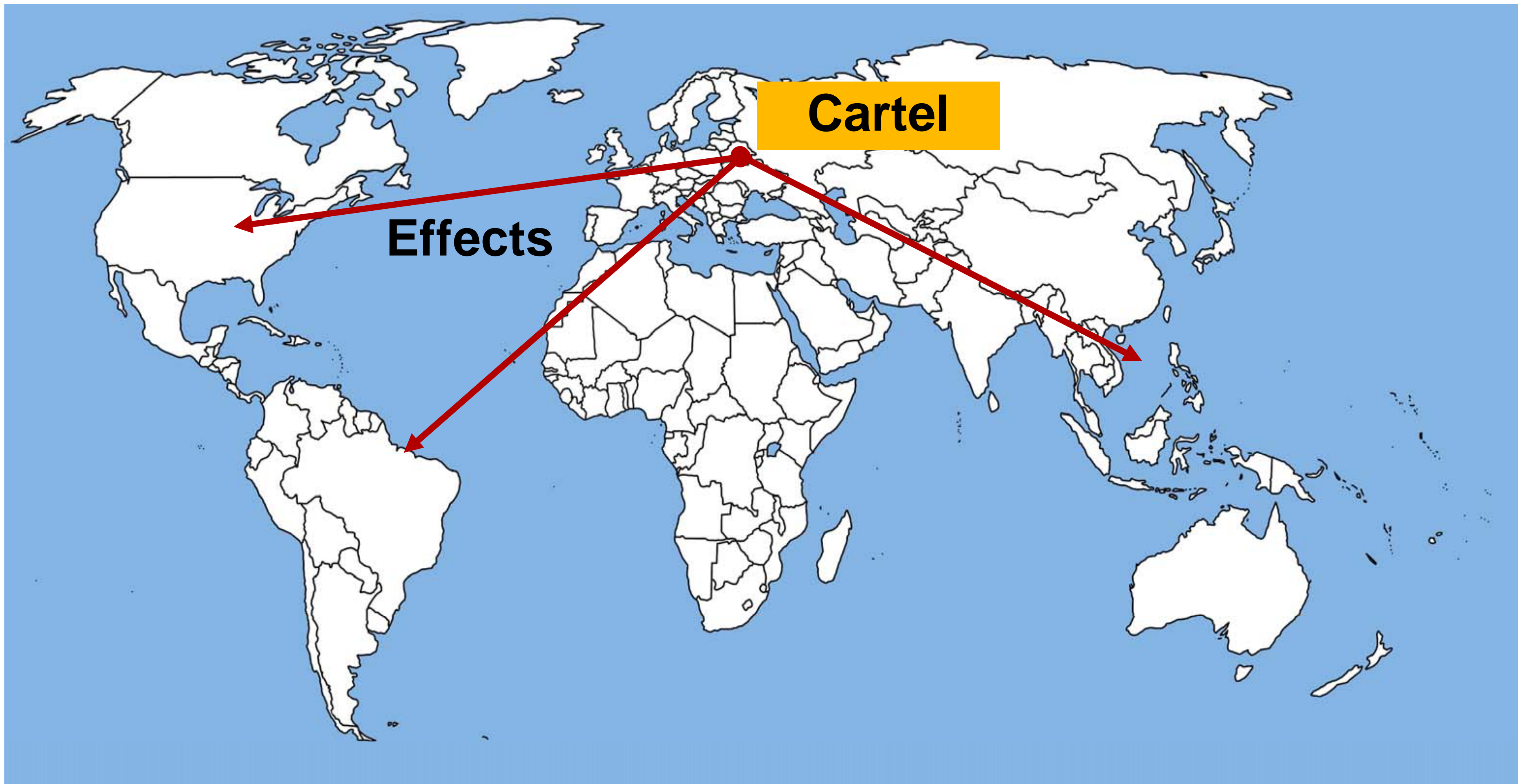
The Problem – A Civil Remedy for International Conduct That Affects the U.S.



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

Sections 1 to 7 of [the Sherman Act] shall not apply to [defendants'] 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 . . . 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.

Empagran I – Supreme Court

- Vitamins cartel
  - Court assumed "independent" foreign injury
  - Did not foreclose cases where harm linked
  - Endorsed *Industria Siciliana* where foreign injury was "*inextricably bound up with* . . . *domestic restraints of trade*" and foreign injury was "dependent upon, *not independent of*, domestic harm." (emphasis in original)

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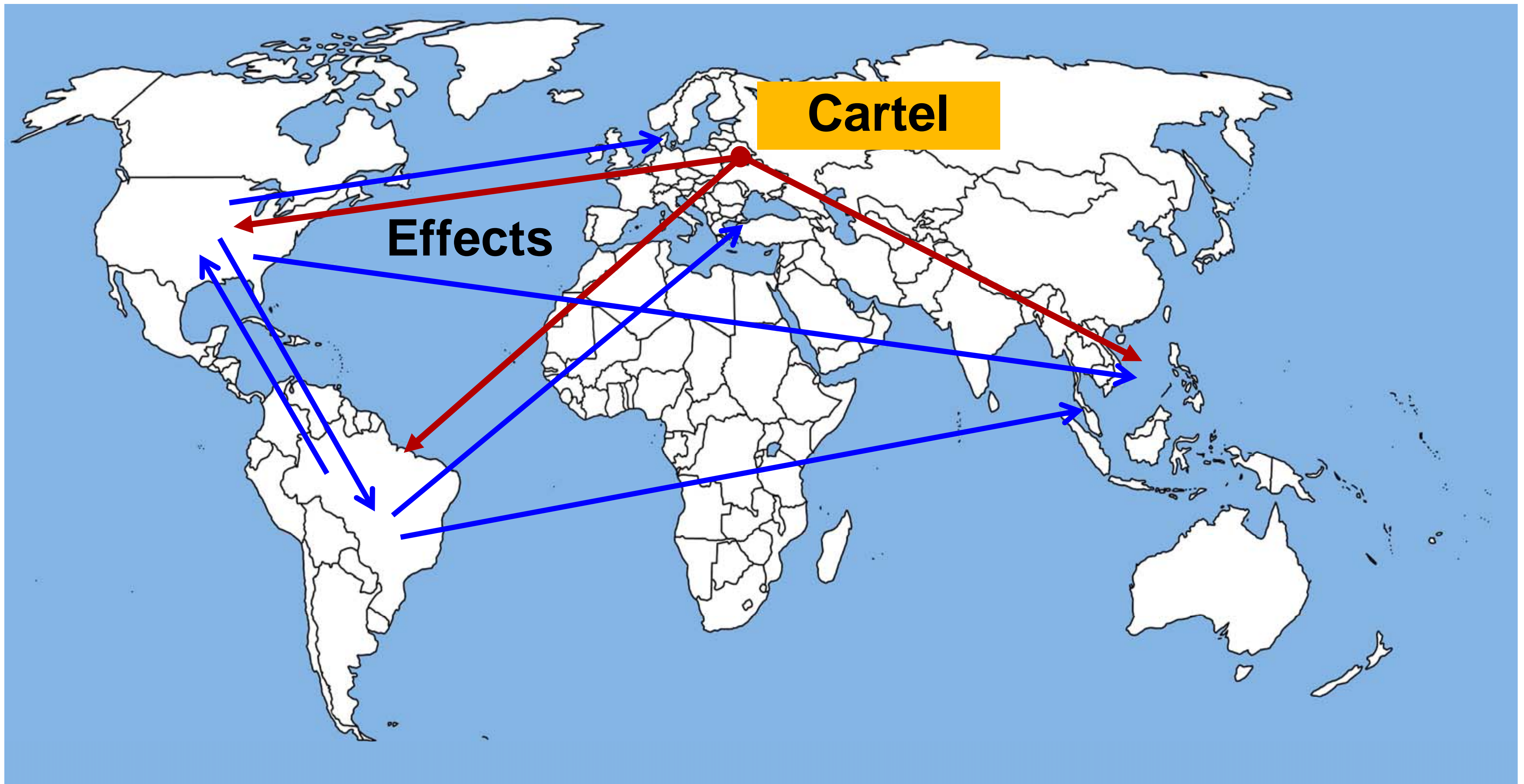

Empagran II

- Arbitrage theory ***not*** enough
- D.C. Circuit required “proximate cause” between U.S. effect and victim’s injury
- Virtually all courts have followed D.C. Circuit
- Courts will sever “foreign transactions”
- DRAM went one step further

The Issues

- **Comity**
  - No intrusion on sovereign interests of foreign countries.
- **Corporate Leniency Policy**
  - Fears that significant civil exposure will deter applicants.
- **Practical**
  - Courts are reluctant to “open the floodgates”

Comity

- Avoid "unreasonable interference"
- Is it "unreasonable" to give international victims a Sherman Act remedy in worldwide geographic market?
- **Conduct** is already within court's reach
- DOJ's decision governs
- Consistency with *Intel*

Corporate Leniency Policy

- DOJ argued in *Empagran* that increased civil exposure could deter applicants
- Prior to ACPERA, *all* civil damage claims arguably deterred applicants
- After ACPERA, U.S. government and civil plaintiff interests aligned
- No evidence that civil damage claims influence decision-making

Practical Considerations

- Single forum is more efficient
- Conduct already before the court
- Relates to scope of damages, not jurisdiction

The Solution: Eliminate Subsection (2) of the FTAIA

Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce with foreign nations unless that conduct has a direct, substantial, and reasonably foreseeable effect on domestic trade or commerce.