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**UNITED STATES COURTS AND THE OPTIMAL DETERRENCE
OF INTERNATIONAL CARTELS:
A WELFARIST PERSPECTIVE ON *EMPAGRAN***

By

Alvin K. Klevorick and Alan O. Sykes

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United States Courts and the Optimal Deterrence of International Cartels:
A Welfarist Perspective on *Empagran*

Alvin K. Klevorick and Alan O. Sykes*

ABSTRACT

E. Hoffmann-La Roche Ltd. v. Empagran S.A. concerned a private antitrust suit for damages against a global vitamins cartel. The central issue in the litigation was whether foreign plaintiffs injured by the cartel's conduct abroad could bring suit in U.S. court, an issue that was ultimately resolved in the negative. We take a welfarist perspective on this issue and inquire whether optimal deterrence requires U.S. courts to take subject matter jurisdiction under U.S. law for claims such as those in Empagran. Our analysis considers, in particular, the arguments of various economist amici in favor of jurisdiction and arguments of the U.S. and foreign government amici against jurisdiction. We explain why the issue is difficult to resolve, and identify several economic concerns, which the amici did not address, that may counsel against jurisdiction. We also analyze the legal standard enunciated by the Supreme Court and applied on remand by the DC Circuit, and we argue that its focus on "independent" harms and "proximate" causation is problematic and does not provide an adequate economic foundation for resolving the underlying legal issues. A revised version of this paper is forthcoming in ANTITRUST STORIES from Foundation Press, edited by Daniel Crane and Eleanor Fox.

Introduction

Globalization has captured the attention of policymakers, commentators, and the general public. Its specific characteristics vary from one context to another and from one observer to another, but at its core is the increasing economic interdependence of countries around the world. Although some economists argue that from a historical

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perspective the current period is not one of especially heightened interdependence, globalization remains a dominant theme in discussions of economics and legal policy. In the antitrust arena two important aspects of globalization are the increased cooperation of firms across national boundaries for both good and ill, and the spread of antitrust or competition policy regimes among countries though without convergence on a unitary approach.

These two facets of globalization came together in the case of *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,¹ which was decided by the U.S. Supreme Court in June 2004. The case centered on the activity of a global price-fixing cartel in vitamins. The plaintiffs were foreigners who purchased vitamins outside the United States and sought relief under U.S. antitrust law. The Court's decision was heavily influenced by the respect it held should be accorded other nations' competition laws and policies.

We shall use the *Empagran* case as a vehicle to examine the effects of globalization on U.S. antitrust law. In particular, how do some common themes of antitrust law take on a different shape or form in a world of greater economic interdependence? What should the form and substance of U.S. antitrust law and policy be in this globalized setting? We begin in Section I with a discussion of the *Empagran* case and its background. Then, in Section II, we offer a welfare-analytic perspective on the decision and the opinion's reasoning supporting it. In Section III, we draw out the

¹ 542 U.S. 155 (2004).

legal implications of our analysis for the *Empagran* decision itself and for the Foreign Trade Antitrust Improvements Act (henceforth, “FTAIA”),² the interpretation of which was at the heart of the case. In the final section, we offer some concluding comments.

² 15 U.S.C. § 6a (2000).

I. The *Empagran* Case

The *Empagran* matter began its journey to the Supreme Court in the District Court for the District of Columbia. The plaintiffs included foreign and domestic firms that had purchased vitamins for delivery outside the United States from the defendant vitamin manufacturers or their alleged co-conspirators. The plaintiffs, including corporations from Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia, and Ukraine as well as the United States, sought to bring a class action on behalf of all similarly situated foreign and domestic customers of the defendant members of the international vitamins cartel. For the cartel's alleged supracompetitive pricing, the *Empagran* plaintiffs asked both "damages and injunctive relief under the antitrust laws of the United States, the antitrust laws of the relevant foreign nations, and international law."³

A. The Global Vitamins Cartel

The global vitamins cartel, self-styled "Vitamins, Inc." by some of its members, actually comprised a set of overlapping cartels, each fixing prices and allocating markets for one or more vitamins. It consisted of "wheels within wheels," in one observer's characterization,⁴ and included multinational corporations located in Belgium, France, Germany, Japan, the Netherlands, Switzerland, and the United States. The cartel thrived

³ *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, No. Civ. 001686TFH, 2001 WL 761360, at *1 (D.D.C. June 7, 2001).

⁴ JOHN M. CONNOR, GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY 305 (2001).

during the 1990s and encompassed at least 16 products manufactured by at least 20 parent companies. The price fixing was more effective and lasted longer for some products than for others. An undertaking of that scale and scope required a complex organization, which the vitamins cartel had -- a hierarchy of three management tiers running from regional managers, who met quarterly to make necessary price and quantity adjustments, to major policymakers, who met once a year. John M. Connor, a leading student of global price-fixing cartels, estimates that the international vitamins cartel affected over \$34 billion of commerce, measured by the sales revenues derived from the products during the price-fixing period.⁵ He further estimates that on these sales the cartel members earned global monopoly profits of somewhere “between \$9 and \$13 billion, of which 15% accrued in the United States, 1% in Canada, 26% in the EU, and 58% in the rest of the world.”⁶

The international vitamins cartel ended with the close of the twentieth century principally as the result of enforcement actions by the United States Department of Justice. Competition authorities in other jurisdictions, including Australia, Canada, the European Union, Japan, and South Korea, also imposed sanctions on cartel members, and enforcement actions were facilitated by the cooperation of authorities across national boundaries. The Department of Justice emphasized the importance to its success of its

⁵ Brief Amici Curiae of Professors Darren Bush et al. in Support of Respondents at 11, *Empagran*, 542 U.S. 155 (No. 03-724), 2004 WL 533933.

⁶ *Id.* at 15.

leniency program, which grants amnesty from criminal prosecution to potential antitrust defendants under specific conditions, and especially the cooperation elicited from Rhône-Poulenc. Other countries' competition authorities also stressed the central place of their amnesty programs in their actions against the global vitamins cartel, a point that will take on importance when we come to the Supreme Court's *Empagran* decision.

A large number of state attorneys general, who pursued *parens patriae* actions on behalf of their states and their states' residents as indirect buyers of vitamins and vitamin premixes, also played a role in the enforcement effort. Finally, private attorneys contributed to the cartel's demise as they brought class actions against members of the cartel in federal court on behalf of direct purchasers and in state courts on behalf of indirect buyers, where state indirect-purchaser statutes provided for such actions. The suits initiated by the private class-action lawyers and by the state attorneys general addressed the injuries inflicted on United States purchasers by sales of vitamins and vitamin products sold in the United States, which sharply distinguishes them from the harms for which the *Empagran* plaintiffs sought recovery.

The corporate members of the international vitamins cartel and a significant number of their senior managers paid a very high price for their illegal activity. As reported in the government's amicus brief to the Supreme Court in the *Empagran* case in Spring 2004:

To date, the investigation . . . has resulted in plea agreements with twelve corporate defendants and thirteen individual defendants and the imposition of

finances exceeding \$900 million -- including the largest criminal fine (\$500 million) ever obtained by the Department of Justice under any statute Eleven of the thirteen individuals have received sentences resulting, in imprisonment, and an additional individual awaits a criminal trial. European Union, Canadian, Australian, and Korean authorities similarly have obtained record civil penalties exceeding € 855 million against the vitamin companies.

In the wake of the government's investigations, domestic private parties sued the vitamin companies seeking treble damages and attorney's fees . . . for overcharges that the domestic companies paid in United States commerce as a result of the price-fixing conspiracy. In settlement of suits by some United States purchasers, the vitamin companies paid amounts "exceeding \$2 billion."⁷

The amicus brief submitted at the same time by Professor Connor and his colleagues characterized "[t]he vitamins cartel [as] the most harshly sanctioned conspiracy in antitrust history"⁸ and reckoned the total financial antitrust fines and penalties imposed on the cartel at between \$4.4 and \$5.6 billion.⁹ This included \$907 million in criminal fines in the United States, \$100 million in criminal fines paid in Canada, \$759 million of administrative fines imposed by the European Union, a fine of \$14 million ordered by Australia, and a \$3 million fine charged by South Korea.¹⁰ The damages and legal fees and costs recovered by direct buyers in the United States are difficult to calculate. While some of these sanctions are publicly known, as they resulted from resolved class actions in federal courts, the amounts paid to original class-action

⁷ Brief for the United States as Amicus Curiae Supporting Petitioners at 2, *Empagran*, 542 U.S. 155 (No. 03-724), 2004 WL 234125.

⁸ Brief Amici Curiae of Professors Darren Bush et al. in Support of Respondents, *supra* note 5, at 15.

⁹ *Id.* at 21.

¹⁰ *Id.* at 19.

plaintiffs who opted out of the class to litigate on their own are not public information. Connor states that there were about 225 such opt-out plaintiffs, within a class originally established at above 4000, and they represented more than 75% of the purchases by class members. “Assuming that they will settle for a somewhat larger percentage of affected sales than those buyers that remained in the class, amicus Connor estimates the total payout to be in the range of \$1200 to \$2400 million.”¹¹

B. The District Court Decision

The *Empagran* defendants moved to dismiss the complaint “for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.”¹² The District Court deferred ruling on the motion with respect to the domestic plaintiffs’ claims until they provided more specific factual allegations about how the defendants’ conduct had injured those plaintiffs in United States commerce. In sharp contrast, Judge Hogan granted the defendants’ motion with respect to the foreign plaintiffs. He dismissed the foreign purchasers’ claims under federal antitrust law, the ones they pressed through supplemental jurisdiction under the competition laws of foreign nations, and their claims under the Alien Tort Claims Act for violations of customary international law proscribing the cartel’s conduct. The District Court’s dismissal of the foreign plaintiffs’ federal antitrust claims shaped the question that came before the

¹¹ *Id.* at 20.

¹² *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, No. Civ. 001686TFH, 2001 WL 761360, at *1 (D.D.C. June 7, 2001).

Supreme Court in *Empagran*. But the trial court’s consideration of the other two claims, its finding that there is no customary international law of antitrust and its discussion of the multiplicity of foreign tribunals weighing foreign purchasers’ claims against the vitamins cartel, highlight important aspects of the current context of antitrust policy and the background for the Supreme Court’s decision.

In finding that it lacked subject matter jurisdiction over the *Empagran* plaintiffs’ claims under federal antitrust law, the District Court characterized “[t]he critical question in this case [as] whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws.”¹³ The answer to that question was to be found, the court said, in the FTAIA and its interpretation in the caselaw. That Act provides as follows:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

- (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 operation

¹³ *Id.* at *2.

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.¹⁴

The FTAIA excludes from coverage under the Sherman Act conduct involving non-import trade or commerce with foreign nations unless it meets the two stipulated conditions. The District Court found that the *Empagran* plaintiffs' complaint satisfied what we shall call the "effects condition" in (1) because "plaintiffs generally allege that the defendants' price fixing behavior had direct, substantial, and reasonably foreseeable effects on U.S. commerce."¹⁵ But Judge Hogan determined that the vitamins purchasers failed to meet condition (2), the "claim condition," because they did not allege that the *effects* on United States commerce that they had identified gave rise to the injury they suffered. The District Court emphasized the distinction between *conduct as the cause of harm* and *effects as the cause of harm*, which would be central to the Supreme Court's decision in the case. As Judge Hogan wrote, "Plaintiffs argue that the jurisdictional nexus is provided solely by the global nature of the defendants' conduct. In plaintiffs' view, the territorial effect of that conduct is irrelevant. However, the existing caselaw does not support plaintiffs' position."¹⁶ Put another way, although the global cartel's activity may have caused injury to the plaintiffs and in United States commerce, the vitamin buyers before the court had "not alleged that the precise injuries for which they

¹⁴ 15 U.S.C. § 6a (2000).

¹⁵ *Empagran*, 2001 WL 761360, at *3.

¹⁶ *Id.*

[sought] redress [had] the requisite domestic effects necessary to provide subject matter jurisdiction over [the] case.”¹⁷

C. The Court of Appeals Decision

The foreign purchasers appealed to the Court of Appeals for the District of Columbia Circuit. A divided court found, contrary to Judge Hogan, that the District Court had subject matter jurisdiction in the case and the foreign plaintiffs had standing to press their claim under the federal antitrust laws. Consequently, the Court of Appeals reversed the District Court’s decision, vacated its judgment, and remanded the case.¹⁸ For the Court of Appeals, “The precise issue presented in this appeal [was] whether the ‘gives rise to a claim’ requirement under § 6a(2) of FTAIA authorizes subject matter jurisdiction where the defendant’s conduct affects both domestic and foreign commerce, but the plaintiff’s claim arises only from the conduct’s foreign effect.”¹⁹ Could a plaintiff proceed with a Sherman Act action only if it could show that it was injured by “anticompetitive effects of the defendant’s conduct on U.S. commerce,” or did it suffice for the plaintiff to show that the defendant’s conduct’s anticompetitive effects on U.S. commerce “give rise to an antitrust claim under the Sherman Act by someone, even if not the plaintiff who is before the court”?²⁰

¹⁷ *Id.*

¹⁸ *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 360 (D.C. Cir. 2003).

¹⁹ *Id.* at 344.

²⁰ *Id.*

Judge Edwards, writing for Judge Rogers and himself, answered this central question by examining the language, structure, and legislative history of the FTAIA, as well as the deterrence objective and effect of the antitrust laws. The court also weighed the conflicting interpretations of the FTAIA's claim condition given by the Second and Fifth Circuits. In *Den Norske Stats Oljeselskap As v. HeereMac Vof*, the Fifth Circuit had read the FTAIA as requiring that the plaintiff's injury must arise from the anticompetitive domestic effects of the defendant's conduct.²¹ The effects of that conduct had to give rise to *the* claim made by the plaintiff. The Second Circuit, on the other hand, in *Kruman v. Christie's International PLC* had taken a much more relaxed interpretation of the FTAIA's Section 2.²² It held that a plaintiff could bring an action under the federal antitrust laws, even if its injury did not arise from the domestic effects of the defendant's conduct so long as those domestic effects "violate the substantive provisions of the Sherman Act."²³ For the *Kruman* court, the FTAIA's claim condition required only proof of a violation of the substantive antitrust law, not a showing that the conduct's domestic effect caused an injury that would ground an action under the Clayton Act.

²¹ 241 F.3d 420, 427 (5th Cir. 2001).

²² 284 F.3d 384 (2d Cir. 2002).

²³ *Id.* at 400.

The *Empagran* Court of Appeals decision came to an interpretation of the FTAIA that “falls somewhere between the views of the Fifth and Second Circuits, albeit somewhere closer to the latter.”²⁴ The court went on,

We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct’s effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct’s harmful effect on United States commerce must give rise to “a claim” by someone, even if not the foreign plaintiff who is before the court. Thus, the conduct’s domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff’s (private) claim.²⁵

Because the foreign purchasers alleged that the international vitamins cartel had effects in United States commerce that gave rise to antitrust claims by parties who were injured in the United States as a result of such domestic transactions, the Court of Appeals found that the District Court had subject matter jurisdiction over the *Empagran* plaintiffs’ claims.²⁶

Judge Henderson dissented because she disagreed with the majority’s interpretation of the FTAIA. She believed that the District Court’s and the Fifth Circuit’s *Den Norske* interpretation of the FTAIA was “[t]he more natural reading of the statutory language” and supported by its legislative history.²⁷ The dissent determined

²⁴ *Empagran*, 315 F.3d at 350.

²⁵ *Id.*

²⁶ *Id.* at 341.

²⁷ *Id.* at 360 (Henderson, J., dissenting).

that “subsection (2) of the FTAIA expressly limits jurisdiction to a claim which *itself* arises from the domestic antitrust effect required under subsection (1) of the statute.”²⁸

The *Empagran* defendants requested a rehearing before the panel and then a rehearing en banc. Both petitions were denied.²⁹

D. The Supreme Court Decision

The Supreme Court granted the petition for certiorari by the defendant vitamin manufacturers and distributors. In a unanimous 8-0 judgment, with Justice O’Connor not participating, the Court vacated the judgment of the D.C. Circuit and remanded the case for proceedings consistent with the opinion of the Court. That opinion, written by Justice Breyer, began by characterizing the *Empagran* facts in a way that sharply narrowed the question the Court faced and hence the scope of applicability of its decision. Specifically, the opinion of the Court states, “We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that caused some domestic injury, and that *independently* caused separate foreign injury.”³⁰ Although we add the emphasis in this quotation, that stress seems merited by the number of times the Court itself intones the independent character of the foreign effect. For example, just two paragraphs following this characterization, Justice Breyer writes, “To clarify: The issue before us concerns (1)

²⁸ *Id.* at 361-62 (emphasis added).

²⁹ See *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, No. 01-7115, 2003 U.S. App. LEXIS 19021, at *1 (D.C. Cir. Sept. 11, 2003).

³⁰ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004) (emphasis added).

significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim.”³¹

The Court applies the FTAIA to this setting and reaches two principal conclusions about “the price-fixing conduct and the foreign injury that it causes.”³² First, that price-fixing conduct comes within the FTAIA’s general exclusion of the Sherman Act’s reach because it constitutes “conduct involving trade or commerce . . . with foreign nations,” and second, that conduct does not fit within the FTAIA’s “domestic-injury exception to the general rule . . . where the plaintiff’s claim rests solely on the independent foreign harm.”³³ As a result, in the case of the global vitamins cartel, “a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.”³⁴ The same conclusions applied to the other remaining *Empagran* plaintiffs from Australia, Panama, and Ukraine, just as it would apply to any other foreign buyer who suffered only foreign harm.³⁵

³¹ *Id.* at 159.

³² *Id.* at 158.

³³ *Id.* at 158-59.

³⁴ *Id.* at 159.

³⁵ Although the *Empagran* plaintiffs were drawn from eight foreign countries and the United States, by the time the case reached the Court of Appeals for the District of Columbia, the appellants, all foreign, were from only Australia, Ecuador, Panama, and Ukraine. The domestic plaintiffs, Procter & Gamble Manufacturing Company and The Procter & Gamble Company, were by then parties in the domestic litigation. The foreign plaintiffs no longer in the litigation -- from Belgium, Indonesia, Mexico, and the United Kingdom -- were all foreign affiliates of Procter & Gamble. *See* Brief for Appellants at i

Justice Breyer begins the Court's analysis by quickly disposing of the vitamin buyers' first argument that the FTAIA has no applicability to the case because its exclusionary rule extends only to conduct relating to exports. Citing the legislative history and referring more generally to careful consideration of "the amendment itself and the lack of any other plausible purpose," he concludes "that the FTAIA's general rule applies where the anticompetitive conduct at issue is foreign."³⁶ This cleared the way for consideration of "the basic question presented, that of the exception's application."³⁷ Since, as the opinion continued, "[t]he price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States,"³⁸ the *Empagran* plaintiffs met the effects condition of the FTAIA. The only remaining question was whether their action satisfied the claim condition -- condition (2) -- of the FTAIA, and the Court's answer was no.

The Court gave two main reasons for its decision that the FTAIA exception, and hence the Sherman Act, did not apply to the *Empagran* situation. First, as a matter of

n.2, *Empagran S.A. v. F. Hoffmann-La Roche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115). On June 7, 2001, Judge Hogan had decided in *In Re Vitamins Antitrust Litigation* that the jurisdiction of the court, responsible for the action by U.S. vitamins purchaser – plaintiffs, encompassed the direct purchase claims of foreign affiliates of a U.S. firm when those purchases were part of a coordinated procurement plan of the U.S. firm. *See In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 8903 (D.D.C. June 7, 2001). As a result, Procter & Gamble's foreign affiliates also departed the *Empagran* litigation.

³⁶ *Id.* at 163.

³⁷ *Id.*

³⁸ *Id.* at 164.

“prescriptive comity,” the Court “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”³⁹ Applying this rule of statutory construction, which reflects principles of customary international law, courts “assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.”⁴⁰ Of course, any application of U.S. antitrust law to foreign conduct can interfere with another country’s capacity to regulate its economy. When the antitrust law is invoked to remedy domestic antitrust injury, the Court has found that interference reasonable. But the Court sharply distinguishes the situation, as in *Empagran*, where the injury is entirely foreign.

Differences abound among countries’ laws governing the substance of competition policy (what conduct is legal and what behavior is outside the bounds), the remedies for established injury (injunction or damages at what level), and the appropriate enforcement strategy (for example, an amnesty policy). Given the range of policy choices made by different countries, the Court deems it unreasonable to interfere with foreign countries’ sovereign authority by applying United States antitrust law to foreign conduct to remedy private plaintiffs’ independent purely foreign injury. Such a case presents the same “serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs” as there is when the injury suffered is domestic, but with independent foreign injury, “the justification for that interference

³⁹ *Id.*

⁴⁰ *Id.*

seems insubstantial.”⁴¹ The Court goes on to reject as “too complex to prove workable” the *Empagran* plaintiffs’ proposed resolution that comity considerations be applied on a case-by-case basis in circumstances like theirs of independent foreign injury.⁴²

There is at least a bit of irony in the Court’s characterization of what the principle of prescriptive comity helps to achieve. This rule, Justice Breyer writes, “helps the potentially conflicting laws of different nations work together in harmony -- a harmony particularly needed in today’s highly interdependent commercial world.”⁴³ But the Court never pauses to ask whether that high degree of commercial interdependence has any implications for the premise that the harmful foreign effects of the global vitamins cartel were independent of the adverse domestic ones. It is precisely this assumption that the *Empagran* plaintiffs and *amici* writing in support of them questioned.

The second principal reason the Court provides for its finding the Sherman Act inapplicable in *Empagran* revolves around the Court’s understanding of the FTAIA’s purpose and the state of antitrust law when the FTAIA was enacted in 1982. Referring to the language and legislative history of the FTAIA, the Court finds that Congress intended the Act “to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act’s scope as applied to foreign commerce.”⁴⁴ Hence, the plaintiff vitamins buyers would be able to establish subject matter jurisdiction only if they could have done

⁴¹ *Id.* at 165.

⁴² *Id.* at 168.

⁴³ *Id.* at 164-65.

⁴⁴ *Id.* at 169.

so prior to the passage of the FTAIA. The Solicitor General and the vitamin manufacturers and distributors reported that they found no such pre-FTAIA case in which a court applied the Sherman Act to the *Empagran* plaintiffs' type of claim. The Court observes that the vitamins purchasers themselves had apparently conceded the point in a District Court hearing but that they noted for the Supreme Court six cases that they argued provided support for their position.⁴⁵

After reviewing the six cases, three decided by the Supreme Court and three decided by lower courts, Justice Breyer concluded that “no pre-1982 case provides significant authority for application of the Sherman Act in the circumstances we here assume.”⁴⁶ The three Supreme Court cases were distinguished from *Empagran* because in each of them the United States government was the plaintiff, and “a Government plaintiff has legal authority . . . to carry out [its] mission” of “obtain[ing] the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm.”⁴⁷ Furthermore, in none of the three cases had the Court focused on relief for “independently caused foreign harm.”⁴⁸ The absence of consideration of that type of injury, Justice Breyer finds, also rendered the three lower court cases cited by the *Empagran* plaintiffs incapable of supporting the proposition that before the FTAIA's enactment, the Sherman Act applied to a claim like theirs.

⁴⁵ *Id.* at 169-70.

⁴⁶ *Id.* at 173.

⁴⁷ *Id.* at 170.

⁴⁸ *Id.* at 171.

Having concluded from considerations of comity and history “that Congress would not have intended the FTAIA’s exception to bring independently caused foreign injury within the Sherman Act’s reach,”⁴⁹ the Court gives brief attention to the plaintiffs’ linguistic and policy arguments. The former focused on the FTAIA’s reference to “a claim” rather than “the plaintiff’s claim” or “the claim at issue,” while the latter emphasized the deterrence value of applying the Sherman Act to the vitamins purchasers’ claim. The Court finds the empirical dispute between the appellants and respondents about deterrence “neither clear enough, nor of such likely empirical significance” to outweigh its concerns about comity and history.⁵⁰ And, although Justice Breyer recognizes that the plaintiffs’ arguments from the statute’s language “might show that [their] reading is the more natural” one, comity and history show that it is inconsistent with Congress’s intent in passing the FTAIA.⁵¹ “If the statute’s language reasonably permits an interpretation consistent with that intent,” as the Court believes it does, “we should adopt it.”⁵² This last point is emphasized in the concurring opinion that Justice Scalia writes for Justice Thomas and himself. He finds that the FTAIA is “readily susceptible” of the Court’s interpretation and that only that interpretation is consistent with the principle of prescriptive comity.⁵³

⁴⁹ *Id.* at 173.

⁵⁰ *Id.* at 174-75.

⁵¹ *Id.* at 174.

⁵² *Id.*

⁵³ *Id.* at 176 (Scalia, J., concurring).

The Court concludes by remanding the case to the District of Columbia Court of Appeals after noting once again its central assumption “that the anticompetitive conduct here independently caused foreign injury” and remarking that the plaintiffs offer an alternative argument that their injury was not independent of the cartel’s domestic effects.⁵⁴ This argument, which the Court of Appeals had not considered and hence the Supreme Court had elided, is that because of the fungibility and ready transportability of vitamins, the cartel could not have succeeded in raising prices in foreign markets without raising them in the United States. Hence, the buyers argued, they would not have incurred their foreign injury without there having been a harmful domestic effect, and the conduct of which they complain comes within the FTAIA’s exception. Justice Breyer leaves it to the Court of Appeals to determine whether the buyers had preserved their alternative argument and, if they had, to consider and decide that claim.⁵⁵

E. The Court of Appeals Decision on Remand

On remand, the Court of Appeals found that the plaintiffs had preserved for appeal their alternative argument that their injury was not independent of the vitamins cartel’s domestic effects, but the court rejected their theory and concluded that the FTAIA does not afford it subject matter jurisdiction.⁵⁶ Writing for the same, but now unanimous, panel that heard the original appeal, Judge Henderson adopted Justice

⁵⁴ *Id.* at 175 (majority opinion).

⁵⁵ *Id.*

⁵⁶ *Empagran S.A. v. F. Hoffmann-La Roche, Ltd.*, 417 F.3d 1267, 1269 (D.C. Cir. 2005).

Breyer’s “but-for” characterization of the buyers’ alternative argument. Rooted in the defendants’ need to eliminate arbitrage possibilities, the purchaser-plaintiffs’ argument, she writes, offers “a plausible scenario under which maintaining super-competitive prices in the United States might well have been a ‘but-for’ cause of the appellants’ foreign injury.”⁵⁷ But that does not suffice to satisfy the FTAIA’s statutory language “gives rise to a claim,” which requires instead “a direct causal relationship, that is, proximate causation.”⁵⁸ Consequently, the higher prices the vitamins cartel engendered in the United States market -- the domestic effect the *Empagran* plaintiffs marshaled -- did not cause their harm in the way required to bring their antitrust claim within the exception that the FTAIA provides.

The District of Columbia Circuit rejected, in particular, the plaintiffs’ argument that the vitamins cartel’s global price-fixing conspiracy caused the supracompetitive prices they paid and the similarly higher prices in the United States, and thereby caused the vitamins buyers’ harm. To satisfy the FTAIA exception, the court says, the plaintiffs must show that one set of effects of the conspiracy -- the domestic effects -- caused the other -- the supracompetitive foreign prices that injured the plaintiffs. Showing that both sets of effects had a common cause, in the global cartel’s price fixing, does not establish “the kind of direct tie” the court finds in two prior cases whose facts met the FTAIA’s

⁵⁷ *Id.* at 1270.

⁵⁸ *Id.* at 1271.

claim condition.⁵⁹ The *Empagran* plaintiffs' injury as a result of Vitamins Inc.'s conduct "was not 'inextricably bound up with . . . domestic restraints of trade'" as had been true in those distinguishable cases.⁶⁰

⁵⁹ *Id.*

⁶⁰ *Id.*

II. A Welfarist Perspective on *Empagran*

Following the bulk of modern academic commentary on antitrust, we posit that the primary goal of U.S. antitrust policy, if not the exclusive goal, is the promotion of economic welfare. Accordingly, this section offers a welfarist perspective on the issues raised by *Empagran*. We begin with some background considerations relating to optimal antitrust remedies against cartels in a closed economy, and then proceed to consider the issues introduced by the fact that the vitamins cartel was international in scope.

A. Economic Background: Optimal Remedies for Cartel Practices in a Closed Economy

Much of the academic writing on antitrust addresses the appropriate policies for a “closed economy,” by which we mean an economy in which all of the firms and consumers who might be affected by anticompetitive practices are domestic. From the closed economy perspective, economic commentary is uniformly hostile to cartels. Cartels create the standard deadweight loss of monopoly by raising price above marginal cost and pricing some consumers out of the market. They also transfer substantial rents to themselves from the consumers who buy their goods and services. Further, in contrast to other business practices that sometimes run afoul of the antitrust laws such as mergers, exclusive dealing, or tying, it is difficult to imagine any significant business efficiencies associated with cartels. Indeed, cartel members will often expend significant resources to fix their prices, allocate their markets, and monitor and enforce the cartel, thus compounding the economic costs of monopoly pricing. For these reasons, a consensus

exists that cartels reduce economic welfare in a closed economy and ought to be sharply discouraged.

To deter their formation, cartels must be made unprofitable from the perspective of their members -- that is, the *ex ante* expected returns to the formation of a cartel must be negative (at least from the perspective of the individual decision makers who may induce their firms to join the cartel). This objective can be accomplished in various ways using criminal and civil penalties. Individuals who initiate or participate in the cartel can be incarcerated or fined, and the firms that participate in the cartel can be made to pay fines to the state or monetary penalties to private plaintiffs.

If, to achieve deterrence, enforcement authorities rely solely on monetary penalties against the firms that participate in cartels, mainstream economic analysis suggests that those penalties should equal, in expectation, the sum of the monopoly profits that the cartel can expect to earn *plus* the value of the deadweight losses caused by the cartel.⁶¹ Such a penalty structure forces the cartel to “internalize” all of the harms that it imposes on others, and will more than suffice to render it unprofitable.

If criminal penalties against individuals are used in conjunction with monetary remedies against firms, the penalties imposed on the firms themselves can be reduced. In principle, criminal penalties against individuals might become high enough (imagine life imprisonment and total forfeiture of assets for individuals who participate in cartel

⁶¹ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 10.12 (5th ed. 1998).

formation and administration) that penalties against firms could become unnecessary. In general, however, both types of penalties will be valuable, and many combinations of them can achieve the desired deterrence.

Whatever mix of penalties is employed, one difficulty that enforcement authorities face is that cartel members generally expect and strive to operate without detection, at least with some substantial probability. This “underdetection problem,” familiar in criminal law, necessitates an upward adjustment in penalties to ensure that the *expected* penalty is sufficient to deter. For example, if cartel members expect to be caught about one-third of the time, and firms can be taken to be risk neutral, the penalties that are appropriate for a cartel that will be detected with certainty need to be approximately tripled. (The analysis is more subtle for criminal penalties against individuals.) This observation is sometimes invoked in defense of the treble damages remedy under U.S. law in private antitrust actions, although a routine trebling of damages in all cases across all business practices is surely no more than the crudest sort of adjustment for the underdetection problem. A more careful approach would take account of the mix of civil and criminal penalties available in each type of case, as well as the likelihood that the anticompetitive practice in question would escape detection.

A further complication arises because litigation against cartels, whether by public or private complainants, is costly. How best, then, to achieve appropriate levels of deterrence while reducing litigation and enforcement costs? It is plausible that more

effort and cost are required to detect the existence of a cartel than to extract a stiffer penalty once it has been detected. Optimal enforcement policy under these conditions may then require that penalties be set at a very high level in cases where cartel behavior is detected, while enforcement efforts directed at the detection of cartels are curtailed to reduce the attendant costs.⁶²

This last observation suggests one reason why public enforcement of laws against cartels may be superior to private enforcement. If penalties increase with private enforcement, the result will be to attract *more* lawsuits and increase the social costs of litigation. In deciding whether to proceed with an action, private plaintiffs will weigh their private benefits and costs, and those may well diverge from their social counterparts. With public enforcement, by contrast, penalties can be increased while efforts to investigate and identify possible cartel behavior are simultaneously curtailed, thereby lowering the costs of enforcement.

U.S. antitrust policy does not seem to take much account of these considerations. It relies heavily on private litigation for antitrust enforcement, and it makes that litigation quite attractive to plaintiffs in general by trebling their damages and enabling them to recover their litigation costs. The distinct possibility exists that greater reliance on public enforcement coupled with a curtailment of private litigation would achieve appropriate

⁶² See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

deterrence at lower cost. A possible counterargument, to be sure, is that generous private damage awards are valuable at inducing private parties to reveal information about cartel activity that they might not otherwise be inclined to provide.

In summary, to deter the formation of cartels, the total of all penalties, criminal and civil, discounted by the probability that the cartel will escape detection, must be large enough to render the formation of cartels unprofitable from the perspective of the individuals who decide whether to induce their firms to participate. This objective may be achieved by ensuring that any firms participating in a cartel will earn negative expected profits, by targeting the individual actors who choose whether or not to join a cartel with criminal and civil penalties large enough to make participation unattractive to them, or by combining these two approaches. Adding considerations of litigation and enforcement costs to the mix reveals that public and private enforcement efforts are not simple substitutes for each other. Acceptable levels of deterrence may be obtained most cheaply by relying on public enforcement coupled with stiff penalties, but we cannot be sure.

B. The International Dimension: Global versus National Welfare

The analysis of antitrust policy can change, perhaps in quite important ways, when anticompetitive practices arise in “open economies” -- that is, in settings where affected firms and consumers are no longer all of the same nationality. A business practice that reduces welfare in a closed economy will, of course, also reduce global

economic welfare because the global economy as a whole is a closed economy. But the welfare effects on individual countries can vary. For example, it is well known that a merger may enhance national welfare but lower global welfare or vice versa.⁶³ Likewise, although a cartel will lower global welfare for the same reasons that it reduces welfare in a closed economy, the cartel may well enhance the national welfare of countries whose nationals reap cartel profits. What constitutes the “optimal” enforcement policy in a given case can thus turn critically on the question of *whose* welfare is to be promoted by antitrust policy.

Our focus here is on U.S. policy. One possibility is that policy should promote the economic welfare of all individuals regardless of their nationality -- a “global welfare” maximand. Another possibility is that U.S. policy should place exclusive emphasis on the welfare of domestic nationals -- a “national welfare” maximand. Of course, many intermediate possibilities can be imagined.

If nations cooperate on antitrust policy, a strong argument can be made for the global welfare maximand. When nations jointly pursue global welfare-maximizing policies, global economic surplus will increase, and all nations can gain on average. In principle, winners could compensate losers so that all are better off. Such reasoning has

⁶³ See Janusz A. Ordover & Alan O. Sykes, *The Antitrust Guidelines for International Operations: An Economic Critique*, in ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: NORTH AMERICAN AND COMMON MARKET ANTITRUST AND TRADE LAWS 4-1 (Barry Hawk ed., 1988).

led various commentators to encourage international agreements on competition policy aimed at the promotion of global welfare.⁶⁴

The United States is indeed a party to a handful of international agreements relating to antitrust, including bilateral agreements with Australia, Canada, the European Union, and Japan. These agreements oblige the United States to cooperate with foreign competition policy authorities along certain dimensions such as the exchange of information and the coordination of simultaneous investigations.⁶⁵ World Trade Organization (WTO) obligations also place some limited constraints on U.S. antitrust policy. A violation of the GATT national treatment obligation (a non-discrimination principle) would arise, for example, if U.S. antitrust law were to impose quadruple damages on foreign defendants but only treble damages on domestic defendants.

For the most part, however, substantive antitrust rules remain outside the domain of international agreements, in part because much disagreement exists on what constitutes an “optimal” antitrust policy. Even in the area of cartel practices, where substantial consensus exists on the evils of cartels, international cooperation has been limited. A recent initiative of the OECD aimed at stimulating cooperative efforts to attack “hard

⁶⁴ See, e.g., Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT’L ECON. L. 665 (1999); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998); Alan O. Sykes, *Externalities in Open Economy Antitrust and Their Implications for International Competition Policy*, 23 HARV. J.L. & PUB. POL’Y 89 (1999).

⁶⁵ The texts of existing U.S. antitrust cooperation agreements may be found at <http://www.ftc.gov/bc/international/coopagree.htm>.

core cartel” practices,⁶⁶ for example, has so far yielded little beyond the sorts of bilateral agreements for procedural cooperation just noted. The international legal system’s approach to competition policy remains highly decentralized.

As a consequence, the United States is largely free to shape its policy toward international cartels to promote the national interest. The question then becomes, what is the “national interest,” and to what extent does it deviate from a policy aimed at global welfare maximization?

To answer this question, it is helpful to begin by considering what global welfare maximization would imply for policy toward cartels. We know that cartels are economically undesirable in a closed economy, and the global economy is assuredly closed. Thus, a global welfare-maximizing policy would be indifferent to the location of a cartel and its activities and to the identity of those who are harmed. The policy would seek to deter any cartel regardless of whose firms benefit from participation in the cartel and whose consumers suffer from it, subject only to the requirement that the costs of deterring cartels must also be considered. If the United States pursued global welfare faithfully, it might then take jurisdiction freely over conduct abroad regardless of its impact on U.S. commerce whenever the remedy for cartel practices elsewhere failed to provide adequate deterrence, as long as a U.S. court could impose additional penalties

⁶⁶ See Org. for Econ. Co-operation & Dev. [OECD], *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, C(98)35/FINAL (Mar. 25, 1998), available at [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(98\)35](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35).

effectively. The caveat is that the United States might decline to take jurisdiction if it believed that it would thereby stimulate greater foreign enforcement efforts when such foreign enforcement is more efficient, perhaps because foreign enforcers have better access to evidence or can more easily punish the cartel participants.

While the pursuit of global welfare in this fashion might seem commendably high-minded to some observers, it does not ineluctably follow that the United States should undertake to subsidize global enforcement efforts in this way, and indeed it is questionable whether the U.S. Congress would wish it or authorize it. The Webb-Pomerene Act,⁶⁷ for example, exempts from the antitrust laws “export cartels” created by or involving U.S. firms, so long as the conduct in question does not have adverse effects on U.S. consumers. It thus allows U.S. firms to participate in cartels and profit at the expense of foreign consumers even though such behavior reduces global welfare. Likewise, the amendments to the Sherman Act embodied in the FTAIA and at issue in *Empagran* make clear that U.S. courts do not have subject matter jurisdiction over conduct that does not have a “direct, substantial, and reasonably foreseeable effect” on U.S. consumers engaged in domestic or import commerce, or on firms in the U.S. engaged in export commerce.⁶⁸ Thus, jurisdiction is precluded unless the conduct in question has adverse effects on the welfare of U.S. consumers or firms. Both statutes

⁶⁷ 15 U.S.C. §§ 61-66 (2000).

⁶⁸ 15 U.S.C. § 6a (2000).

suggest that Congress is more concerned with U.S. welfare than with global welfare, a posture that is hardly surprising.

Accordingly, we proceed here on the assumption that U.S. policy toward international cartels should emphasize the pursuit of national welfare over the pursuit of global welfare when the two conflict, at least barring any conflict with the language of the FTAIA or other pertinent provisions of the antitrust laws, or any conflict with international law. We now elaborate what the pursuit of national welfare implies for enforcement policy.

C. International Cartel Practices and National Welfare

The national welfare effects of international cartels and of enforcement policies against them are complex. These effects often turn on empirical issues that vary from case to case, and hence theory alone does not provide simple guidelines for antitrust policy in this area or for resolving the particular issues raised in *Empagran*.

We develop the analysis in several steps and begin with a narrow focus on the welfare of firms and consumers in the markets potentially affected by international cartels, blended with attention to enforcement costs. We then add a discussion of the relation between private enforcement actions and amnesty programs (an issue raised by some of the parties in *Empagran*) and a brief discussion of “comity” considerations.

1. Net Welfare Effects on Firms, Consumers, and Enforcers

As Arnold Harberger argued half a century ago, the deadweight costs of monopoly pricing in a closed economy need not be terribly large. Although subsequent writers took issue with his empirics, it is possible that the primary effect of a cartel in a closed economy is to effect transfers from consumers to producers, and that the value of the deadweight loss triangle is modest.⁶⁹

The effects of an international cartel can differ dramatically, however, and can be either favorable or unfavorable from the perspective of the United States. For example, if the firms that participate in a cartel are foreign while the affected consumers are domestic (at least in part), the rent transfer from those consumers to the cartel members becomes pure deadweight loss from the national perspective. The welfare cost is no longer the deadweight loss triangle that was Harberger's focus, but that triangle *plus* the portion of the monopoly profit rectangle earned outside the United States. Depending on the circumstances, the costs to the U.S. economy could be enormous (think of OPEC).

By contrast, if at least some of the firms that participate in the cartel are domestic and the consumers who suffer from the cartel are principally foreign, the cartel may raise U.S. welfare (as we noted earlier with respect to the Webb-Pomerene Act). This can occur even if U.S. consumers are injured by cartel practices to some degree. What is

⁶⁹ See Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. (PAPERS & PROCEEDINGS) 77 (1954). The early response to Harberger is well surveyed in F. M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 461-65 (2d ed. 1980).

required for U.S. welfare to increase is that the deadweight loss in the United States associated with consumers who are priced out of the market, plus the rent transfer from U.S. consumers to foreign cartel members, must be less than the cartel profits earned by U.S. firms.

These considerations lead to several observations about enforcement policy. First, the United States seemingly has a powerful stake in enforcement policies aimed at *foreign* cartels that earn their profits at the expense of *domestic* consumers. From a national welfare perspective, enforcement policies that deter the formation of such foreign cartels, or that transfer their profits back to the United States after they have been discovered, may be considerably more important than enforcement efforts against purely domestic cartels.

Second, it may or may not be in the interest of the United States to provide *foreign* consumers with the opportunity to pursue antitrust actions against *domestic* cartel members. Other things being equal, the United States gains when domestic firms earn cartel profits at the expense of foreign consumers, and the nation loses when it transfers those profits abroad as antitrust damages. Other things may not be equal, however, because actions by foreign consumers against domestic cartel members may help to deter the formation of international cartels that, on balance, cause a welfare loss for the United States.

Third, and similarly, from a strictly national-welfare perspective, it is not always in the interest of the United States to allow actions by *domestic* consumers against *domestic* firms that participate in international cartels. The net impact on U.S. welfare from such actions will depend on the circumstances. The possibility arises that U.S. firms will be dissuaded from participating in cartels that reduce U.S. welfare, but it is also possible that cartels will be discouraged that actually enhance U.S. welfare.

Finally, the United States may or may not have an interest in allowing actions by *foreign* consumers against *foreign* cartel members. Of particular pertinence to the issues in *Empagran*, allowing actions by foreign consumers may help to deter the formation of international cartels that cause a net welfare loss for the United States. Rather trivially, a welfare gain also arises to the degree that U.S. law firms may earn rents at the expense of foreign cartel members through their representation of foreign plaintiffs. But there are also some potential sources of offsetting losses. A welfare cost will occur to the degree that the United States confers a subsidy on foreign consumers by allowing them to use the U.S. court system and its enforcement mechanism.

In light of these observations, one might imagine an enforcement policy that sorted cases based on an initial appraisal of the welfare effects of a particular cartel. Cartels that have no impact on U.S. commerce could reasonably be ignored (as indeed is the law under the FTAIA). For example, there is no welfare loss for the United States from a foreign cartel selling a product that is not consumed by U.S. consumers, and

whose price does not affect the prices of other products sold in the United States. Such cartels can be ignored, and U.S. courts could decline to hear foreign purchasers' complaints about them. Other cartels that enhance U.S. welfare might be allowed to operate unfettered, while those that reduce U.S. welfare might be subject to challenge. The Webb-Pomerene Act accomplishes this sorting in a crude and limited way by exempting cartels that do not sell to U.S. consumers. In principle, the law might engage in further classification by examining indicators such as the share of U.S. firms in cartel profits and the share of U.S. consumers in cartel purchases. Where the former share was considerably greater than the latter, a presumption of net benefit to the United States might arise, and enforcement actions might then be foreclosed.

Of course, U.S. law does not engage in this type of analysis (beyond Webb-Pomerene), and it is easy to imagine how such an enforcement strategy might run into difficulties. The information necessary to make a determination regarding the national welfare effects of a particular cartel (such as data on the profits of U.S. cartel members) may be quite difficult to obtain in practice. Indeed, the net welfare effects may not be stable over time. Further, such a transparent policy of promoting national welfare over global welfare would likely trigger unfortunate strategic reactions abroad, or even a WTO complaint predicated on violation of GATT nondiscrimination obligations. Finally, allowing cartels that enhance U.S. welfare to operate might somehow facilitate the operation of domestic cartels.

As an alternative to distinguishing among cartels based on their welfare effects, enforcement policy might instead attempt to promote national welfare by circumscribing the set of private plaintiffs who may bring cases or the subject matter of the claims they can pursue. This brings us to the sorts of issues that confronted the courts in *Empagran*. Congress has made a clear choice through the FTAIA to allow injured domestic consumers to pursue cases against all cartel members whenever a cartel has “substantial effects” on U.S. commerce. Such suits by domestic consumers may at times discourage the formation of cartels that benefit the United States, but at least the lawsuits themselves transfer rents to U.S. nationals.

Should the same rule apply to suits by foreign plaintiffs in a case such as *Empagran*? The *Empagran* plaintiffs would answer that question in the affirmative, as would a number of the *amici* in the case, particularly the economists who filed amicus briefs. They note that antitrust enforcement outside the United States is often lax, and that penalties are generally lower under foreign antitrust law. They also note that because of arbitrage possibilities, cartels most often must set high prices on a global basis. Unless the combination of trade barriers and transportation costs is high enough, a cartel may be able to reap its supracompetitive profit only if it charges a supracompetitive price in every market it serves. Consequently, a cartel may not be able to charge a competitive price in one market (say, the United States) and still maintain cartel prices elsewhere. For this reason, an international cartel may choose to charge an inflated price in the

United States even if penalties under U.S. antitrust law are adequate to deter purely domestic cartels -- the added profits on foreign sales can more than compensate for the expected losses on U.S. sales due to antitrust liability. Based on such analysis, the *amici* argue that the total penalties faced by international cartels are inadequate to deter them, and they urge the Court to allow suits by foreign plaintiffs such as those in *Empagran* to enhance the level of deterrence.⁷⁰ And the courts should do so, argue the *amici*, whenever the cartel in question has substantial effects on U.S. commerce, even if the harm suffered by the foreign plaintiffs arises from purchases abroad.

The analysis of the *amici* is correct as far as it goes. Allowing foreign plaintiffs to sue will enhance deterrence, other things being equal, and the suggestion that international cartels are not “adequately” deterred without such suits because of weaker antitrust remedies abroad seems plausibly correct. But there are other issues that the *amici* do not address at least in part because they argue from the premise of flat condemnation of the entire category of cartels.

For example, do the international cartels that would be deterred by such a policy generally reduce U.S. welfare? The answer to this question requires at least some analysis. Perhaps it might be argued that because cartels reduce global welfare, they

⁷⁰ See Brief of Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 533934; Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents, *Empagran*, 542 U.S. 155 (No. 03-724), 2004 WL 533930.

reduce U.S. national welfare on average, but this claim is conjectural. Of course, if one counts only consumer surplus and ignores producer surplus in the welfare calculus, then any international cartel selling into the U.S. national market will necessarily reduce U.S. welfare so measured. But we see little reason for neglecting domestic producer surplus in formulating a national welfare-maximizing policy.

The economist *amici* also downplay the fact that a welfare cost arises for the United States to the degree that U.S. resources are expended on litigation brought by foreign plaintiffs. One might restate the position of these *amici* as follows: Because foreign governments have not done enough to address the problem of international cartels, the United States should shoulder the costs of remedying the situation, effectively providing the rest of the world free use of the U.S. judicial system. So restated, their argument plainly loses some of its force. The *amici* do, however, make the important point that in calculating the incremental costs of making U.S. courts available to foreign plaintiffs, the effect that the enhanced liability has in deterring cartel formation -- and hence reducing the need for litigation -- must be taken into account.⁷¹

Indeed, the enforcement policies of other nations may be endogenous to U.S. policy. If the United States lends its judicial system to the world to address the problem of global cartels, other nations may freely accept the gift. But if the United States limits

⁷¹ See Brief of Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents, *supra* note 70, at 24-25; Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents, *supra* note 70, at 23.

its enforcement activity and impliedly insists that other nations contribute to the effort, they may eventually be induced to do so to a considerably greater extent.⁷²

Moreover, even if for some reason it is necessary for the United States to shoulder the burden of enhancing deterrence, widening the scope for private suits by foreign plaintiffs is not the only option. Greater levels of public enforcement are a substitute to at least some degree, and one must inquire which option is cheaper and more effective.

Finally, the *amici* do not take account of the fact that a national welfare loss will occur, other things being equal, when litigation brought by foreign plaintiffs transfers rents to them from U.S. firms. This danger is all the more acute since foreign plaintiffs can bring suit in U.S. courts only against firms over which the courts can secure personal jurisdiction, and those plaintiffs can collect damages only from defendants over which the courts have enough leverage to coerce them to pay. The firms that best fit this description may often be U.S. firms, not their fellow cartel members based abroad. The existence of “clawback” statutes in some nations -- an attempt to preclude the collection of treble damages from defendants based in such countries -- further encourages plaintiffs to pursue U.S. firms. Also, cartel members are subject to joint and several liability under U.S. law.⁷³ Plaintiffs can thus collect their damages from any one or more of the defendants, and will tend to collect from the defendants from whom they can most

⁷² A similar point is made in Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. CHI. L. REV. 265 (2005).

⁷³ See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 17.7 (3d ed. 2005).

cheaply secure payment. U.S. firms may once again be the easy targets. Finally, because contribution actions are not allowed in federal antitrust cases,⁷⁴ the distinct possibility arises that plaintiffs will not only tend to collect their damages from U.S. firms, but that those firms will be unable to shift any of their liability to other cartel members through a cross-claim.

Of course, U.S. firms may well anticipate this prospect, and therefore decline to participate in international cartels. If, as a consequence, the cartels never get off the ground or, having launched, fall apart, the *amici*'s objective of deterrence will have been achieved. But cartels may be able to survive and operate without the participation of U.S. firms, especially if U.S. producers have a relatively small market share. Perhaps the cartels most likely to be undermined by allowing plaintiffs such as those in *Empagran* to bring actions are the ones in which U.S. firms have a large portion of the global market and are essential participants -- precisely the cartels that may be more likely to contribute to U.S. national welfare.

For these reasons, a careful, more complete analysis of the national interest leaves a more complicated picture than the economist *amici* in *Empagran* acknowledged. Their policy conclusion may be the right one, but only if one embraces certain empirical assumptions that require justification that the *amici* themselves do not provide, or if in formulating policy one ignores the surplus earned by U.S. producers.

⁷⁴ *Id.*

2. The Amnesty Issue

Returning to the relation between public and private enforcement efforts, part of the dispute in *Empagran* centered on the claim that allowing private suits by foreign plaintiffs would undermine public enforcement. In particular, an *amicus* brief filed on behalf of the United States by the State Department Legal Adviser, the Acting General Counsel of the FTC, and the Acting Solicitor General argued that greater *civil* liability because of suits by foreign plaintiffs such as those in *Empagran* would discourage cartel members from participating in the existing *criminal* amnesty program. That amnesty program allows cartel members and their executives who reveal valuable enforcement information about cartel activities to the U.S. government to receive a substantial reduction in criminal penalties. The first cartel member to disclose information about the group's organization and activities is treated the most leniently. Succeeding confessor firms benefit only if they provide information of sufficient incremental value. Because, however, criminal amnesty does not foreclose civil liability, the U.S. government *amici* argued that an increase in civil liability would make potential amnesty program participants less likely to break ranks with the cartel.⁷⁵ The *amici* further argued

⁷⁵ See Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 7, at 20-21; see also Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 29-30, *Empagran*, 542 U.S. 155 (No. 03-724), 2004 WL 226388; Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 13-14, *Empagran*, 542 U.S. 155 (No. 03-724), 2004 WL 226389; Brief of the United Kingdom of Great Britain and Northern Ireland et al. as Amici Curiae

that the amnesty program had been exceptionally effective at uncovering cartel behavior, and that it did far more to discourage cartels than would expanded civil liability. Consequently, to maintain the attractiveness of amnesty, they strongly favored a construction of the FTAIA that would bar suits by foreign plaintiffs such as those in *Empagran*.

The merits of this argument turn on careful empirical evaluation of alternative enforcement measures. Neither the required data nor the full specification of relevant counterfactuals was provided, and the *Empagran* court wisely declined to try to resolve this empirical debate. It is indeed possible that public enforcement is superior to private enforcement. Public enforcers have both the power and the inclination to pursue individual wrongdoers, and to punish them severely with penalties that private enforcers cannot utilize (for example, incarceration). They can also ratchet up the penalties for cartel activity and curtail costly detection efforts in line with the teachings of optimal deterrence theory. The U.S. government *amici*'s argument goes a step further, however, by emphasizing that public enforcement can employ an additional policy instrument -- the promise of amnesty -- to induce cartel members to break ranks. These *amici* are right that the advantage of seeking amnesty is, other things being equal, smaller the greater is the residuum of prospective civil liability. How much the incentive to seek amnesty is

in Support of Petitioners at 11-13, *Empagran*, 542 U.S. 155 (No. 03-724), 2004 WL 226597.

blunted depends on the effect that residuum has at the margin on individual cartel members' calculations of the costs and benefits of staying in the cartel versus disclosing its activities.⁷⁶ That calculus may entail weighing complex strategic interactions among the cartel members. If the adverse effect of greater civil liability on the incentives to seek amnesty is great enough, the net impact on deterrence may be adverse.

But if this is true, it is a generic problem and not one limited to suits by foreign plaintiffs against international cartels. As the economist *amici* argued in response to the United States, the interpretation of the FTAIA favored by the *Empagran* plaintiffs would expose participants in international cartels affecting the U.S. market to the same potential civil liability that the participants in purely domestic cartels already face. All victims of cartel activity would be allowed to sue in U.S. courts. In fact, foreign cartel participants likely would still face somewhat less liability than domestic cartel participants because foreign cartel members may have the capacity to ignore U.S. judgments, or may be protected by clawback statutes that reduce their liability. Hence, if allowing suits by the foreign plaintiffs in *Empagran* would undermine the amnesty program with respect to foreign cartels, the adverse effects of civil liability on the amnesty program would seem to be even more acute for domestic cartels unless for some reason the expected penalties

⁷⁶ For a related discussion, see Jonathan T. Schmidt, Note, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 246-47 (2006).

for domestic cartels are otherwise lower than for foreign cartels, a situation which seems unlikely.

An irony is that just as the United States was arguing against extending cartel members' civil liability to foreign plaintiffs because of the deleterious effect it would have on the amnesty program, Congress was debating a bill to reduce the civil liability that an amnesty program participant might face. That proposal, which allows potential detrebling of the private damages that a fully cooperating leniency-program participant might face, was supported by the Department of Justice. It became law in 2004 as part of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.⁷⁷ Consequently, the harmful impact that the U.S. *amici* argued would follow from a plaintiff's victory in *Empagran* was soon to be considerably diminished in any event.

The U.S. government *amici*'s point may nevertheless be recast as a second-best argument. If civil liability for cartel activity is presently so high that it undermines public enforcement efforts, at least the problem is diminished in the case of international cartels as long as foreign plaintiffs are limited in their capacity to bring claims. So restated, we cannot exclude the possibility that the argument is correct.

3. "Comity"

One other set of considerations warrants attention and was central to the Supreme Court's *Empagran* decision. When the United States takes jurisdiction over conduct

⁷⁷ See Pub. L. No. 108-237, § 213, 118 Stat. 661, 666-67 (2004).

abroad, and especially when it seeks to impose stiff penalties on foreign firms or individuals, it may tread on the interests and preferences of foreign governments. Such concerns do not arise with purely domestic antitrust enforcement. The courts have long recognized that antitrust enforcement directed at parties or activities outside the U.S. should be attentive to international relations and to the question of when and to what extent the United States should defer to other countries' choices about competition policy rules and remedies. This set of issues may be subsumed under the rubric of "comity."

The comity issues are perhaps somewhat easier in the case of cartels because there is now little international disagreement that cartels are detrimental to the global economy. The problems of international cooperation, and hence jurisdiction, are greater with respect to other offenses for which there is not a shared understanding of what should be sanctioned. But even with regard to cartels, differences of opinion remain with respect to the proper remedy. The divergence may relate to the different remedies and penalties that the United States and other nations have imposed. Alternatively, other countries with fledgling antitrust policies may have a more general concern about having a U.S. court determine the criminal and civil penalties that foreign nationals -- individuals and businesses -- would face, and instead wish to evolve their own systems of remedies.

As the economist *amici* point out in their analysis of why international cartels may not be adequately deterred, other nations often have considerably weaker criminal penalties than the United States does and limited or non-existent private enforcement. In

nations where private enforcement exists, the damages are often limited to compensatory amounts (no trebling). The fact that other nations employ weaker remedies, however, does not necessarily imply that international relations will be undermined in any important way if the United States employs stiffer remedies. Foreign governments might be delighted to see the United States take on the costs of more vigorous cartel enforcement. In *Empagran*, however, numerous foreign governments intervened to argue against allowing the foreign plaintiffs to sue. The foreign government *amici* included the United Kingdom, Republic of Ireland, Federal Republic of Germany, Belgium, Canada, Japan and the Netherlands. All of them argued, at least implicitly, that considerations of comity should lead the United States to defer to foreign remedies.

The mere fact that foreign governments express preferences on an issue, while deserving careful consideration, does not establish that the United States should honor those preferences in the interests of comity. The idea of comity has a simple economic interpretation. It is a way of saying that nations may defer to the preferences of other nations at times because they expect to benefit on balance through some form of reciprocity, whether in the form of reciprocal deference or cooperation on some entirely unrelated matter. So understood, it is easy to see why, in principle, nations might at times wish to defer to others on grounds of comity. But it is exceedingly difficult to decide, as a practical matter, when to do that.

The dimensions of international relations that may be affected by matters before a court, and by decisions that foreign governments find objectionable, are vast. Courts have no direct way to obtain reliable information about them. Private litigants face much the same problem, and, in any event, their assessments are shaped by their interest in the case's outcome. As a result, courts are generally forced to rely on representations by various government *amici*. Yet, none of the *amici* has systematic incentives to offer advice that unbiasedly balances the relevant costs and benefits. Foreign governments have every incentive to overstate their interests and to ignore the U.S. domestic interest. The U.S. Executive Branch is no doubt somewhat more inclined to consider both sides of the ledger, but it too may be driven by excessive concern for one type of problem over another, or by political considerations that do not map well with the national interest. Nevertheless, the position taken by the Executive Branch may be the most reliable indicator of the national interest available notwithstanding its imperfections.

III. The Implications of the Welfarist Perspective on *Empagran*

In this section we explore the implications of our welfarist perspective on the Supreme Court's *Empagran* decision. We assess whether the Court's decision advanced the development of antitrust law and policy in an increasingly interdependent world. In particular, we consider the Court's approach to comity and the role that it ought to play in deciding antitrust cases under U.S. law. Then, we examine the implications of the welfarist perspective for the statute at the center of the *Empagran* case, the FTAIA.

A. Comity and the "Independence" of the Plaintiff's Injury

In deciding *Empagran*, the Court could not undertake a welfare analysis from first principles as we and other commentators can. The Court needed to follow the canons of faithful statutory interpretation and decide the case as it had been precisely framed. When the statute at issue in an antitrust case is perceived to be ambiguous, as the Court regarded the FTAIA in this case, perhaps, however, the Court has more scope to shape the doctrine in a way that systematically promotes economic welfare. In any event, as an analytical matter, with regard to any antitrust case, we can ask whether the Court's approach and the factors it considered -- not just the decision it reached -- comports with welfarist analysis undertaken from either a global or a national perspective. In *Empagran* the Court's analysis did not proceed along that path.

The disjunction results, in large part, because of the central concept that drives the Court's analysis, its postulated "independence" of the effects that the global vitamins

cartel's activities had on foreign consumers and domestic ones. Sometimes the effect of a cartel can be confined to one nation or one region, and sometimes high transportation costs, tariff barriers, or other national regulatory requirements may insulate the effects of a truly international cartel between countries or regions. But what meaning can the Court's hypothesized "independent effect" have in the case of a global price-fixing cartel that sets prices in many countries when traders can easily arbitrage price differences? The concept is difficult to fathom unless it is meant to be another (redundant) way of asking whether the conduct at issue harms U.S. nationals. That, however, is not what the Court seemed to be saying. The Court takes independent foreign injury to be an injury that the conduct's domestic effects did not help to create. It is difficult to understand what this concept means when maintenance of the cartel's price in one location requires its maintenance wherever it is sold because arbitrage can successfully overcome price differences.

The Court's causation language is distinctly unhelpful, and it created further problems when the *Empagran* case returned on remand to the D.C. Circuit, which said that the effect of the cartel in the U.S. market was a but-for cause but not a proximate cause of the plaintiffs' harm. There is need for a change in thinking and language about the appropriate concept of causation. The cartel's *activity* gives rise to a *set of effects* in different countries. No one of those effects is causally related to the others. Unless trade between the countries is impeded and arbitrage ineffective, the international worldwide

action has international, worldwide effects. A welfarist-based policy that aims to deter the formation and activities of detrimental cartels must take account of the full set of effects such cartels engender.

The “independent” character of the *Empagran* plaintiffs’ injury plays an important role in the Court’s application of prescriptive comity. “[W]hy is it reasonable,” Justice Breyer asks, “to apply [America’s antitrust] laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim?*”⁷⁸ It is the independence and purely foreign character of the injury that renders “insubstantial” the gains from interference with foreign countries’ regulation of their own commercial affairs. With respect to comity, *Empagran* takes a step away from the Court’s approach in *Hartford Fire Insurance Co. v. California*.⁷⁹ It follows much more closely Justice Scalia’s dissent in *Hartford Fire*, a case concerning *foreign* conduct causing *domestic* effects and *domestic* harm, than it does the majority opinion in that case. The *Empagran* Court’s approach represents a revival of prescriptive comity analysis as it proceeds along the lines of Justice Scalia’s *Hartford Fire* dissent to consider the reach of U.S. law to foreign behavior and conduct, and as it rejects the case-by-case interest-balancing approach of *Timberlane*.⁸⁰

⁷⁸ *Empagran*, 542 U.S. at 165.

⁷⁹ 509 U.S. 764 (1993).

⁸⁰ *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

Considering Justice Breyer's question, suppose that the foreign plaintiff's domicile does not provide any remedy for the supracompetitive prices it pays as a result of the cartel's price fixing. Would prescriptive comity require that U.S. courts defer and not allow suit under U.S. antitrust law? The penalty imposed for international price-fixing cartel behavior then might be less than required for optimal deterrence, even from a national welfare perspective. To paraphrase Justice Breyer, Why would that be reasonable? Why ignore this problem of inadequate deterrence? By contrast, if the potential plaintiff's home country does provide adequate remedy, then there is little reason for the U.S. court to accept the case, and the directive of prescriptive comity would be well-aligned with the theory of optimal deterrence. This analysis suggests that comity considerations alone should not be determinative, but merely one factor to consider along with others, including the adequacy of deterrence from the U.S. perspective and the likely impact on U.S. firms of allowing the suit to proceed (as discussed in our section on welfare issues).

In addition, while discussing considerations of prescriptive comity, the Court sharply distinguishes between private and public enforcement of the antitrust laws. This distinction is, of course, important in purely domestic actions as well, especially in the context of an action brought by a firm's competitor. There is always the concern that private interests may motivate the filing of an action when the public enforcement agency would stay its hand. The antitrust injury doctrine emerged from just such concerns. But

the *Empagran* Court's emphasis on the private-public distinction to explain why fewer questions would be raised by a public enforcement agency's claim than by a private party's in an *Empagran*-type setting reflects a new element injected by the international context. The Court correctly explains that in deciding whether to pursue a claim, public enforcement agencies weigh the international, diplomatic concerns while private parties have no incentive to do so. This is a variant of the point that with respect to questions of comity, reliance on the Executive is about the best we can do. The counterargument is that enforcement authorities face scarce resources and that U.S. antitrust enforcement has always relied heavily on private attorneys general. Inaction by the enforcement authorities does not provide conclusive evidence that concerns about an action's ramifications for international relations predominate.

Case-by-case application of comity can be difficult, as the *Empagran* Court argues, but that difficulty cannot completely determine how to proceed in such cases. What we are seeking is a second-best approach in the absence of shared international agreement about a global antitrust regime but in the presence of strong economic interdependence. When welfare effects are significant enough, careful examination of the substantive concerns traveling under the "comity" heading should be undertaken. In particular, as the *Empagran* plaintiffs argued,⁸¹ it may be possible to identify categories of harmful behavior -- for example, price fixing by cartels -- on which there is sufficient

⁸¹ See *Empagran*, 542 U.S. at 168.

international agreement that remaining inter-country differences pale in comparison with welfarist considerations.

B. The Text of the Foreign Trade Antitrust Improvements Act

Can the FTAIA be interpreted in a way that is consistent with a welfarist approach? The Act requires first that for the Sherman Act to apply to conduct involving non-import trade or commerce with foreign nations the activity must have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce. This meshes with what our analysis sets as a necessary condition for U.S. courts to take jurisdiction over foreign plaintiffs’ allegations that they have suffered anticompetitive harms.

The central issue about the statute is the putative ambiguity of its language in speaking of “a claim.” Justice Breyer recognizes the natural meaning of the text, but he says that it is not the only acceptable meaning. Justice Scalia, in his concurrence, emphasizes this possibility of other acceptable meanings. With “a claim” broadly construed, as the D.C. Circuit interpreted it in that court’s original decision,⁸² the FTAIA would permit *Empagran*-type claims in the circumstances in which we conclude jurisdiction should be granted.

The statute permits our preferred interpretation but apparently many others as well. Under the dictates of prescriptive comity, however, ambiguous statutes are ordinarily understood “to avoid unreasonable interference with the sovereign authority of

⁸² *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 350 (D.C. Cir. 2003).

other nations,”⁸³ and that might argue against reading the FTAIA to allow *Empagran*-type claims at least by nationals of countries that have effective competition policies of their own. In addition, the history of the FTAIA does not reveal any Congressional intent to extend the reach of the Sherman Act to foreign commerce. Quite to the contrary, the principal purpose of the FTAIA was to limit the antitrust exposure of U.S. exporters. Yet Congress rejected language proposed by business interests that would have prohibited suits by parties who were injured outside the U.S.⁸⁴

The difficult questions are empirical in character: Is deterrence inadequate without a U.S. remedy? And what are the stakes in declining to exercise “comity”? These are not issues that can be neatly resolved by parsing the statutory language.

⁸³ *Empagran*, 542 U.S. at 164.

⁸⁴ See Sprigman, *supra* note 72, at 278.

Conclusion

Empagran raises difficult issues for antitrust enforcement, as do global cartels more generally. We favor a welfarist approach to the issues here as elsewhere in antitrust, but that does not make the cases easy. The Supreme Court in *Empagran* does not follow any intelligible welfarist course, however, and instead confuses matters with a line of causal analysis that can promote public welfare only by coincidence.

The road forward is murky both as a legal matter and from an economic perspective. The government and economist *amici* in the case did a good job of identifying the stakes, but none of them provides a fully satisfactory framework for decisionmaking. The economists, who favored allowing the case to go forward, correctly emphasized the importance of adequate deterrence, but do not convince us that the United States should necessarily shoulder the burden in all of these cases, especially given the greater exposure that U.S. firms may face in U.S. courts as compared to their foreign competitors. The government's concern about negative effects on its amnesty program, offered in opposition to the action, seems to prove far too much. Finally, appeals to "comity" by various *amici*, and ultimately by the Supreme Court itself, are of at best modest utility, for the simple reason that the weightiness of comity considerations in the face of other welfarist concerns is extremely difficult to assess.

The *Empagran* Court did not provide much help with the difficult issues in play. And the approach of the D.C. Circuit on remand suggests that foreign plaintiffs will

systematically be excluded from the opportunity to pursue remedies in U.S. courts against global cartels regardless of the implications for deterrence. It is possible that this is the right policy from a national welfare perspective, but the reasoning behind it is dubious at best. The case may indicate the need for further Congressional action with the Supreme Court's *Empagran* decision considered an invitation to Congress to clarify whether the FTAIA should allow such claims against international price-fixing cartels to go forward in U.S. courts. But, more important, the case highlights the potential value of deeper international agreements on competition policy.