Revisiting *Empagran* – a Proposed Solution to Insufficient Compensation for Victims and Deterrence of International Cartels[1]

I. INTRODUCTION

Congress enacted Section 4 of the Clayton Act providing a private right of action and mandatory treble damages to deter antitrust violators, to deprive them of "the fruits of their illegality," and to compensate victims of antitrust violations.[2] In an increasingly global economy, these treble damage remedies can effectuate their policy goals only if applied to the full geographic scope of the illegal conduct. At a minimum, domestic victims must have a remedy for all of the harm that they suffered at the hands of international cartelists.

In recent years, however, federal courts have cut the remedies available to domestic and international victims of global cartels through a tortured application of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), a statute criticized by courts as "inelegantly phrased" and by commentators as "mind-numbingly" bad.[3] Five years ago, in *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, the Supreme Court ruled that the FTAIA barred Sherman Act claims for injuries arising from the independent foreign effects of unlawful conduct but left open the possibility that the Sherman Act may apply to "foreign" injuries arising from global cartels in interdependent worldwide markets, where the foreign effect is inextricably intertwined with the

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[1] James R. Martin is a partner in Dickstein Shapiro LLP and a member of the firm's Antitrust & Financial Services practice group. Mr. Martin co-authored the Brief for Certain Professors of Economics as *Amici Curiae* cited by the Supreme Court in *Empagran*. The author has litigated FTAIA issues from the plaintiff's perspective in several international cartel cases. The views expressed in this article represent the author's views and do not represent the views of Dickstein Shapiro.

[2] *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978) (citation and internal quotation marks omitted).

[3] *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997); Antitrust and American Business Abroad (Waller) § 9:7B.

domestic effect.[4] Lower courts have since rejected that possibility. In fact, courts will split a victim's Sherman Act claim into "domestic" and "foreign" components to bar recovery for overcharges paid internationally even when the same conduct caused both the domestic and foreign injuries. In this respect, courts have crossed the line from determining subject matter jurisdiction to imposing judicial limitations on the scope of the remedy available to domestic cartel victims.

Moreover, one court recently ruled that domestic corporations cannot recover for overcharges they paid through affiliates or subsidiaries even when the corporation utilized a centralized system to negotiate its purchases on a global level.[5] Thus, in a case where the Department of Justice ("DOJ") obtains a guilty plea for a bid-rigging conspiracy aimed directly at a United States corporation, the prevailing FTAIA interpretation threatens to foreclose that American corporation from asserting Sherman Act claims, even though the conduct had a direct, substantial, and foreseeable effect on U.S. commerce and the cartelist specifically targeted that United States corporation.

These developments cannot be reconciled with the purposes of the Sherman Act, the language of the FTAIA, the policies underlying the FTAIA, the Supreme Court's ruling in *Empagran*, or the intent of the FTAIA drafters. Proponents of these overbroad FTAIA decisions raise two main arguments to defend their views. First, they say that comity principles require deference to a foreign nation's ability to regulate its commercial affairs. Second, they argue that higher civil penalties undermine the DOJ's amnesty program by creating a disincentive to report cartel activity. While both arguments stem from legitimate concerns, neither justifies the courts' overly broad application of the FTAIA.

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[4] *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

[5] *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166 (N.D. Cal. 2009).

The FTAIA already accounts for most comity concerns by limiting the Sherman Act to conduct that causes a "direct, substantial, and reasonably foreseeable effect" in the United States. This language carries forward the limitations imposed by the Second Circuit in *Alcoa*[6] to ensure that courts will only address disputes that significantly affect domestic interests. Further, in the context of international cartels, virtually all countries condemn hardcore cartel violations.[7] Providing a Sherman Act remedy to victims of global cartels will promote, not undermine, the interests of those countries by deterring the conduct. Moreover, providing a single forum for resolution of claims for victims of international cartels is more efficient than forcing victims to resort to piecemeal litigation in those relatively few countries that provide civil remedies.

Concerns about the United States' corporate leniency policy are also misplaced and outdated. Since its inception, the leniency policy has conflicted in principle with private actions insofar as potential applicants consider potential civil liability in deciding whether to seek amnesty. In theory, any civil remedy diminishes the incentive to apply for leniency. Private damage remedies, however, are firmly established in the law and credited with helping to detect and deter illegal conduct.[8] Moreover, now that Congress has passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), private damage claims *increase* the incentive for cartelists to seek amnesty by giving leniency applicants the opportunity to significantly limit their civil liability (single damages without joint and several liability).

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[6] *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

[7] The Organization for Economic Cooperative Development defines "hardcore cartels" as "anticompetitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets." *See, e.g.*, OECD Reports, Hard Core Cartels 2000 at 6, http://www.oecd.org/dataoecd/39/63/2752129.pdf.

[8] *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy of [Clayton Act] § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." (emphasis in original)); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972).

There is no evidence that Congress ever intended for courts to apply the FTAIA as broadly as it is being applied today. The House Report confirms that Congress expected the FTAIA to preserve the right of international victims to raise Sherman Act claims, including purchasers that "take title abroad or suffer economic injury abroad" and victims of international cartels.[9] The FTAIA modifies only Sections 1 through 7 of the Sherman Act, which articulate the Sherman Act's substantive prohibitions. It does not modify the causation and other requirements for private civil actions set forth in the Clayton Act.[10] Thus, the jurisdictional requirements for criminal and civil actions should be congruent.

In 2005, the American Antitrust Institute's Working Group on International Issues considered seeking an amendment to the FTAIA to clarify the circumstances in which it applies. The Working Group chose not to do so because it saw that the Supreme Court in *Empagran* left open the possibility that courts would accept the arbitrage argument and permit damages for international victims of global cartel cases.[11] Unfortunately, common law has gone the other way.

Congress can remedy this problem by amending the FTAIA to confirm application of the Sherman Act over conduct that exerts an anticompetitive effect in a geographic market that includes the United States. This would eliminate the potential for claims arising from purely "foreign" conduct, ensure that the effect on the United States is one prohibited by the Sherman Act, and properly align the scope of the remedy with the scope of illegal conduct.

II. HISTORY OF THE FTAIA AND *EMPAGRAN*

In *Pfizer*, the Supreme Court extended the Sherman Act to 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 by foreign plaintiffs because "[t]o deny a foreign

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9 H.R. No. (citing *Pfizer*).

10 *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 397-400 (2d Cir. 2002).

11 http://www.antitrustinstitute.org/archives/files/430a.pdf.

plaintiff injured by an antitrust violation the right to sue would . . . permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers."[12] At the time, the FTAIA did not exist and courts were guided by precedent, particularly *Alcoa*, *Timberlane*, and *Mannington Mills*.[13]

After *Pfizer*, Congress enacted the FTAIA to promote exports and "clarify" the legal standard for determining U.S. jurisdiction over international transactions.[14] Congress expected the FTAIA to free American exporters from Sherman Act concerns to compete in markets where collusion was permitted but only insofar as the exporter's conduct did not affect domestic commerce. The House Report notes that Congress expected international conduct that substantially affects the United States to support application of the Sherman Act even if some purchasers took title or suffered economic injury abroad. The Report also endorsed *Pfizer*, observing that "to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons."[15]

The FTAIA states:

> Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
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> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—

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[12] *Pfizer*, 434 U.S. at 314-15.

[13] *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

[14] Pub. L. No. 97-290, Title IV, 96 Stat. 1246 (1982). One commentator noted that the statute failed in its intent to clarify anything. Antitrust and American Business Abroad (Waller) § 9:7.

[15] H.R. Rep. No. 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495.

> (A) on trade or commerce which is not trade or commerce with foreign nations [i.e., domestic trade or commerce], or on import trade or import commerce with foreign nations; or
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> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States [i.e., on an American export competitor]; and
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> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
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> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.[16]

Congress added the clause in subsection (2) to address a perceived deficiency in an earlier version of the statute that could have authorized jurisdiction where conduct exerts an anticompetitive effect outside the United States but a neutral or pro-competitive effect in the United States. "This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. . . . [I]t is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States."[17]

Following passage of the FTAIA, circuit courts of appeals split on how to apply the statute to Sherman Act claims brought by foreign victims of global cartels, focusing on the definition of "a claim" in subsection (2). The Fifth Circuit affirmed the lower court's denial of subject matter jurisdiction over such claims to avoid opening the floodgates to foreign plaintiffs in a variety of Sherman Act settings.[18] Proponents of a more limited reading of the FTAIA took solace in Judge Higginbotham's dissent: "I am not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by

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[16] 15 U.S.C. § 6a.

[17] H.R. Rep. No. 97-686, (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2497 at 12.

[18] *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001).

the same illegal conduct. That was not the law before this effort to assist American business abroad, and Congress did not intend to change it or do so unwittingly."[19]

The Second and D.C. Circuits ruled that the FTAIA provides subject matter jurisdiction over claims brought by foreign plaintiffs in global conspiracies.[20] When the Supreme Court granted certiorari in *Empagran*, antitrust counsel and business executives worldwide expected the Court to address whether and when foreign companies could assert treble damage antitrust claims in U.S. courts. The Court's unanimous opinion, however, ducked these important questions.

The Supreme Court reversed the D.C. Circuit's decision and abrogated the Second Circuit decision, but grounded its ruling on a presumed factual scenario in which injuries suffered by foreign victims were deemed wholly independent of the domestic effects. The Court did not address the plaintiffs' "arbitrage" argument that the conspirators fixed prices and restricted output of products sold in an interdependent worldwide market. Instead, the Supreme Court remanded for a determination of that issue.

The D.C. Circuit rejected the argument, concluding that the phrase "gives rise to" in subsection (2) requires proof that the domestic effect "proximately caused" the plaintiff's injury and that the arbitrage theory only demonstrated but-for causation.[21] The D.C. Circuit based its ruling not on standard tort principles of proximate causation (which focus in large part on foreseeability), but on the same comity principles discussed by the Supreme Court in

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[19] *Id*. at 431 (Higginbotham, J. dissenting).

[20] *Kruman*, 284 F.3d 384; *Empargran S.A. v. F. Hoffman-La Roche, Ltd*., 315 F.3d 338 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004).

[21] *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1270 -71 (D.C. Cir. 2005).

Empagran.[22] Virtually every subsequent court to consider the issue has adopted the D.C. Circuit's approach and arrived at similar conclusions.[23]

Recently, the court overseeing an international cartel case arising out of the sale of computer memory products took *Empagran* one step farther by barring claims brought by an American company for overcharges it paid through foreign subsidiaries. In that case, the defendants engaged in a conspiracy to fix the price of dynamic random access memory ("DRAM") chips, which they sold in an interdependent worldwide market. A U.S. company, Sun Microsystems, negotiated its global purchases from its U.S. headquarters. Its subsidiaries and affiliates implemented the global purchase plan by placing orders and invoicing the sales. The court found that the purchases made for Sun by its affiliates outside the United States were "foreign" claims barred by the FTAIA and the direct purchaser rule in *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 731-35 (1977).[24]

We may see a similar argument raised in other international cartel cases where the DOJ obtains guilty pleas for conspiracies to rig bids and fix the prices of products sold to U.S.

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[22] *Id*. at 1271. The Antitrust Modernization Commission solicited comments on whether to recommend revisions to the FTAIA. Antitrust Modernization Commission ("AMC"), Request for Public Comment, 70 Fed. Reg. 28,902-07 (May 19, 2005). Some commentators questioned the direction in which courts would take *Empagran*, but agreed that it was too early to tell. The AMC concluded that, as a general principle, purchases made outside the United States from a seller outside the United States should be deemed outside the scope of the Sherman Act. Antitrust Modernization Commission, Report and Recommendations (2007) at 215, *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[23] *See, e.g.*, *Centerprise Int'l, Ltd. v. Micron Tech., Inc. (In re Dynamic Random Access Memory (DRAM) Antitrust Litig.)*, 546 F.3d 981 (9th Cir. 2008); *Inquivosa SA v. Ajinomoto Co.* (*In re Monosodium Glutamate Antitrust Litig.*), 477 F.3d 535 (8th Cir. 2007); *Saudi Iron & Steel co. v. UCAR Int'l, Inc.* (*In re Graphite Electrodes Antitrust Litig.*), Nos. 10-md-1244, 00-5414, 2007 WL 137684 (E.D. Pa. Jan. 16, 2007); *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V.*, No. 03 Civ. 10312(HBDF), 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437 (D.N.J. 2007).

[24] *Sun Microsystems*, 608 F. Supp. 2d 1166.

customers with worldwide operations. For example, in a pending case involving flat-panel monitor screens sold to American companies such as Dell Inc. and Apple. Although according to the plea agreement the scheme there was directed at American companies, the "DRAM" analysis could limit their right to recover to only those purchases actually invoiced in, and perhaps delivered to, the United States. If the products were all built overseas, there could conceivably be no right to recovery.

Several years ago, the American Antitrust Institute Working Group declined to recommend a revision of the FTAIA because case law had not developed to the point where one could predict how the courts would implement *Empagran*. Professor Eleanor Fox, however, recommended revising the prevailing "proximate cause" test to permit claims where the illegal conduct (not the conduct's effects) proximately caused the victim's injuries. As she phrased it, "the requirement that the harm must be proximately *caused* by the U.S. *effects* . . . is simply a way of slamming a steel door – to the detriment not only of compensatory justice but also to deterrence of cartels that hurt Americans, since other nations' private action remedies are exceedingly weak, and global cartels' profits from sales outside of America may overwhelm losses from damages on sales within."[25]

III. DETERRENCE V. DETECTION

A. Civil Damage Remedies Do Not Undermine the Corporate Leniency Policy

In *Empagran*, under the Bush Administration, the DOJ filed an *amicus* brief arguing that the FTAIA should be interpreted broadly to limit the chilling effect that civil damage claims could have on the DOJ's corporate leniency policy. In contrast, a group of economists, including President Barack Obama's current budget director, Peter Orszag, argued that treble damages

[25] Testimony of Eleanor M. Fox Before the Antitrust Modernization Commission (Feb. 15, 2006), at 10 *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Fox_final.pdf.

coincident with the geographic scope of the harm were appropriate to deter cartel formation *ex ante*.[26] The Supreme Court treated these arguments as a wash, finding them too complicated to resolve.

The passage of ACPERA in 2004 answered the DOJ's concerns and aligned the interests of the United States and the plaintiffs bar. According to supporters, ACPERA's limitations on civil liability provide strong incentives for potential amnesty applicants to participate in the leniency program.[27] If true, then ACPERA tips the balance in favor of expanding civil remedies and limiting application of the FTAIA by increasing the benefits of amnesty and, conversely, raising costs for the potential applicant's rivals.

This assumes that the applicant genuinely views these issues as important. I have argued elsewhere that ACPERA benefits are illusory and that corporations make amnesty decisions on more pragmatic factors, such as avoiding jail time for key executives. If I am correct, then the DOJ's initial concerns about the effect of increased civil damage remedies were misplaced from the beginning. Either way, the scope of the FTAIA should not influence the leniency program.

B. <u>Treble Damages are Necessary to Deter Cartel Formation</u>

It is recognized that a primary focus of U.S. antitrust law is to provide a deterrent to behaviors that harm U.S. commerce. In international markets where products move relatively freely, a price-fixing cartel will need to take into account product flows between regions. In this context, a relevant geographic market constitutes the set of regions in which the flow of product

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[26] Brief for the United States as Amicus Curiae Supporting Petitioners, *available at* http://www.justice.gov/atr/cases/f202300/202397.htm; Brief of *Amici Curiae* Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents, *available at* http://www.esjpc.com/Empagran-Amicus-Final.pdf.

[27] *See, e.g.*, Senate Passes Kohl Initiative to Help Detect and Prosecute Price-Fixing Cartels (June 18, 2009), *available at* http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2889.

is sufficiently responsive to regional differences in price to significantly limit price differences. If a price-fixing cartel tried to raise prices in only one portion of its relevant market, market forces would reallocate sales among the regions.

Applied to a situation in which the relevant geographic market includes the United States and other regions of the world, any attempt by a cartel to raise prices outside the United States, without affecting U.S. prices, or vice versa, will be restrained by arbitrage. In the case of multinational buyers who source an input product in several regions, a cartel may be forced to fix prices in all regions in order to be credible to its buyers. The injuries sustained by foreign victims therefore bear a very real "proximate" connection to the conspiracy's effects on U.S. commerce, and vice versa. Injuries to foreign victims in these markets are both foreseeable and intended.

The examples of the vitamins, lysine, citric acid, graphite electrodes, and other international price-fixing cartels illustrate that there is frequently inadequate deterrence to protect U.S. commerce from global price-fixing cartels unless all victims can pursue their remedies under U.S. law. In the case of the vitamins cartel, for example, the conspiring firms' worldwide illegal profits have substantially exceeded the total value of government fines and civil recoveries.[28] More generally, given that civil antitrust enforcement outside the United States is less aggressive, and hence penalties are significantly lower than in the United States, the prospect of treble damages for domestic transactions alone will likely be insufficient to deter the formation of a large international cartel, as non-U.S. profits will likely outweigh even the maximum possible sanctions available within the United States and abroad.

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[28] *See* Brief for Certain Professors of Economics as *Amici Curiae* in Support of Respondents, at 3-4 *available at* http://www.dicksteinshapiro.com/files/Publication/4ca4819f-6949-4de7-af3c-dd00ff8fa2cc/Presentation/PublicationAttachment/b8fe460e-600d-4999-bc8e-dd1d8b410381/Martin.pdf.

The focus on *ex ante* deterrence is particularly important in view of the fact that, according to some estimates, more than two-thirds of conspiratorial activity goes undetected and unpunished.[29] That deterrence is weak in practice is illustrated by the observed recidivism of cartel members, many of which are serial offenders. As long as the gap between the expected costs and benefits of forming a cartel is large, which is often the case when cartels are international in scope, firms will have an incentive to engage in price-fixing behavior that harms U.S. consumers and businesses. The Brief for Certain Professors of Economics submitted as *amici* in *Empagran* provided a concrete example, calculating that the defendants in *Vitamins* made a multibillion-dollar illegal profit even after taking into account civil fines and criminal penalties.[30]

IV. COMITY

In *Hartford Fire Insurance Co. v. California*,[31] the Supreme Court explained that for purposes of an international comity analysis, no conflict exists between the laws of two jurisdictions if the violator can comply with the laws of both jurisdictions. In international cartel cases, comity concerns are greatly overstated because countries around the world universally condemn "hardcore" cartels.

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29 *See, e.g.*, John M. Connor, Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement at 40, n. 40, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=611909.

30 *See supra* note 26, at 9-11. The economists estimated $30 billion in total sales and an overcharge of 20-27 percent. Taking the time-value of money into account, illicit profits reached some $18 billion as of 2003. Therefore, ignoring legal fees, the vitamins conspirators netted approximately $13.6 billion in illegal worldwide profits despite having been caught. *Id*. This conclusion is not particularly sensitive to the assumed overcharge. Even with an overcharge of 15 percent, the vitamins conspirators would have netted over $7.6 billion in illegal profits. *Id.* at 11 n. 15.

31 509 U.S. 764, 799 (1993).

In its 1995 Antitrust Enforcement Guidelines for International Operations, the DOJ addressed comity and the role it plays in making enforcement decisions.[32] As expressed in the Guidelines, the core question is whether application of the Sherman Act to the conduct will affect a significant interest of a foreign sovereign. The Guidelines identify a number of factors to take into account, including: the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; the nationality of the persons involved in or affected by the conduct; the presence or absence of a purpose to affect U.S. consumers, markets, or exporters; the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; the existence of reasonable expectations that would be furthered or defeated by the action; the degree of conflict with foreign law or articulated foreign economic policies; the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and the effectiveness of foreign enforcement as compared to U.S. enforcement action. The DOJ may choose to defer enforcement after consulting with foreign authorities and obtaining assurances from the foreign authority that it will address the conduct and attempt to address anticompetitive effects in the United States. In cases where the United States decides to prosecute an antitrust action, the decision represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. The DOJ does not believe that courts should second-guess its judgment in that regard.

The Supreme Court's decision in *Empagran* was justified primarily on comity concerns. It acknowledged that U.S. courts have long held that application of the Sherman Act to foreign anticompetitive conduct is consistent with principles of prescriptive comity insofar as it redresses domestic antitrust injury. But the Supreme Court could not identify a reason to

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[32] Available at http://www.justice.gov/atr/public/guidelines/internat.htm.

extend a Sherman Act claim to victims of foreign conduct that caused independent foreign harm. The Supreme Court asked rhetorically "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in [in] significant part by Canadian or British or Japanese or other foreign companies?"[33] As limited, the question naturally answers itself. The question that the Court did not ask – in fact avoided – is why American law should provide a remedy to victims of global cartels who suffered their injuries in the same geographic market as the United States? The answer, as discussed elsewhere, is to protect domestic commerce and, to the extent that domestic companies suffered their injuries internationally, to protect the right of domestic businesses to obtain full compensation.

Notably, the same week that it decided *Empagran*, the Supreme Court in *Intel* dismissed comity concerns in deciding that a 150-year-old statute authorized a domestic company to compel discovery of another domestic company for use in a European Commission proceeding, notwithstanding the fact that foreign procedures did not provide comparable discovery rights and the European Commission specifically opposed the discovery request, arguing that its ability to carry out its responsibilities would be threatened if United States courts permitted the discovery.[34] In dissent, Justice Breyer recognized the disconnect between the Court's comity discussions in the two cases.

Lower courts incorrectly seized on the comity language in *Empagran* to develop a nebulous "proximate cause" standard that prevents recovery by victims of cartels in markets where the conspirators knew and understood that they needed to increase domestic prices in order to maintain international prices. Those courts do not engage in a full comity analysis nor

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[33] 542 U.S. at 165.

[34] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

do they fairly address the fact that treble damages are only adequate when applied to the full scope of the conduct. In fact, these courts use the term "proximate cause" in ways that are inconsistent with established law, ignoring concepts of foreseeability and intent.

In a traditional antitrust standing analysis, the plaintiff must show that the defendant's illegal conduct caused the plaintiff's injury. The conduct need not be the exclusive cause of the injury, but the defendant is permitted to argue that other forces caused the harm. Case law is filled with standing cases that can be used to ensure that there is a legitimate connection between the illegal conduct – in an international cartel case the agreement to fix prices globally – and the plaintiff's harm. In cases where the cartel agrees independently to fix prices internationally in a foreign market but does not need to fix prices in the United States to support their foreign price-fixing agreement, standing would not exist for foreign victims. The Draconian blanket rules adopted by lower courts through their uncritical application of the FTAIA are unnecessary and repeal years of standing jurisprudence.

At the very least, in cases where the DOJ brings an action, it has made an executive decision that comity considerations do not justify abstention and civil plaintiffs harmed by the same conduct should be permitted to bring their claims.

V. COMPENSATION TO DOMESTIC VICTIMS OF INTERNATIONAL CARTELS

In *Vitamins*, Chief Judge Thomas Hogan (who dismissed the class action in *Empagran*), permitted certain companies to pursue claims for purchases made through a global purchasing system "coordinated by the American parent companies."[35] In the *Sun Microsystems* case, however, the district court dismissed claims by a domestic corporation for purchases made by foreign affiliates and subsidiaries, even though the parent company negotiated global

[35] *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 755852, at *2 (D.D.C. June 7, 2001).

purchases from its U.S. headquarters and the foreign affiliates and subsidiaries simply implemented the global purchase plan by placing orders and invoicing the sales.[36]

The court in *Sun Microsystems* premised its ruling, in part, on indirect purchaser issues as well as the FTAIA. *Illinois Brick* generally requires that direct purchasers bring Sherman Act claims.[37] When the "direct purchaser" is a foreign subsidiary or affiliate, however, the parent company in the United States must plead and prove some theory that deals with *Illinois Brick* and complies with the FTAIA. In *Sun Microsystems*, the court demanded proof that the plaintiff's damages claims fit within standard exceptions to *Illinois Brick* to establish a right to pursue claims for purchases by foreign affiliates, subsidiaries, and agents. The court demanded evidence (i) that the parent and purchasing entities operated as a single enterprise with a unified purpose in the production, sale, and procurement, or (ii) that the parent intended to have its foreign subsidiaries act on its behalf in purchasing the product, that the subsidiaries accepted or understood this role, and that there was an understanding that the parent was to be in control of the procurement.[38]

Consider how such factual allegations may affect the course of litigation. Assume that the DOJ obtains a guilty plea from a foreign defendant for conspiring to fix the price of products sold to a U.S. electronics company. The conspirators, unconcerned with corporate formalities, specifically targeted the American company and even met on U.S. soil. Assume further that the American company made purchases through an overseas division, took delivery

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[36] *See also Emerson Elec.*, 500 F. Supp. 2d at 446-47 (alleging that plaintiffs are multinational corporations with unitary purchasing organizations in the United States that paid a single global price); *Goodyear Tire & Rubber Co. v. Dow Deutschland GmbH & Co.*, Case No. 5:08 CV 1118, slip op. at 4.

[37] *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 731-35 (1977).

[38] *Microsystems Sun* at 1185-88.

overseas, and used the price-fixed product as an input to assemble televisions overseas that are sold in the United States.

In order to establish jurisdiction under the FTAIA, the American company, not its foreign affiliate, must show that it suffered injury as a direct purchaser. Myriad different facts can be relevant to this analysis. The plaintiff may need to demonstrate traditional indicia of control, such as interlocking directors and officers, common ownership of stock, extending credit on behalf of the subsidiaries, or entering into loan and trust agreements on behalf of the subsidiaries. The plaintiff also may wish to show that the domestic parent intended to authorize its subsidiaries to purchase on the parent's behalf, that the subsidiaries understood their role in purchasing on the parent's behalf, and any other facts that might demonstrate a unity of interest between the domestic company and the foreign buyers with respect to such procurement activities. As of today, the legal requirements are unclear and threaten to give conspirators a windfall at the expense of American victims of cartel conduct.

VI. PROPOSED REVISION

The FTAIA is so poorly phrased that it is tempting to repeal it altogether, a possibility proposed by the American Antitrust Institute. Given that the statute has existed for more than 25 years, however, the preferable course might be to amend it to address the particular issue raised above. A simple statement that "Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct unless that conduct exerts a direct, substantial, and reasonably foreseeable anticompetitive effect on domestic trade or commerce" should suffice. This adopts the jurisdictional standard that existed prior to the FTAIA and ensures that private plaintiffs and government officials cannot bring Sherman Act claims for neutral or pro-competitive domestic effects of conduct – which was the concern that led to implementation of the awkward (and misapplied) "gives rise to a claim" language in subsection (2) of the FTAIA.

In practice, this would permit victims of conduct prohibited by the Sherman Act to bring civil claims so long as their injuries occurred in the geographic market affected by the conduct. This would align the scope of the remedy with the scope of the conduct to effectuate the deterrence and compensation functions of the Sherman Act. It would also confirm that domestic corporations can recover for all of the harm that they suffered for purchases coordinated through their centralized purchasing systems.

Courts may still apply traditional rules of *forum non conveniens* or more specific comity analyses that they undertake today for import transactions and other cases involving areas where the antitrust laws of the United States and foreign nations may not be in harmony, such as tying, vertical restrictions, unilateral conduct, and rule-of-reason cases. As recognized by the DOJ, courts are capable of performing this analysis without additional statutory guidance.