causation requires a precipitating action that produces a subsequent effect. The cause is also separate and independent from the effect. In contrast, cartels raise their prices in all markets simultaneously, and their foreign and domestic effects are interdependent. The cartel's domestic effect can never "cause" its foreign effect, nor can the foreign effect "cause" the domestic effect. The two are inseparable aspects of the overarching global effect of the cartel's activities. Fortunately, two district courts have looked past the Supreme Court's unfortunate but-for language to find subject matter jurisdiction due to intertwined foreign and domestic harms.

The first case was *MM Global Services Inc. v. Dow Chemical Company*.<sup>119</sup> The Indian plaintiff alleged that the defendants forced it to participate in a resale price maintenance scheme. The Indian firm "refused to accept orders or cancelled accepted orders if the prospective resale prices to end-users in India were below certain levels."<sup>120</sup> The plaintiffs alleged that this scheme prevented them from "effectively and fully competing and maximizing their sales of [p]roducts."<sup>121</sup> The arrangement harmed the U.S. domestic market because "competition in the sale and resale of [Union Carbide] [p]roducts in and from the United States was improperly diminished and restrained . . ."<sup>122</sup> The defendants argued that the plaintiffs did not meet the FTAIA's requirements because the plaintiffs had not argued that the domestic effects of the scheme directly caused their harms in India.<sup>123</sup> Without explicitly discussing the plaintiff's foreign harms and the domestic harms as intertwined, the court nevertheless implied such a link when it wrote that it "[did] not agree with the defendants that it is inconceivable for both domestic effects to give rise to the plaintiffs' injuries and for those injuries to also affect domestic commerce."<sup>124</sup> As in *Industria Siciliana*, *MM Global Systems* represents conduct in which the foreign and domestic harms arose simultaneously and in an interdependent manner, such that the domestic harm (increased prices) and the foreign harm (reduced sales) could not have arisen separately.

Another district court explicitly considered jurisdiction due to inextricably linked effects. *In re: Monosodium Glutamate Antitrust Litigation*<sup>125</sup> involved foreign plaintiffs alleging that the defendants engaged in a global cartel in monosodium glutamate ("MSG") that caused them to pay supra-competitive prices in their wholly foreign transactions. The plaintiffs alleged that the supra-competitive prices they paid abroad "were inextricably

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118. *Empagran*, 542 U.S. at 175.

119. 329 F. Supp. 2d 337 (D. Conn. 2004).

120. *Id.* at 340.

121. *Id.* at 342.

122. *Id.*

123. *See id.* ("[P]laintiffs have built their case around the proposition that Indian resale price maintenance led to higher prices in the United States, not the other way around.")

124. *Id.* at 343.

125. 2005 U.S. Dist LEXIS 8424 (D. Minn. May 2, 2005).

linked” to the supra-competitive prices paid in the United States.<sup>126</sup> Although the court still evaluated the foreign and domestic effects in causal terms,<sup>127</sup> the court found the following:

Plaintiffs allege that they were direct purchasers of overpriced MSG and/or nucleotides who were forced to pay inflated prices from abroad because Defendants’ conspiracy prevented them from buying competitively priced MSG and/or nucleotides from the United States. Plaintiffs also allege that the injury was direct and was specifically intended by Defendants. Accordingly, Plaintiffs have sufficiently alleged that their injury arose from the United States effects of Defendants’ anti-competitive actions.<sup>128</sup>

Though some courts have recognized the conceptual utility of inextricably linked foreign and domestic harms as a basis for jurisdiction, the D.C. Circuit has not, perhaps because the Supreme Court remanded *Empagran* in terms of but-for causation. In its remanded *Empagran* opinion (“*Empagran II*”),<sup>129</sup> the D.C. Circuit held that but-for causation was insufficient to establish subject matter jurisdiction. The court began its opinion by incorrectly summarizing the facts of *Industria Siciliana*. The court wrote that the “reciprocal tying agreement effected the exclusion of the American rival of one defendant, resulting in higher consumer prices” to the foreign plaintiff.<sup>130</sup> This statement conflicts with the clear record in *Industria Siciliana* that the underlying transaction occurred in Italy.<sup>131</sup> The court’s incorrect reading of *Industria Siciliana* allowed it to conclude, with respect to *Empagran*, that “[t]he foreign injury caused by the appellees’ conduct, then, was not ‘inextricably bound up with . . . domestic restraints of trade.’”<sup>132</sup>

Having dispensed with the concept of inextricably bound up effects, the court addressed but-for causation. In two sentences lacking explanation and analysis other than what the foreign plaintiffs “acknowledged at oral argument,”<sup>133</sup> the court concluded that the FTAIA’s “statutory language—‘gives rise to’—indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for ‘nexus.’”<sup>134</sup> The D.C. Circuit viewed the foreign price increase and the domestic price increase as separable rather than two aspects of the same global effect. “It was the foreign effects of price-fixing outside of the United States that directly caused or ‘gave rise to’ the appellants’ losses when they purchased vitamins abroad at supra-competitive prices.”<sup>135</sup> Thus the D.C. Circuit, without referencing *Den Norske*, essentially adopted its holding: U.S. courts only have jurisdiction over foreign claims for foreign harms caused by international cartels when the foreign harm was directly caused by the domestic harms.

When the Supreme Court considers this matter again, as it almost certainly will, it should fully endorse inextricably linked foreign and domestic

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126. *Id.* at \*3.

127. *See id.* at \*14.

128. *Id.* at \*22.

129. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005).

130. *Id.* at 1270.

131. *See supra* note 115.

132. 417 F.3d at 1271.

133. *Id.* at 1270.

134. *Id.* at 1271.

135. *Id.* at 1271.

effects as a basis for jurisdiction in *Empagran*-type cases. Such a basis for jurisdiction can be reconciled with the language of the FTAIA. First, it is not much of a conceptual leap to say that when two harms are inextricably linked, they “give rise to” each other. They are not separable into one effect that causes the other effect; they are intertwined such that neither effect could have arisen without the other. This interpretation may not meet a “more natural reading”<sup>136</sup> of the FTAIA, but the Supreme Court’s unanimous *Empagran* opinion explicitly favored reading the FTAIA in a manner meeting the Court’s policy goals:

At most, respondents’ linguistic arguments might show that respondents’ reading is the more natural reading of the statutory language. But those arguments do not show that we *must* accept that reading. And that is the critical point. . . . [W]e believe that the statute’s language permits the reading that we give it.<sup>137</sup>

Similarly, the Court should not let poor syntax stand in the way of sound economics. Instead, it should clearly enunciate a basis for jurisdiction that is economically sound: domestic effects “give rise to” foreign effects when the domestic and foreign effects are inextricably bound up with one another.

The Supreme Court can endorse jurisdiction based on intertwined foreign and domestic effects without fear that the U.S. courts will be overwhelmed with *Empagran*-type suits. A foreign plaintiff must still show that there was a “direct, substantial and reasonably foreseeable” domestic effect from the cartel that led to “a [domestic] claim.” The courts could require that foreign plaintiffs seeking U.S. jurisdiction over *Empagran*-type suits (1) follow a DOJ conviction against the cartel,<sup>138</sup> (2) follow a domestic plaintiff’s successful lawsuit; or (3) file their lawsuit concurrently with domestic plaintiffs.<sup>139</sup> I believe all three scenarios should be permitted to maximize the ability of foreign plaintiffs to identify international cartels that would otherwise go undetected in the United States. Regardless of which option is chosen, my point is that the courts will still be able to establish a restrictive threshold for exercising jurisdiction in *Empagran*-type suits within the language of the FTAIA.

#### IV. UNRESOLVED ISSUES

So long as the courts do not deny jurisdiction to *all* foreign plaintiffs in *Empagran*-type cases, two important concerns raised by the amici briefs submitted to the Supreme Court in *Empagran* must be addressed. The first is the policy concern that U.S. jurisdiction in *Empagran*-type cases will undermine government amnesty programs. The United States has led the world in creating an effective amnesty program that encourages cartel members to expose their cartels by creating a winner-takes-all Prisoner’s Dilemma. Other governments have created similar programs, and the United

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136. *Empagran*, 542 U.S. at 174.

137. *Id.*

138. This first option would have permitted jurisdiction in *Den Norske, Kruman*, and *Empagran*, but not in *MM Global Servs.* and *Monosodium Glutamate*.

139. A fourth option, that the foreign plaintiff show that there was a domestic effect somewhere to someone, was essentially the basis for jurisdiction articulated in *Kruman* and overruled in *Empagran*.

States and foreign governments feared that U.S. jurisdiction over *Empagran*-type suits would undermine the effectiveness of these programs. The second concern is a legal one: because American courts are perceived to be more favorable to plaintiffs, if the United States exercises jurisdiction in *Empagran*-type cases, foreign plaintiffs will bring their antitrust suits in the United States even when suitable fora exist in their home countries. The governments feared such forum shopping would undermine the antitrust regimes of foreign governments, overwhelm the U.S. court system, and threaten the cooperation that the United States and these governments have fostered with respect to international cartels.

A. *Effects on Government Amnesty Policies*

Amnesty programs succeed by taking advantage of the secrecy and distrust inherent in cartels through the dynamics of the Prisoner's Dilemma.<sup>140</sup> The Prisoner's Dilemma models collusive behavior threatened by government prosecution. The model involves two criminals who are arrested by the police. The police can only convict the criminals if one or both confesses. If both confess, they each receive a moderate sentence, such as four years in prison (see Chart 1). If only one confesses, the confessor receives a light sentence, such as only one year in prison, while the other receives the most severe punishment, such as a ten-year sentence. The optimal decision for both prisoners is to work together and not confess. However, the police interrogate the criminals separately so that even if they agree to not confess, the criminals cannot be assured that each will abide by their agreement. The rational criminal must therefore decide whether to confess (and thereby break the criminals' agreement) by considering the risk the other criminal will confess and the consequences of him doing so. For example, if criminal A believes there is a 50% chance that criminal B will break the agreement and confess, then criminal A faces a sentence of 2.5 years if he confesses and a sentence of five years if he does not confess (see "Example Explanation" accompanying Chart 1). Both the sentence structure, and the uncertainty of what the other collaborator will do, lead Criminal A (and Criminal B) to decide that his optimal action is to confess. Confessing is the optimal decision even though Criminal A will receive a punishment, albeit a relatively light one.

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140. See Evenett et al., *supra* note 10, at 14; see also Leslie, *supra* note 45, at 515; Jason D. Medinger, Comment, *Antitrust Leniency Programs: A Call for Increased Harmonization as Proliferating Programs Undermine Deterrence*, 52 EMORY L.J. 1439 (2003).

CHART 1. THE PAY-OUT STRUCTURE FOR EACH CRIMINAL IN  
A PRISONER'S DILEMMA

		Criminal B	
		Does Not Confess	Confess
Criminal A	Does Not Confess	A = 0 yrs (no penalty) B = 0 yrs (no penalty)	A = 10 yrs (severe penalty) B = 1 yr (light penalty)
	Confess	A = 1 yr (light penalty) B = 10 yrs (severe penalty)	A = 4 yrs (moderate penalty) B = 4 yrs (moderate penalty)

**Example Explanation:**

If Criminal A believes there is a 50% chance that Criminal B will break their agreement and confess, Criminal A's probable sentences are:

- If Criminal A confesses:  $(.50)*(1 \text{ yr}) + (.50)*(4 \text{ yrs}) = 2.5 \text{ yrs}$
- If Criminal A does not confess:  $(.50)*(0 \text{ yrs}) + (.50)*(10 \text{ yrs}) = 5 \text{ yrs}$

Criminal A's optimal decision, given the uncertainty of what Criminal B will do, is to confess.

Amnesty programs for cartel informants attempt to create a real-world Prisoner's Dilemma. After a cartel is formed, its members continually face the choice of either remaining in the cartel or leaving it and seeking amnesty. Participating in amnesty programs has two costs: (1) the opportunity cost of leaving the cartel (the member's lost future supra-competitive profits), and (2) the expected cost from the civil liability that the amnesty participant still faces. Continuing in the cartel has two costs: (1) the expected cost of criminal liability, and (2) the expected cost of civil liability (which includes the lost future supra-competitive profits from the point when the cartel is discovered). Unlike the costs of participating in the amnesty program, which are certain, the costs of continuing in the cartel are uncertain. They depend on the probability that the cartel will be detected through the amnesty program or other means.<sup>141</sup>

Governments can encourage firms to seek amnesty through a variety of mechanisms. For example, governments can reduce the amnesty program's participation costs, as the United States recently did when it limited the liability of amnesty participants to compensatory damages while retaining the treble damages regime for other cartel members.<sup>142</sup> Governments can also increase the expected costs of continuing in the cartel, such as by allocating more resources to the enforcement of their antitrust laws against international cartels.<sup>143</sup> If the expected cost of seeking amnesty (the lost future cartel profits plus the reimbursement of past cartel profits) is less than the expected cost of continuing in the cartel (facing the full civil and criminal penalties of the

141. The cartel may be detected through private litigation by the cartel's consumers or other law enforcement efforts. For example, the United States government "profiles" cartels to target its investigations.

142. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665 (2004) (current version at 15 U.S.C.A. § 1 (West 2005)).

143. Evenett et al. explore the law-and-economics approach to amnesty programs and cartel sanctions in more detail. See Evenett et al., *supra* note 10, at 13-18.

antitrust laws as well as some lost future profits), members will confess and seek amnesty.

Amnesty programs extend the Prisoner's Dilemma one step further by granting amnesty (the equivalent of a light sentence) only to the first criminal who confesses. As Chart 2 demonstrates, the winner-takes-all dynamic increases the incentive for a criminal to confess. It also modifies the decision calculus as Criminal A must not only consider whether Criminal B will confess, but also whether Criminal B will confess and receive amnesty *first*. A winner-takes-all dynamic increases the incentive for a criminal to confess, and it adds a time component to the decision. If all cartel members face these same costs and are risk-neutral, each has a strong incentive to be the firm that exposes the cartel, provoking a "rush to the courthouse."<sup>144</sup> Cartel members try to secure the advantages of the amnesty program first,<sup>145</sup> which in turn increases the likelihood that the cartel will be exposed.

CHART 2. THE PAY-OUT STRUCTURE OF A WINNER-TAKES-ALL PRISONER'S DILEMMA

		Criminal B	
		Does Not Confess	Confess
Criminal A	Does Not Confess	A = 0 yrs (no penalty) B = 0 yrs (no penalty)	A = 10 yrs (severe penalty) B = 1 yr (light penalty)
	Confess	A = 1 yr (light penalty) B = 10 yrs (severe penalty)	X

**Example Explanation:**

If Criminal A believes there is a 50% chance that Criminal B will confess, the winner-takes-all dynamic increases the differential between Criminal A's probable sentences:

- If Criminal A confesses first:  $(.50) * (1 \text{ yr}) = 0.5 \text{ yrs}$
- If Criminal A does not confess first:  $(.50) * (0 \text{ yrs}) + (.50) * (10 \text{ yrs}) = 5 \text{ yrs}$

Criminal A has a greater incentive to confess than he does in the example detailed in Chart 1.

144. Cartel members need to know that it is rational for at least one other member of the cartel to seek amnesty at the other firm's great expense. The more general point is that cartel members do not need to fear that the cartel will be discovered by public or private investigations.

145. See Gary R. Spratling, Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Program—An Update, Presentation at the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust 3 (Feb. 16, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2247.pdf> [hereinafter Spratling Presentation] ("We frequently see situations where a company approaches the government a few days, or even less than one full day, after one of its conspirators has already approached the Division and secured its position as first in line for amnesty.").

### 1. *United States Amnesty Programs*

In 1978, the United States became the first country to institute an amnesty program.<sup>146</sup> Amnesty was available to corporations that confessed to participating in a cartel and that cooperated in the subsequent investigation. To receive amnesty, the DOJ could not have known of the cartel prior to the firm's confession. Even then, amnesty was conditional on prosecutorial discretion, and if a corporation received amnesty, its executives did not.<sup>147</sup> This initial amnesty program presented an amnesty participant with additional uncertain costs from those previously discussed. In addition to the lost future cartel profits and the reimbursement of past cartel profits, an amnesty participant would face some probability that it would still receive the full criminal and civil penalties, including treble damages, of the antitrust laws.

The DOJ and Congress have reformed the amnesty program to eliminate some and lower other costs of participating in the program.<sup>148</sup> The current Corporate Leniency Policy offers automatic amnesty from criminal prosecution to the first cartel member<sup>149</sup> who reveals the cartel's existence before a government investigation has begun. Amnesty is now automatic so long as the applicant meets various objective, non-discretionary conditions. For example, the DOJ must not already know about the cartel from another source.<sup>150</sup> The amnesty applicant must not have started or led the cartel, and it must stop participating in the cartel. The amnesty applicant must confess to the wrongdoing,<sup>151</sup> make restitution to victims, and provide "full, continuing and complete cooperation" to the DOJ throughout the investigation.<sup>152</sup> In return, not only does the company receive automatic amnesty from criminal prosecution, but its liability to the cartel's victims is limited to compensatory damages.<sup>153</sup> All directors, officers, and employees of the company also receive amnesty if they admit their wrongdoing and cooperate with the DOJ's investigation.<sup>154</sup> If the DOJ already began an investigation before the applicant came forward, full or partial amnesty may still be available if the government "does not yet have evidence against the [specific] company that is likely to result in a sustainable conviction" and "granting leniency would not be unfair to others."<sup>155</sup> Finally, the DOJ provides full or partial amnesty for cartel activities for which a firm is already being investigated if the firm

146. HARD CORE CARTELS, *supra* note 12, at 20.

147. However, individuals could benefit from cooperating, as is the case in most criminal investigations.

148. *See supra* note 28.

149. Spratling Presentation, *supra* note 145, at 1.

150. DEP'T OF JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY (1993), *available at* <http://www.usdoj.gov/atr/public/guidelines/0091.pdf> [hereinafter CORPORATE LENIENCY POLICY].

151. Confessions must be a corporate act as opposed to isolated confessions of individual executives or officials. *Id.*

152. *Id.*

153. *See supra* text accompanying note 142.

154. *See* CORPORATE LENIENCY POLICY, *supra* note 150, at 4. A second program, the Amnesty Policy for Individuals, grants leniency to individuals who cooperate on their own behalf rather than through their company. *See* DEP'T OF JUSTICE, ANTITRUST DIV., LENIENCY POLICY FOR INDIVIDUALS (1994), *available at* <http://www.usdoj.gov/atr/public/guidelines/lenind.htm> [hereinafter LENIENCY POLICY FOR INDIVIDUALS].

155. *See* CORPORATE LENIENCY POLICY, *supra* note 150, at 2.

discloses cartel activities in other markets in which it competes.<sup>156</sup> These reforms removed the possibility of criminal liability for amnesty participants, while reducing their civil liability.

The United States reduced the costs to amnesty participants in another way: by ensuring that the information provided by those participants will not be used against them in subsequent private litigation or in actions by other governments. By using such information as grand jury materials, the DOJ protects the firms from having their information used against them in private litigation.<sup>157</sup> The firms are still susceptible to private litigation—for single damages—but not based on the information they provided to the government. Similarly, the DOJ adopted the policy that it does not share the information from amnesty participants with foreign governments, even those cooperating in the investigation.<sup>158</sup> Thus, strict confidentiality with respect to the information provided by amnesty participants eliminates the possibility that their participation will increase their chance of facing civil litigation or criminal prosecution from abroad.<sup>159</sup>

## 2. *How the United States Increased the Cost of Continuing in a Cartel*

The United States also took steps to increase the criminal fines imposed on cartel members.<sup>160</sup> In 1987, Congress created the “alternative fine,” allowing the government to fine cartel members “up to twice the gross gain or twice the gross loss” to society of their illegal activity.<sup>161</sup> The 1991 United States Sentencing Guidelines encouraged courts to impose these much higher fines through a flexible points system that allows courts to weigh additional

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156. The government encourages harsher sentences for companies that know of a second offense and do not report it. Scott D. Hammond, *When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual’s Freedom?*, Presentation at the Fifteenth Annual National Institute on White Collar Crime ‘6 (Mar. 8, 2001), available at <http://www.usdoj.gov/atr/public/speeches/7647.pdf> [hereinafter Hammond Speech]; see also Spratling Presentation, *supra* note 145, at 6 (“Roughly half of these [30 international cartel investigations] were initiated as a result of evidence developed during an investigation of a completely separate market.”). Evenett et al. credit the Amnesty Plus program with setting “off a ‘domino’ effect in which one cartel investigation can result in evidence for subsequent investigations.” Evenett et al., *supra* note 10, at 15.

157. See ANTITRUST FINAL REPORT, *supra* note 3, at 180.

158. See Spratling Presentation, *supra* note 145, at 5 (“In the final analysis, the Division’s overriding interest in protecting the viability of the Amnesty Program has resulted in a policy of not disclosing to foreign antitrust agencies information obtained from an amnesty applicant unless the amnesty applicant agrees first to the disclosure . . . [T]here is no doubt that amnesty applications would dry up if the Division took a different position.”).

159. See HARD CORE CARTELS, *supra* note 12, at 22 (“The need for this confidential treatment is obvious. Without it, would-be applicants would be much less willing to come forward, and it also increases the uncertainty among the conspirators about whether, or when, one of their fellow conspirators might have defected.”).

160. See generally Baker, *supra* note 26 (providing an historical overview of the use of criminal penalties for antitrust violations).

161. See 18 U.S.C. § 3571(d) (2000). Because not all cartels are discovered and prosecuted, to achieve maximum deterrence, “[m]any experts contend [that] . . . the total fine against the participating organizations should exceed the gain that they realised from the cartel. If, for example, the chances that any given cartel would be discovered and punished were one in three, then a fine that would provide an adequate deterrent would have to be three times the actual gain realised by the cartel. Some believe that as few as one in six or seven cartels are detected and prosecuted, implying a multiple of at least six. A multiple of three is more commonly cited.” HARD CORE CARTELS, *supra* note 12, at 27.

factors to increase or decrease the fine imposed. The total fines in the two years of 1997 and 1998 were nearly equal to the total fines imposed in the twenty years prior (1976 to 1996).<sup>162</sup> The average criminal fine in 1998 was fifteen times higher than the average criminal fine in 1996,<sup>163</sup> and it is likely to rise further now that Congress has increased the maximum fine to \$100 million.<sup>164</sup>

The United States also increased the penalties that can be assessed against individuals, and it demonstrated a much greater willingness to impose those penalties. Penalties against individuals both deter future cartel activities<sup>165</sup> and help identify existing cartels.<sup>166</sup> An individual has the greatest incentive to come forward and provide evidence of corporate misconduct when he perceives his interests as separate from those of the corporation. The government has tried to foster this perception by “carving out” of its corporate plea agreements the dispositions of officers, directors, and employees.<sup>167</sup> To avoid criminal indictment, those individuals must enter their own plea agreements.<sup>168</sup> Of course, a policy deters only when it is enforced. Penalizing individuals became a much stronger deterrent after the United States adopted the Sentencing Guidelines, which helped overcome the reluctance of federal judges to sentence business executives to prison.<sup>169</sup> In fiscal years 1999 and 2000, “[a]pproximately 50 individuals were imprisoned for antitrust and related offenses . . . which [was] more than the total number of individual defendants imprisoned in the previous five years combined.”<sup>170</sup>

The threat of imprisonment has been particularly effective with respect to international cartels.<sup>171</sup> Although foreign firms may be able to avoid paying fines, the threat of criminal sanctions against their executives is much more disruptive.<sup>172</sup> When an indicted official refuses to appear in U.S. court, the government labels him an international fugitive. This designation means the individual can be arrested, detained, and held for trial upon entry into the United States or any country with which the United States has an extradition treaty that covers antitrust offenses.<sup>173</sup> Criminal penalties assessed against individuals can be extremely disruptive to the operations of multinational

162. See Spratling Presentation, *supra* note 145.

163. *Id.*

164. See *supra* note 29.

165. See Hammond Speech, *supra* note 156.

166. The dynamic of evidence provided by an individual in an antitrust conspiracy is described in Baker, *supra* note 26, at 708-09. He observes that individuals turn over evidence out of fear and a desire for revenge, and that a crucial component of this work is the use of the secret federal grand jury.

167. Hammond Speech, *supra* note 156, at 9-10.

168. See Baker, *supra* note 26, at 705 (“This perceived risk of incarceration is critical. As one very senior corporate executive [said] . . . ‘as long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can do for me.’”).

169. See *id.* at 705-06.

170. Hammond Speech, *supra* note 156, at 8-9 (emphasis omitted).

171. Baker notes that, “[m]eanwhile, in the rest of the world, there have been very few prosecutions of individuals,” and “[t]he United States has tried hard to raise the stakes for foreign executives residing outside of the United States.” Baker, *supra* note 26, at 707.

172. In 1999 and 2000, the United States indicted foreign nationals from Germany, Belgium, the Netherlands, England, France, Switzerland, Italy, Canada, Mexico, Japan, and Korea. Six are now serving time. Hammond Speech, *supra* note 156, at 9-10.

173. *Id.*

corporations,<sup>174</sup> and the United States has exploited that disruption by refusing to plea down imprisonment for individuals associated with foreign corporations in international cartels. The threat of personal prosecution has been particularly important because individuals associated with international cartels may provide the best information about the cartels, including evidence that otherwise would be located abroad.<sup>175</sup>

### 3. *Foreign Amnesty Programs and Criminal Sanctions*

Other jurisdictions have followed the United States's lead and created their own amnesty programs and increased the sanctions against cartel members.<sup>176</sup> The European Commission created its amnesty program in 1996.<sup>177</sup> Initially, the program graduated leniency based on whether the corporation provided "decisive evidence" and whether it came forward before the Commission had begun an investigation.<sup>178</sup> The Commission's program allowed for substantial prosecutorial discretion, thereby increasing an applicant's potential costs. In 2002, the Commission reformed the program, bringing it more in line with the United States's approach. Now, full amnesty is automatically provided to the first cartel member who comes forward, and in certain circumstances immunity is available after the Commission initiates an investigation.<sup>179</sup> Many countries have started or are planning to start similar amnesty programs.<sup>180</sup> Lagging behind this development is an increase in national sanctions against cartel members, though certain countries have improved that aspect of their enforcement as well.<sup>181</sup>

174. *Id.*

175. See HARD CORE CARTELS, *supra* note 12, at 30 ("Sanctions against natural persons . . . may stimulate one or more individuals to offer their co-operation in circumstances in which their employer is not inclined to enter a leniency programme. In this way, strong sanctions can be thought of as creating a 'virtuous circle.' They create incentives for cartel operators to co-operate with investigations, which generates more prosecutions, which generate more and heavier sanctions, which both enhances deterrence and prompts offers of co-operation in other cases, and so forth.").

176. See Evenett et al., *supra* note 10, at 18 ("Consequently, corporate leniency programmes have been revised or introduced in several countries, international norms for and reforms of cartel enforcement have been proposed at the OECD, and bilateral cooperation developed between a few jurisdictions. Much of this change has its origins in the events that followed the revision of the U.S. corporate leniency programme in 1993.").

177. HARD CORE CARTELS, *supra* note 12, at 21.

178. A corporation that submitted "decisive evidence" before an investigation had begun received leniency of 75% to 100% of the criminal fine. The 75% threshold was automatic, but the 100% threshold could only be obtained at the European Commission's discretion. If a corporation came forward after the Commission began an investigation, it could only receive leniency between 50% and 75% of the criminal fine. A corporation that provided less useful evidence or that came forward much later in the process could only receive leniency of 10-50%. *Id.*

179. *Id.* at 22.

180. See *id.* at 23 ("Other countries that have recently implemented leniency programmes or are in the process of doing so are Australia, Brazil, the Czech Republic, France, Germany, Ireland, Korea, the Netherlands, Sweden, Switzerland, and the United Kingdom.").

181. See ORG. FOR ECON. COOPERATION AND DEV., REPORT ON THE NATURE AND IMPACT OF HARD CORE CARTELS AND SANCTIONS AGAINST CARTELS UNDER NATIONAL COMPETITION LAWS 12 (2003) ("There is a clear trend in several countries toward stronger sanctions in cartel cases, and other countries are reviewing their laws and policies to provide for enhanced sanctions against cartels."); *id.* at 17 ("The trend toward more rigorous sanctions in cartel cases is uneven—in some countries sanctions continue to be minimal—but it is unmistakable.").

#### 4. *Amnesty Program Successes*

According to the OECD, “[e]xperience has shown that a properly structured leniency programme can dramatically increase the success of an anti-cartel effort.”<sup>182</sup> The DOJ has identified and prosecuted more international cartels due to these policies than all of its other police techniques combined.<sup>183</sup> After the policies were formally instituted in 1993, amnesty applications increased more than ten-fold from an average of one per year to one per month.<sup>184</sup> The DOJ believes these programs are “unquestionably, the single greatest investigative tool available to anti-cartel enforcers.”<sup>185</sup> Other countries have similarly praised their amnesty programs.<sup>186</sup> Thus, the OECD concludes, “[i]n recent years leniency programmes have brought about successful prosecutions of many large, high profile cartels that would not otherwise have been discovered.”<sup>187</sup>

#### 5. *The Governments’ Fears Regarding the Amnesty Programs*

In its amicus brief in *Empagran*, the U.S. government expressed its fear that granting U.S. jurisdiction for suits by foreign plaintiffs for foreign injuries would decrease participation in its amnesty programs by making such participation more costly. Permitting such suits:

would tilt the scale for conspirators against seeking amnesty by expanding the scope of their potential civil liability. Faced with joint and several liability for coconspirators’ illegal acts all over the world, a conspirator could not readily quantify its potential liability. The prospect of civil liability to all global victims would provide a significant disincentive to seek amnesty from the government.<sup>188</sup>

The seven foreign governments also expressed concern that private suits would undermine their amnesty programs. These governments particularly feared America’s treble-damage regime. The Canadian argument was emblematic of these foreign governments’ fears. Granting jurisdiction in *Empagran*-type cases would give cartel members:

less incentive to make a voluntary disclosure to Canadian authorities, because criminal immunity from Canadian authorities would come at the increased cost of punitive treble damages under U.S. law for its worldwide transactions. This threat of treble damages may make it too expensive for many cartel members to cooperate, which potentially risks

182. HARD CORE CARTELS, *supra* note 12, at 20.

183. See Hammond Speech, *supra* note 156, at 2 (“The Amnesty Program has been responsible for determining and prosecuting more antitrust violations than all of our search warrants, consensual-monitored audio or video tapes, and cooperating informants combined.”).

184. Evenett et al., *supra* note 10, at 18. Evenett et al. also write that “the revision of the U.S. corporate leniency programme in 1993 . . . led to a dramatic increase in international cartel prosecutions.” *Id.*

185. *Id.*

186. Canada describes its program as a “singular success.” Canada Amicus Brief, *supra* note 21, at 12. Ireland describes its program as “spectacularly successful.” United Kingdom Amicus Brief, *supra* note 21, at 11.

187. HARD CORE CARTELS, *supra* note 12, at 20.

188. United States Amicus Brief, *supra* note 22, at 20-21.

a significant diminution in the effectiveness of the disclosure and immunity programs upon which Canadian antitrust enforcement has successfully relied.<sup>189</sup>

In Part VI, I show that these fears are greatly overstated, largely driven by the specific design of the amnesty programs, and can be overcome by structuring these programs to better account for the characteristics of international cartels.

### B. *Forum Shopping*

Seven foreign governments<sup>190</sup> submitted briefs to express their concern that if the United States allowed foreign plaintiffs to bring antitrust lawsuits for foreign injuries, it “would provide substantial encouragement for widespread forum shopping.”<sup>191</sup> Over the past twenty years the world has experienced a significant convergence in competition laws, particularly as they relate to cartels.<sup>192</sup> In 2002, the OECD concluded that cartels are “universally recognized as the most harmful of all types of anticompetitive conduct,” and that they are “condemned in all competition laws.”<sup>193</sup> The seven countries that submitted amici briefs have strong anti-cartel enforcement regimes that include a private right to seek compensation for antitrust harms.<sup>194</sup> Yet, their regimes still differ from the United States’s regime in significant ways that almost invariably cause the United States to be a more attractive forum for plaintiffs in antitrust actions (see Chart 3 below).

One of the most significant differences between the United States’s regime and those of other countries is the damage awards available to private litigants. “No other country has adopted the United States’s unique ‘bounty hunter’ approach” permitting recovery of treble damages.<sup>195</sup> Some countries allow plaintiffs to recover discretionary punitive damages.<sup>196</sup> However the

189. Canada Amicus Brief, *supra* note 21, at 13-14.

190. See, e.g., Germany Amicus Brief, *supra* note 21; United Kingdom Amicus Brief, *supra* note 21; Canada Amicus Brief, *supra* note 21; Japan Amicus Brief, *supra* note 21.

191. United Kingdom Amicus Brief, *supra* note 21, at 6.

192. See Evenett et al., *supra* note 10, at 18 (“The 1990s saw a sea change in official attitudes toward cartel enforcement. At the start of the decade, only one industrial nation—the United States—was taking aggressive action against international cartels, and these actions were criticized by other governments as an improper extraterritorial application of domestic antitrust laws. By decade’s end, several high profile enforcement actions have convinced policymakers in other industrial countries that stronger measures against international cartels ought to be taken.”).

193. RECOMMENDATION OF THE OECD COUNCIL, *supra* note 37, at 5.

194. Yet in a cross-country comparison of private compensatory damage regimes, the OECD concluded, “the laws of several OECD countries provide for the recovery of such damages, but the remedy is seldom invoked, save in the *United States*.” HARD CORE CARTELS, *supra* note 12, at 29. The OECD did note that several countries were strengthening these regimes, including Japan, New Zealand, and the United Kingdom. *Id.*

195. United Kingdom Amicus Brief, *supra* note 21, at 13.

196. For example, New Zealand conducted a review of private damage actions against cartels. The review noted that “[p]rivate enforcement . . . is a necessary corollary to public enforcement in achieving an optimal deterrence to would be offenders.” CARTELS: HARMS AND SANCTIONS, *supra* note 41, at 89 (quoting the New Zealand report, *Paper 3—Reforming Remedies*). “The report considered both treble damages and exemplary (punitive) damages as additional incentives, and settled on the latter, concluding that they are likely to provide more accurate signals and to offer greater fairness.” *Id.*

majority of developed countries award only single damages, preferring to deter through government prosecutions.<sup>197</sup>

To foreign governments, America's treble damages regime is particularly problematic when considered in the context of other aspects of the American judicial system that favor plaintiffs. These features include extensive discovery, class actions, asymmetrical rules on payments of attorneys' fees, and the presumption of private liability based on successful government actions.<sup>198</sup> In addition, unlike in the United States, in other nations judges or administrative tribunals adjudicate competition law claims. These bodies are less likely to be persuaded to provide large damage awards, as often occurs with American juries.<sup>199</sup>

Because they perceive that the U.S. system favors plaintiffs to such a greater extent, the foreign governments seem to fear that the United States would be the *de facto* forum of choice for plaintiffs everywhere.<sup>200</sup> Such forum shopping would undermine these governments' antitrust policies.<sup>201</sup> The extreme situation would arise when a citizen of one nation sued another citizen of the same nation for harms occurring in that nation, but in U.S. courts and applying U.S. law.<sup>202</sup> Such suits would render these governments' economic regulations and policy choices irrelevant.<sup>203</sup> Allowing private lawsuits in such matters would be particularly problematic because, unlike public enforcement actions by the U.S. government, private plaintiffs would show no sensitivity toward the concerns of foreign governments.<sup>204</sup>

The United States government expressed its own concerns regarding forum shopping. The United States feared that U.S. jurisdiction over *Empagran*-type cases "would be likely to burden the federal courts with a wave of antitrust cases raising potentially complex satellite disputes."<sup>205</sup> The

197. See Canada Amicus Brief, *supra* note 21, at 2 ("Further, in contrast to the United States, Canada has determined that punitive sanctions for illegal cartel behavior be imposed only through prosecutions initiated by the Government. Civil plaintiffs are limited to the recovery of their actual damages and associated costs. The structure of these antitrust remedies reflects Canada's sovereign choices regarding the appropriate measures to combat anticompetitive behavior within its territory.")

198. See Germany Amicus Brief, *supra* note 21, at 11.

199. United Kingdom Amicus Brief, *supra* note 21, at 14-15.

200. See *Smith Kline & French Labs. Ltd. v. Bloch*, 1 W.L.R. 730, 734 (C.A. 1982) (Eng.) ("As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.")

201. See Canada Amicus Brief, *supra* note 21, at 14 ("The contrary, and unique, policy of the United States permitting the recovery of treble damages in civil antitrust actions likely would prove powerfully attractive to most Canadian plaintiffs injured by anti-competitive behavior in Canada.")

202. See *id.* ("A sovereign's interests are most immediately involved in enforcing its own laws against its own nationals for actions within its own territory.")

203. See *id.* ("Accordingly, the attractiveness of the treble damages remedy would supercede the national policy decision by Canada that civil recovery by Canadian citizens for injuries resulting from anti-competitive behavior in Canada should be limited to actual damages.")

204. See Buxbaum, *supra* note 32, at 236-37 ("[G]uidelines issued by the Antitrust Division and the Federal Trade Commission set forth a list of factors not unlike those included in the Third Restatement to be considered before an enforcement action is pursued. Considerations of comity, in the sense of sensitivity to foreign interests, would therefore be taken into account by those responsible for initiating the action. . . . [A]ctions by a federal agency are subject to interest balancing while actions brought by private attorneys general—in service of the same public interests—are not.")

205. United States Amicus Brief, *supra* note 22, at 22. These fears were also expressed by the Fifth Circuit in *Den Norske*: "Any reading of the FTAIA authorizing jurisdiction over Statoil's claims would open United States courts to global claims on a scale never intended by Congress." *Den Norske Stat Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 431 (5th Cir. 2001).

U.S. government also feared the negative diplomatic repercussions of such suits, especially given the increased international cooperation that had developed with respect to international antitrust.<sup>206</sup> In 1999 and 2001, the OECD conducted two surveys of its member states on international cooperation in cartel investigations and cases.<sup>207</sup> In the 1999 survey, “[t]he responses disclosed that there had been relatively little co-operation among national competition agencies in cartel investigations and cases prior to 1999.”<sup>208</sup> The 2001 survey told a different tale. “There had been more international cooperation in the intervening period. . . . [T]he most active cooperative relationships in cartel investigations were between the *European Commission* and *EU Member states*, the *United States* and *Canada*, the *European Commission* and the *United States*, and *Australia* and *New Zealand*.”<sup>209</sup> The increase in cooperation is also demonstrated by the increase in bilateral agreements between the United States and other countries.<sup>210</sup> The United States feared that permitting U.S. courts to exercise jurisdiction in *Empagran*-type cases would threaten these cooperative relationships while burdening the U.S. courts.

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206. See generally United States Amicus Brief, *supra* note 22; Charles S. Stark, *International Cooperation in the Pursuit of Cartels*, 6 GEO. MASON L. REV. 533 (1998).

207. *HARD CORE CARTELS*, *supra* note 12, at 31.

208. *Id.*

209. *Id.*

210. See generally *id.* at 30-44; Stark, *supra* note 206.

CHART 3. ANTITRUST REGIMES IN VARIOUS DEVELOPED COUNTRIES

Nation	Law/Act	Basis of Jurisdiction	Cartels Per Se Violations?	Criminal Penalties?	Private Rights of Action?	Available Damages
European Union*	Article 81 and 83 of the European Community Treaty	Implementation test	Except when there are countervailing benefits to consumers	N/A	Yes, under procedures authorized by member states	N/A
Belgium	Act on the Protection of Economic Competition	N/A	Some beneficial conduct exempt	N/A	Yes, in civil courts (most suits through administrative and enforcement bodies)	N/A
United Kingdom	Competition Act of 1998	Implementation test	N/A	Subject to criminal sanction	Yes, before U.K. courts or simplified administrative procedures before the Competition Appeal Tribunal	Single damages; court costs can be awarded at the court's discretion
Ireland	Ireland Competition Act, 2002	Object or effect test	N/A	Yes, corporate fines of up to 4 million euros or 10% of annual turnover, maximum imprisonment of five years for individuals	Yes	Damages, including exemplary damages
Germany	Act Against Restraint of Competition	Effects test	Some beneficial conduct exempt	Yes, principal means for deterrence	Yes	Simple damages
Netherlands	Competition Act	Object/effects test	N/A	N/A	Yes, in civil court (accepts decisions of the National Competition Authority as legal proof of anticompetitive behavior)	Single damages; court costs can be awarded at the court's discretion; exemplary damages except Scotland
Japan	Antimonopoly Act of 1947	N/A	N/A	N/A	N/A	N/A
Canada	Competition Act	Economic effect (combination of market power and the likelihood of injury)	N/A	Maximum fines of Canadian \$10 million; maximum imprisonment of five years	Yes	No punitive damages

\* The European Union has developed a dual-territorially-based enforcement system in conjunction with member states' competition laws.

Sources: Germany Amicus Brief, *supra* note 21; United Kingdom Amicus Brief, *supra* note 21; Canada Amicus Brief, *supra* note 21; Japan Amicus Brief, *supra* note 21.

## V. PROPOSED SOLUTION

Even under the belief that U.S. antitrust policy should maximally deter cartels to protect American consumers, the best legal-policy response may not be to open U.S. courts to all *Empagran*-type suits. As the U.S. government and foreign governments asserted in their briefs in *Empagran*, such litigation could decrease deterrence if it undermined participation in government amnesty programs. In this Part, I look more closely at this concern, and I show that it is greatly overstated. To the degree that U.S. jurisdiction over *Empagran*-type suits will decrease participation in amnesty programs, such a result is mostly due to the structure of these programs—especially the lack of harmonization and reciprocity among the various governments' amnesty programs.

Yet even if amnesty programs were properly designed and harmonized to account for international cartels, exercising U.S. jurisdiction over *Empagran*-type claims could still reduce the deterrence of international cartels. Jurisdiction over such claims could undermine the effective antitrust policies of other countries and unnecessarily burden U.S. courts with litigation. At the same time, closing U.S. courts to all *Empagran*-type cases will almost certainly reduce deterrence. Many nations—particularly developing nations, but also some developed nations—do not effectively enforce their antitrust laws against international cartels,<sup>211</sup> or they provide protection to domestic export cartels.<sup>212</sup> Thus the United States requires a remedy that distinguishes between those situations in which litigation is more appropriately brought in another jurisdiction and those situations where no other jurisdiction will provide the plaintiffs with the possibility of adequate relief.

Fashioning such a remedy implicates two other foreign policy interests of the United States. First, America has an interest in seeing that its antitrust laws are applied consistently and predictably in order to reduce the uncertainty regarding the cost of trading in U.S. commerce. Potential defendants—whether domestic or foreign multinational corporations—cannot predict their potential liability.<sup>213</sup> Uncertainty also encourages foreign

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211. See also Wurmnest, *supra* note 117, at 205 (“Outside the United States, private antitrust enforcement is either virtually non-existent or still in the fledgling stages,” and “[i]n developing and transition countries, even law enforcement by public bodies is less than assured.”).

212. See Margaret C. Levenstein & Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 AM. U. INT’L L. REV. 785, 815 (2005) (noting that, of fifty-five countries surveyed, seventeen explicitly exempt domestic export cartels from domestic antitrust laws and another thirty-four “exempt such activity implicitly because their competition laws are silent on restrictive activities that affect foreign markets”). Levenstein and Suslow conclude that “the construction of domestic antitrust laws that only ban activity that harms domestic competition leaves a vacuum in which export cartels can continue to operate with no obvious or practical institution to provide oversight or prosecution of their activities.” *Id.*

213. See Thomas W. Dunfee & Aryeh S. Friedman, *The Extra-Territorial Application of United States Antitrust Law: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883, 890-91 (1984) (“The fear of extra-territorial application of conflicting national competition laws inevitably leads to inefficient business planning . . . . This problem is especially acute when the extra-territorial application of U.S. antitrust laws is anticipated. The substantive content of U.S. antitrust law is ambiguous and uncertain, and involves potential liability of gargantuan sums through trebled damages . . . . Business

plaintiffs to try to bring lawsuits in the U.S. courts instead of other venues because a successful suit in U.S. court can bring much greater damage awards.<sup>214</sup> Second, the United States has an interest in not becoming the world's antitrust court. Antitrust cases are large and require a significant amount of court resources. The United States has an interest in seeing that other countries take on the burden of antitrust enforcement, particularly if those countries do so in a manner that is harmonious with America's antitrust policies.

In this Part, I review various remedies that have been proposed to distinguish *Empagran*-type suits according to the effectiveness of the antitrust regimes of the other countries whose nationals are involved in these suits. I first argue that judicial responses—whether interest-balancing comity analysis or the doctrine of *forum non conveniens*—fail to provide predictable national rules for antitrust jurisdiction and to create an incentive for additional harmonization of antitrust policies. Second, I show that a federal policy of providing a rebuttable presumption of jurisdiction only provides weak national consistency and predictability to antitrust jurisdiction, and it too fails to encourage harmonization.

Instead, I propose that Congress enact legislation that empowers the DOJ annually to limit jurisdiction in *Empagran*-type suits according to the principles of *forum non conveniens*. That is, the U.S. courts would not have jurisdiction over *Empagran*-types suits if the DOJ has determined that the countries in which the plaintiff or defendant resides offer antitrust plaintiffs an effective forum for the recovery of at least compensatory damages in their international cartel case. Such a solution would create a consistent, predictable, national policy on international antitrust jurisdiction. It would also encourage harmonization as states could remove their nationals from U.S. antitrust liability by enacting and effectively implementing policies that are sufficiently similar to those of the United States. I conclude that this proposal is consistent with precedents regarding the separation of powers and that it advances the international system toward the eventual establishment of a global antitrust regime.

#### A. *Amnesty Policies—Domestic*

The U.S. government's argument regarding its amnesty policies was that allowing antitrust lawsuits by foreigners based on foreign transactions would have a chilling effect on its amnesty policies—because of the size and number of foreign claims that would result against the participating firm. This argument is confused. It implies that the relevant comparison is between the firm's cost of participating in the amnesty program and zero. The relevant

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planning is negatively affected by this threat because multinationals cannot accurately predict whether new methods of doing business will result in unanticipated legal problems. Risk-averse firms that respond to such an unstable environment by taking conservative, defensive postures are likely to hamper the efficiency of their operations. The continuing presence of these inefficiencies frustrates the goal of fostering a positive climate for international trade.”).

214. See generally Canada Amicus Brief, *supra* note 21.

decision calculus, however, compares the expected cost of participating in the amnesty program with the expected cost of continuing in the cartel.

In considering the U.S. government's claim, the relevant comparison is between the situation in which the cartel members do not face U.S. liability for *Empagran*-type suits and the situation in which they do face such liability. If there is no U.S. jurisdiction over *Empagran*-type suits, then a cartel member who receives amnesty first faces an expected cost of lost future domestic and foreign supra-competitive profits and compensatory damages equal to its past *domestic* supra-competitive profits. Permitting U.S. jurisdiction over *Empagran*-type suits increases the amnesty participant's costs by an amount equal to the compensatory damages of their past *foreign* supra-competitive profits. If the relevant comparison was to zero, such additional liability would unambiguously create a disincentive to participate in the amnesty program.

However, the relevant comparison is not to zero; instead, it is to the costs that the cartel members face if they continue in the cartel. If there is no U.S. jurisdiction over *Empagran*-type claims, a cartel member who continues in the cartel faces the following costs if the cartel is detected: lost foreign and domestic future profits, criminal sanctions, and civil damages equal to three times the member's past supra-competitive *domestic* profits. U.S. jurisdiction over *Empagran*-type suits increases the continuing members' costs by an amount equal to three times the member's past supra-competitive *foreign* profits. Thus, U.S. jurisdiction over *Empagran*-type suits causes the continuing members' liability to increase at three times the rate of the amnesty participant.

However, unlike the increased costs to the amnesty participant, which are certain, the increased costs to the continuing cartel members are uncertain. The continuing cartel members costs are discounted by the probability that the cartel will be detected—either through the amnesty program or some other means. If the probability of detection is high enough, allowing *Empagran*-type suits would widen the cost-differential between participating in the cartel and seeking amnesty. If these probabilities are high enough, permitting U.S. jurisdiction over *Empagran*-type suits would encourage *greater* use of the amnesty program.

As the *Empagran* opinion correctly noted, the effect that U.S. jurisdiction over *Empagran*-type suits will have on America's amnesty program is an empirical matter,<sup>215</sup> but it is one that is context-dependent. First, the probabilities in question are partially endogenously determined. For example, permitting foreign plaintiffs to bring *Empagran*-type suits will increase the possibility that private (foreign) plaintiffs will identify cartels that would otherwise go undetected. Second, this empiricism is highly dependent on the specific structure of the amnesty program. For example, the U.S. government's claims in its amicus brief were greatly weakened when Congress reduced the liability of all amnesty participants from treble to compensatory damages. Indeed, perhaps the best way to ensure that jurisdiction over *Empagran*-type claims strengthens America's amnesty programs is to exempt amnesty participants from all *Empagran*-type suits in

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215. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169, 174 (2004).

the United States—while still permitting compensatory damages claims from domestic plaintiffs. Such a change would eliminate the additional cost of *Empagran*-type suits to amnesty participants while still permitting such suits to greatly increase the costs of continuing in the cartel. Thus, the empirical result is easily manipulated by government policy. To categorically assert that U.S. jurisdiction over *Empagran*-type suits will undermine America's amnesty programs is simply untrue.<sup>216</sup>

### B. *Amnesty Programs—Foreign*

The foreign governments' concerns regarding their amnesty programs are somewhat different. For the most part, the foreign governments' briefs rely on the same faulty logic as the United States's—that a firm is concerned about the absolute costs of the amnesty program rather than the costs of participating in the amnesty program relative to the costs of remaining in the cartel. However, in two situations, foreign amnesty programs could be undermined by allowing *Empagran*-type suits in the United States: (1) if nationals of the country with an amnesty program could sue the participating firm in the U.S. courts for more than they could claim in their country,<sup>217</sup> or (2) if a firm's participation in a foreign amnesty program were to increase its exposure to lawsuits in the United States by plaintiffs from countries other than the one with the amnesty program.<sup>218</sup> The first matter can be addressed by limiting U.S. jurisdiction over *Empagran*-type suits to situations where the foreign plaintiff otherwise could not receive relief for at least single damages (a proposal I discuss in the second half of this Part). If this reform was implemented, foreign plaintiffs from countries with amnesty programs could not bring antitrust claims before U.S. courts for their foreign injuries if their governments provide adequate relief for their private claims.<sup>219</sup>

The second situation—of increased exposure to other foreign plaintiffs in the United States—is more complex. Barring U.S. jurisdiction over *Empagran*-type cases does not eliminate this problem because American plaintiffs could still sue the firm participating in the foreign amnesty program for treble damages.<sup>220</sup> Indeed there are only two ways a participant in a

216. See, e.g., Salil K. Mehra, *More Is Less: A Law-And-Economics Approach to the International Scope of Private Antitrust Enforcement*, 77 TEMP. L. REV. 47, 53 (2004) ("Allowing foreign-injured plaintiffs to sue in United States courts could lead to more violators seeking amnesty . . .").

217. Much of the foreign governments' concern focused on the treble damages regime. But the amount and form of damages would not affect a firm's decision to participate in foreign amnesty programs—except to the degree that, absent collective amnesty across countries, a firm would choose the United States's amnesty program over another country's because it would thereby avoid greater exposure to lawsuits.

218. This discussion is predicated on the view that, for the U.S. courts to have jurisdiction under the FTAIA, there must be domestic effects of the cartel activity and domestic plaintiffs or a DOJ criminal action preceding or concurrent with the foreign lawsuit.

219. The United States should also refuse jurisdiction to foreign plaintiffs if the foreign government's amnesty policy completely eliminates civil liability for participating firms. Such a policy reflects a different weighting of how an amnesty program can achieve deterrence, punishment, and compensation of victims.

220. However, access for foreign plaintiffs could create *more* of a disincentive in certain situations—namely when the size of claims by foreign plaintiffs is much greater than that of domestic plaintiffs.

foreign amnesty program can be exposed to *greater* liability in the United States. First, the foreign government could fail to maintain the confidentiality of the firm's identity and the information it provides. Second, the United States could fail to recognize the foreign government's grant of amnesty, or it could instead provide amnesty to a different cartel participant, if to any at all.<sup>221</sup>

The problem that *Empagran*-type suits present with respect to foreign amnesty programs is therefore one of program design. The best policy solution would be to harmonize amnesty programs so amnesty participants are guaranteed confidentiality around the world.<sup>222</sup> That policy change may require substantial legal reforms—implicating procedural law far removed from antitrust—and it would be difficult to achieve. A second-best approach would be for the various governments to standardize their amnesty programs' applications and processes so that the same participant could receive amnesty.<sup>223</sup> Such multinational amnesty would reduce the uncertainty—and therefore the cost—associated with participating in the programs. The more countries that grant amnesty to the same cartel member, the lower an amnesty recipient's penalty will be relative to the other cartel members. Thus, as in the domestic situation, proper design of amnesty programs will enable U.S. jurisdiction over *Empagran*-type suits to *strengthen* the incentive for firms to participate in amnesty programs.

## B. *Forum Shopping*

Even if the United States and other governments harmonize and reform their amnesty programs to better account for international cartels, U.S. jurisdiction over *Empagran*-type lawsuits could still undermine the deterrence of international cartels if it results in widespread forum shopping. The United States must therefore distinguish between the situations in which U.S. jurisdiction increases deterrence—by providing a forum to litigate against international cartel members when no other forum exists—and the situations in which U.S. jurisdiction will decrease deterrence—by undermining the effective antitrust regimes of other countries and needlessly expending the scarce resources of America's judiciary. Three mechanisms have been proposed to distinguish between these two situations.

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221. In this case, the amnesty participant presumably would weigh the costs and benefits of the various amnesty programs and levels of exposure to civil suits and pick the jurisdiction that would provide maximum protection.

222. Such a reform requires substantial legal changes as well as trust between the governing authorities that information shared will not be used for trade competition purposes. Neither condition exists at the present time. See Evenett et al., *supra* note 10, at 20.

223. See Evenett et al., *supra* note 10, at 23 (“[A] provision should be introduced so that firms can simultaneously apply for leniency in multiple jurisdictions and have those applications evaluated on the totality of the evidence of cartelisation presented.”); see also Medinger, *supra* note 140, at 1480 (“Despite the initial success of leniency policies, their continued effectiveness is threatened by the rise of numerous competing policies with differing requirements that do not give recognition to other nations’ grants of immunity. . . . Only by harmonizing national policies and granting reciprocal effect in one jurisdiction for the grant of immunity in another will the costs of applying for leniency and the concomitant uncertainty in making leniency applications in multiple jurisdictions be decreased to the point at which the payoff for defection from a cartel will again outweigh the payoff for continuing to collude.”).

### 1. *Interest-Balancing Comity Analysis*

Many commentators have suggested that the U.S. courts should employ a case-by-case interest-balancing comity analysis to address the challenge presented by *Empagran*-type cases.<sup>224</sup> Comity refers to “the rules of politeness, convenience, and goodwill observed by states in their mutual intercourse without being legally bound by them.”<sup>225</sup> Principles of comity suggest that “at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.”<sup>226</sup> Courts have invoked comity in two types of analyses.

Prescriptive comity analysis looks at whether the legislature can appropriately prescribe law against extraterritorial conduct of a certain type. As the *Restatement (Third) of Foreign Relations Law of the United States* explains, “a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”<sup>227</sup> Comity analysis attempts to determine the point at which the extraterritorial application of U.S. law is unreasonable. The analysis recognizes that “factors other than simply the effect on the United States [should be] weighed.”<sup>228</sup> The Restatement lists a number of factors to consider:

(a) the link of the activity to the territory of the regulating state . . . ;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between the state and those whom the regulation is design to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

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224. See, e.g., Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. CHI. L. REV. 265, 267 (2005) (“I suggest that . . . courts should reintroduce an expanded analysis that incorporates comity considerations as a second filter supplementing the effects test.”); Susan E. Burnett, Comment, *U.S. Judicial Imperialism Post Empagran v. F. Hoffman-LaRoche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 EMORY INT’L L. REV. 555, 626 (2004) (The interest-balancing approach is the proper “vehicle to defer cases to foreign agencies [to] aid global deterrence.”); Karen O’Brien, Notes & Comments, *Giving Rise to a Claim: Is FTALA’s Section 6A(2) an Antitrust Plaintiff’s Key to the Courthouse Door?*, 9 SW. J.L. & TRADE AM. 421, 456 (2003) (“It is in the best interests of the U.S. federal courts to apply a comity analysis when determining whether U.S. antitrust laws apply extraterritorially.”).

225. PARRY & GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW (John P. Grant & J. Craig Barker eds., 2d ed. 2004).

226. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 609 (9th Cir. 1984).

227. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S.: LIMITATIONS ON JURISDICTION TO PRESCRIBE § 403(1) (1987).

228. *Timberlane Lumber Co.*, 549 F.2d at 611.

- (f) the extent to which the regulation is consistent with the tradition of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.<sup>229</sup>

Many commentators have suggested that the *Empagran* opinion itself exemplifies prescriptive comity analysis.<sup>230</sup> The Court considered a certain type of conduct—foreign antitrust harms that are independent of domestic antitrust harms—and it determined that the United States was unreasonable in prescribing a law to affect such conduct. Prescriptive comity analysis is thus useful in determining whether a legislature can prescribe legislation reaching a type of international conduct, but it is not useful in distinguishing when U.S. jurisdiction is inappropriate with respect to certain foreign jurisdictions but not others.

To address the inappropriate application of U.S. law in specific cases, some courts have applied a second type of comity analysis: interest-balancing comity analysis. Whereas prescriptive comity analysis asks whether U.S. jurisdiction *can* be reasonably asserted for a certain type of cases, interest-balancing comity analysis asks whether U.S. jurisdiction *should* be exercised in a specific case. Proponents of interest-balancing comity analysis argue that this approach “allow[s] federal courts to define with precision the jurisdictional inquiry and weigh significant and multiple interests vested in the outcome of the controversy” so they can “determine ‘whether proceeding is prudent under the circumstances.’”<sup>231</sup> Applying interest-balancing comity analysis, courts can explicitly recognize that “[a]n effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness.”<sup>232</sup> Some U.S. courts have balanced at least some combination of the comity interests identified by the Restatement in a case-by-case review.<sup>233</sup>

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229. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S.: LIMITATIONS ON JURISDICTION TO PRESCRIBE § 403(2) (1987).

230. See Buxbaum, *supra* note 117, at 1102 (“[B]y referring to ‘prescriptive comity,’ [the Court] signal[ed] acceptance of the notion that comity operates actually to limit the reach of U.S. law to foreign conduct, and not merely as a doctrine of judicial abstention.”); see also Wurmnest, *supra* note 117, at 220 (The *Empagran* decision “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.”); Marissa Fitzpatrick, Recent Development, *Hoffman-La Roche Ltd. v. Empagran, S.A.: The Supreme Court Trusts That Foreign Nations Can Preserve Competition Without American Interference*, 13 TUL. J. INT’L & COMP. L. 357 (2005); Kenneth S. Reinker, Recent Development, Case Comment, *Roche v. Empagran*, 28 HARV. J.L. & PUB. POL’Y 297 (2004).

231. O’Brien, *supra* note 224, at 455 (citation omitted); see also Steven A. Kadish, *Comity and the International Application of the Sherman Act: Encouraging the Courts To Enter the Political Arena*, 4 NW. J. INT’L L. & BUS. 130 (1982).

232. *Timberlane Lumber Co.*, 549 F.2d at 613.

233. See *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378 (9th Cir. 1984); *Mannington Mills, Inc. v. Congoleum Corp.*, 610 F.2d 1059 (3d Cir. 1979); see also Dunfee & Friedman, *supra* note 213, at 905-06 (“The overlapping but not identical formulations of the relevant criteria proposed by the circuit courts in *Timberlane* and *Mannington Mills* are extremely general and abstract. Moreover, no guidance is provided on the relevant weight to be given the various factors.”).

After the Supreme Court's decision in *Hartford Fire Insurance Co. v. California*,<sup>234</sup> interest-balancing comity analysis may no longer be good law for resolving international antitrust cases. *Hartford Fire* involved American insurance and British reinsurance companies that were accused of conspiring to restrict trade in the American insurance market. The British reinsurers "apparently concede[d]" jurisdiction.<sup>235</sup> They instead argued that the United States should decline to exercise jurisdiction due to comity. The defendants argued that Britain had "established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy."<sup>236</sup> The appellate court agreed that exercising jurisdiction "would lead to significant conflict with English law and policy."<sup>237</sup> The Supreme Court rejected that argument, writing, "[t]he only substantial question . . . is whether 'there is in fact a true conflict between domestic and foreign law.'"<sup>238</sup> The Court held, "[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."<sup>239</sup> If the Supreme Court found that interest-balancing comity analysis was not required in a case involving a British regulatory scheme that permitted conduct that the United States outlawed, it is difficult to see how it would permit interest-balancing comity analysis in *Empagran*-type suits in which nearly every nation has some sort of policy banning most forms of cartel activity. Indeed, the Court rejected interest-balancing comity analysis in its *Empagran* opinion.<sup>240</sup>

Where there is true conflict between the antitrust laws of two countries with respect to cartels, it is difficult to see what guidance comity offers. For the most part, such conflict exists when foreign nations explicitly protect their domestic export cartels, and foreign plaintiffs sue the cartel members in U.S. courts. Assuming that the cartel also harmed U.S. consumers and that the foreign plaintiffs meet whatever standard is set to establish jurisdiction, such as a prior DOJ prosecution against the foreign defendants, should the U.S. courts decline jurisdiction out of deference to the protectionist policies of another country? The D.C. Circuit confronted a similar situation in *Laker Airways Ltd. v. Sabena* and concluded:

[Comity analysis] is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law. Interest balancing in this context is hobbled by two primary problems: (1) there are substantial limitations on the court's ability to conduct a neutral balancing of the competing interests, and (2) the adoption of interest balancing is unlikely to achieve its goal of promoting international comity.<sup>241</sup>

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234. 509 U.S. 764 (1993).

235. *Id.* at 795.

236. *Id.* at 798-99.

237. *Id.* at 797.

238. *Id.* at 799 (citations omitted).

239. *Id.* at 799 (citations omitted).

240. See *infra* notes 245-246.

241. 731 F.2d 909, 948 (D.C. Cir. 1984) (footnotes omitted).

Interest balancing is problematic even when there is no conflict in laws because most of the factors of analysis cut two ways. In the context of an *Empagran*-type case, whose “justified expectations” should a court consider in evaluating whether those expectation are “protected or hurt by the regulation,”<sup>242</sup>—the foreign purchaser who was harmed, the foreign cartel member, the domestic purchaser who was also harmed, or all three? How does a court determine whether the U.S. antitrust laws are “consistent with the tradition of the international system,”<sup>243</sup> especially when the United States has been the leader on antitrust matters? Twenty years ago, the United States stood alone with respect to the extraterritorial application of its laws through the effects test. That is no longer true after the European Community recognized jurisdiction on a basis very similar to America’s effects test.<sup>244</sup> Similar questions can be asked of nearly every factor listed in the Restatement. Even if courts knew which way these factors cut, they would need to engage in extensive fact-finding to analyze the various factors, something which the *Empagran* opinion described as “too complex to prove workable,”<sup>245</sup> and likely to 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.”<sup>246</sup> Thus, interest-balancing comity analysis provides courts with almost no guidance in resolving *Empagran*’s jurisdictional question.<sup>247</sup>

## 2. *Forum non conveniens*

Forum non conveniens<sup>248</sup> is a second doctrine by which courts may be able to determine when they should decline jurisdiction in *Empagran*-type suits. Forum non conveniens is a common-law doctrine under which “a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute” in favor of another, more convenient forum.<sup>249</sup> The first American case to apply this doctrine was *Gulf Oil Corp. v. Gilbert*.<sup>250</sup> A Virginia resident sued, in New York state court, a company that had operations in New York and Virginia for a tort that

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242. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S.: LIMITATIONS ON JURISDICTION TO PRESCRIBE § 403(2)(d) (1987).

243. *Id.* § 403(2)(f).

244. See generally James J. Friedburg, *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 (1991).

245. *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004).

246. *Id.* at 168-69.

247. See Dunfee & Friedman, *supra* note 213, at 913 (quoting *Laker Airways*, 731 F.2d at 948-49) (“Pursuing these inquiries only leads to the obvious conclusion that jurisdiction could be exercised or that there is a conflict, but does not suggest the best avenue of conflict resolution.”).

248. See generally John Byron Sandage, Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1693-94 (1985) (finding the “present interest-based revisionist approach to extraterritorial jurisdiction of antitrust law . . . incapable of effectively resolving the tensions produced by expansive application of United States competition laws to international transactions”).

249. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

250. *Id. Gilbert*’s companion case, *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947), applied the doctrine of forum non conveniens to a plaintiff’s derivative suit.

occurred in Virginia. The New York state court had jurisdiction over the matter, and the question was whether that court could decline to exercise it.

The Supreme Court held that courts could decline jurisdiction after weighing a number of private and public factors. The private factors included (1) the relative ease of access to evidence; (2) the possibility of compelling unwilling witnesses to appear; (3) the cost of having willing witnesses appear; (4) other practical problems "that make trial of a case easy, expeditious and inexpensive;"<sup>251</sup> and (5) the ability to enforce the judgment. The public factors included (1) administrative difficulties due to congestion in the court docket; (2) the burden on a jury "which has no relation to the litigation,"<sup>252</sup> and (3) "a local interest in having localized controversies decided at home."<sup>253</sup> In weighing these factors, the Court concluded, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."<sup>254</sup>

The first case to apply the *Gilbert* analysis to a matter involving foreign litigants was *Piper Aircraft Co. v. Reyno*.<sup>255</sup> *Piper* involved the crash of a Pennsylvania-made plane in Scotland that killed six Scottish nationals and residents, whose heirs and next of kin were also Scottish. A tort suit was filed in California "because its laws regarding liability, capacity to sue, and damages are more favorable . . ." <sup>256</sup> The Supreme Court considered whether courts could apply the doctrine of forum non conveniens when "the law of the alternate forum is less favorable to recovery than that which would be applied by the district court."<sup>257</sup>

The Court held that courts could apply forum non conveniens in these circumstances. The *Piper* court added a preliminary test to the *Gilbert* analysis:

At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus . . . dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.<sup>258</sup>

Regarding the deference afforded the plaintiff's choice of forum, the Court added, "[w]hen the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."<sup>259</sup>

Although *Piper* involved a tort action, the principles of forum non conveniens it articulates should be adopted by the United States in antitrust

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251. *Gilbert*, 330 U.S. at 508.

252. *Id.* at 508-09.

253. *Id.* at 509.

254. *Id.* at 508.

255. 454 U.S. 235 (1981).

256. *Id.* at 240.

257. *Id.* at 246 n.12.

258. *Id.* at 254-55 n.22 (internal citation omitted).

259. *Id.* at 256.

cases brought by foreign plaintiffs for foreign injuries.<sup>260</sup> Specifically, forum non conveniens should be invoked when foreign plaintiffs can bring their antitrust action and recover damages in an alternate forum that is more convenient to them or the defendant. *Piper* demonstrates that the alternative forum could not be declared “clearly unsatisfactory” due to the lack of treble damages, the lack of a jury trial to settle the claim, or the lack of other procedural factors benefiting the plaintiff. All of these factors were present in *Piper*, and the Court explicitly held that use of forum non conveniens was acceptable.

In most cases, the *Gilbert* balancing test would support invoking forum non conveniens where the foreign plaintiff has an alternative forum to hear its claim based on a foreign transaction.<sup>261</sup> The private factors—regarding evidence, witnesses, the ease of trial, and the ability to enforce judgments<sup>262</sup>—all would support invoking the doctrine and declining jurisdiction, especially since the foreign plaintiff’s choice of forum is deserving of “less deference.”<sup>263</sup> The public factors weigh more ambiguously. The deterrence goals of the antitrust acts would likely favor exercising jurisdiction in U.S. courts. The public factors of judicial economy and court congestion would favor invoking forum non conveniens. Thus, unless a court viewed the deterrence factor as paramount, it would likely refuse to exercise jurisdiction because of forum non conveniens in cases where the foreign plaintiff had an alternative forum to hear its claim based on a foreign transaction. In comparison to interest-balancing comity analysis, forum non conveniens provides greater guidance to courts regarding the evaluation of the various public and private interests involved in *Empagran*-type cases.

It is not clear whether courts can invoke the doctrine of forum non conveniens in an international antitrust action due to the Clayton Act’s section 12 venue provision. In *United States v. National City Lines, Inc.*,<sup>264</sup> the Supreme Court held that courts could invoke forum non conveniens in *domestic* antitrust suits. That decision rested on the general transfer provision<sup>265</sup> of the Rules of Federal Procedure, which “enables district courts to transfer cases to each other for convenience and justice.”<sup>266</sup> The *National City Lines* Court held that the general transfer provision trumped the Clayton Act’s venue provision. The problem is that the general transfer provision refers only to transfers between United States domestic courts, and “[c]ourts disagree on what lessons to draw from this holding for international antitrust cases.”<sup>267</sup> In *Industrial Investment Development Corp. v. Mitsui & Co.*,<sup>268</sup> the Fifth Circuit held that “the common law doctrine of forum non conveniens is

260. Indeed, antitrust originated out of common law doctrines.

261. In my description of the *Gilbert* case, if “antitrust suit” replaced “tort action” and “a foreign country” replaced “Virginia” and “United States” replaced “New York,” the situations would be identical.

262. The difficulty in enforcing antitrust judgments abroad supports invoking the doctrine because of the blocking and clawback statutes that foreign jurisdictions have passed.

263. 454 U.S. 235, 256 (1981).

264. 337 U.S. 78 (1949).

265. 28 U.S.C. § 1404(a) (2000).

266. Bates, *supra* note 31, at 282-83.

267. *Id.* at 290.

268. 671 F.2d 876 (5th Cir. 1982), *rev’d on other grounds*, 460 U.S. 1007 (1983).

inapplicable to [international] suits brought under the United States antitrust laws." In contrast, the Second Circuit, in *Capital Currency Exchange NV v. National Westminster Bank PLC*,<sup>269</sup> affirmed the use of forum non conveniens in an international antitrust suit. This split in the circuits needs to be resolved in favor of permitting courts to invoke forum non conveniens in international antitrust suits.

### 3. *Problems with a Judicial Response*

Still, forum non conveniens is not a panacea for *Empagran*-type cases for reasons that are true of any judicial response, including interest-balancing comity analysis. These court-made doctrines require detailed, fact-specific, case-by-case analyses by individual judges who may weigh similar facts differently. Before a court can consider invoking forum non conveniens, it must first determine what laws, rights, remedies, and procedures would apply if the case were tried in the alternate forum. This inquiry requires a court to determine whether the antitrust laws and procedures of foreign jurisdictions are "clearly unsatisfactory," something many courts may feel ill-equipped to judge. Precedent will often be an ineffectual guide in these factual inquiries, given the frequent changes in the antitrust policies of foreign nations.<sup>270</sup>

The resultant inconsistency and unpredictability across the district courts could frustrate one of the reasons for using the doctrine—to provide a clear standard for exercising jurisdiction based on the availability of adequate relief in other countries implicated in the litigation. With so many fact-specific factors in play in a court's decision, neither plaintiffs nor defendants could accurately assess how a judge will rule on jurisdiction. This uncertainty encourages foreign plaintiffs to file antitrust suits in the United States, and it raises the costs to defendants of doing business in the United States. A case-by-case approach to resolving jurisdiction over *Empagran*-type suits will likely lead not only to forum shopping internationally, but also venue-shopping domestically. Because public factors are assessed and weighed in the analysis, foreign nations will also operate in an uncertain environment. They therefore have no reason to enact laws and policies in harmony with those of the United States; one district court could still choose to exercise jurisdiction over that countries' nationals. *Piper's* forum non conveniens analysis articulates the principles to apply in *Empagran*-type suits, but its case-by-case application fails to provide an effective, national solution to resolve jurisdiction in *Empagran*-type suits.

### 4. *The Rebuttable Presumption—and its Inadequacy*

In 1984, Thomas W. Dunfee and Aryeh S. Friedman offered their own "interim solution" to the general problem of extraterritorial application of U.S.

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269. 155 F.3d 603 (2d Cir. 1998).

270. Writing of interest-balancing comity analysis, Dunfee and Friedman note, "[p]recedent is of little value because foreign relations and policies constantly shift and change." Dunfee & Friedman, *supra* note 213, at 906.

antitrust laws in private litigation.<sup>271</sup> They proposed Congressional legislation amending section 4 of the Clayton Act as follows:

No United States federal court shall decline on grounds of comity, or a jurisdictional rule of reason, to make a determination on the merits of a private treble damages suit unless the President, in a suit against a foreign defendant and involving a foreign transaction wherein prescriptive jurisdiction has been challenged by such a defendant, determines the jurisdiction against the defendant(s) ought not be asserted because of the foreign policy interests of the United States.<sup>272</sup>

Dunfee and Friedman's proposal was modeled after the Hickenlooper Amendment, which "barred the U.S. courts from applying the act of state defense in certain foreign expropriation cases unless . . . the President informed the court that consideration of the defense was essential for foreign policy reasons."<sup>273</sup> Dunfee and Friedman recognized that the judiciary was institutionally incapable of resolving the jurisdictional question raised by the extraterritorial application of antitrust law. They created their proposal as a mechanism by which the executive branch could provide consistent national guidance to the courts as to when jurisdiction *should not* be exercised. Dunfee and Friedman's proposal was made in a different era of international antitrust, when tension between America and its trading partners was greater, antitrust policies were much more divergent, and the extraterritorial application of America's antitrust laws was particularly problematic with respect to specific corporations or industries. Therefore, Dunfee and Friedman structured their proposal to focus on individual cases before the U.S. courts, and they assumed U.S. jurisdiction would be appropriate except in those "relatively rare" instances when the executive deemed it inappropriate.<sup>274</sup>

There are two interrelated problems with Dunfee and Friedman's approach with respect to *Empagran*-type suits. First, it provides no guidance as to when the executive should ask the courts to defer jurisdiction except because of "foreign policy interests."<sup>275</sup> Such a broad mandate invites political decision-making in an area that should be guided by whether U.S. jurisdiction would be appropriate to achieve the goals of maximal deterrence, consistent and predictable trade policies, and international harmonization of antitrust regimes. The potential for political interference is enhanced by Dunfee and Friedman's reliance on an analysis based on the specific facts of a case. One can easily imagine the subtle and not-so-subtle pressures that multinational corporations would apply to affect the executive's decision on whether to ask the courts to waive jurisdiction. Dunfee and Friedman take this approach because—reflecting the lack of antitrust harmonization at the time—they assume U.S. jurisdiction is always appropriate except in relatively rare circumstances. To correct these problems, I suggest modifying Dunfee and Friedman's proposal so that U.S. courts would exercise jurisdiction except when the executive asked a court to decline jurisdiction based on the principles of *forum non conveniens* articulated in *Piper*—a determination that

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271. *Id.*

272. *Id.* at 924.

273. *Id.*

274. *Id.* at 923.

275. *Id.* at 924.

the home countries of the plaintiffs or defendants provide an effective forum for the recovery of at least compensatory damages.

Even this modified proposal is problematic. First, although the analysis would now be applied country-by-country, the DOJ would still issue its guidance on a case-by-case basis. Such an approach would be labor-intensive for the DOJ, which would need to monitor all *Empagran*-type suits before the courts and file briefs with each individual court. Foreign plaintiffs and defendants from the same countries may be treated differently either because of a DOJ decision *not* to issue a letter in a specific instance or because the DOJ simply failed to issue a letter for other reasons. Second, there is no guarantee the courts would follow the DOJ's recommendation in an individual case. Thus, the uncertainty regarding U.S. jurisdiction in *Empagran*-type suits might be reduced, but it would not be eliminated. Plaintiffs would still have hope that their case would not receive a Dunfee and Friedman letter or that they could craft a brief that would convince a court to exercise jurisdiction despite the executive's recommendation. Finally, other countries would not know what they needed to do to prevent their nationals from being hauled before the U.S. courts. Countries that work to harmonize their antitrust policies with those of the United States may be frustrated by a determination by a district court that they have not gone far enough. Although DOJ guidance to the courts, based on the principles of *forum non conveniens*, would improve how the United States addresses jurisdiction in *Empagran*-type suits, it is still not an optimal national solution.

5. *A New Approach to the Empagran Problem: Legislative Authorization to the Executive Branch To Limit Jurisdiction Based on the Principles of Foreign Non Conveniens*

A better approach would systematize the executive branch's review of other countries' antitrust regimes, apply that executive determination categorically over a class of cases, and remove judicial discretion with respect to complying with that executive determination. Accordingly, I recommend that the DOJ<sup>276</sup> should annually review other countries' antitrust regimes to determine whether they provide private parties an adequate forum to recover damages from cartel activities. Congress should amend<sup>277</sup> section 12 of the Clayton Act to bar jurisdiction in cases involving international cartels in which (1) neither the plaintiff nor the defendant is a national of the United States, and (2) the plaintiff or defendant is a national of a country that the DOJ currently lists as one that provides plaintiffs with an adequate<sup>278</sup> private remedy in the antitrust claim, except (3) when that country permits United States jurisdiction for reasons of judicial economy. Such a law would promote international judicial economy in a transparent and predictable manner that

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276. To minimize political influence over these determinations, Congress could instead provide the Federal Trade Commission with this authority.

277. Rather than pass a unilateral act of Congress, the United States could negotiate a bilateral or multilateral agreement.

278. Such an amendment could also provide guidance on what private remedies are adequate, such as the verified, actual ability to recover at least single damages for antitrust harms through a judicial or administrative process.

prevents forum shopping without greatly reducing the deterrent effect of United States law.

The principles underlying this proposed law are those of the doctrine of forum non conveniens as articulated in *Piper*. Thus, if plaintiffs can secure relief in their domestic courts for antitrust violations that involve foreign harms, they should not be able to sue a foreign defendant in U.S. courts simply because the damages available there may be more favorable. However, when a foreign plaintiff cannot secure relief in her domestic courts—either because the courts do not permit jurisdiction over the claims or because the statutory relief is not actually available—she should first turn to the court system in which the foreign defendant is located. Again, this result would accord with a concern for convenience and judicial economy. Only if the plaintiff cannot receive adequate relief in her home forum or the defendant’s home forum should U.S. courts exercise jurisdiction, assuming the requisite showing of a link to domestic effect is made. Such an exercise of jurisdiction would not be an act of charity toward the plaintiff; it would recognize that affording such plaintiffs an opportunity for relief somewhere is necessary to deter the international cartels that harm American consumers and businesses.

Such a restriction of jurisdiction would not affect the ability of American plaintiffs to bring antitrust claims against anyone in the world, nor would it prevent U.S. courts from exercising jurisdiction over cases involving American defendants. Instead, this restriction on jurisdiction would apply only when neither the plaintiff nor the defendant was an American. In such situations, the United States retains an interest in ensuring that plaintiffs can receive adequate compensation because of its deterrent effect on international cartels that affect the United States. However, if such claims could be better heard before a foreign court, the United States should decline jurisdiction because of convenience and judicial economy.<sup>279</sup>

The DOJ’s annual review of other countries’ private antitrust remedies should be more than a broad “thumbs-up, thumbs-down” review; it should distinguish the types of claims for which a country’s relief is adequate from those for which it is inadequate. For example, although Canada has a strong anti-cartel regime, it also protects its domestic export cartels.<sup>280</sup> Such protectionist policies—of which the FTAIA is one—do not enhance worldwide deterrence,<sup>281</sup> and when implemented by foreign governments, they specifically do not deter conduct harming American consumers. Therefore, the DOJ would list Canada as a country that provides an adequate forum except in cases involving Canadian export cartels. Similarly, other countries may not permit foreign plaintiffs to sue their domestic firms for participating in an international cartel, though domestic plaintiffs can bring such actions. In these situations, the DOJ would list those countries as providing an adequate forum for domestic plaintiffs, but U.S. jurisdiction

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279. Such a policy could also advance the United States’s foreign policy interests by avoiding conflict with other developed countries with which it collaborates in antitrust enforcement.

280. Canada Amicus Brief, *supra* note 21, at 15 (“[A]greements entered into by competitors who collectively lack market power in Canada are legal because the requisite ‘undue’ economic effect is not present.”).

281. See *supra* note 212.

would be permitted if the plaintiffs were foreigners who also lacked an adequate forum in their home country.

The definition of “adequate” relief is an important component of this proposal. Consistent with the principles of *forum non conveniens* articulated in *Piper*, the United States should not require that countries provide treble damages. The United States should decline jurisdiction in anti-cartel actions so long as plaintiffs can recover at least compensatory damages. America’s mandatory treble damages regime is based on a policy choice in the United States regarding the proper mix of public and private enforcement. The fact that other governments do not provide treble damages may reflect other aspects of their systems, such as greater public fines, the availability of punitive damages, or the cost to plaintiffs of bringing actions for damages. The United States should not require treble damages as the sole mechanism of deterrence.

Refusing jurisdiction in international antitrust suits may sacrifice some global judicial economy. The nature of international cartel activities increases the possibility that the same defendants will simultaneously face multiple lawsuits in many countries. By splitting the plaintiffs’ actions, these multiple lawsuits could complicate the suits, delay them, and make them more expensive.<sup>282</sup> For this reason, the U.S. courts could exercise jurisdiction if the nations implicated in the case ask it to do so. Admittedly, this is only a partial solution to the issue of global judicial economy. A more comprehensive solution will require additional political solutions, such as an international agreement permitting some form of transnational transfer or consolidation of cases. Such agreement is foreseeable, as informal collaboration already occurs with respect to public lawsuits against international cartel members.

This proposal would help achieve America’s three goals with respect to international antitrust. First, the U.S. government would have a national policy with respect to jurisdiction in international cartel cases that distinguishes between those foreign antitrust regimes that are effective and those that are not. Second, such a policy would be consistent and predictable, facilitating international trade. Plaintiffs and defendants would know whether jurisdiction could be exercised before bringing a case. Plaintiffs from countries that the United States deems to have an effective antitrust regime would have no reason to bring a case in U.S. courts, and they would therefore need to turn to their home jurisdiction. In this manner, the policy would encourage other jurisdictions to enact policies that would be in harmony with those of the United States. For example, with respect to Canada, the exercise of U.S. jurisdiction with respect to a Canadian export cartel may cause Canadian lawmakers to tear down their measures protecting such cartels, especially if they wish to protect Canadian defendants from America’s treble damages

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282. An example in intellectual property is *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 491-92 (2d Cir. 1998) (vacating a *forum non conveniens* dismissal of foreign copyright infringement claim because private interests of plaintiffs in not having claims split among multiple jurisdictions outweighed other *Gilbert* factors).

regime.<sup>283</sup> Upon such action, the DOJ would determine that U.S. jurisdiction should no longer be granted in such cases. Thus, this proposal, like my suggested reforms of national amnesty programs, seeks to harmonize international antitrust policies and to do so in a manner that most effectively deters international cartels.

#### 6. *Response to Possible Objections to this Proposal*

My proposal is consistent with precedents regarding the ability of the executive to limit the jurisdiction of federal courts in favor of alternative international fora. For example, in 1981, the United States negotiated the release of the American hostages from Iran. As part of that agreement, the President issued an Executive Order that suspended all private claims against Iran pending before the U.S. courts in favor of international arbitration before the United States-Iran International Claims Tribunal. If the Tribunal determined that it had jurisdiction over the American plaintiff's claims, the U.S. courts could no longer hear their claims. In *Dames & Moore v. Regan*,<sup>284</sup> the Supreme Court allowed the President to limit the courts' jurisdiction in this manner without specific congressional authorization.<sup>285</sup> "Crucial" to the Court's decision was "the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."<sup>286</sup> Responding to the plaintiff's claims that the President was divesting the federal courts of jurisdiction, the Court noted that claims were only suspended to the degree the International Claims Tribunal had jurisdiction over the matter, and that, if the tribunal lacked jurisdiction, the plaintiffs were free to return to U.S. courts. Therefore, the Court viewed the President's settlement power as simply "effect[ing] a change in the substantive law governing the lawsuit."<sup>287</sup> "This case, in short, illustrates the difference between modifying federal-court jurisdiction and directing the courts to apply a different rule of law."<sup>288</sup>

Although *Dames & Moore* could be read to only apply to the specific instance of resolving private claims against other nations, the President has exercised his foreign affairs powers to negotiate trade agreements that similarly limit the jurisdiction of Article III courts over other private disputes. For example, both the Canada-United States Free Trade Agreement (FTA) and the North American Free Trade Agreement contain provisions that "replace[] Article III judicial review of administrative antidumping and countervailing duty . . . decisions with review by a binational arbitral

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283. Indeed, America's treble damages regime would provide an incentive for foreign companies to lobby their countries to enact antitrust policies sufficiently strong to remove them from U.S. jurisdiction in *Empagran*-type suits.

284. 453 U.S. 654 (1981).

285. See *Dames & Moore*, 453 U.S. at 676 ("We are reluctant to conclude that this provision constitutes specific authorization to the President to suspend claims in American courts."); see also Evan Todd Bloom, Note, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 COLUM. L. REV. 155 (1985).

286. *Dames & Moore*, 453 U.S. at 680.

287. *Id.* at 685.

288. *Id.*

panel.”<sup>289</sup> Despite numerous court challenges in the seventeen years since the Canada-U.S. FTA was enacted, these provisions still remain in effect.

Congress has also enacted legislation that grants the President the authority to determine the subject matter jurisdictional limits of the federal courts with respect to international topics. For example, Congress has carved out exceptions to the general foreign sovereign immunity that states enjoy from U.S. lawsuits. One exception is for terrorism. U.S. courts have jurisdiction over a foreign state for a claim arising out of an act of terrorism if “the foreign state was . . . designated as a state sponsor of terrorism . . . at the time the act occurred, unless later so designated as a result of such act . . . .”<sup>290</sup> Molora Vadnais notes that, “the terrorism exception applies only to states that are designated by the State Department as state sponsors of terrorism.”<sup>291</sup>

My proposal accords with these judicial and legislative precedents. My proposal represents explicit congressional authorization for the President to determine the scope of international antitrust jurisdiction with respect to more convenient, alternative fora. As in *Dames & Moore*, if such fora do not exist, the U.S. courts retain jurisdiction over the claims. Thus, my proposal only limits the subject matter jurisdiction of the courts as an explicit grant of authority from Congress to the President so the President can best further America’s economic and trade interests.

My proposal is also consistent with the desire by many economists and legal scholars to see some form of global antitrust authority established. Eleanor Fox notes, “international antitrust has been a gleam in the eye of the world at least since the proposal of the Havana Charter in the 1940s.”<sup>292</sup> Yet while there are “seeds”<sup>293</sup> for some sort of international antitrust charter, there is disagreement as to whether the international community should adopt a common international antitrust code,<sup>294</sup> establish an oversight body along the lines of the World Trade Organization to ensure compliance with such a code, or create a world antitrust court to adjudicate important private international disputes.<sup>295</sup> Indeed, the United States and the European Union—arguably the two jurisdictions that present the most agreement on the substantive aspects of international antitrust—occupy diametrically opposed positions with respect to the form international antitrust enforcement should take. The European Union favors binding dispute resolution in the WTO; the United States favors a more voluntary approach that focuses on technical assistance and the issuance of voluntary standards. Although there has been convergence in

289. See Matthew Burton, Note, *Assigning the Judicial Power to International Tribunals: NAFTA Binational Panels and Foreign Affairs Flexibility*, 88 VA. L. REV. 1529, 1530 (2002); see also Patricia Kelmar, Note, *Binational Panels of the Canada-United States Free Trade Agreement in Action: The Constitutional Challenge Continues*, 27 GEO. WASH. J. INT’L L. & ECON. 173 (1993).

290. See 28 U.S.C. § 1605(A)(7)(a) (2000).

291. Molora Vadnais, Comment, *The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?*, 5 UCLA J. INT’L L. & FOR. AFF. 199, 203 (2000).

292. Eleanor Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT’L L. 911, 912 (2003).

293. *Id.*

294. Diane P. Wood, *Antitrust at the Global Level*, 72 U. CHI. L. REV. 309 (2005).

295. Fox provides a nice summary of the various proposals in international antitrust. Fox, *supra* note 292, at 925-32.

substantive antitrust policies, there, too, disagreement exists. The substantive disagreements led Judge Diane Wood, after proposing a baseline general international antitrust code, to note that in actually negotiating such a code, “the details would indeed be devilish” and to “wonder whether the effort it would take to achieve international consensus on all [of the areas of antitrust] would be worth it.”<sup>296</sup> As an international antitrust regime is still such a distant possibility, I prefer to propose an improvement to the status quo rather than waiting for the intellectually best solution.

Absent an international agreement establishing some form of global antitrust regime, the international community needs to work to further harmonize their practices to fill the enforcement gaps that allow corporate criminals like cartels to thrive.<sup>297</sup> I believe my proposal is the best mechanism—absent an international agreement—to encourage harmonization of antitrust policies with respect to international cartels. By exercising jurisdiction over claims by plaintiffs located in countries where the laws do not provide adequate relief, the United States implicitly encourages those countries to implement and enforce laws that provide such relief. Although other nations might respond negatively to America’s judgment of their antitrust regimes, their objections should be mollified by the fact that such judgments are undertaken to limit, rather than extend, American power through an exercise of jurisdictional restraint.<sup>298</sup>

Still, international antitrust disagreements will persist, but such disagreements are not *created* by the United States. Instead, they reflect real policy differences between the United States and its trading allies regarding the degree to which all cartels, especially domestic export cartels, should be deterred, the viability of private antitrust suits as a means of policing cartel activities, and the ability of the United States to protect its consumers, even at the expense of foreign corporations. *Empagran* has not generated conflict; it has only revealed it. Accordingly, I reject the view that the absence of conflict, such as would result by closing our courts to *Empagran*-type suits, is equivalent to harmony. Instead, the closing of our courts to all *Empagran*-type suits would represent a surrender of America’s interest in protecting its consumers from the harms of international cartels. At the least, such a capitulation of America’s vital economic interests should not be achieved by judicial fiat.

## VI. CONCLUSION

In this Note, I have proposed a resolution to the concerns expressed by the various governments in their amici briefs to the Supreme Court in *Hoffman LaRoche v. Empagran*. My proposal is grounded in the deterrence rationale of the U.S. antitrust laws. International cartels are a criminal scourge in our globalized economy, creating billions of dollars of deadweight loss in

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296. Wood, *supra* note 294, at 324.

297. For further discussion, see Diane P. Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare?*, 3 CHI. J. INT’L L. 391 (2002).

298. Indeed, I would argue that my proposal is no more problematic than the clawback statutes and frustration-of-judgment statutes, which connote a negative view of America’s antitrust policies.

developed and developing economies alike. Effective deterrence of international cartels cannot stop at America's borders. If America is adequately to protect its citizens from the harms of international cartels, it must lead proactively and internationally by cooperating with other governments where they have developed their own effective anti-cartel regimes and by filling the void left where governments are unable or unwilling to institute effective anti-cartel regimes. Accordingly, my proposal seeks to engage all three branches of the United States government in this effort by calling on Congress to pass legislation that empowers the executive to guide the courts as to when and under what circumstances U.S. jurisdiction should be granted to foreign plaintiffs suing international cartel members for harms sustained abroad. At the same time, I have tried to show that exercising jurisdiction will not undermine the United States's successful domestic amnesty programs, and with proper adjustments in the United States and abroad, U.S. jurisdiction over *Empagran*-type claims could improve amnesty programs worldwide. These proposals are consistent with—and help promote—a convergence in antitrust regimes worldwide. If jurisdiction is legal power, it is power that America can apply wisely.

This Note may offer another lesson, this one in the area of international law. The international concerns embodied in the FTAIA line of litigation fall within a larger range of controversies around concurrent jurisdiction. Rather than trying to apply a single, universal judicial standard—such as nationality, territoriality, comity, or effects—to resolve *Empagran*'s jurisdictional issues, I have proposed a legislative-executive-judicial solution that is partially an effects standard, partially a nationality standard, and partially a comity standard. It is an approach that is anchored in policy goals (deterrence) and international norms (opposition to international cartels). I do not suggest my specific solution should be copied in other international law contexts, or even in other international antitrust contexts. I merely suggest that resolutions to the concurrent jurisdiction controversies that seem endemic to our globalized world might proceed best from a solid understanding of the policy goals and international norms specific to each situation.