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With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress

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NOTE

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A US JUDICIAL INTERNATIONAL COMITY
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*Sean Murray**

I. INTRODUCTION	228
II. THE SHERMAN ACT’S EXTRATERRITORIAL EXPANSION	239
A. Alcoa and the Effects Doctrine.....	240
B. Reasons to Extend the Sherman Act Abroad.....	244
III. EFFORTS TO LIMIT THE SHERMAN ACT’S CROSS-BORDER APPLICATION.....	250
A. Non-Judicial Checks on Extraterritoriality	255
1. The FTAIA.....	256
2. Positive Comity	257
B. Judicial Response to Sherman Act Extraterritoriality.....	259
1. Timberlane	259
2. Hartford Fire.....	261
3. Empagran	261
IV. SHORTCOMINGS OF THE CURRENT JURISPRUDENCE	263
A. Problems Arising from the Circuit Split.....	264
B. Comity Analysis: A Possible Solution to Interpreting the FTAIA?.....	269

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V. SOLVING THE COURTS' INCONSISTENT INTERPRETATION OF THE FTAIA AND APPLICATION OF COMITY PRINCIPLES: A COMITY BALANCING TEST	270
VI. CONCLUSION.....	281

I. INTRODUCTION

International enforcement of the world's antitrust laws is a developing project, but recovery for private victims remains elusive due to the complexities of national sovereignty.¹ To illustrate, suppose all of the wool textile manufacturers in Pakistan agree to fix the price of cotton textiles. One of these cartelists in turn signs a contract in Karachi for the sale of cotton textiles to a non-wholly owned subsidiary of a US clothier located in Sri Lanka, which takes the textiles and manufactures pants. It sells these pants to its parent company at cost for distribution around the world, which includes retail outlets in the United States. Assuming the price of the cotton textiles was higher than it otherwise would have been but for the price-fixing agreement, where is the proper locale for the US clothier to seek redress, personal jurisdiction over defendants and other procedural arguments aside, and what is the proper applicable law?² Is the nexus to the United States

1. For clarity's sake, the term "antitrust" is an American convention, whereas the more commonly employed synonymous term is "competition." See ELEANORA POLI, *ANTITRUST INSTITUTIONS AND POLICIES IN THE GLOBALISING ECONOMY* 2 (2016) (describing the genesis of the American "antitrust" as relating back to the late nineteenth century when US cartelists would label their joint activities "trusts" to conceal their collusive nature); PETER MORICI, *ANTITRUST IN THE GLOBAL TRADING SYSTEM: RECONCILING U.S., JAPANESE, AND EU APPROACHES* 3-4 (2000) (noting that though competition policy has a broader meaning than antitrust policy in most cases, the terms are used interchangeably); Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 278 (1992) (noting that "antitrust" is synonymous with "competition" and "antimonopoly"). Labels may vary by country, such as in China where "antimonopoly" is used or in France where "concurrency" is used for the body of law. See 中华人民共和国反垄断法 (Anti-Monopoly Law of the People's Republic of China) (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China) (setting out China's antitrust law); CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] arts. 410-1 to 470-8 (Fr.) (book IV entitled "de la liberté des prix et de la concurrence," or "Freedom of Prices and Competition").

2. As a preliminary matter, it is necessary to highlight that in such conflicts-of-law situations courts will typically dismiss cases rather than apply foreign regulatory law, such as antitrust law, due in part to the longstanding principle that states will not apply the penal, tax, or regulatory rules of another state. See William S. Dodge, *Extraterritoriality and Conflict-of-Laws*

strong enough to justify subjecting the Pakistani cotton producers to US antitrust law, or does the existence of a foreign non-wholly owned intermediary purchaser and a non-US point of sale sufficiently weaken the United States' interest in applying its own laws? What if the Pakistani cotton textile manufacturers had no knowledge of the initial purchaser's corporate ownership, which would have intimated the possibility of the price-fixed cotton textiles ending up in the United States? And surely Pakistan would take issue with the United States imposing US law in private litigation to the detriment of a large portion of the Pakistani economy and Pakistan's ability to independently regulate its own commercial affairs.³

In the past fifty years the world has experienced a marked increase in international trade. Global exports have exploded (in constant 2010

Theory: An Argument for Judicial Unilateralism, 39 HARV. INT'L L.J. 101, 109 (1998) (discussing that US courts dismiss cases where foreign antitrust law governs); Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311, 322ff (1979) (expounding the "public law tabu" that explains why states decline to apply foreign penal, tax, and regulatory laws in domestic fora).

3. Indeed, these issues have been voiced in recent influential cases on US antitrust law extraterritoriality. See Brief of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 2, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) ("Germany also has an interest in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs – whose injuries were sustained in transactions entirely outside United States commerce – seeking treble damages in private lawsuits against German companies."); Brief of the Korea Fair Trade Commission as Amicus Curiae in Support of Appellees' Opposition to Rehearing En Banc at 3, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2014) (No. 14-8003) [hereinafter *KFTC Motorola Brief*] ("Under prevailing international norms, claims should be brought in a country in which the underlying transactions took place and should be governed by the laws of that country rather than by the antitrust laws of the U.S., the commerce of which was not directly affected by the transactions."); Amicus Curiae Brief of the Ministry of Economy, Trade and Industry of Japan in Support of Appellees at 5, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2014) (No. 14-8003) [hereinafter *Japan Motorola Brief*] ("[T]he Ministry of Economy, Trade and Industry of Japan [is concerned] that the applicability of treble damages, which are not common outside the US, will be expanded through excessive extraterritorial application of US competition law, and that, as a result, Japan's ability to regulate its own commercial affairs will be interfered."); Brief for Amicus Curiae her Majesty the Queen in Right of the Province of Saskatchewan, Canada, in Support of Petitioners at 21, *Agrium Inc. v. Minn-Chem, Inc.*, 683 F.3d 845 (7th Cir. 2012) (No. 12-650) [hereinafter *Saskatchewan Minn-Chem Brief*] ("[T]he Seventh Circuit's expansion of the FTAIA's "direct" requirement to include any "reasonably proximate causal nexus," as well as its interpretation of the "import commerce" provision of the FTAIA, will impede the legitimate interest of the Government of Saskatchewan to adopt and implement policies to maximize the efficient export of potash and other products.").

dollars) from US\$1.6 trillion in 1965 to US\$22.7 trillion in 2015.⁴ Total exports' share of the global economic activity more than doubled in the same period, from twelve percent to twenty-nine percent in 2015.⁵ But while markets for goods and services transcend national borders, antitrust laws regulating these markets are national in scope.⁶ Historically, the United States has served as the primary enforcer of antitrust law for private litigants due to its early development of redress for these litigants, including the availability of treble damages and other plaintiff-friendly procedural mechanisms, as well as the progressively long extraterritorial reach of the Sherman Act.⁷ Its evolution as the

4. *World DataBank: World Development Indicators*, THE WORLD BANK, <http://databank.worldbank.org/data/reports.aspx?source=world-development-indicators#> [<https://perma.cc/2DTJ-YEW8>] (last visited Oct. 26, 2017) (database of macroeconomic data). Average annual growth, estimated through a least-squares growth rate, was a healthy 5.2 percent. *Id.*

5. *Id.*

6. U.S. Dep't of Justice, Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust 35-36 (2000), <http://www.justice.gov/atr/final-report> [<https://perma.cc/JPT3-MLX9>] (last visited Oct. 26, 2017) [hereinafter ICPAC Report] (describing the implications of globalization for international antitrust enforcement); Matthew Cooper, Comment, *The Role of Positive Comity in U.S. Antitrust Enforcement Against Japanese Firms: A Mixed Review*, 10 PAC. RIM L. & POL'Y J. 383, 383 (2001) (citing ICPAC Report).

7. See WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 45 (5th ed. 1996) ("For years the United States was the only country with antitrust laws, and only in the past two decades have we seen the beginning of active enforcement in other countries of a scope to be compared to the U.S. antitrust laws."); Reza Rajabiun, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States*, 8 J. COMP. L. & ECON. 187, 191-93 (2012) (discussing the divergence of the US antitrust enforcement system from the common mold of other countries); Susan E. Burnett, Comment, *U.S. Judicial Imperialism Post Empagran v. F. Hoffman-La Roche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 EMORY INT'L L. REV. 555, 571, 571 n.69 (2004) (noting that as of World War II, when extraterritorial application of the Sherman Act began, the United States was one of the few countries with developed antitrust laws and that while some European states had common-law or statute provisions against restrictive practices, the United States was the home of "antitrust"); Spencer Weber Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523, 532 (2002) [hereinafter Waller, *Courtroom*] (explaining the incentives for plaintiffs to seek recovery of antitrust harm in US courts, including treble damages, extensive discovery, jury trials, class actions, contingent fees, and potential punitive damages). Section 4 of the Clayton Act, 15 U.S.C. § 15, not only grants private litigants the right to sue antitrust perpetrators but also the ability to collect threefold damages (treble damages) plus all fees related to bringing suit.

The Sherman Act, enacted in 1890, prohibits companies from entering into agreements that restrain trade and proscribes anticompetitive conduct arising from or leading to monopoly. See 15 U.S.C. § 1-7; STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 97 (2015) (summarizing the Sherman Act); Charles W. Smitherman III, *The Future of Global Competition Governance: Lessons from the Transatlantic*, 19 AM. U. INT'L L. REV. 769, 796-7 (2004) (same). To be clear, this Note will only address the

world's antitrust courtroom was, of course, grounded in the interest of protecting national commerce and allowing its citizens to recover from wrongful acts committed at home or abroad.⁸ Internationally, widespread antitrust law only began to emerge decades later when, for instance, the European Union ("EU") introduced its own antitrust law in the form of Articles 85 and 86 (now 101 and 102 in the Treaty on the Functioning of the European Union ("TFEU")) in the 1957 Treaty of Rome, which initially founded the European Economic Community.⁹ The private right to sue would wait until 2014, when the European Commission ("EC") issued Directive 2014/104/EU ("the EC Directive"),¹⁰ requiring EU member states to legislatively facilitate private enforcement of competition law at the national level.¹¹

extraterritorial application of the Sherman Act to foreign conduct, though it will reference "U.S. antitrust law" generally. It should be noted that US antitrust law, found in Title 15 of the U.S. Code, is comprised of several acts that are jurisprudentially different from the Sherman Act in terms of cross-border application. See Russell J. Davis, Annotation, *Extraterritorial Application of Federal Antitrust Laws to Acts Occurring in Foreign Commerce*, 40 A.L.R. Fed. 343, n.1 (2016) (highlighting that the majority of antitrust actions involving extraterritorial conduct are brought under the Sherman Act due to the broader phrasing of its substantive provisions); Earl W. Kintner & Katherine Drew Hallgarten, *Application of United States Antitrust Laws to Foreign Trade and Commerce—Variations on American Banana Since 1909*, 15 B.C. INDUS. & COM. L. REV. 343, 365 n.104 (1973) (explaining the jurisdictional implications for the Clayton Act, another US antitrust statute).

8. See *infra* § II. See also Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 629 (2010) [hereinafter Cavanagh, *Lessons*] (characterizing the American private right of action under antitrust law not just as a means to redress harm but also "as a complement to public enforcement to assure the detection and prosecution of antitrust offenders" where government resources were limited to accomplish these objectives).

9. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. The Treaty of Rome has since evolved into the TFEU, which was signed in 2007 and is the current governing treaty of the European Union. See Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47 [hereinafter TFEU]. The European Union was formed from the European Economic Community with the signing of the Maastricht Treaty in 1992. See Consolidated Version of the Treaty Establishing the European Community, 2006 O.J. C 321 E/37.

10. Directives are edicts of the European Union that require member states to achieve a certain result without articulating the means by which the result must be achieved. See TFEU art. 288 ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.").

11. Directive 2014/104/EU, 2014 O.J. L 349; see *infra* § II.B. While Australia has developed a limited system for private redress since the 1970s, private actions to recover harm from anticompetitive behavior are even rare in other English-speaking legal systems besides the United States, such as Canada and the United Kingdom, though recent UK law allowing for collective action suits may change that trend. See Rajabiun, *supra* note 7, at 192 n.19 (noting the lack of recourse for private victims of antitrust harm); John Pheasant, *Private Antitrust Damages*

With nowhere else to go, private litigants have naturally flocked to the United States for remedial assistance, creating an issue for developing antitrust regimes.¹² Several implications attend foreign plaintiffs seeking recovery in the United States. American courts have recognized the importance of allowing foreign plaintiffs to bring claims in the United States under the Sherman Act.¹³ Before 2004, there was a significant chance that parties injured abroad by global cartels that directly harmed the United States would be able to sue in US courts to recover their losses.¹⁴ But, as illustrated above, private litigants

in Europe: The Policy Debate and Judicial Developments, 21 ANTITRUST 59, 59 (2006) (explaining that “the low level of reported cases [in Europe] suggests that [private] actions are still relatively rare”); Matthew O’Regan, *United Kingdom: Consumer Rights Act 2015 Introduces New Procedures for Competition Litigation, Including Collective Follow-On Damages Actions*, KLUWER COMP. L. BLOG (Oct. 5 2015), <http://kluwercompetitionlawblog.com/2015/10/05/united-kingdom-consumer-rights-act-2015-introduces-new-procedures-for-competition-litigation-including-collective-follow-on-damages-actions/> [<https://perma.cc/AS9L-ZBDB>] (archived Oct. 26, 2017) (“[The Consumer Rights Act 2015 provisions concerning private actions in competition law] have been described in the media as introducing ‘US-style class actions law suits’; whilst this is undoubtedly somewhat hyperbolic, it is clear that things will never be the same again.”); *infra* notes 18, 214.

12. See S. Lynn Diamond, Note, *Empagran, The FTAA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT’L L. 805, 805 (2006) (“The United States has the most developed and aggressive antitrust regime in the world, so it is not surprising that parties injured by worldwide price-fixing conspiracies would prefer to litigate their claims here than anywhere else.”); Waller, *Courtroom*, *supra* note 7, at 532 (describing the aspects of US law that make the United States a favorable litigation venue for private antitrust litigants).

13. See *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 314-315 (1978) (addressing in dicta that foreign purchasers generally had proper standing to bring claims under the Sherman Act); *Laker Airways Ltd. v. Sabena, Belgium World Airlines*, 731 F.2d 909, 938 n.109 (D.C. Cir. 1984) (observing that “Congress has expressly allowed foreign corporations to sue for violations of the Sherman and Clayton Acts.”).

14. See Eleanor M. Fox, *Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief*, 80 TUL. L. REV. 571, 580-81 (2005) [hereinafter Fox, *Remedies*] (explaining that the US Supreme Court’s decision in *F. Hoffman-La Roche Ltd. v. Empagran S.A.* restricted the United States’ antitrust jurisdiction to hear claims from foreign plaintiffs alleging harm from a worldwide cartel if US defendants were no longer a party to the suit despite the cartel’s activities directly harming the United States); *infra* §§ II.A; III.B. After 2004, American courts have reiterated that US antitrust adjudication is proper for foreign plaintiffs only if the injury the party endures – that is, the “effect” arising from the proscribed anticompetitive conduct – occurs with US borders. See *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran)*, 542 U.S. 155, 159 (2004) (holding that only parties claiming domestic injury may maintain a US lawsuit under the Sherman Act); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 820 (7th Cir. 2015) (asserting that US antitrust law is not meant to redress foreign victims realizing foreign harm); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 858 (7th Cir. 2012) (“U.S. antitrust laws are not to be used for injury to foreign customers . . . [but it is a] well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce.”); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co., Ltd.*, 753 F.3d 395, 413-14 (2d

applying US antitrust law for redressing harm that occurred abroad create tensions over sovereignty with other countries.¹⁵

Moreover, bringing claims to the United States strips valuable opportunities for young foreign antitrust regimes to develop their own jurisprudence, depressing the effectiveness of global antitrust enforcement and stalling the emergence of private redress.¹⁶

Cir. 2014) (finding that a foreign plaintiff harmed by foreign anticompetitive conduct that coincidentally caused a domestic effect was barred from bringing Sherman Act claims by the FTAA because the domestic effect did not give rise to the foreign plaintiff's claim). *See infra* §§ III, IV.

15. *See, e.g.*, Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 160-61 (1999) (discussing that aggressive extraterritorial application of the Sherman Act brought "considerable backlash from foreign governments"); Mark S. Popofsky, *Extraterritoriality in U.S. Jurisprudence*, in 3 ISSUES IN COMPETITION LAW AND POLICY 2417, 2423 (2008) (describing the controversy associated with US antitrust law extraterritoriality with US trading partners). *See also infra* § III.

16. *See* Fox, *Remedies*, *supra* note 14, at 580 (recognizing that effective enforcement by every antitrust jurisdiction would be better than the United States unilaterally strengthening its own enforcement efforts for global benefit). *But see generally* Dodge, *supra* note 2 (arguing that, due to the complexity of multilateral conflict-of-law approaches weighing foreign interests, US courts should only employ *Alcoa's* US-centric effects doctrine to encourage growth of international antitrust law so long as all courts similarly apply such unilateral approaches); Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2001) (drawing on the US prosecution of the *Vitamins Case* cartel to show that aggressive US extraterritoriality can lead to comprehensive international antitrust enforcement).

Others have proposed ideas for multilateral international antitrust enforcement, including a proposal from a group of antitrust scholars (the Munich Group) that involves the creation of an international agency tasked with enforcing a globally adopted antitrust code. *See* Int'l Antitrust Code Working Grp., *Draft International Antitrust Code as a GATTMTO-Plurilateral Trade Agreement*, 5 WORLD TRADE MATERIALS 126 (1993) [hereinafter DIAC] (proposing the establishment of an international antitrust agency sharing the responsibility of enforcement of an international antitrust code with national governments); Wolfgang Fikentscher, *On the Proposed International Antitrust Code*, in ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 345-47 (John O. Haley & Hiroshi Iyori eds., 1995) (describing the code by one of its drafters). The DIAC addresses private redress in a similar fashion to EU law: mandating that national governments provide for certain remedies, though ultimately allowing each signatory to determine the appropriate parties to seek remedial action. *See* DIAC, *supra* note 16, at 180-81 (addressing "Remedies" under Article 15 to include redressing private harm but stopping short of creating a private right of action); *see also infra* § II.B (summarizing the EC Directive). However, because such an international code is not yet a practical reality, this Note will focus on how US jurisprudence should operate in absence of international law to create a suitable environment for the growth of international private redress. For more information on the DIAC or other supranational antitrust law, *see* Steven L. Snell, *Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity*, 33 STAN. J. INT'L L. 215, 221-235 (1997) (discussing the search for international consensus on antitrust law, including the DIAC); Ulrich Immenga, *Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy*, 4 PAC. RIM L. & POL'Y J. 93, 150-51 (1995) (introducing the recommendation for the DIAC); *see generally* Wood, *supra* note 1 (examining

Worldwide jurisdictions are increasingly recognizing the importance of private rights of action to enforcement efforts.¹⁷ Within the past ten years several countries have expanded private parties' ability to recover harm from unlawful anticompetitive behavior by allowing collective action.¹⁸ However, private actions remain rare in many developing antitrust jurisdictions with little, if any, precedent establishing the basis for compensatory damages or discovery.¹⁹

In response to international criticism of the statute's unbridled transnational application, the United States has curtailed the Sherman Act's reach both judicially and legislatively.²⁰ Judicially, courts looked to international comity, the practice of taking into account the interests of other nations.²¹ The Ninth Circuit was the first court to invoke

efforts and difficulties in establishing an international antitrust code); Mark R. Joelson & Joseph P. Griffin, *International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis*, 11 INT'L LAW. 5 (1977) (advocating for an international convention as the most effective means of curtailing restrictive business practices engaged in by transnational enterprises while detailing challenges and past attempts).

17. See *infra* § II.B. See also Cavanagh, *Lessons*, *supra* note 8, at 629-30 (highlighting that while private remedy in the United States has been under siege in federal courts, the rest of the world has been contemplating the adoption of the private right of action); Pheasant, *supra* note 11, at 59 (noting that the 2004 Ashurst Study authorized by the EC recognized that importance of private enforcement of EU competition laws due to insufficient resources at the EC and EU Member States' national competition authorities). *But see* Rajabiun, *supra* note 7, at 190-91 (detailing resistance to private enforcement, particularly in civil law countries and those with small economies).

18. See, e.g., Consumer Rights Act 2015, c. 15 (Eng.) [hereinafter CRA 2015] (providing procedures to make it easier for groups of purchasers to seek compensation in UK courts from firms that have fixed prices and formed cartels); Class Actions Law, 5766-2006, SH No. 2054 p. 264 (Isr.) [hereinafter Class Actions Law] (prescribing uniform rules on the submission and conduct of class actions with the object to improve the protection of rights granted under Israeli law, including Israel's antitrust law); Neil Hodge, *Class Actions: The Consumer Rights Act*, INT'L BAR ASS'N (Mar. 7, 2016), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=6cb4718f-9845-4d8d-8a1f-e571fbdd4b56> [https://perma.cc/2UU3-N8FK] (archived Oct. 26, 2017) (describing class action structures around the world). See also § II.B.

19. See Ilene Knable Gotts, *Editor's Preface*, in THE PRIVATE COMPETITION ENFORCEMENT REVIEW vii (6th ed. 2013) (identifying Lithuania, Romania, Switzerland, and Venezuela as countries with a dearth of private antitrust litigation); *supra* note 11. See also *infra* § II.B.

20. Griffin, *supra* note 15, at 160-62 (discussing measures taken by US courts and legislature to correct the Sherman Act's jurisdictional overreaching); Popofsky, *supra* note 15, at 2423-28 (describing the judicial and congressional response to the international controversy over US antitrust law extraterritoriality).

21. See *Hilton v. Guyot*, 159 U.S. 113, 163-64 ("[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."); BREYER, *supra* note 7, at 96 (introducing various conflict-of-law doctrine); Dan E. Stigall, *International Law and Limitations*

international comity in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, which used an interest-balancing test to determine whether exercising jurisdiction was proper.²² Legislatively, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), which attempts to delimit and define the cross-border reach of US antitrust laws by introducing an objective test under the effects doctrine.²³ Powerful arguments can be advanced in the American interest for applying US antitrust laws beyond US borders, including adequately protecting American competition and consumers, deterring inimical foreign anticompetitive behavior affecting the United States, especially in an increasingly globalized economy, and providing remedial measures to US victims of such conduct.²⁴ However, these interests in providing protection and redress are counterbalanced by equally important rationales for limiting the extraterritorial span of US

on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law, 35 HASTINGS INT’L & COMP. L. REV. 323, 335-36 (2012) (detailing the use of comity in limiting extraterritorial jurisdiction in international law). *See infra* §§ III, IV.

22. 549 F.2d 597 (9th Cir. 1976). *See infra* § III.

The American federal judicial system, which has exclusive jurisdiction over claims arising from the Sherman Act, is structured into three tiers: district courts are courts of first instance, circuit courts generally provide appellate review of district court decisions, and finally the United States Supreme Court issues final appellate review, often to resolve conflicting legal conclusions that arise between circuit courts. *See* HOWARD M. ERICHSON, *INSIDE CIVIL PROCEDURE: WHAT MATTERS AND WHY* 224-27 (2d ed. 2012) (explaining generally the US federal court system). There are thirteen circuit courts, which are either geographically restricted by the district court from which they take appeals and designated by a number from one through eleven, or are assigned appeals based on the specialized categories of disputes. *Id.* at 4, 224 (describing US court of appeals). While Supreme Court decisions are binding on all lower courts, which include circuit courts, circuit court decisions are binding only on appellate panels within the circuit and lower courts below them, though the decisions may be used as persuasive authority for all others. Amy E. Sloan, *If You Can’t Beat ‘Em, Join ‘Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 916-17 (2008) (summarizing the hierarchy of precedent in the US federal court system with footnoted exceptions); Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1179ff (2006) (explicating the precedential effect of federal appellate court opinions). District court decisions have no precedential weight. *See* *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) (noting that “there is no such thing as “the law of the district,” in that federal district court decisions do not bind subsequent cases); Sullivan, *supra* note 22, at 1179 (explaining that district court opinions are not set precedent for later cases).

23. 15 U.S.C. § 6a (1982) (statute limiting extraterritorial applicability of the Sherman Act); *see infra* § III. It is important to observe that this Note discusses jurisdictional issues with respect to the FTAIA liberally, though it is recognized that according to recent appellate decisions, such as the Seventh Circuit’s opinion in *Minn-Chem*, the FTAIA’s jurisdictional impact may exist as a substantive element for a claim rather than a procedural issue of whether a US court has the authority to adjudicate a claim. *See infra* note 36.

24. *See infra* § II.B.

antitrust law, such as costly overregulation, avoiding international disputes, allowing nascent worldwide antitrust regimes to develop to beget increased antitrust enforcement, and avoiding harmful interference with antitrust regulators' amnesty programs.²⁵

The aforementioned responses to these competing concerns have been ambiguous, inconsistent, and over-inclusive or under-inclusive.²⁶ In particular, the poorly worded FTAIA has created more problems than it has solved, including inconsistent holdings, wrongly decided cases, and disagreements among the circuit courts over interpreting the statute's language.²⁷ The most recent interpretational difficulty involves determining what constitutes a "direct" domestic effect under the FTAIA. Some courts have held that "direct" takes on a broader meaning, where conduct causing domestic effect need only be an "immediate consequence."²⁸ In comparison, other courts have narrowly interpreted the statute's "direct" domestic effect requirement as calling for "a reasonably proximate causal nexus," drawing from tort law to exclude an injury that is too remote from the injury's cause.²⁹

25. *See infra* § III.

26. *See infra* §§ III, IV.

27. Prior to the Supreme Court's decision in *Empagran*, three federal circuit courts interpreted the FTAIA in three different ways. *See* Thomas Köster & H. Harrison Wheeler, *Appellate Courts Split on the Interpretation of the Foreign Trade Antitrust Improvements Act: Should the Floodgates Be Opened*, 14 *IND. INT'L & COMP. L. REV.* 717, 719-25 (2004) (describing the circuit split); Diamond, *supra* note 12, at 805-06 (same). After *Empagran*, the Seventh and Ninth Circuits disagreed on interpretation of the statute. *See infra* § IV. *See also* Diamond, *supra* note 12, at 819 ("Why were there so many different interpretations of the FTAIA? It is widely considered to be a poorly drafted statute, full of 'double negatives, triple negatives, carve-ins and carve-outs and a proviso that is an exception to one of the exceptions,' and even its legislative history is contradictory.") (quoting John H. Shenefield, Attorney, Morgan Lewis & Bockius LLP, Remarks at the N.Y. State Bar Ass'n 2005 Antitrust Law Section Symposium: *Empagran* and the International Reach of U.S. Antitrust Laws (Jan. 27, 2005)); Waller, *Courtroom*, *supra* note 7, at 524-25 ("The courts do not understand the FTAIA. Almost all of the opinions are simply wrong or they reach the right result for the wrong reason. As a result, the courts are botching the Congressional purpose underlying the statute and misconstruing the proper role of antitrust in foreign commerce cases, particularly global cartel cases.").

28. *See* *United States v. Hsiung*, 778 F.3d 738, 758-59 (9th Cir. 2015) (relying on Ninth Circuit precedent that a "direct" effect as contemplated by the FTAIA is a domestic effect that "follows as an immediate consequence of the defendant[s'] activity."); *United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004) (drawing interpretation of the FTAIA's "direct . . . effect" requirement from the US Supreme Court's interpretation of the Foreign Sovereign Immunities Act's "direct effect" term declared in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)).

29. *See* *Lotes*, 753 F.3d at 410-11 (citing *Minn-Chem* to reject the Ninth Circuit's interpretation of the FTAIA's "direct . . . effect" requirement as drawing from an inappropriate similarity with another US statute); *Minn-Chem*, 683 F.3d at 856-57 (adopting the interpretation

The most recent appellate decision involving the FTAIA, *Motorola Mobility LLC v. AU Optronics Corp.*, has contributed to the statute's confusion.³⁰ There, the Seventh Circuit held that a US parent company failed to show that it suffered direct injury as a result of foreign anticompetitive conduct, despite the fact that price-fixed component products were purchased by its majority-owned foreign subsidiaries to be incorporated into final products purchased by the US parent and sold to US customers.³¹

Nevertheless, various delineations already exist that suggest a solution to the inconsistency is attainable and may be designed to enhance global antitrust enforcement through greater availability of worldwide private redress. What is apparent from the succession of decisions from *Hartford Fire Insurance Co. v. California*³² to *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran)*³³ is that the FTAIA grey area has been sufficiently tapered to allow for the return of a comity balancing test to appropriately reconcile the conflicting interests at hand in the residual universe of cases.³⁴ This Note argues that *Hartford Fire*, its progeny, and *Empagran* form confining parameters on the applicability of the FTAIA, namely that cases that do not involve a US party, domestic effect, and domestic injury arising from that effect will fail the FTAIA's exemption test. Moreover, because the FTAIA's "direct, substantial, and reasonably foreseeable" effect test can be construed as a proxy for the United States' prescriptive jurisdiction interest, comity analysis is helpful in its

of "direct" in the FTAIA proposed by the US Department of Justice as being more consistent with the language of the statute than the Ninth Circuit's competing interpretations).

30. 775 F.3d 816 (7th Cir. 2015), *cert. denied*, 135 S. Ct. 2837 (2015). This Note recognizes that the Supreme Court's recent decision in *RJR Nabisco, Inc. v. European Community* may have implications for extraterritorial application of US antitrust laws by noting that the private right to action in the Racketeer Influenced and Corrupt Organization Act ("RICO") was modeled after US antitrust law's private right of action in Section 4 of the Clayton Act before holding that RICO's private right of action requires domestic injury. *See* 136 S. Ct. 2090, 2111 (2016); *supra* note 7. However, because the decision ultimately decided a question connected with RICO and because the Supreme Court to date has refrained from hearing cases related to antitrust extraterritoriality after *Empagran*, this Note does not provide commentary on *RJR Nabisco*. *See* *Motorola Mobility LLC v. AU Optronics Corp.*, 135 S. Ct. 2837 (2015) (declining to take the *Motorola Mobility* appeal from the Seventh Circuit); *infra* § III.B.3.

31. *Id.*

32. 509 U.S. 764 (1993).

33. 542 U.S. 155 (2004).

34. *See infra* § V.

interpretation.³⁵ Thus, claims which are based on exclusively non-US conduct that questionably has a “direct effect” on US commerce resulting in the plaintiff’s injury are more properly decided not by the courts’ current focus on statutory interpretation, but rather by a *Timberlane*-style ad hoc fact-intensive balancing test that contemplates factors more suitable to the modern global economy and promoting international dialogue.³⁶

In sum, this Note proposes the introduction of a new international comity balancing test into US antitrust jurisprudence with the aim of fostering and strengthening global antitrust enforcement and private redress. It does so in four parts. Following this introduction, Part II briefly summarizes the expansion of US antitrust extraterritorial application. Next, Part III discusses various developments undertaken to limit and demarcate the reach of US antitrust law. Part IV raises issues arising from those efforts that have resulted in inconsistent and questionable holdings. Finally in Part V, by analyzing and synthesizing the existing precedent, this Note contends that a judicial international comity balancing test would most appropriately determine the propriety of US antitrust extraterritoriality for particular types of private recompense cases that are problematic under the current framework.

35. See *Empagran*, 542 U.S. at 164-65 (asserting while construing the FTAIA that the rule of construing ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations as a principle of customary international law “assumes that legislators take account of the legitimate sovereign interests of other nations when they write American laws . . . [which] helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today’s highly interdependent commercial world.”); *Motorola Mobility*, 775 F.3d at 818 (“[The FTAIA] has been interpreted, for reasons of international comity . . . , to limit the extraterritorial application of U.S. antitrust law.”); Japan Motorola Brief, *supra* note 3, at 4-5 (“The [FTAIA] was intended to prevent such ‘unreasonable interference with the sovereign authority of other nations.’” (citing *Empagran*, 542 U.S. at 164)).

36. It should be noted that this Note does not consider procedural issues associated with extraterritoriality such as personal jurisdiction, venue, and *forum non conveniens*. Additionally, it does not discuss whether the FTAIA, properly understood, addresses the question of courts’ subject matter jurisdiction or, alternatively, whether it spells out a prima facie element in an antitrust claim. See *Lotes*, 753 F.3d at 398 (“We hold that . . . the requirements of the FTAIA are substantive and non-jurisdictional in nature. Because Congress has not ‘clearly state[d]’ . . . that these requirements are jurisdictional, they go to the merits of the claim rather than the adjudicative power of the court.”); *Minn-Chem*, 683 F.3d at 851-53 (establishing that FTAIA addresses “conduct” to which the Sherman Act applies and thus refers to the element of a claim rather than subject-matter jurisdiction).

II. THE SHERMAN ACT'S EXTRATERRITORIAL EXPANSION

The narrative of the Sherman Act's extraterritorial evolution begins with *American Banana Co. v. United Fruit Co.*, where Justice Oliver Wendell Holmes' opinion initially established strict territoriality for the question of whether the statute governed foreign conduct.³⁷ Deciding whether an American plaintiff was entitled to redress for anticompetitive conduct and resulting injury that occurred entirely outside of the United States, Holmes observed that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."³⁸ Holmes' analysis embodied a tension inherent in prescriptive jurisdiction between a state's authority to have absolute and exclusive jurisdiction within its territory and a state's authority to protect its citizens from harmful external conduct undertaken abroad.³⁹ The former precept is known as the "territorial principle," whereas the latter reflects its objective application, otherwise known as "objective territoriality."⁴⁰ In direct opposition to the territorial principle, objective territoriality dictates that "one state may share *concurrent* jurisdiction with another state."⁴¹

37. 213 U.S. 347 (1909). In *American Banana*, a US plaintiff brought suit under the Sherman Act to recover from a defendant who had allegedly influenced a foreign government to seize plaintiff's properties.

38. *Am. Banana Co.*, 213 U.S. at 355-56 (distinguishing instances where harmful conduct occurs in regions subject to no sovereign, such as piracy on the high seas, where extraterritorial application of domestic laws would be proper).

39. Prescriptive jurisdiction, also known as legislative jurisdiction, refers to the authority of a state to make its law applicable to persons or activities. *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting) (discussing legislative jurisdiction, or "jurisdiction to prescribe"); Popofsky, *supra* note 15, at 2418 (defining prescriptive jurisdiction as "the scope of a state's power to regulate conduct."). International law traditionally recognizes four predicates of prescriptive jurisdiction: (1) territorial principle – jurisdiction over all conduct within the prescribing state's territory; (2) nationality principle – jurisdiction over all conduct of the prescribing state's citizenry, including conduct beyond the state's borders; (3) protective principle – jurisdiction over external conduct directed at the prescribing state's security or the interests; and (4) universality principle – jurisdiction over universally condemned conduct as a matter of public international law, such as piracy or slave trade. See BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 82 (2d ed. Supp. 1993) (expounding the concept of prescriptive jurisdiction).

40. See Popofsky, *supra* note 15, at 2418-20 (discussing the bases for prescriptive jurisdiction); Dodge, *supra* note 2, at 130 (same).

41. Popofsky, *supra* note 15, at 2419 (explaining the difference between the territorial principle and its objective application) (emphasis in original); see also *Laker Airways*, 731 F.2d at 922-23 (discussing the objective application of territorial jurisdiction as being entirely consistent with internationally recognized limits on sovereign authority).

While the court decided this tension in favor of finding jurisdiction based on pure territoriality, it faced a question of whether a US plaintiff harmed abroad by foreign conduct arguably taken at the behest of a foreign sovereign suffered a cognizable injury under the Sherman Act. Decisions immediately following *American Banana*, however, began to stretch the reach of pure territoriality jurisdiction to foreign conduct so long as there existed some substantial in-US conduct to serve as a predicate for the Sherman Act's applicability.⁴² When globalization began to develop in the 1920s, national interest pressures on doctrine started to mount as the international cartel movement complicated relationships across borders.⁴³

A. Alcoa and the Effects Doctrine

Legal doctrine undergirding extraterritorial application of the Sherman Act was fundamentally altered by Judge Learned Hand's 1945 opinion in *United States v. Aluminum Co. of America (Alcoa)*.⁴⁴

42. See, e.g., *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (finding that the Sherman Act applied to an illegal agreement executed in England to divide world markets that kept an American firm out of the British market and a British firm out of the American market); *United States v. Pac. & Artic Ry. & Navigation Co.*, 228 U.S. 87 (1913) (rejecting the argument that the Sherman Act was inapplicable to transportation routes between the United States and Canada on the grounds that the conduct occurred partially within the United States); see also Popofsky, *supra* note 15, at 2420-21 (detailing reactions and cases following *American Banana*).

43. See *Diamond*, *supra* note 12, at 811 (narrating the growth of globalization and the international cartel movement in the early part of the twentieth century); Jeremy C. Bates, Comment, *Home Is Where the Hurt Is: Forum Non Conveniens and Antitrust*, 2000 U. CHI. LEGAL F. 281, 317 (2000) (demonstrating that US national interest shaped the doctrine underlying the applicability of US antitrust law during growth of globalization in the early twentieth century); see also RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* 75-89 (rev. ed. 1996) (discussing the cooperative competition movement and the rise of encouraged trade associations during the 1920s).

44. 148 F.2d 416 (2d Cir. 1945); see also Snell, *supra* note 16, at 246-47 (explaining that *Alcoa* forced reconsideration of traditional notions of national sovereignty by expanding the concept of territory). Of note, during a time in which cases involving the Sherman Act were appealed directly to the United States Supreme Court, the case was referred to the Second Circuit after four Supreme Court justices recused themselves. PERITZ, *supra* note 43, at 363 n.128 (recounting the circumstances leading to the Second Circuit hearing and deciding *Alcoa*); James M. Anderson, Eric Helland & Merritt McAlister, *Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases*, 103 GEO. L.J. 1163, 1176 n.76 (2015) (same). The Supreme Court later explicitly approved the decision in *Am. Tobacco v. United States*, 328 U.S. 781 (1946). 1 SPENCER WEBER WALLER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 6-12 n.12 (3d ed. 2009) [hereinafter WALLER, *AMERICAN BUSINESS*] (noting that the Supreme Court in *Am. Tobacco* observed that *Alcoa* "was decided . . . under unique circumstances which add to its weight as a precedent."); PERITZ, *supra* note 43, at 363 n.128 (explaining that when approving *Alcoa* the Supreme Court cited extensive passages from *Alcoa* in its *Am. Tobacco* decision).

By the time the Second Circuit heard *Alcoa*, objective territoriality doctrinally began to realize widespread acceptance, due in part to the utility of the Sherman Act in thwarting enemy misconduct in US wartime industry during both World Wars.⁴⁵ In deciding the case, Judge Learned Hand recognized the question facing the Second Circuit in *Alcoa* was manifestly different from the question analyzed by Justice Holmes.⁴⁶ Specifically, *Alcoa* involved Alcoa's Canadian subsidiary participating in an international cartel on Alcoa's behalf to fix aluminum prices worldwide, but where none of the conduct occurred within US boundaries.⁴⁷ Accepting Holmes' axiom from *American Banana* that courts "should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States," Hand distinguished cases with conduct that intended substantial effects in the United States.⁴⁸ Hand observed that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."⁴⁹ The court accordingly held that when conduct causes an intended effect on US commerce, such conduct is within the Sherman Act's regulatory grasp.⁵⁰

Alcoa thus launched objective territoriality via the effects doctrine into US antitrust jurisprudence and began an era of aggressive extraterritorial enforcement.⁵¹ The effects doctrine articulated by *Alcoa*

45. See Popofsky, *supra* note 15, at 2421 (chronicling the events leading up to *Alcoa*, particularly during the Second World War); Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, 16 ANTITRUST 71, 71-73 (2002) (same); First, *supra* note 16, at 728-30 (same); Thomas K. Fisher, *Antitrust During National Emergencies*, 40 MICH. L. REV. 969, 988-89 (1942) (describing the use of antitrust enforcement during World War One).

46. *Alcoa*, 148 F.2d at 443-44 (elaborating on the distinction between *American Banana*'s territorial doctrine and the facts at hand in *Alcoa*); Popofsky, *supra* note 15, at 2422 (summarizing Judge Hand's approach to framing the question in *Alcoa*).

47. *Alcoa*, 148 F.2d at 421-22, 442-43 (discussing the nature of the anticompetitive conduct in the dispute).

48. *Id.* at 443-44 (highlighting that the domestic US effect intended by defendant's foreign conduct removed it from the auspices of *American Banana* and drew similarity to subsequent cases, such as *Pacific & Artic* and *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927)).

49. *Id.* at 443.

50. See *id.* at 443-44 (establishing that conduct intending to affect US imports stood as sufficient reason to apply US law to cross-border conduct).

51. See, e.g., *Hartford Fire*, 509 U.S. 764 (1993) (holding that a lower court should not have refused to exercise Sherman Act jurisdiction over foreign reinsurers under principles of international comity because foreign law was not in direct conflict with US law); *Pfizer*, 434 U.S. 308 (1978) (concluding that a foreign nation is a "person" under Section 4 of the Clayton

and its progeny establishes national jurisdiction over conduct that has an intentional or foreseeable effect on the nation's commerce where the effect is substantial.⁵² Subsequent cases expanded on the application of the effects doctrine, including questions regarding segmenting conspiracies by location of the injury and the nationality of the plaintiffs.⁵³ The former question was decided in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, in which the Court found that a domestic plaintiff was entitled to combine claims of domestic and foreign injury so long as they were part of the same conspiracy.⁵⁴ Specifically, the Court held that "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."⁵⁵

With respect to foreign plaintiffs, the Supreme Court opined in *Pfizer, Inc. v. Government of India* that though American consumers are the main object of the Sherman Act's protection, US antitrust law also entitles foreign parties to seek redress for antitrust injury because "foreigners who have been victimized by antitrust violations clearly

Act and thus entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (finding in part that a conspiracy to monopolize or restrain domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conspiracy is conducted in foreign countries); *United States v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997) (holding that cartel activities committed abroad that have a substantial and intended effect within the United States may form the basis for criminal prosecution under the Sherman Act); see also Wood, *supra* note 1, at 298 (attributing aggressive extraterritorial enforcement to a number of factors, including increased global business activity, the economic and political dominance of the United States, American acceptance of the effects doctrine, and lack of international machinery to address genuine transnational competition problems).

52. See MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER: A GUIDE TO THE OPERATION OF UNITED STATES, EUROPEAN UNION AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY 44 (3d ed. 2006) (describing the implications of the effects doctrine); Snell, *supra* note 16, at 246-47 (same).

53. See generally *Cont'l Ore Co.*, 370 U.S. 690 (1962) (holding that the character and effect of a price-fixing conspiracy should be judged as a whole and not dismembered and viewed in separate parts); *Pfizer*, 434 U.S. 308 (1978) (holding that a foreign nation had standing to sue for treble damages under Section 4 of the Clayton Act).

54. 370 U.S. at 704 ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."). As will be later discussed, the Court did an about-face on this question when deciding *Empagran* by interpreting the FTAIA through comity principles. See *infra* §§ III, IV.

55. *Cont'l Ore Co.*, 370 U.S. at 699 (quoting *United States v. Patten*, 226 U.S. 525, 544 (1913)).

may contribute to the protection of American consumers.”⁵⁶ While the main question decided by *Pfizer* was whether a foreign *sovereign* was a “person” as contemplated by the Clayton Act and thus entitled to seek redress for harmful anticompetitive conduct, the decision has been understood as affording foreign purchasers the protection of US antitrust laws when harmed by US conduct.⁵⁷ Subsequent lower court opinions have followed the Supreme Court’s observation, also noting that foreign parties relying on US laws to transact with American parties are entitled to the protection of those laws.⁵⁸

The effects doctrine continued to be embraced in US courts through the 1990s, notably in the Supreme Court’s decision of *Hartford Fire* and in the First Circuit’s *United States v. Nippon Paper Industries Co., Ltd.*, in which the doctrine was applied in a criminal action.⁵⁹ In *Hartford Fire*, US plaintiffs alleged boycott conspiracies in the US reinsurance market between American and British conspirators.⁶⁰ Noting that “it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States,” the Supreme Court shrugged off an international comity defense and held that the British defendants were properly subject to the Sherman Act.⁶¹

56. 434 U.S. at 314 (assessing the authority of foreign purchasers to recover treble damages from an American defendant under Section 4 of the Clayton Act for Sherman Act violations affecting foreign countries).

57. *Id.* at 311-12 (describing the legal issue on appeal); WALLER, AMERICAN BUSINESS, *supra* note 44, at 9-34-9-35 (discussing arguments for *Pfizer* supporting “the proposition that the Sherman Act condemns restraints imposed by American firms from the United States on foreign consumers.”); Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT’L L. 275, 297, 297 n.88 (2002) (“Both the sponsor of the FTAIA and commentators on the bill understood that the bill did not reject *Pfizer* or its endorsement of standing for foreign parties under federal antitrust laws.”); *see also Foreign Trade Antitrust Improvements Act of 1981: Hearings on H.R. 2326 Before the Subcommittee on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 111, 113 (1981) (statement of Martin F. Connor, Washington Corporate Counsel, General Electric Co.) [hereinafter 1981 FTAIA Hearings] (including statement of Business Roundtable to the effect that the bill containing the FTAIA was not a substitute for legislation to modify *Pfizer* that was being considered simultaneously).

58. *See Laker Airways*, 731 F.2d at 943 (observing that as a foreign corporation operating within the United States plaintiff is entitled to the protection of US antitrust laws); *Transor (Bermuda), Ltd. v. BP North American Petroleum*, 666 F. Supp. 581, 584-85 (S.D.N.Y. 1987) (following *Pfizer* to hold that Bermudian victims of anticompetitive behavior affecting a primarily US market have standing to assert US antitrust claims).

59. 109 F.3d 1 (1st Cir. 1997).

60. *See Hartford Fire*, 509 U.S. at 773-78 (recounting the facts of the case).

61. *Id.* at 796 (citing prior holdings by the court that subjected defendants to US competition scrutiny where there were substantial intended effects on US commerce: *Matsushita*

In the *Nippon Paper* case, the United States Department of Justice (“DOJ”) charged Nippon Paper with entering into a price-fixing agreement with other thermal fax competitors in Japan to raise the price of the paper exported to the United States.⁶² Nippon Paper was accused of having sold thermal fax paper to two trading companies in Japan for export to the United States, but none of the conduct was alleged to have occurred in the United States. Refusing to distinguish between civil and criminal cases, the First Circuit followed *Hartford Fire*’s reaffirmation of the effects doctrine and held that the Sherman Act applies to wholly foreign conduct that has an intended and substantial effect in the United States.⁶³ By adopting the Supreme Court’s approach in *Hartford Fire*, *Nippon Paper* was believed to have cemented the effects doctrine as the controlling test for Sherman Act extraterritoriality.⁶⁴

B. Reasons to Extend the Sherman Act Abroad

In part, the United States’ adoption of the effects doctrine and the extraterritorial expansion of Sherman Act applicability was a protective

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986); *Cont’l Ore Co.*, 370 U.S. at 704; *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952); *Sisal Sales Corp.*, 274 U.S. at 275-76; *Alcoa*, 148 F.2d at 444).

62. See *Nippon Paper*, 109 F.3d at 2 (relaying the factual account from the indictment).

63. *Id.* at 4 (establishing that the effects doctrine applies both to civil and criminal scenarios due to section one of the Sherman Act’s undiscerning language). Two years after *Nippon Paper*, Japan and the United States would sign the Agreement Between the Government of the United States and the Government of Japan Concerning Cooperation in Anticompetitive Activities to address enforcement coordination and international comity. See generally Agreement Between the Government of the United States and the Government of Japan Concerning Cooperation in Anticompetitive Activities, Oct. 7, 1999, U.S.-Japan, <https://www.justice.gov/atr/agreement-between-government-united-states-america-and-government-japan-concerning-cooperation> [<https://perma.cc/32UG-GAQY>] (last visited Oct. 26, 2017) (antitrust cooperation agreement between the United States and Japan noting that “the sound and effective enforcement of competition laws of each country would be enhanced by cooperation and, where appropriate, coordination between the Parties in the application of those laws”). For more detailed information on the bilateral agreement and the surrounding circumstances, see generally Cooper, *supra* note 6 (analyzing the antitrust cooperation agreement between the two countries). See *infra* § III.A.2.

64. See, e.g., First, *supra* note 16, at 723 (“[*Nippon Paper*] is more appropriately viewed as one that actually closes a chapter on the territorial controversies of the last three decades of antitrust law . . . [and] confirms that we have now moved to a general acceptance of what had previously been labeled ‘extraterritorial’ jurisdiction.”). See also Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT’L L. 563, 569 (2000) [hereinafter Waller, *Twilight*] (explaining that *Hartford Fire* “virtually eliminated” international comity as a meaningful restraint on the extraterritorial application of the Sherman Act).

measure.⁶⁵ As global enterprise became the new norm for national economies, an international mechanism was needed to address genuine transnational competition problems.⁶⁶ Because national antitrust laws partly exist to protect domestic markets and consumers, proponents of extraterritoriality argue that the law must then apply to those causing domestic harm externally in order to adequately serve that purpose.⁶⁷

Globally, major antitrust jurisdictions have agreed protection is best attained through cross-border application of domestic laws. The EC established extraterritorial application of the EEC Treaty Article 85 (now TFEU 101), Sherman Act Section 1's counterpart, in its 1988 *Woodpulp* decision.⁶⁸ There, the EC decided it was necessary to extend jurisdiction over a cartel of producers located outside the European Union to avoid affording offenders of EU competition law "an easy means of evading those prohibitions."⁶⁹ Apart from the United States and the European Union, a number of other jurisdictions have also

65. See Eleanor Fox, Witness Statement Before the Antitrust Modernization Commission, Hearings on International Antitrust Issues 2 (Feb. 15, 2006), http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Fox_final.pdf [<https://perma.cc/M88U-68G6>] (archived Oct. 26, 2017) [hereinafter Fox, AMC Hearing] (stating that most antitrust jurisdictions have adopted some form of the effects doctrine to protect themselves, the absence of which would necessitate an international antitrust regime); see also Case T-102/96, *Gencor Ltd v Comm'n*, 1999 E.C.R. II-0753 (embracing the effects doctrine in the EU by stating that the application of EU regulations to a merger between companies located outside EU territory "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.").

66. See Wood, *supra* note 1, at 298 (explaining that US adoption of the effects doctrine was borne out of increasing transnational business activity); John A. Trenor, *Jurisdiction and the Extraterritorial Application of Antitrust Laws After Hartford Fire*, 62 U. CHI. L. REV. 1583, 1600 (1995) (stating that *American Banana's* standard of strict territoriality grew increasingly unacceptable given the rise of internationalized markets); see also Joelson & Griffin, *supra* note 16, at 16-17 (highlighting that an international mechanism governing transnational enterprises does not yet exist in part due to differences in national policies concerned with protecting domestic markets and industry).

67. See, e.g., Brief for Economists Joseph E. Stiglitz and Peter R. Orszag as Amici Curiae Supporting Respondents at 2, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) [hereinafter Stiglitz & Orszag Brief] (arguing that extraterritorial application of the Sherman Act in private litigation helps protect American consumers against the potential harms of international cartels); Trenor, *supra* note 66, at 1600 ("However, the application of [strict territoriality in *American Banana*] failed to further the central policy behind antitrust laws: protecting US markets from anticompetitive behavior.").

68. Case C-89/85, *Ahlström Osakeyhtiö & Ors v. Comm'n (Woodpulp)*, 1988 E.C.R. 5193 (establishing the effects doctrine in the EU); *Gencor*, 1999 E.C.R. II-0753 (following *Woodpulp*); First, *supra* note 16, at 726 (discussing the EC's extraterritorial extension of EU competition law beginning with *Woodpulp*).

69. See *Woodpulp*, 1988 E.C.R. 5193, ¶ 16 (observing that restricting Article 85 to conduct occurring within the EU would afford offenders "an easy means of evading those prohibitions.").

extended the reach of their own antitrust laws, including Austria, Belgium, Canada, China, Denmark, Finland, France, Germany, Greece, Japan, Luxembourg, Norway, Portugal, Spain, Sweden, and Switzerland.⁷⁰

Protection under antitrust law is principally realized through deterrence and redress objectives.⁷¹ Deterring anticompetitive conduct is achieved through criminalizing conduct and allowing for the recovery of treble damages in private litigation.⁷² In regard to private litigation, supporters of extraterritorial application highlight the powerful deterrent effect of treble damage recovery in removing the ability of international cartelists to subsidize US operations through foreign cartel profits even in the face of domestic liability.⁷³

70. HAWK, *supra* note 39, at 87-88 (listing countries that have accepted some variation of the effects doctrine as a basis of antitrust jurisdiction); Waller, *Twilight*, *supra* note 64, at 574-75 (discussing other countries that have undertaken cross-border application of national antitrust laws); John Terzaken, *Antitrust Enforcement Goes Global*, REUTERS (Nov. 22, 2013), <http://blogs.reuters.com/great-debate/2013/11/22/antitrust-enforcement-goes-global> [<https://perma.cc/D73R-VY5R>] (archived Oct. 26, 2017) (noting countries engaged in extraterritorial anti-cartel prosecutions).

71. *See Pfizer*, 434 U.S. at 314 (noting that allowing private parties to sue under US antitrust law to recover harm threefold serves two purposes: “to deter violators and deprive them of ‘the fruits of their illegality,’ and ‘to compensate victims of antitrust violations for their injuries.’”); Antitrust Modernization Comm’n, Report and Recommendations 241-42 (Apr. 2007), http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm [<https://perma.cc/TT9K-52QP>] (last visited Oct. 26, 2017) (describing US antitrust law’s public-private enforcement framework); *see generally* Stiglitz & Orszag Brief, *supra* note 67 (arguing that deterrence achieved through broader US antitrust jurisdiction best protects American consumers from global cartels).

72. *See Pfizer*, 434 U.S. at 314-15 (explaining that granting standing to foreign plaintiffs under Section 4 of the Clayton Act, and with it the availability of treble damages, furthers the deterrence purposes of US antitrust law by stripping cartelists of the ability to offset domestic liability with illicit gains made in foreign markets); *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 403 (2d Cir. 2002) (citing *Pfizer* for the proposition that American markets can benefit from the additional deterrence associated with allowing plaintiffs to sue for foreign harm caused by conduct that negatively affects American markets); *Den Norske Stats Olkeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420, 434-35 (5th Cir. 2001) (Higginbotham, J., dissenting) (opining that barring foreign plaintiffs to bring suit in US court for claims arising from global cartel conspiracies affecting the United States lessens the deterrent effect of US treble damages); *see generally* Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 ANTITRUST BULL. 207 (2011) (evaluating the deterrence mechanisms of American antitrust enforcement).

73. *See Den Norske*, 241 F.3d at 435 (Higginbotham, J., dissenting) (emphasizing the importance of deterring global cartel activity by completely depriving cartelists of price-fixing benefits for adequate protection of markets). *See also* Stiglitz & Orszag Brief, *supra* note 67, at 6-8 (explaining the need to eliminate a cartel’s expected global profits to effectively deter global cartels).

Indeed, antitrust regimes outside of the United States are increasingly recognizing that effective enforcement is costly and, thus, private actions for damages notwithstanding trebling bolsters enforcement without greater public expenditure.⁷⁴ This recognition is underscored by the European Court of Justice (“ECJ”) in its 2001 *Courage v Crehan* decision:

The full effectiveness of Article [101] of the [TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreement or practices . . . which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.⁷⁵

As a result, governments around the globe have increasingly initiated or bolstered the ability for private parties to recover from harms created by unlawful anticompetitive over the past ten years. The ECJ’s sentiments can most readily be associated with the EC’s decision in 2014 to issue Directive 2014/104/EU, which required EU member states to enact legislation providing for private rights of action at the national level within two years of the Directive’s promulgation.⁷⁶ The EC Directive was the culmination of “wide spread support in Europe for the principle that legal and natural persons who suffered a loss as a

74. See Pheasant, *supra* note 11, at 59 (“In the [EC]’s view, any increase in private litigation . . . would serve the purpose of more effective antitrust enforcement without placing greater strains on the public purpose); Maria Teresa Vanikiotis, Note, *Private Antitrust Enforcement and Tentative Steps Toward Collective Redress in Europe and the United Kingdom*, 37 *FORDHAM INT’L L. J.* 1639, 1642-43 (2014) (introducing dialogue in the United Kingdom and Europe on implementing mechanisms for collective private antitrust redress that indicates authorities believe current private enforcement requires strengthening); *supra* note 17.

75. Case C-453/99, *Courage v Crehan*, 2001 E.C.R. I-6297, ¶¶ 26, 27.

76. See Directive 2014/104/EU (addressing the creation of private rights of action in Member States, including prescribed procedural rules, party standing, damages calculations, and interaction with the EC’s leniency program); Joaquin Almunia, V.P. of the Eur. Comm’n, *Fighting Against Cartels: A Priority for the Present and for the Future*, Address Before SV Kartellrecht (Apr. 3, 2014), http://europa.eu/rapid/press-release_SPEECH-14-281_en.htm [<https://perma.cc/K43W-SKMN>] (archived Oct. 26, 2017) (describing generally the EC Directive and its effect on overall cartel enforcement).

result of an antitrust infringement should be entitled to recover damages to compensate them for that loss.⁷⁷

Brazil presents another example of a jurisdiction seeking to have an expanded private enforcement regime complement its public enforcement efforts.⁷⁸ In lieu of treble damages or other incentives for pursuing private recovery, the Brazil's Administrative Council of Economic Defence ("CADE") has searched for new and more effective ways to encourage victims to claim damages collectively with the object to amplify the deterrent effect of CADE's decisions.⁷⁹ This has involved delivering agency judgments to trade confederations and associations so that any interested parties might be notified of the potential for pursuing recovery, drafting administrative bylaws that allows effective compensation of anticompetitive harms at lower costs to the aggrieved parties, and joining private litigation as an *amicus curiae* to provide its view of Brazil's Competition Law in an effort to influence decisions.⁸⁰

Other countries have also sought to expand private enforcement through expansions of class action-style recovery, such as Israel and the United Kingdom.⁸¹ In 2006, Israel enacted its Class Actions Law,

77. Almunia, *supra* note 76, at 2 (stating that the EC Directive was proposed to reach "out to victims of antitrust infringements so that they can obtain compensation for the harm they suffered."); Pheasant, *supra* note 11, at 59 (introducing the debate preceding the eventual adoption of a European private right of action); *supra* note 11 and accompanying text.

78. Carlos Francisco de Magalhães, Gabriel Nogueira Dias & Cristiano Rodrigo Del Debbio, *Brazil*, in *THE PRIVATE COMPETITION ENFORCEMENT REVIEW* 52 (Ilene Knable Gotts ed., 6th ed. 2013) (summarizing recent efforts to expand private enforcement in Brazil); Org. for Econ. Co-operation & Dev., Latin American and Caribbean Competition Forum – Session I: Cartels: Estimation of Harm in Public Enforcement Actions 7 (Mar. 19, 2017), [https://one.oecd.org/document/DAF/COMP/LACF\(2017\)21/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2017)21/en/pdf) [<https://perma.cc/U238-EYGG>] (archived Oct. 26, 2017) (highlighting that a goal of Brazil's competition authority has been to foster private antitrust damages actions).

79. De Magalhães et al., *supra* note 78, at 52 (discussing the Brazilian competition authority's efforts in provoking private litigation as a means of enforcement); *CADE Submits for Public Consultation Bylaw on Procedures Related to Access to Documents from the Antitrust Investigations*, ADMIN. COUNCIL FOR ECON. DEF. (Dec. 14, 2016), <http://en.cade.gov.br/press-releases/cade-submits-for-public-consultation-resolution-on-procedures-related-to-the-access-to-documents-from-the-antitrust-investigations> [<https://perma.cc/WPH2-7XRS>] (archived Oct. 26, 2017) [hereinafter CADE Press Release] (announcing the submission of an administrative bylaw that aims to encourage private follow-on lawsuits to public prosecutions).

80. De Magalhães et al., *supra* note 78, at 52 (offering examples of how CADE has spurred private parties to pursue litigation in Brazil). CADE Press Release (explaining a proposed bylaw that would encourage antitrust victims to seek recovery by lowering administrative fines and limiting exposure to private liability for cartelists participating in investigatory efforts in addition to facilitating greater access to the fruits of CADE investigations).

81. *See supra* note 18.

under which private antitrust actions may be brought.⁸² The statute provides for collective recovery for violations of certain laws, including antitrust violations, by either a group of private class members that raise common substantive questions of fact or law, a public authority on behalf of a class, or an organization on behalf of class members within the sphere of one of the organization's public purposes.⁸³ As a result, Israel has experienced a sharp increase in private antitrust litigation, notably with respect to international cartels.⁸⁴

The United Kingdom recently enacted the Consumer Rights Act 2015, which, among other adjustments, makes changes to the Competition Act 1998⁸⁵ to facilitate recovery actions by private victims of proscribed anticompetitive conduct.⁸⁶ For instance, the statute extends the time purchasers have to bring claims from two years to six years.⁸⁷ In addition, the statute introduces a new type of collective action suit that requires class members to “opt out” to complement “opt in” actions, the former of which provides greater strength in numbers to encourage quick compensatory resolutions.⁸⁸

Equally important to effective enforcement is providing relief for victims of anticompetitive conduct.⁸⁹ Remedies for harm created by an

82. See Class Actions Law, § 1(1) (establishing class action recovery in part for those private parties that would find it difficult to seek redress as individuals); David E. Tadmor & Shai Bakal, *Israel*, in GETTING THE DEAL THROUGH: PRIVATE ANTITRUST LITIGATION 2017 76 (Samantha Mobley ed., 2016) (describing class actions in Israel).

83. Class Actions Law, § 4 (setting forth the persons entitled to petition the court for class action approval). See also Tadmor & Bakal, *supra* note 82, at 76 (“The Class Actions Law provides that a person, public entity, or consumers’ organization may, under certain conditions, file a class action on behalf of a class of plaintiffs and seek damages for breach of [Israel’s antitrust law].”).

84. Tadmor & Bakal, *supra* note 82, at 76 (summarizing the development of private antitrust litigation in Israel); Ido Baum, *Who Profits from Class Actions Suits? Not You*, HAARETZ (Dec. 19, 2014), <http://www.haaretz.com/israel-news/business/.premium-1.632671?=&ts=1502369885185> [<https://perma.cc/Q8MC-NB2J>] (archived Oct. 26, 2017) (following a study that analyzed the increase of class actions suits since the Class Actions Law).

85. The Competition Act 1998, c. 41 (Eng.) (the UK’s current major source of antitrust law).

86. See CRA 2015, § 81 (setting out modifications to the Competition Act 1998 for private actions); see also Hodge, *supra* note 18 (highlighting changes made by CRA 2015).

87. See CRA 2015, § 81.8 (outlining changes to limitation and prescriptive periods associated with certain types of actions); see also Hodge, *supra* note 18 (noting the increase in the limitation period).

88. See CRA 2015, § 81.5(11) (defining “Opt-out collective proceedings”); Hodge, *supra* note 18 (detailing ramifications of opt-out actions).

89. See generally Fox, *Remedies*, *supra* note 14 (stressing the global necessity of remedies while evaluating how “the law, the quest of competitiveness, and the perceived interests of

antitrust violation are needed on both micro and macro levels.⁹⁰ These include restoring a competitive environment, compensating victims, correcting the conditions facilitating the anticompetitive behavior, and incentivizing adherence to the law.⁹¹ While perfect relief is impossible, effective relief for purchasers harmed by foreign antitrust perpetrators may only be achieved in some cases through extraterritorial application of antitrust law.⁹² Advocates of such measures maintain that the United States should not compromise its law on comity grounds just because a foreign state's law may have tolerated or even sanctioned the cartel.⁹³

III. EFFORTS TO LIMIT THE SHERMAN ACT'S CROSS-BORDER APPLICATION

Though the deterrence and redress achieved through *Alcoa's* effects doctrine seemingly justify its place in US jurisprudence, the doctrine has been subject to three main criticisms.⁹⁴ First, critics have argued that the effects doctrine is contrary to established principles of international law, which at the time were firmly based on pure

nations are creating retrenchment and suboptimal remedies.”); *see, e.g.*, Pheasant, *supra* note 11, at 59 (noting that the debate preceding the private right to sue in the EU was led by widespread support for compensating private loss); Cavanagh, *Lessons, supra* note 8, at 631 (explaining that allowing private actions ensures that victims are fairly compensated because public enforcement actions do not provide monetary recovery for individual losses).

90. Fox, *Remedies, supra* note 14, at 573 (defining the micro goal as correcting the market failure, reestablishing competition, and compensating victims and defining the macro goal as structuring incentives to minimize the recurrence of the anticompetitive conduct); Cavanagh, *Lessons, supra* note 8, at 631-36 (describing the remedial objectives of private actions under US antitrust law).

91. Fox, *Remedies, supra* note 14, at 573 (enumerating the objectives of antitrust remedies); Cavanagh, *Lessons, supra* note 8, at 631-36 (same).

92. *See, e.g.*, *Woodpulp*, 1988 E.C.R. 5193, ¶ 16 (noting that if applicability of EU competition law was restricted by the territorial confines of the European Community, violators could easily evade the established prohibitions); Fox, *Remedies, supra* note 14, at 581-82 (arguing that the recent trend in judicial narrowing of US antitrust jurisdiction is at odds with the need for stronger remedies).

93. *See* Fox, *Remedies, supra* note 14, at 577 (announcing that the US Supreme Courts' decision in *Hartford Fire* met the “test of courage of convictions” by applying the Sherman Act extraterritorially amid “other nations' pleas on behalf of ‘their’ firms.”); *see, e.g.*, First, *supra* note 16, at 726 (illustrating that the EC took the same approach in *Woodpulp* when it decided it had jurisdiction over an international cartel that included an American firm exempted from US antitrust law).

94. *See* HAWK, *supra* note 399, at 111-12 (describing critique of the effects doctrine). *See also* WALLER, AMERICAN BUSINESS, *supra* note 44, at 6-22ff (discussing challenges levied by foreign governments and commentators accusing *Alcoa's* holding of “going beyond both the practice of nations and American precedent.”).

territoriality.⁹⁵ Second, critics have pointed out that the effects doctrine does not take into account foreign interests.⁹⁶ The failure to account for these interests, critics argue, enables courts to mask the true reasons underlying their decisions or to openly slight foreign interests.⁹⁷ Finally, critics have complained that *Alcoa's* effects test has lacked clarity and predictability.⁹⁸ In particular, lower courts have reformulated the test from an intent and effect test to either a direct and substantial effect test or have only required fictional general intent.⁹⁹

95. See WALLER, *AMERICAN BUSINESS*, *supra* note 44, at 6-25 (highlighting that *Alcoa's* effects test may not have met the normal exception to the general presumption of territoriality nor did it follow the recognized principles of comity, which leaves regulation of conduct to the state with the primary interest); HAWK, *supra* note 39, at 111 (conceding that Hand overstated the acceptance of the effects doctrine when he announced it as “settled law”).

Professor Barry Hawk, however, finds this point to be unpersuasive, contending that whether *Alcoa's* effects test was inconsistent with contemporaneous international law is irrelevant because it is now consistent with current state practice and international law. HAWK, *supra* note 39, at 111 (“[W]hether or not the effects doctrine as adopted in *Alcoa* was consistent with international law at the time of the decision in 1945, the effects doctrine as a basis for antitrust jurisdiction is consistent with the trend in state practice and today is not contrary to international law.”).

96. WALLER, *AMERICAN BUSINESS*, *supra* note 44, at 6-24-6-25 (contending that another weakness of *Alcoa's* adoption of the effects test was “its perceived failure to take into account the possible legitimate interests of other nations affected by an exercise of extraterritorial jurisdiction.”); HAWK, *supra* note 39, at 111 (declaring as a more “facially attractive” criticism that Hand’s “intent and effect test does not encompass an explicit recognition of foreign interests,” nor does it have a doctrinal handle to ensure that those interests may be weighed).

97. WALLER, *AMERICAN BUSINESS*, *supra* note 44, at 6-26 (“To minimize conflict and resentment, [foreign interests] ideally should have been brought to bear at the time an antitrust court was deciding whether it had jurisdiction to apply United States laws.”); HAWK, *supra* note 39, at 111 (stating that *Alcoa's* failure to recognize foreign interests lead to the Ninth Circuit’s adoption of a “balancing of interests” test in 1976).

Others, on the other hand, argue that disregarding foreign interests is not only the best method for assessing US jurisdiction, but will ultimately lead to a greater proliferation of global antitrust enforcement. See, e.g., First, *supra* note 16, at 712ff (asserting that an international system of antitrust enforcement need not be based on international agreement but rather is already based on implicit consensus of US antitrust extraterritoriality); Dodge, *supra* note 2, at 104-06 (arguing that disregarding foreign interests in applying domestic statutes extraterritorially is the best way promote international cooperation and achieve optimal regulation).

98. HAWK, *supra* note 39, at 112 (agreeing that without guidance from the Supreme Court lower American courts have struggled with the test); Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1478-81 (highlighting the difficulty courts have had in uniformly applying the effects test).

99. HAWK, *supra* note 39, at 112-13 (describing the differing interpretations of *Alcoa's* test arising out of lower courts). See also *Timberlane*, 549 F.2d at 600, 613-16 (reversing a lower court decision that required a “direct and substantial effect on United States foreign commerce”); *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504, 592 (S.D.N.Y. 1951) (requiring “a conspiracy . . . which affects American commerce”); *United States v. Timken Roller Bearing*

Moreover, decisions of the courts have varied on the type of effect required.¹⁰⁰

In addition to these criticisms, the application of the Sherman Act to foreign defendants' conduct, often legal under the laws of their own sovereigns, prompted controversy among US trading partners.¹⁰¹ Non-US litigants were concerned with the US government's power to fine and imprison non-US defendants as well as the ability of US plaintiffs to subject non-US companies to expensive discovery and treble-damage exposure.¹⁰² As a consequence, US trading partners enacted legislation blocking discovery and permitting defendants to "claw back" the treble-damages portion of any private recovery that might be awarded by a US court.¹⁰³

Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949) (articulating the test as "a direct and influencing effect on trade").

100. HAWK, *supra* note 399, at 114-15 (commenting on lower court decisions formulating *Alcoa's* effect requirement); Joseph E. Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations: Paths Through the Great Grimpen Mire*, 32 OHIO ST. L.J. 519, 519 (1971) (describing the confusion in the development of the effects doctrine).

101. See WALLER, AMERICAN BUSINESS, *supra* note 44, at 6-22 n.2 (citing reports documenting friendly foreign governments' reactions to *Alcoa* and its progeny); JOELSON, *supra* note 52, at 64-65 (summarizing foreign reactions to US exercise of the effects doctrine); Popofsky, *supra* note 15, at 2422-23 (same); First, *supra* note 16, at 723-24 (same). See also Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627 (2001) (noting that disputes with trading parties over the Sherman Acts cross-border reach began just after *Alcoa*).

102. First, *supra* note 16, at 723-24 (explicating non-US defendant's concerns associated with the controversy over the extraterritorial application of the Sherman Act).

103. *Id.* at 724 (discussing the reaction of foreign sovereigns to private antitrust litigation in the United States subjecting non-US nationals to extensive discovery and the potential for treble liability); see, e.g., *Laker Airways*, 731 F.2d at 920 (explaining that the British Protection of Trading Interests Act, when invoked, authorizes the English Secretary of State to prevent UK courts from complying with requests for document production issued by foreign tribunals and forbids enforcement of treble damage awards or antitrust judgments specified by the Secretary of State). See also *supra* note 15. Trading partners that enacted blocking statutes included Australia, Canada, the United Kingdom, and France. First, *supra* note 16, at 724 (listing countries enacting blocking statutes); Sidney Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. & POL. 1061, 1064-66 (1984) (recounting foreign sovereigns' legislative reactions to nationals being subjected to US antitrust litigation).

In general, blocking statutes involved prohibiting disclosure of information located within the political borders of the enacting sovereign or possessed by that sovereign's subjects. For a more detailed account of blocking statutes, see Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction – European Responses*, 26 HOUSTON J. INT'L L. 309, 311-13 (2004) (explicating the U.K.'s blocking statute, the Protection of Trading Interests Act of 1980); R. Edward Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 GEO. WASH. J. INT'L L. & ECON. 315, 322-31 (1995)

Other calls for restraint have also emerged. In its amicus brief for *Empagran*, the DOJ maintained that US antitrust extraterritoriality as it pertains to private litigation, and with it the treble damage feature, may deter leniency applicants that greatly aid cartel prosecution.¹⁰⁴ Consequently, the agency argues, cartel crackdown efforts would suffer because the threat to cartels from leniency-applicant turncoats deters more cartels than would higher penalties.¹⁰⁵ Others have cautioned against negative consequences of overregulation, which in turn may harm efficiency and consumers as much as the anticompetitive behavior antitrust laws proscribe.¹⁰⁶ The growth of effects jurisdiction has expanded the number of different jurisdictions in which regulatory claims must be satisfied.¹⁰⁷ This proliferation increases the cost of doing business internationally: firms must spend more time and money crafting and maintaining antitrust compliance programs, defending in lawsuits alleging illegal anticompetitive

(detailing the history, varieties, and consequences of blocking statutes); *see generally* Rosdeitcher, *supra* note 103 (explaining the purpose and function of blocking statutes).

104. Brief for the United States as Amicus Curiae Supporting Petitioners at 19-21, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) [hereinafter DOJ Brief]. The EC also recognizes the dangers expanded private recovery poses to public cartel enforcement. *See* Almunia, *supra* note 76, at 5 (explaining that the EC Directive presents “the opportunity to fine-tune the interaction between the actions for damages brought by victims and the public enforcement by the Commission and [national competition authorities].”).

105. DOJ Brief, *supra* note 104, at 20-21 (arguing that, because potential amnesty applicants weigh civil liability exposure when deciding whether to apply to the amnesty program, “civil liability to all global victims would provide a significant disincentive to seek amnesty from the government.”).

106. *See* Fox, AMC Hearing, *supra* note 65, at 7 n.13 & at 16 (discussing the detriment associated with increased regulation of a given transaction or conduct); Layton & Parry, *supra* note 103, at 313 (explaining that the U.K. saw undue extraterritorial application of the US antitrust law as “exposing international businesses to double jeopardy.”). *See generally* Terzaken, *supra* note 70 (arguing that without harmonization and restraint of extraterritoriality the growth of antitrust jurisdictions produces disproportionate and multiple penalties for the same violation where overlapping jurisdiction exists).

107. *See* Wood, *supra* note 1, at 301-02 (noting that the triumph of the effects doctrine has complicated the ability of businesses to determine with certainty what conduct was lawful or unlawful, subjecting these businesses to increased regulation); *see also infra* note 216 and accompanying text. *See also* Terzaken, *supra* note 70:

Companies caught in the crosshairs of serial enforcement agencies complain that whatever the alleged transgressions, the sanctions they and other defendants now face are badly out of whack. The problem isn’t just prosecutorial overkill, but outright piling on. One illustration is the recent Air Cargo cartel case. As part of what was alleged to be an overarching conspiracy to artificially inflate surcharges on global air freight services, antitrust prosecutors in at least ten different jurisdictions brought enforcement actions.

conduct, and completing cross-border transactions subject to merger reviews.¹⁰⁸

Lastly, worldwide governments have expressed concern that US antitrust extraterritoriality stunts the growth of their own antitrust regimes due to the allure of treble damages.¹⁰⁹ For example, competition authorities have argued that improper extraterritorial application of US antitrust law is likely to substantially undermine the effectiveness of other countries' leniency programs, which are successful tools in discovering unlawful cartel activity, and thus will interfere with those countries' overall antitrust enforcement, including private enforcement.¹¹⁰ Additionally, broad availability of US treble damage recovery to non-US litigants attracts away cases that might otherwise be litigated in non-US courts, thereby depriving those jurisdictions the development of the substantial body of jurisprudence

108. Wood, *supra* note 1, at 302-03 (describing the administrative burdens associated with overlapping merger jurisdictions); Terzaken, *supra* note 70 (exemplifying the increase in defending in multiple lawsuits through the Air Cargo cartel case, in which defendants faced actions in the United States, European Union, Australia, Brazil, Canada, Mexico, New Zealand, South Africa, South Korea, and Switzerland). In addition to these accounting costs, the growth of the effects doctrine may also increase the economic costs associated with chilling beneficial conduct. *See, e.g.*, Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. & ECON. 445, 447 (1985) (explaining that excessive enforcement of antitrust laws has the potential to produce socially undesirable costs by "inducing firms to back off, to avoid approaching the margin at which the costs of more competition and more cooperation are in equilibrium.").

109. *See* Diamond, *supra* note 12, at 810, 823-24 (touching on the argument that claims being pursued under the Sherman Act stunt the growth of private recovery); Margaret Bloom, *Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remedies? A Post-Empagran Perspective from Europe*, 61 N.Y.U. ANN. SURV. AM. L. 433, 451 (2005) (stating the EC's belief that cartel deterrence by the United States alone was an insufficient deterrent and that if "foreign purchasers have ready access to U.S. antitrust damages remedies, this will attract away cases from EU courts that might otherwise be litigated in Europe."). *See also* Empagran, 542 U.S. at 167-68 (listing complaints lodged by non-US governments in *amicus curiae* briefs highlighting the trouble of treble damages in drawing non-US plaintiffs to US courts and interfering with their domestic enforcement policies); Layton & Parry, *supra* note 103, at 310-13 (examining the U.K.'s responses to Sherman Act extraterritorial legislative jurisdiction, which including a recognition that "[t]here was an obvious danger that business would seek enforcement of antitrust laws for less than public-spirited motives" in the United States by virtue of treble damage availability).

110. KFTC Motorola Brief, *supra* note 3, at 4 ("Such disincentive [to seek leniency with non-U.S. competition authorities due to potential increased exposure to U.S. antitrust liability under broader extraterritorial application] is likely to undermine substantially the effectiveness of other countries' leniency programs and will interfere with the countries' overall antitrust enforcement."); Bloom, *supra* note 109, at 451 (explaining the EC's argument that interfering with a competition authority's leniency program directly harms private enforcement because "[u]nless cartels are uncovered by the competition authorities – most frequently through a leniency application – there cannot be a [private] lawsuit."). The Korean Fair Trade Commission is the competition authority of South Korea.

that is necessary to facilitate the private enforcement of antitrust claims.¹¹¹ An example of underdeveloped jurisprudence can be demonstrated in Israel, where the Israeli Supreme Court has not yet been required to decide whether Israel's antitrust statute provides for indirect purchaser recovery.¹¹² Other countries with underdeveloped private recovery doctrine, such as South Africa and Denmark, have seen little private litigation to fine-tune their private enforcement schemes, though activity is on the rise.¹¹³

A. Non-Judicial Checks on Extraterritoriality

In response to this international criticism, the United States has taken steps to clarify and define conduct that is subject to US jurisdiction. These efforts have taken the form of legislation (the FTAIA) and bilateral agreements with important trading partners

111. Diamond, *supra* note 12, at 824 (“Courts need a steady-diet of cases to feed the development of a body of jurisprudence that will in turn facilitate private enforcement of antitrust claims; if those cases are attracted to the United States, foreign antitrust development will suffer.”); Bloom, *supra* note 109, at 451 (pointing out that if recovery under US antitrust law is made broadly available to non-US purchasers that it strips valuable private litigation from jurisdictions with developing antitrust law).

112. See Restrictive Trade Practices Law, 5748-1988 (Israel's antitrust law); Tadmor & Bakal, *supra* note 82, at 76 (detailing private actions under Israel's antitrust statute).

113. See Mark Garden & Lufuno Shinwana, *South Africa*, in *GETTING THE DEAL THROUGH: PRIVATE ANTITRUST LITIGATION 2017* 113-14 (Samantha Mobley ed., 2016) (explaining that there is an absence of private litigation for damages in part because private recovery hinges upon whether South Africa's competition authority can prove liability but that an uptick has been seen marked by South Africa's first class action antitrust suit in 2010); Henrik Peytz, Thomas Mygind & Mia Anne Gantzhorn, *Denmark*, in *GETTING THE DEAL THROUGH: PRIVATE ANTITRUST LITIGATION 2017* 33 (Samantha Mobley ed., 2016) (“[P]rivate antitrust litigation is in its infancy in Denmark, but it is growing and a rise in the number of cases can be expected as the principles to be applied in such litigation, regarding both the procedural issues as well as the conditions for liability, are clear” due largely to the EC Directive); Malcom Ratz, *Flying Into New Heights: Damages Claims Arising from Contraventions of the Competition Act*, DE REBUS (Feb. 1, 2017), <http://www.derebus.org.za/flying-new-heights-damages-claims-arising-contraventions-competition-act/> [<https://perma.cc/GCF2-UP5X>] (archived Oct. 26, 2017) (announcing that a South African High Court gave the first ever judgment relating to the damages stage of private litigation that “will undoubtedly herald in a new phase of competition law in South Africa”); see also *supra* note 19. But see Lizl Leonardo, Comment, *A Proposal to the Seventh and Ninth Circuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct that Impacts U.S. Commerce*, 66 DEPAUL L. REV. 175, 208-09 (2016) (arguing for broader extraterritorial application in part because private recovery is only available in a limited number of non-US jurisdictions, and where it exists it is sparse due to low probability of success stemming from stringent requirements of proving actual damages and requiring plaintiffs to pay all court costs). For a response to these criticisms, see *supra* § II.B (explaining that a growing number of countries recognize the value of private enforcement and are enacting laws that provide more plaintiff-friendly discourse).

containing comity provisions. These agreements are examples of positive comity: preemptive steps taken by the United States and trading partners to establish enforcement protocol.¹¹⁴

1. The FTAIA

The FTAIA was drafted for the purpose of clarifying US antitrust statutes “to make explicit their application only to conduct having a ‘direct, substantial, and reasonably foreseeable effect’ on domestic commerce or domestic exports.”¹¹⁵ Hoping to address the concerns expressed over the unrestrained effects doctrine, Congress sought to create a single, objective test to serve as “a simple and straightforward clarification of existing American law” and US antitrust regulator standards.¹¹⁶ The statute thus endorsed the effects doctrine by requiring that the effects of the anticompetitive conduct on US commerce “give rise to a claim” under US antitrust laws.¹¹⁷

As the Supreme Court stressed in *Empagran*, the FTAIA also reflects principles of international comity by limiting the types of foreign conduct to which US antitrust law applies in order to avoid unreasonable interference with the commercial activity of other countries.¹¹⁸ The statute constitutes the first time since 1890 that the jurisdictional language of the Sherman Act distinguishes between imports and exports, removing export and purely foreign transactions from US courts while carving-out import transactions.¹¹⁹ Notably, though, while the FTAIA was meant to limit antitrust liability for US sellers transacting abroad with foreign buyers, one consideration in the

114. *See infra* § III.A.2.

115. *See* H.R. REP. NO. 97-686, at 2 (1982).

116. *Id.*

117. 15 U.S.C. § 6a(2); H.R. REP. NO. 97-686, at 5 (1982) (“Since Judge Learned Hand’s opinion in [*Alcoa*], it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies.”).

118. *Empagran*, 542 U.S. at 164-65 (explaining that the FTAIA was intended to prevent “unreasonable interference with the sovereign authority of other nations” because untamed extraterritorial application of US law “creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.”); *Minn-Chem*, 683 F.3d at 854 (“As the Supreme Court stressed in *Empagran*, the public recognition of [the FTAIA’s international limitation of U.S. antitrust law] was inspired largely by international comity.”).

119. *See* 15 U.S.C. § 6a (exempting export transactions from the Sherman Act where the effect of the illegal anticompetitive activity occurs abroad); *see also* HAWK, *supra* note 39, at 173 (adding that though the FTAIA differentiates jurisdiction over import and export transactions it is largely consistent with prior US case law).

statute's formulation was to maintain the protection of US laws for foreign purchasers transacting within the United States.¹²⁰

2. Positive Comity

In addition to legislation, the United States and other countries have also entered into bilateral agreements with positive comity provisions, whereby the United States' competition authorities, the DOJ and the Federal Trade Commission, and those of other countries typically agree to, among other things, certain measures recognized as necessary to avoid potential enforcement conflicts.¹²¹ Comity is a concept of reciprocal deference, described as serving "our international system like the mortar which cements together a brick house."¹²² By

120. See 15 U.S.C. § 6a(1)(B) (applying US antitrust law to export opportunities of a person engaging in exporting *from the United States*); 1981 FTAIA Hearings, *supra* note 57, at 114 ("Obviously, we will always have situations where foreign firms are in the United States doing business in the United States, for example, purchasing in the United States, and will have the protection of our laws, whereas to the extent they do business within their own domicile they would not have the protection of those laws."); *Kruman*, 284 F.3d at 403 n.10 ("Indeed, to deny [foreign purchasers] this protection [of U.S. antitrust law in American markets] could violate this Friendship, Commerce and Navigation treaties this country has entered into with a number of foreign nations."); *supra* notes 56 & 57 and accompanying text. *But see* WALLER, AMERICAN BUSINESS, *supra* note 44, at 9-11 (concluding that the majority of cases where plaintiffs seek to assert jurisdiction under the FTAIA held that the statute bars US jurisdiction even for domestic conduct where the only effects are felt in other markets); *cf. id.* at 9-14 (noting that "the FTAIA is unlikely to protect defendants accused of restraining competition in export markets as part of a broader conspiracy in the United States or world markets.").

121. See, e.g., Agreement on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI) of the Republic of Peru, of the Other Part, May 26, 2016, U.S.-Peru, <https://www.ftc.gov/policy/cooperation-agreements/us-peru-antitrust-cooperation-agreement> [<https://perma.cc/4EX7-YNY9>] (last visited Oct. 26, 2017) [hereinafter U.S.-Peru Bilateral Agreement] (the United States' latest bilateral antitrust agreement which provides that "[t]he U.S. antitrust agencies and INDECOPI shall, within the framework of their laws, and to the extent compatible with their important interests, give careful consideration to the important interests of the other country's competition authority throughout all phases of their enforcement activities"); Cooper, *supra* note 6, at 388ff (recounting the events that led up to and formed the basis for the U.S.-Japan bilateral antitrust cooperation agreement).

122. *Laker Airways*, 731 F.2d at 937. See also Fox, AMC Hearing, *supra* note 65, at 6 ("Comity is a horizontal, nation-to-nation concept, seeking – by reciprocal deference – to maximize the joint interests of the affected nations or to split their differences through repeated interactions."); Snell, *supra* note 16, at 229 n.83 ("The traditional concept of international comity is a negative one: A nation refrains from extending its own legal or administrative activities into the areas of competence of another nation state."). The Supreme Court of Canada has adopted a similar legal definition of international comity. See *Morguard Invs., Ltd. v. Be Savoye*, 1990 S.C.R. 1077, 1096 (Can.) ("[Comity] is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due

definition, international comity is a doctrine that counsels voluntary forbearance when a sovereign that has a legitimate claim to jurisdiction concludes that a second sovereign has a greater claim to jurisdiction under principles of international law.¹²³ However, international comity never obligates a national forum to ignore the rights of its own citizens or of other persons who are under the protection of its laws.¹²⁴

Positive comity, on the other hand, entails “one nation helping the other, with respect to international rules of peaceful cooperation and assistance.”¹²⁵ Use of positive comity in US bilateral trade agreements has typically addressed cooperation between competition authorities and attempts to avoid jurisdictional and sovereignty tensions “by placing initial responsibility for investigation of market access barriers into the hands of the jurisdiction where the alleged anticompetitive behavior occurs.”¹²⁶ In other words, it acts as a “mechanism whereby the jurisdiction more closely associated with the alleged anticompetitive conduct assumes primary responsibility for the investigation and possible remedy,” precluding the need for extraterritorial enforcement.¹²⁷ These bilateral agreements reflect the United States’ objective of increasing coordination to avoid enforcement system clashes and international disputes, which have

regard both to international duty and convenience, and to the right of its own citizens or of other persons who are under the protection of its laws.”)

123. *Nippon Paper*, 109 F.3d at 8 (defining international comity). *See also* Eleanor Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is “Reasonableness” the Answer?*, 19 N.Y.U. J. INT’L L. & POL. 565, 567 n.4 (1987) (explaining that some see the concept of comity as fully discretionary while others see it as an element of obligation); *supra* note 21 and accompanying text.

124. *Hilton*, 159 U.S. at 164 (comity contemplates due regard to the national forum’s own citizens and other persons under protection of its laws); *Morguard Invs.*, 1990 S.C.R. at 1096 (same).

125. Snell, *supra* note 16, at 229 n.83 (defining positive comity in comparison to the traditional sense of international comity); *see, e.g.*, Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, U.S.-EC, art. I., Sept. 23, 1991, <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0525.pdf> [<https://perma.cc/F5ZQ-MUTR>] (last visited Oct. 26, 2017) (“The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.”).

126. ICPAC Report, *supra* note 6, at 226-27. *See, e.g.*, U.S.-Peru Bilateral Agreement, *supra* note 121, at Art. 1(1) (“The purpose of this Agreement is to promote cooperation, including cooperation in the enforcement of competition laws, and to ensure that the U.S. antitrust agencies and INDECOPI give careful consideration to each other’s important interests in the application of their competition laws.”).

127. ICPAC Report, *supra* note 6, at 226.

tended to hurt US business interests.¹²⁸ The United States currently has cooperative agreements, memorandum of understandings, or enhanced comity agreements with fifteen jurisdictions, including the EC.¹²⁹ But, these bilateral agreements do not override inconsistent provisions of US law because they are not treaties ratified by the United States Senate.¹³⁰ To date, however, positive comity provisions do not address jurisdictional concerns for private litigation.

B. Judicial Response to Sherman Act Extraterritoriality

In addition to legislation and positive comity, US courts have also considered international comity in determining whether or not the United States has jurisdiction over certain conduct repugnant to US antitrust law. Three cases in particular have articulated international comity principles: *Timberlane*, *Hartford Fire*, and *Empagran*. However, it would not be until the Supreme Court's decision in *Empagran* that international comity would function as a limitation on extraterritorial jurisdiction for antitrust lawsuits in all US courts.¹³¹

1. Timberlane

Timberlane is the first decision to have recognized the comity doctrine as a potential defense or limiting factor in cases brought under the Sherman Act.¹³² International comity as a doctrine of limitation was

128. See, e.g., Cooper, *supra* note 6, at 388ff (discussing the events and circumstances leading the 1999 agreement between Japan and the United States).

129. See *International Competition and Consumer Protection Agreements*, FED. TRADE COMM'N, <https://www.ftc.gov/policy/international/international-cooperation-agreements> [https://perma.cc/7L3U-9XNA] (last visited Oct. 26, 2017). Jurisdictions include Australia (1982), Brazil (1999), Canada (1995, enhanced comity in 2004), Chile (2011), China (2011), Colombia (2014), EC (1991, enhanced comity in 1998), Germany (1976), India (2012), Israel (1999), Japan (1999), Mexico (2000), Russia (2009), South Korea (2015), and Peru (2016).

130. ICPAC Report, *supra* note 6, at Annex 1-Cv.

131. See, e.g., Waller, *Twilight*, *supra* note 64, at 564 (2000) ("Since [1976], comity has remained the darling of the majority of academic commentators, but has received an ambivalent reception in the courts and uniform rejection from American legislators."). Recent lower court approaches to comity analysis have largely followed the precedents set in *Hartford Fire* and *Empagran*. See, e.g., *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 185-86 (2d Cir. 2016) (relying on *Hartford Fire* in conducting a comity analysis of whether US and Chinese laws presented a "true conflict"); *Motorola Mobility*, 775 F.3d at 834 (relying in part on *Empagran*'s invocation of international comity to bar recovery by a US parent company for antitrust injuries dealt to its foreign non-wholly owned subsidiaries).

132. See BREYER, *supra* note 7, at 99 (explaining that with *Timberlane* the Ninth Circuit for the first time undertook an interest-balancing analysis to determine the propriety of

first proposed as the “jurisdictional rule of reason” by Kingman Brewster in 1958 and reached its zenith in 1976 when the Ninth Circuit in *Timberlane* declared that a comity analysis was required before exercising jurisdiction to prescribe under the Sherman Act.¹³³ In that case, a US plaintiff alleged that the defendant, a US bank, conspired with officials in Honduras to prevent Timberlane’s subsidiaries in Honduras from milling lumber and exporting it to the United States.¹³⁴ Importantly, the alleged anticompetitive activity took place entirely outside of the United States, was perpetrated mainly by foreign citizens, and the effect was primarily felt in Honduras.¹³⁵

The court held that an effect on US commerce was necessary but not sufficient to assert US jurisdiction.¹³⁶ Rather, courts should assess whether the “interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”¹³⁷ To do so, the court put forth a balancing test to account for (1) potential conflicts of law or policy, (2) identity of the parties, (3) expectation of antitrust enforcement, (4) comparative effect of the alleged conduct between the United States

extraterritorial application of the Sherman Act); Fox, AMC Hearing, *supra* note 65, at 7 (“*Timberlane* [is] the parent of U.S. antitrust comity ‘doctrine.’”).

133. Popofsky, *supra* note 15, at 2423-24; Waller, *Twilight*, *supra* note 64, at 564. See also KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958). The Second, Third, Fifth, and Tenth Circuits would later follow *Timberlane*’s lead. See *In re Vitamin C Litig.*, 837 F.3d at 184-86 (employing the *Timberlane* factors to determine whether or not to abstain from asserting jurisdiction on comity grounds); *Indus. Inv. Dev. Corp. v. Matsui & Co.*, 671 F.2d 876 (5th Cir. 1982) (finding that defendants failed to satisfy the *Timberlane* test in support of summary judgment motion); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864 (10th Cir. 1981) (employing *Timberlane* analysis to find that United States courts had no jurisdiction over a suit in which a foreign plaintiff alleged Sherman Act violations committed by US companies’ foreign subsidiaries); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (holding that where foreign nations were involved, foreign policy, reciprocity, comity, and limitations of judicial power were considerations have bearing on the court’s decision to exercise or decline jurisdiction). Not all circuits followed, however. See *Laker Airways*, 731 F.2d at 948-49 (observing that the *Timberlane* factors “are not useful in resolving the controversy” involving defendants initiating suit in British court to bar US court from adjudicating antitrust claims brought by a British plaintiff); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255 (7th Cir. 1980) (finding that failing to consider *Timberlane* test did not amount to an abuse of discretion).

134. *Timberlane*, 549 F.2d at 601.

135. *Id.* (summarizing the plaintiffs’ allegations); Diamond, *supra* note 12, at 813 (distinguishing *Timberlane* from *American Banana* and *Alcoa*).

136. *Timberlane*, 549 F.2d at 611-12, 613 (proclaiming the effects doctrine incomplete because it does not account for foreign sovereigns’ interests).

137. *Id.* at 613.

and the foreign country, (5) degree of harm to US commerce, (6) the foreseeability of the effect, and (7) the importance of the violations alleged in the United States compared with those in the foreign country.¹³⁸

2. Hartford Fire

In contrast to the attention the Ninth Circuit paid evaluating a foreign sovereign's interests in regulating alleged anticompetitive conduct in *Timberlane*, the Supreme Court in *Hartford Fire* articulated a new principle of prescriptive jurisdiction by which international comity considerations are relevant only when a "true conflict between domestic and foreign law" exists.¹³⁹ The *Hartford Fire* Court defined a "true conflict" of law as when a party subject to regulation by two states cannot simultaneously comply with the laws of both, lest the laws of one be infringed.¹⁴⁰ Notably, the Court gave little contemplation to the FTAIA, explaining only that in enacting the statute "Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity" but declining to answer that question.¹⁴¹

3. Empagran

Justice Scalia's dissent in *Hartford Fire* set the stage for a change of course on which the Court embarked in *Empagran*.¹⁴² In that

138. *See id.* at 614. The court concluded after listing the balancing test's elements that "[a] court evaluating these factors should identify the potential degree of conflict if American authority is asserted." *Id.*

139. *See Hartford Fire*, 509 U.S. at 798-99; David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUSTON J. INT'L L. 287, 296 (2004). Cf. *Minn-Chem*, 683 F.3d at 854 (explaining that *Hartford Fire* suggested a pragmatic reason for the FTAIA's inapplicability to import transactions, namely that "[f]oreigners who want to earn money from the sale of goods or services in American markets should expect to have to comply with U.S. law").

140. *Hartford Fire*, 509 U.S. at 799.

141. *Id.* at 798. Recently, though, lower courts have employed such comity analyses. In *In re Vitamin C Antitrust Litig.*, the Second Circuit affirmed the dismissal of a price-fixing claim brought against Chinese manufacturers of Vitamin C chiefly due to the existence of a "true conflict" between Chinese and United States law. *See* 837 F.3d at 185-86 (finding that while the existence of a "true conflict" may not be a necessary prerequisite for invoking the doctrine of comity, the existence of one is sufficient to abstain from asserting jurisdiction).

142. *See* Fox, *Remedies*, *supra* note 14, at 578 (noting that in *Empagran* the Supreme Court substantially adopted Justice Scalia's *Hartford Fire* dissent); Diamond, *supra* note 12, at 815 (citing Harry First, Prof., NYU School of Law, Remarks at the N.Y. State Bar Ass'n 2005

dissenting opinion, Justice Scalia reframes the question before the Court as not whether the United States has the prescriptive jurisdiction to subject the British defendants to US antitrust law, but rather whether it has exercised that jurisdiction in enacting the Sherman Act.¹⁴³ In doing so, Justice Scalia invokes a canon of statutory construction predicated on prescriptive comity to argue that Congress did not intend for the Sherman Act to unequivocally apply to extraterritorial conduct without considering the jurisdictional claims of foreign states.¹⁴⁴ This reflected the Court's new approach to comity, one which was concerned not with the direct conflicts highlighted in *Hartford Fire* but instead focused on harmonization of similar national laws that seek to achieve common objectives.¹⁴⁵

In *Empagran*, which was a follow-on action to the *Vitamins Case*¹⁴⁶ cartel prosecution of the late 1990s, foreign and US class plaintiffs asserted a Sherman Act claim against a mix of foreign and US defendants.¹⁴⁷ After the US class settled, the *Empagran* Court faced an issue of interpreting the FTAIA to decide whether the statute's condition that a requisite domestic effect "give[] rise to a claim" refers broadly to any potential claim or specifically to the plaintiff's claim.¹⁴⁸

Antitrust Law Section Symposium: *Empagran* and the International Reach of U.S. Antitrust Laws (Jan. 27, 2005)).

143. *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting).

144. *See id.* at 814-21; JOELSON, *supra* note 52, at 53 ("The Court reasoned that Congress, mindful of principles of customary international law implicating the legitimate sovereign interests of other nations, sought to release from U.S. antitrust constructs anticompetitive conduct causing foreign effects unrelated to domestic effects.").

145. *Empagran*, 542 U.S. at 164-65 (observing that the contemporary global economy demands harmonization of potentially conflicting laws of different nations); BREYER, *supra* note 7, at 92 ("'Comity' once referred simply to the need to ensure that domestic and foreign laws did not impose contradictory duties upon the same individual . . . Today it means something more. In applying it, our Court has increasingly sought interpretations of domestic law that would allow it to work in harmony with foreign laws, so that together they can more effectively achieve common objectives.").

146. The *Vitamins Case* was a prosecution of an international price-fixing conspiracy among vitamin manufacturers that began in the late 1990s and involved defendants from the United States, Switzerland, and Germany. Diamond, *supra* note 12, at 806 (describing briefly the cartel prosecution leading to *Empagran*); First, *supra* note 16, at 712ff (narrating in detail the events of the *Vitamins Case* cartel prosecution). The vitamins at issue were "most commonly used as nutritional supplements or to enrich animal feed; they [were] also used in vitamin premixes to enrich numerous processed foods (such as breakfast cereals)." First, *supra* note 16, at 715.

147. *Empagran*, 542 U.S. at 159-61 (detailing the procedural posture of the case); Diamond, *supra* note 12, at 806 (summarizing the procedural history leading up to the *Empagran* decision).

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

Following similar logic to Justice Scalia's *Hartford Fire* dissent, the Supreme Court invoked prescriptive comity to conclude that Congress did not intend to expand the Sherman Act's scope in anyway by enacting the FTAIA, and thus foreign injury resulting from foreign conduct independent of a domestic effect did not qualify for the statute's carve-out.¹⁴⁹ In effect, *Empagran* dictated that the FTAIA has two distinct causation inquiries, one asking whether a defendant's foreign conduct causes a cognizable domestic effect, and the other asking whether that effect causes the plaintiff's injury.¹⁵⁰ This is the current governing US case law on the FTAIA.

IV. SHORTCOMINGS OF THE CURRENT JURISPRUDENCE

Although clarity was one of Congress' goals in enacting the FTAIA, the statute as drafted is anything but clear, and the FTAIA itself has contributed to the ill-defined boundaries of the effects doctrine. The FTAIA has produced a number of circuit splits, one of which was decided by *Empagran*.¹⁵¹ Other circuit splits currently exist, including one between the Seventh and Ninth circuits concerning the interpretation of the FTAIA's requirement that anticompetitive behavior have a "direct, substantial, and reasonably foreseeable effect" on US commerce which the Supreme Court has so far abstained from resolving.¹⁵² As explained in *Minn-Chem, Inc. v. Agrium Inc.*, the "substantial" and "reasonably foreseeable" prongs have produced little dispute and are relatively straightforward.¹⁵³ Rather, what it takes to show "direct" is less clear.¹⁵⁴ The Seventh Circuit took the position that, like in tort law, recovery should be cut off for injuries that are too remote from the cause of an injury and held that the term "direct" means only "a reasonably proximate causal nexus."¹⁵⁵

To the contrary, the Ninth Circuit in *United States v. LSL Biotechnologies* looked to the Supreme Court's definition of "direct"

149. *See id.* at 163-69.

150. *See Lotes*, 753 F.3d at 414.

151. *Empagran*, 542 U.S. at 160-61; *see also* Amelie Doublet, *Motorola Mobility II and the Circuit Split Over the Interpretation of the FTAIA: The Necessity of Supreme Court Review*, 83 USLW Issue No. 43 2015-05, Bloomberg BNA.

152. *See Motorola Mobility LLC v. AU Optronics Corp.*, 135 S. Ct. 2837 (2015); Doublet, *supra* note 151.

153. 683 F.3d 845, 856 (7th Cir. 2012).

154. *Id.*

155. *Id.* at 856-57.

from a different statute germane to international relations.¹⁵⁶ Drawing from dictionary definitions and language in the Foreign Sovereign Immunities Act that is similar to that in the FTAIA, the court held that an effect is “direct” if “it follows the immediate consequence of the defendant’s activity.”¹⁵⁷ This definition was subsequently utilized by the Ninth Circuit in its decision in *United States v. Hsiung* (the criminal prosecution of the defendants in *Motorola Mobility*), which expressly rejected *Minn-Chem*’s “reasonably proximate causal nexus” approach and reiterated instead the broader “immediate consequence” test.¹⁵⁸

A. Problems Arising from the Circuit Split

Using *Minn-Chem*’s definition of “direct,” however, has produced a questionable holding in *Motorola Mobility*.¹⁵⁹ In that case, a US company, Motorola, brought a claim under Section 1 of the Sherman Act, alleging that it was the victim of price-fixing among foreign manufacturers of liquid crystal display (“LCD”) panels used as components in the manufacture of cellphones.¹⁶⁰ The LCD panel manufacturers had already been found guilty of participating in an illegal cartel, and those convictions were affirmed in *Hsiung*.¹⁶¹ Motorola was a major purchaser of LCD panels, but had purchased most of the price-fixed products through its majority-owned foreign subsidiaries.¹⁶² Only one percent of its purchases were made directly by Motorola in the United States and incorporated into cellphones also sold in the United States.¹⁶³ The other ninety-nine percent of its purchases were made abroad.¹⁶⁴ Of those purchases, forty-two percent

156. 379 F.3d 672, 680 (9th Cir. 2004); *see also* *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (interpreting the “direct effect” in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, to be an effect that “follows ‘as an immediate consequence of the defendant’s . . . activity.’”).

157. *LSL Biotech.*, 379 F.3d at 680 (drawing similarities between the exception in the Foreign Sovereign Immunities Act and the FTAIA).

158. 778 F.3d 738, 758 (9th Cir. 2015). *See also id.* at 759 n.9 (recognizing the disagreement with the Seventh Circuit).

159. *See generally* Ellen Meriwether, *Motorola Mobility and the FTAIA: If Not Here, Then Where?*, 29 ANTITRUST 8 (2015) (critiquing the outcome of *Motorola Mobility*). *See also* Leonardo, *supra* note 113, at 206ff (same).

160. *Motorola Mobility*, 775 F.3d at 817.

161. *Id.*; *see also Hsiung*, 778 F.3d 738 (9th Cir. 2015).

162. *Motorola Mobility*, 775 F.3d at 817, 818.

163. *Motorola Mobility*, 775 F.3d at 817.

164. *Id.*

were incorporated into phones destined for the United States, while the remainder were used to make phones sold abroad.¹⁶⁵

In its first stab at the appeal of the lower court's decision, the Seventh Circuit following *Minn-Chem's* definition of "direct" held that anticompetitive behavior affecting intermediary products, rather than final products, could not have a "direct" effect on US commerce.¹⁶⁶ After additional consideration likely influenced by the DOJ's concern with the initial holding and its implications for international cartel enforcement, the court vacated the first opinion and opted for a different approach to the same conclusion.¹⁶⁷ Summarizing that the case involved "components [that] were sold by their manufacturers to their foreign subsidiaries, which incorporated them into the finished product to Motorola for resale in the United States," Judge Posner branded the wrongful conduct, effect, and injury as entirely extraterritorial because Motorola and its subsidiaries did not function as one enterprise.¹⁶⁸ Therefore, the court construed Motorola as an indirect purchaser, barred from bringing a claim under the Sherman Act by virtue of the holding in *Illinois Brick Co. v. Illinois*,¹⁶⁹ and concluded that the entire transaction falls outside of the FTAIA's exception, though recognizing that the effect on US commerce may, perhaps, be "direct."¹⁷⁰

But, the court's reliance on *Illinois Brick* was no better than its initial attempt to characterize the effect of the LCD cartel on US commerce. Several points suggest *Motorola Mobility* was wrongly decided, including inconsistencies with US precedent and statutes. In holding that Motorola and its subsidiaries did not function as one enterprise because they are governed by the different laws of the countries in which they are incorporated and operated, Judge Posner

165. *Id.*

166. *See Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014).

167. *See Motorola Mobility*, 775 F.3d at 817. The DOJ's amicus brief urged the court to vacate its March 27, 2014 opinion, arguing that the court's holding - that component price-fixing does not directly affect US commerce in component-incorporating products - severely hampered the agency's ability to prosecute international cartels. *See Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party* at 1, 17-18, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2014) (No. 14-8003).

168. *See id.* at 819 ("The conduct increased the cost to Motorola of the cellphones that it bought from its foreign subsidiaries, but the cartel-engendered price increase in the components and in the price of the cellphones that incorporated them occurred entirely in foreign commerce.").

169. 431 U.S. 720 (1977).

170. *See Motorola Mobility*, 775 F.3d at 819-823.

disregarded the Supreme Court's central holding in *Copperweld Corp. v. Independence Tube Corp.*¹⁷¹ *Copperweld's* progeny have found a corporation and its wholly owned subsidiaries to be a "single entity" with "complete unity of interest" and, similarly, have also found a lack of relevant differences between a corporation and its wholly owned subsidiary for Sherman Act analysis.¹⁷² Additionally, for non-wholly owned subsidiaries, courts relying on *Copperweld* have treated a parent and its non-wholly owned subsidiary as a single entity for antitrust purposes where the parent held a controlling majority of the subsidiary's stock.¹⁷³

In addition to precedent, other US antitrust statutes treat parents and subsidiaries as one entity. The Hart-Scott-Rodino Antitrust Improvement Act ("HSR") requires a business acquiring another business in a transaction meeting certain thresholds to file a premerger notification with the government.¹⁷⁴ If the acquiring business is controlled by a parent corporation, the HSR mandates that the "ultimate parent entity" file the notification regardless of the nationality of the acquired business.¹⁷⁵ Furthermore, appearing to be influenced by

171. 467 U.S. 752 (1984). In *Copperweld*, the Court held that because subsidiaries and their parent corporations are not independent entities, they are incapable of conspiring with one another within the meaning of the Sherman Act. *Id.* at 777. The Court reasoned that "in reality a parent and a wholly owned subsidiary *always* have a 'unity of purpose or common design' . . . whether or not the parent keeps a tight rein over the subsidiary." *Id.* at 771.

172. See *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) (observing the lack of any relevant differences between a corporation and its wholly owned subsidiary, and two corporations wholly owned by a third corporation); *Newport Components v. NEC Home Elec., Inc.*, 671 F. Supp. 1525, 1544 (C.D. Cal. 1987) (holding that manufacturer and two wholly owned subsidiaries must be viewed as a "single entity" with "complete unity of interest" for purposes of the Sherman Act).

173. See *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1217 (S.D. Ga. 1997) (parent owned fifty-one percent); *Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 706 (N.D. Cal. 1994) (eighty percent); *Novatel Comm'cns, Inc. v. Cellular Tel. Supply, Inc.*, No. C85-2674A, 1986 U.S. Dist. LEXIS 16017, at *25-26 (N.D. Ga. Dec. 23, 1986) (fifty-one percent). See also *Wesley Health Sys., LLC v. Forrest County Bd. of Supervisors*, No. 2:12-CV-59-KS-MTP, 2014 U.S. Dist. LEXIS 7764, at *23-29 (S.D. Miss. Jan. 22, 2014) (two-thirds control of the board); *Coast Cities Truck Sales v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 765 (D.N.J. 1995) (seventy percent of the voting shares). *But see* *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 216 U.S. Dist. LEXIS 146013, at *25-28 (E.D. Mich. Oct. 21, 2016) (relying on *Motorola Mobility* to hold that a US parent corporation may not treat its minority-owned foreign manufacturing subsidiary as an extension of itself for satisfying the FTAIA or avoiding the indirect purchaser-standing rule).

174. 15 U.S.C. § 18a(a) (setting out the criteria triggering premerger filing under HSR).

175. 16 C.F.R. § 801.1(a)(1) (clarifying that the entity responsible for HSR filing, "person," means the "ultimate parent company").

Copperweld, the HSR does *not* require filing for the merger of two wholly owned subsidiaries with a common parent.¹⁷⁶

Motorola also argued that it was the “target” of the illegal conduct or, alternatively, the direct victim because its subsidiary “passed on” the cartel-inflated portion of the original purchase price to Motorola.¹⁷⁷ In *Illinois Brick*, which also contemplated the offensive use of the ill-fated pass-on theory in US antitrust jurisprudence, Justice White surmised that a situation in which the pass-on defense “might be permitted” is where the direct purchaser is owned or controlled by its customer.¹⁷⁸ Posner, highlighting the semantic difference between “might be” and “is,” brushed this off as meaningless.¹⁷⁹

176. 16 C.F.R. § 802.30 (exempting intracorporate transactions from HSR filing requirements); Michael D. Belsley, Comment, *The Vatican Merger Defense – Should Two Catholic Hospitals Seeking to Merge be Considered a Single Entity for Purposes of Antitrust Merger Analysis?*, 90 NW. U.L. REV. 720, 727 n.40 (1996) (describing *Copperweld*’s influence on the government’s HSR filing instructions).

Even assuming it is appropriate to view Motorola as a separate and downstream entity from its subsidiaries for the purposes of its analysis, the Seventh Circuit’s reliance on *Illinois Brick* is still misplaced. The *Illinois Brick* Court reasoned that allowing both direct and indirect purchasers to bring suit would place a greater evidentiary burden on plaintiffs by necessitating complex econometric modeling to assess what portion of the inflated price was passed on to the indirect purchaser and what portion absorbed by the direct purchaser. *Ill. Brick Co.*, 431 U.S. at 731-32 (discussing *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968)). So, it concluded, “antitrust laws will be more effectively enforced by concentrating the full recovery ... in the direct purchaser.” *Id.* at 735. But because Motorola controls its foreign subsidiaries, there would not be both a direct purchaser suit and an indirect purchaser suit. See Appellant’s Opening Brief at 9, *Motorola Mobility, LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. Aug. 29, 2014) (stating that Motorola “functioned with its subsidiaries as a single enterprise”); Meriwether, *supra* note 159, at 13 (enumerating the ways in which Motorola controlled all aspects of its mobile phone business). Indeed, Posner all but concedes this point and instead distinguishes Motorola from its foreign subsidiaries by pointing out that the foreign subsidiaries are “incorporated under and regulated by foreign law.” *Motorola Mobility*, 775 F.3d at 823. The issue faced in *Illinois Brick* was therefore categorically different from the issue fabricated by the Seventh Circuit – injury was, in fact, quite easily assessed for the “indirect purchaser” in *Motorola Mobility* in comparison with the *Illinois Brick* scenario and other classic indirect purchaser cases.

177. See *id.* at 822-23 (discussing Motorola’s “target” and “pass-on” theories of standing). The pass-on theory was an argument originally made by defendant cartelists that the plaintiff direct purchaser did not suffer antitrust injury because any overpayment made as a result of the alleged anticompetitive conduct was passed on to the plaintiff’s customers in the form of inflated downstream prices. See *Hanover Shoe*, 392 U.S. at 488-93. The issue decided in *Illinois Brick* involved offensive use of pass-on as justification for indirect purchaser antitrust standing. *Ill. Brick Co.*, 431 U.S. at 726.

178. *Ill. Brick Co.*, 431 U.S. at 736 n.16.

179. *Motorola Mobility*, 775 F.3d at 823.

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The *Motorola Mobility* decision has negative consequences for US antitrust law, non-US subsidiaries of American parents relying on US law for potential recovery, US businesses operating internationally with international subsidiaries, and consumers. In essence, the Seventh Circuit announced a broad rule that eliminates private antitrust remedies where the first purchase of a price-fixed component occurs offshore, drastically mitigating the ability of US antitrust law to deter harmful foreign conduct targeting US markets.¹⁸⁰ Is Posner really suggesting that American businesses are only protected by US antitrust law when the domestic parent itself engages in such wholly foreign transactions?¹⁸¹

Moreover, the Seventh Circuit's decision creates a glaring inconsonance with the Ninth Circuit's in what should be similar outcomes to similar cases. Despite justifying its second decision the Seventh Circuit by warning that "rampant extraterritorial application of U.S. law 'creates a serious risk of interference with a foreign nation's ability to independently regulate its own affairs,'" the court did not delve into any meaningful comity analysis.¹⁸² Particularly troubling is that while concerned with the prospect of "rampant extraterritoriality," the court gives no attention to whether Motorola would be able to recover abroad or, more importantly, whether the cartels' host

would place a greater evidentiary burden on plaintiffs by necessitating complex econometric modeling to assess what portion of the inflated price was passed on to the indirect purchaser and what portion absorbed by the direct purchaser. *Ill. Brick Co.*, 431 U.S. at 731-32 (discussing *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968)). So, it concluded, "antitrust laws will be more effectively enforced by concentrating the full recovery ... in the direct purchaser." *Id.* at 735. But because Motorola controls its foreign subsidiaries, there would not be both a direct purchaser suit and an indirect purchaser suit. See Appellant's Opening Brief at 9, *Motorola Mobility, LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. Aug. 29, 2014) (stating that Motorola "functioned with its subsidiaries as a single enterprise"); Meriwether, *supra* note 159, at 13 (enumerating the ways in which Motorola controlled all aspects of its mobile phone business). Indeed, Posner all but concedes this point and instead distinguishes Motorola from its foreign subsidiaries by pointing out that the foreign subsidiaries are "incorporated under and regulated by foreign law." *Motorola Mobility*, 775 F.3d at 823. The issue faced in *Illinois Brick* was therefore categorically different from the issue fabricated by the Seventh Circuit – injury was, in fact, quite easily assessed for the "indirect purchaser" in *Motorola Mobility* in comparison with the *Illinois Brick* scenario and other classic indirect purchaser cases.

180. See *Motorola Mobility*, 775 F.3d at 823.

181. See, e.g., Meriwether, *supra* note 159, at 13 ("In short, a foreign plaintiff is a foreign plaintiff, and it matters little (maybe not at all) how connected that plaintiff is with the United States, or how its business affects domestic commerce."). See also *Motorola Mobility*, 775 F.3d at 823 (stating in dicta that even if Motorola and its subsidiaries could be considered as a single entity that it would not have changed the court's outcome because it "would have been injured abroad when 'it' purchased the price-fixed components).

182. *Id.* at 824 (quoting *Empagran*, 542 U.S. at 165).

countries have any incentive to prosecute “when their nationals engage in hardcore cartel conduct directed at a huge U.S. consumer market” that caused harm in that, opposed to its own, market.¹⁸³

B. Comity Analysis: A Possible Solution to Interpreting the FTAIA?

Ultimately, the Seventh Circuit may have initially reached a more reasonable conclusion in its first decision of *Motorola Mobility* had the court taken a different interpretational approach, such as one taken by the Supreme Court. Because the FTAIA’s effect test reflects an evaluation of a US jurisdictional claim, a possible method of aiding the courts’ construction of what a “direct” effect entails may be to follow *Empagran*’s example and in fact employ a comity analysis.¹⁸⁴ The two most recent comity principle constructions, as discussed, are in *Hartford Fire* and *Empagran*. However, the different comity approaches the Supreme Court undertakes in both cases result in standards that are under-inclusive and over-inclusive, respectively.

The Supreme Court’s approach in *Hartford Fire* suggested the unhelpfulness, if not irrelevance, of comity if there was no true conflict

183. *Id.*; *Minn-Chem*, 683 F.3d at 860 (observing that governments have no incentive to prosecute domestic export cartels because they “would logically be pleased to reap economic rents from other countries”); Meriwether, *supra* note 159, at 13 (critiquing the Seventh Circuit’s approach in relying on comity considerations, particularly in light of *Hsiung* where no “serious concerns of excessive or unwarranted antitrust enforcement” were raised).

184. See Saskatchewan Minn-Chem Brief, *supra* note 3, at 19-22 (arguing that principles of international comity should be used in interpreting the FTAIA’s “direct” criterion); BREYER, *supra* note 7, at 100 (discussing the FTAIA’s effects test exceptions that would give rise to Sherman Act claim); Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 315-16 (2007) (describing the FTAIA’s “direct, substantial, and reasonably foreseeable” condition as a codification of the *Alcoa* effects test in the form of an objective version of the test’s intent requirement); *supra* note 35 and accompanying text. As suggested in *Empagran*, comity analyses may look different in governmental actions in comparison with private damages cases. See *Empagran*, 542 U.S. at 170-71. This Note addresses the latter, particularly because comity at the government level may be, and in many cases is, addressed by positive comity provisions in bilateral agreements. See *supra* § III.A.2.

It is worth noting, however, that the FTAIA is silent as to whether a comity balancing test is proper in the statute’s construction. See H.R. Rep. No. 97-686, at 10 (1982) (“[T]he bill is intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for the subject matter jurisdiction are met, this bill would have no effect on the courts’ ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction.”); Griffin, *supra* note 15, at 162 (“Congress took a neutral stance towards the Ninth Circuit’s ‘jurisdictional rule of reason’ analysis, indicating that the Act simply stated the requirements for jurisdiction and was not intended to prevent or encourage balancing tests that might limit exercise of that jurisdiction.”).

of laws.¹⁸⁵ *Hartford Fire*'s comity test is under-inclusive in the sense that comity considerations would rarely be triggered, perhaps only in cases where a foreign state established laws mandating anticompetitive behavior.¹⁸⁶ Indeed, the First Circuit in *Nippon Paper* suggested that *Hartford Fire* had "stunted" the growth of comity in antitrust, and Professor Eleanor Fox proclaimed that "[the decision in *Hartford Fire*] gives U.S. jurists and enforcers license to disregard the interests of non-Americans."¹⁸⁷

Empagran's comity analysis, on the other hand, may be rigidly over-inclusive to the point where important US antitrust law objectives, such as deterrence and remedy, may go unserved. Turning its back on the Supreme Court's previous holdings in *Continental Ore* and *Pfizer*, the decision's use of comity may in fact have created "a handicap going forward [that] would lead to under-deterrence as well as unfairness."¹⁸⁸ As Judge Higginbotham's dissent in *Den Norske v. HeereMac* stresses, the FTAIA does not alter *Pfizer*'s affirmation of foreign plaintiffs' ability to sue under the Sherman Act, which was expressly approved in the statute's legislative history.¹⁸⁹

V. SOLVING THE COURTS' INCONSISTENT INTERPRETATION OF THE FTAIA AND APPLICATION OF COMITY PRINCIPLES: A COMITY BALANCING TEST

Interpreting the FTAIA has proven to be challenging and problematic. Apart from the deficiencies associated with the treatment of Motorola and its subsidiaries, *Motorola Mobility* may have been better decided by using a comity balancing test similar to the one in *Timberlane*, which during its time was regarded as a middle-of-the-

185. See *Hartford Fire*, 509 U.S. at 798-99; Fox, AMC Hearing, *supra* note 65, at 7 n.11 (commenting on *Hartford Fire*'s approach to comity).

186. See, e.g., Gerber, *supra* note 139, at 296 ("[T]he Court appeared to dispense with balancing considerations, at least for most cases").

187. *Nippon Paper*, 109 F.3d at 8; Eleanor Fox, *National Law, Global Markets, and Hartford Fire: Eyes Wide Shut*, 68 ANTITRUST L.J. 73, 77 (2000). See also Waller, *Twilight*, *supra* note 64, at 569 (discussing the effect of *Hartford Fire* on the use of comity analysis in US antitrust jurisprudence).

188. Fox, AMC Hearing, *supra* note 65, at 9.

189. 241 F.3d 420, 434 n.12 (5th Cir. 2001) (Higginbotham, J., dissenting); see also *Pfizer*, 434 U.S. at 313 ("Yet it is clear that a foreign corporation is entitled to sue for treble damages, since the definition of 'person' contained in the Sherman and Clayton Acts explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country.'").

road approach between *American Banana* and *Alcoa*.¹⁹⁰ Balancing tests can be expensive and may invite greater litigation, but here courts have already sufficiently narrowed the spectrum of hypothetical cases to stifle any increase in dockets that the balancing test may otherwise cause.¹⁹¹

Despite the FTAIA's ambiguity, the decisions in *Hartford Fire*, *Nippon Paper*, *Den Norske*, and *Empagran* contain sufficient consistencies that provide instruction on what type of conduct and injury the FTAIA will exclude from US antitrust jurisdiction. From *Hartford Fire* and *Nippon Paper* we understand that the FTAIA does not stand in the way of a classic effects doctrine claim, that is, one which involves defendants that directly harm US consumers, and specifically a US plaintiff, irrespective of where the defendant engages in the illegal conduct. The decision in *Empagran* instructs when conduct may be beyond the Sherman Act's reach, *i.e.*, when a claim is brought by a non-US. plaintiff to redress *foreign* injury, especially when the defendant is another foreign national.¹⁹² The Fifth Circuit and the Supreme Court made clear that the United States is no longer in the business of acting as the world's antitrust enforcer.¹⁹³ Additionally, *Empagran* explains that the FTAIA requires a defendant's foreign

190. Matthew C. Franker, Note, *Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity*, 36 Geo. Wash. Int'l L. Rev. 877, 907 (2004) (citing the 1987 Restatement (Third) of Foreign Relations in characterizing *Timberlane's* analysis as a "middle-of-the-road approach"); James E. Ward, Comment, "Is That Your Final Answer?" *The Patchwork Jurisprudence Surrounding the Presumption Against Territoriality*, 70 U. CIN. L. REV. 715, 721 (2002) (commenting on how *Timberlane's* approach gained widespread acceptance by falling between strict territoriality and the effects test).

191. See, e.g., Doug Melamed, *Thoughts About Exclusive Dealing*, in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC 433, 438 (Claus-Dieter Ehlermann & Mel Marquis eds., 2008) (criticizing balancing tests pertaining to antitrust law).

192. See *Empagran*, 542 U.S. at 171-75 (holding that the Sherman Act is unavailable to foreign plaintiffs with foreign injury); *Den Norske*, 241 F.3d at 428 ("A transaction between two foreign firms . . . should not . . . come within the reach of our antitrust laws.").

193. See, e.g., *Den Norske*, 241 F.3d at 431 ("Any reading of the FTAIA authorizing jurisdiction" over claims brought by non-US plaintiffs against non-US defendants to recover foreign harm "would open United States courts to global claims on a scale never intended by Congress."). See also Diamond, *supra* note 12, at 823 n.125, n.126 (citing sources highlighting the dangers granting expanded access to foreign plaintiffs under the FTAIA).

conduct to cause a cognizable domestic effect, which in turn must have caused the plaintiff's injury.¹⁹⁴

That leaves the question of what type of effect “gives rise to a claim” that the Ninth and Seventh Circuits have attempted to address: a US plaintiff bringing a claim against a non-US defendant encompassing wholly foreign conduct and an effect felt in the United States, such as if the US clothier from the opening hypothetical decided to sue the Pakistani textile manufacturers in the United States.¹⁹⁵ It is this type of narrow case, where prescriptive jurisdiction hangs on the “directness” of the effect, that a balancing test would prove beneficial in the absence of a circuit split resolution.¹⁹⁶ So, while the Supreme Court has cautioned against case-by-case comity inquiries, this balancing test is only employable in a small universe of cases.¹⁹⁷ Consequently, the balancing test would not be “too complex to prove workable,” as imagined by the Court in *Empagran*, particularly taking into account the stylized factors to be discussed.¹⁹⁸ But even if the case technically meets the standards for FTAIA's exemption, the balancing test may still be used to evaluate whether extraterritorial application of US antitrust laws is apt.¹⁹⁹

Chiefly, this balancing test would supplement the FTAIA. The underlying impetus for the FTAIA's enactment – responding to international criticism of expansive US extraterritorial jurisdiction and to calls for recognizing foreign sovereignty where the basis for US

194. *Empagran*, 542 U.S. at 173-75 (demonstrating that linguistically the most sensible reading of “gives rise to a claim” in the FTAIA refers to “plaintiff's claim” or “the claim at issue”).

195. Or, conversely, a non-US plaintiff bringing suit against a US defendant for exclusively foreign conduct and a domestic effect and injury. Suppose a US oil producer enters into a worldwide conspiracy to fix the price of tar produced at its Canadian refinery. The producer sells at the fixed, anticompetitive price to one of its wholly-owned subsidiaries in the United States with instruction to pass on the price to downstream purchasers in the United States. One of those purchasers is a German firm. While the conduct in question was exclusively foreign, it seemingly produced an effect in the United States that may “give rise to a claim” for the German firm under the Sherman Act. As mentioned, though the FTAIA was meant to limit antitrust liability for US sellers transacting abroad with foreign buyers, lawmakers still wanted to afford foreign purchasers the protection of US laws when transacting within the United States. See *supra* note 120 and accompanying text.

196. *Lotes* provides even tighter parameters in holding that in order for an effect to “give rise to a claim,” the “effect” must precede the alleged antitrust injury. See 753 F.3d at 414-15.

197. See *Empagran*, 542 U.S. at 168.

198. *Id.* at 168-69 (declining to employ a balancing test).

199. H.R. REP. NO. 97-686, at 13 (1982) (mentioning that the FTAIA would not bar courts from “employ[ing] notions of comity . . . or otherwise [taking] account of the international character of the transaction.”).

prescriptive jurisdiction is weak – functions as this balancing test’s *modus operandi*. While the difficulty in interpreting “direct” has instigated its introduction, the balancing test does not attempt to shed any more light on the FTAIA’s contemplation of “direct.” Instead, it provides an alternative framework to properly apply the FTAIA where the statute’s language makes it impossible to do so.

As was the balancing test in *Timberlane*, a balancing test here may also be criticized as leaving too much discretion over political inquiries (*i.e.*, foreign policy considerations) to the judiciary rather than to the executive and legislative branches, where such decisions may rightly belong.²⁰⁰ Professor William Dodge, while asserting that US courts should engage in judicial unilateralism rather than international comity considerations, points out that the judiciary plays an important complementary role to a country’s political branches by encouraging dialogue and negotiation between sovereigns.²⁰¹ Though Congress and antitrust agencies may be better suited than courts to take account of the interest of other nations, courts are nonetheless faced with the task

200. See Fox, AMC Hearing, *supra* note 65, at 7 (observing that antitrust regulators are better suited to weigh foreign countries’ interests, “as well as take account of other agencies’ or courts’ analysis of the same issues”); John Byron Sandage, Note, *Forum Non Conveniens and the Extraterritorial Approach of United States Antitrust Law*, 94 YALE L.J. 1693, 1699-1701 (1985) (criticizing “interest-based revisionist” approaches that engaged in interest balancing as “both inappropriate and unworkable because it involves courts in weighing sensitive political and diplomatic concerns traditionally considered nonjusticiable.”). Indeed, antitrust authorities are attempting to avoid unnecessary prosecution by increasing cooperation with foreign counterparts. See Terzaken, *supra* note 70 (detailing cooperation efforts); *supra* § III.A.2. In addition, the DOJ has established an internal policy to use wider discretion when defendants are facing parallel enforcement actions abroad. Terzaken, *supra* note 70 (discussing DOJ efforts to curtail prosecutorial overkill).

201. Dodge, *supra* note 2, at 106-07. American courts are also well-versed in taking into account foreign interests through allowing sovereign representatives to articulate official positions in litigation. See, e.g., *Empagran*, 542 U.S. at 167-68 (relying on non-US government *amicus curiae* briefs asserting national interests in considering international comity); *In re Vitamin C Antitrust Litig.*, 837 F.3d at 179 (“When, as in this instance, we receive from a foreign government an official statement explicating its own laws and regulations, we are bound to extend that explication the deference long accorded such proffers received from foreign governments.”); BREYER, *supra* note 7, at 92 (“Since there is no Supreme Court of the World, national courts must act piecemeal, without direct coordination, in seeking interpretations that can dovetail rather than clash with the working of foreign statutes. *And so our Court does, and should, listen to foreign voices, to those who understand and can illuminate relevant foreign laws and practices.*” (emphasis added)).

“Judicial unilateralism,” as defined by Professor Dodge, implies that courts should only consider whether or not the forum’s legislature intended to regulate the conduct at issue without regard to foreign interests. See Dodge, *supra* note 2, at 104-05 (“[A] court should apply a statute extraterritorially whenever doing so appears to advance the purposes of the statute and should not worry about resolving conflicts of jurisdiction with other nations.”); see also *supra* note 16.

of weighing those interests when judging a party's right to redress in private antitrust litigation.²⁰²

The balancing test should be an exercise in both comity and cooperation, an attempt to harmonize counterpoints in the debate over antitrust extraterritoriality. As Professor Fox posits, the question is not "when should we defer to the inconsistent interests of other nations?" but rather "how can the antitrust jurisdictions of the world work together to maximize their shared interest in competitive markets, to the benefit of consumers and robust or potentially robust business?"²⁰³ Indeed, this comports with Supreme Court's current approach to comity analysis of harmonization rather than avoiding conflict among laws.²⁰⁴ Accordingly, the test will have a slightly different focus than the one constructed by the Ninth Circuit in *Timberlane*, which reflects an outdated period of international antitrust regulation lacking potent modern enforcement tools such as amnesty programs. It will, however, encourage the growth of overall worldwide antitrust enforcement, both public and private, which ultimately contributes to properly functioning international markets.²⁰⁵

The challenge of achieving proper adjudication of an antitrust claim consisting of conduct and injury in two different jurisdictions is

202. See *In re Vitamin C Antitrust Litig.*, 837 F.3d at 179 (highlighting that the court's decision rested on the submissions from the Chinese government); BREYER, *supra* note 7, at 107 (noting that the *Empagran* Court reached its conclusion with the aid of briefs filed by the executive branches of foreign governments); see also *supra* note 201.

Outside of filing amicus briefs in private litigation, regulators are otherwise unhelpful for weighing national interests as they pertain to international comity. See, e.g., Diamond, *supra* note 12, at 813 ("While the government does consider comity before bringing cases against foreign nationals under federal antitrust laws, the majority of litigated cases involving foreign nationals, and therefore the development of the case law applying the principle of comity . . . have been centered in private antitrust litigation.").

203. Fox, AMC Hearing, *supra* note 65, at 7. See also Stephen M. Axinn & Christina Shin, *Globalization and Antitrust: The Last Forty Years and Beyond*, 2014 *FORDHAM COMP. L. INST.* 514 (B. Hawk ed. 2015) ("[C]onvergence [of national antitrust laws] – whether in connection with merger doctrine, cartel enforcement or single firm conduct – is necessary for any advanced economy.").

204. BREYER, *supra* note 7, at 96 ("[T]he Court no longer seeks only to avoid direct conflicts among laws of different nations; it seeks, rather, to harmonize the enforcement of what are often similar national laws."). See also *supra* § III.B.3.

205. See, e.g., Erin C. Fuse Brown & Jaime S. King, *The Double-Edged Sword of Health Care Integration: Consolidation and Cost Control*, 92 *IND. L.J.* 55, 85 (2016) ("The goal of any antitrust enforcement action is to restore the opportunity for the market to function without the illegal restraints on competition."); Sandeep Vaheesan, *Market Power in Power Markets: The Field-Rate Doctrine and Competition in Electricity*, 46 *MICH. J.L. REFORM* 921, 923 (2013) ("Anticompetitive conduct reduces economic efficiency and transfers wealth from consumers to producers.").

that national laws must conform to a market that ignores national borders.²⁰⁶ With this in mind, the goal should be to promote adjudication in the most efficient locale in an effort to maximize world welfare, foster growth of antitrust jurisdictions, and avoid overregulation.²⁰⁷ There are currently over 120 antitrust jurisdictions, many of which are new antitrust jurisdictions or have enacted fresh laws allowing for greater access to private redress, such as Israel (2006), China (2008), the European Union (2014), the United Kingdom (2015), and Hong Kong (2015).²⁰⁸ Letting the laws of these jurisdictions develop and inculcate international standards for antitrust enforcement strengthens the deterrence of anticompetitive behavior and the ability of injured parties to seek recompense.²⁰⁹ Achieving

206. Fox, AMC Hearing, *supra* note 65, at 7-8.

207. *See id.* at 7 n.13, 8. *See also supra* § III.B.3.

208. *See generally* Class Actions Law; Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China); EC Directive; CRA 2015; The Competition Ordinance, (2012) Cap. 619 (H.K.) (operational on December 14, 2015). *See also* Axinn & Shin, *supra* note 203, at 513-15 (discussing the proliferation of antitrust jurisdictions since the 1970s, amounting to a current 125 sovereign jurisdictions with competition authorities); *Consumer & Consumer Protection Authorities Worldwide*, FED. TRADE COMM'N, <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide> [<https://perma.cc/8ZMU-7EY4>] (last visited Oct. 26, 2017) (listing worldwide competition authorities); *supra* §§ II.B; III. China and Hong Kong, however, have not yet instituted a private right to action, though as noted above overly expansive availability of US antitrust claims for non-US private recovery may still have a detrimental effect on public enforcement efforts, including developing national jurisprudence. *See supra* note 110 and accompanying text. For greater detail on worldwide anti-cartel regimes, *see* ANTI-CARTEL ENFORCEMENT WORLDWIDE (Maher M. Dabbah & Barry E. Hawk eds., 3 vols., 2009).

209. *See, e.g.*, First, *supra* note 16, at 732-34 (arguing that international political consensus is integral to effective international antitrust enforcement and that the case-by-case common law process of law development is the optimal path to that consensus in the absence of a single system of or approach to market place regulation); Org. for Econ. Co-operation & Dev., Recommendation of the Council Concerning Effective Action Against Hard Core Cartels 2 (May 1998), <http://www.oecd.org/daf/competition/2350130.pdf> [<https://perma.cc/35HU-TEWZ>] (last visited Oct. 26, 2017) (“[C]loser co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade.”). As noted above, while national recourse for compensating private loss is currently available in a minority of antitrust jurisdictions, it is increasingly acknowledged as a necessary tool for under-resourced national competition authorities. *See* Pheasant, *supra* note 11, at 59 (explaining that the European Commission “decided that it would be appropriate to enhance the role of private enforcement to support and supplement public enforcement of the competition rules” given insufficient resources for governmental competition authorities); Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 153-54 (2005) (“Congress created the private right of action to supplement public enforcement because it was aware that the government would not have the necessary resources to uncover, investigate, and prosecute all violations of antitrust laws.”); *see also supra* note 25.

greater international involvement in turn would ostensibly mitigate some of the need behind extraterritorial application of US antitrust law.²¹⁰

Several factors offer helpful guidance. First and most significant, does the foreign jurisdiction have an enforcement program in place with penalties to deter future anticompetitive conduct and to allow a plaintiff to effectively pursue remedial action at both a micro and macro level? Emphasis should be placed here on deterrence.²¹¹ For instance, Judge Wood noted in *Minn-Chem*: “The host country for [an export] cartel will often have no incentive to prosecute it. [It] would logically be pleased to reap economic rents from other countries.”²¹² Moreover, such host countries’ legislatures will often not outlaw conduct that benefits the home state and results only in foreign harm.²¹³ It should also be noted that while many jurisdictions have public enforcement programs, many do not have compensatory channels for private litigants and where those do exist private recovery efforts are seldom brought.²¹⁴ Second, would extraterritorial application of the US

210. *See supra* § II.B. *See also* Fox, *Remedies*, *supra* note 14, at 580 (explaining that the United States as the lone robust enforcer of antitrust law is not enough to deter cartels worldwide).

211. *See* Stiglitz & Orszag Brief, *supra* note 67, at 7 (noting “the importance of examining the strength of antitrust systems in other countries to evaluate whether global cartels are likely to be deterred”). In recent years, roughly a third of jurisdictions with antitrust regimes besides the United States and the EC have begun to aggressively enforce their national antitrust laws, including Brazil, China, India, Japan, Mexico, South Africa, and South Korea. *See* Terzaken, *supra* note 70.

212. *Minn-Chem*, 683 F.3d at 860. *See also* Fox, AMC Hearing, *supra* note 65, at 12 (“In the case of export cartels, for example, it is often said in developed countries: This is not our problem. Let the importing country sue.”).

213. *See, e.g.*, Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-66 (granting immunity from antitrust liability exporter combinations that aided the war effort); FTAIA (exempting export transactions from US antitrust liability); Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-16 (encouraging growth of American exports in part by modifying the application of antitrust laws to certain export trade). *See also* Eleanor M. Fox & Janusz A. Ordover, *The Harmonization of Competition and Trade Law – The Case for Modest Linkages of Law and Limits to Parochial State Action*, 19 *WORLD COMP.* 5, 17 (1995) (“Almost all nations either have export exemptions from their cartel laws, or their law expressly does not reach outbound trade.”); Immenga, *supra* note 16, at 96ff (highlighting US, German, European, and Japanese competition laws in discussing the conflicts between trade regulation that exempts domestic export cartels from competition law regulation and competition policy).

214. Org. for Econ. Co-operation & Dev., Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws 15 (2002), <http://www.oecd.org/competition/cartels/2081831.pdf> [<https://perma.cc/7HJA-5LUU>] (last visited Oct. 26, 2017) [hereinafter OECD 2002 Report] (discussing private cartel enforcement in OECD countries); *supra* notes 11, 19; *see also supra* § III. Changes are being made, though. As of 2014, the EC issued Directive 2014/104/EU requiring alteration in national laws to

antitrust law compromise the efficacy of the DOJ's amnesty program? It is widely acknowledged that the amnesty program serves as an important cartel detection and discovery tool in antitrust enforcement, so courts would be remiss to forego its consideration lest the very purpose the balancing test strives to fulfill be defeated.²¹⁵ Of course, this should also not be seen as the dispositive factor. As discussed above in Part II.B, the ability for private parties to enforce antitrust laws while receiving compensation for incurred harm plays an important role in deterring businesses from committing antitrust violations. Third, if there is a foreign enforcement program available to the plaintiff and the alleged conduct occurs in several foreign jurisdictions, are there any constraints that would stop plaintiff from multiple recoveries for the same conduct and injury? While the laws of most antitrust jurisdictions base damages on domestic harm, some have punitive measures that allow private plaintiffs to receive an amount greater than the harm suffered.²¹⁶ This last factor addresses the potential for overcompensation if the incentive and ability exists for a plaintiff to bring suit in different jurisdictions.²¹⁷

One such solution to this last issue may be found through applying procedural principles interjurisdictionally. In addressing how to reach optimal deterrence levels for international cartels while nurturing

facilitate private enforcement of competition law. *See supra* § II.B. Additionally, other countries, such as Israel and the United Kingdom, have made way for class action-style recovery. *Id.*

215. *See generally* Bill Baer, Ass. Att'y General Antitrust Div. U.S. Dep't of Justice, Prosecuting Antitrust Crimes, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium (Sept. 10, 2014), <http://www.justice.gov/atr/file/517741/download> [<https://perma.cc/9SME-6X96>] (archived Oct. 26, 2017); Scott D. Hammond, Deputy Ass. Att'y General for Crim. Enforcement Antitrust Div. U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Presented at the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), <http://www.justice.gov/atr/file/518241/download> [<https://perma.cc/MGD9-YZMU>] (last visited Oct. 26, 2017); Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 ANTITRUST BULL. 207 (2011). *See also* Antitrust Modernization Comm'n, Report and Recommendations 253, 256 (Apr. 2007), http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm [<https://perma.cc/HH8Y-4U7F>] (last visited Oct. 26, 2017). *See also supra* § III.

216. OECD 2002 Report, *supra* note 214, at 15, 19 n.24 (discussing the debate around punitive damages in private recompense cases as providing either insufficient or excessive deterrence, noting that New Zealand's study of the issue concluded that punitive damages were necessary, but only as exemplary and not treble because the former would provide "more accurate signals" and "offer greater fairness.").

217. *See, e.g., id.* (discussing punitive damages in private antitrust litigation, where besides the United States, New Zealand has also adopted a punitive damage regime); *supra* § III. However, as discussed most jurisdictions do not provide a private right to sue under national antitrust laws. *See supra* note 11 and accompanying text.

growth of developing competition authority regimes, Professor Michal Gal has proposed extending the doctrine of collateral estoppel to other national jurisdictions, a tool she dubbed the Recognition-of-Judgments Mechanism.²¹⁸ The Mechanism's primary aim is to enhance "domestic as well as global deterrence and welfare."²¹⁹ In theory, it would enable a decision entered in the United States (or elsewhere) to be the basis for bringing suits against defendants in their respective jurisdictions by allowing those jurisdictions to rely on factual findings of a reliable and fair foreign decision maker.²²⁰ Plaintiffs would only have to prove harm to their domestic markets and that the foreign decision meets some pre-specified criteria that ensure reasonable and fair legal reliance.²²¹ Professor Gal's mechanism is not without precedent. She points out that Brazilian antitrust authorities adopted a less refined version of the mechanism in its *Vitamins Case* cartel decision.²²² There, the Brazilian antitrust authorities relied on US and EC decisions concerning the worldwide cartel, treating them as established facts.²²³

The Mechanism promotes efficient distribution of relief by location of harm, permitting plaintiffs to be made whole but not to recover in excess of the injury – a step towards effectively stripping violators of anticompetitive profits without the need for punitive measures such as trebling damages.²²⁴ Professor Gal explains that this also encourages the development of newer antitrust regimes that face significant resource constraints by reducing the cost of adjudication, further serving the overarching objective of the balancing test.²²⁵

This list, while not exhaustive of all potentially relevant factors, provides the appropriate framework to achieve the goal of enhancing global antitrust enforcement in tandem with maximizing world economic welfare. An example of how this balancing test would work may be abstracted from our previous hypothetical with changed facts: A is an American company that procures nickel to be smelted and used

218. Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance*, 51 VA. J. INT'L L. 57, 58 (2010).

219. *Id.*

220. *Id.* at 73-75.

221. *Id.*

222. *Id.* at 60-61.

223. *Id.* at 61.

224. *See id.* at 62-63.

225. *Id.* at 73-74 (explaining that the Mechanism removes the costliest part of the process, *i.e.*, proving the existence of an international cartel, and limits litigation to the effect on local markets).

in the production of industrial turbines. A purchases nickel from the leading nickel mining company B in the Philippines, which is actively engaged in fixing the price of nickel with the second leading nickel mining company C, which is located in another country. Both B and C make up over fifty percent of global nickel production and sales, and all of B's customers reside outside of the Philippines. The point of sale for these transactions occurs in the Philippines through A's Japanese subsidiary, which exists for the sole purpose of purchasing raw material and reselling it to the parent company at cost. Manufacture of the turbines takes place both abroad and in the United States at A's proprietary factories, though finished turbines from non-US factories are routinely shipped to end users in the United States and vice versa.²²⁶ Finally, after a change of ownership, C gets cold feet and applies for amnesty with the DOJ in order to avoid potential liability, though A had recently begun to become suspicious after realizing steady incremental increases in the price of nickel despite both B and C discovering new, vast nickel deposits. After the DOJ successfully procures a judgment against B after trial, A sues B to recover treble damages from overcharges in US federal court.²²⁷

This hypothetical represents a situation not clearly resolved by *Hartford Fire* or *Empagran*. Here, we have an American plaintiff that purchases a price-fixed component in purely foreign transactions through a foreign subsidiary to be incorporated in a finished product that is then sold on to US consumers. Ostensibly, the relevant legal question involves whether there has been a "direct, substantial, or foreseeable" effect from B's conduct on US commerce. But in such a case where "direct" may be difficult to define, the previously described comity balancing test provides an alternative method of assessing whether US prescriptive jurisdiction is indeed proper. Notably, unlike the LCD panels in *Motorola Mobility*, the price-fixed component in this hypothetical is a fungible good that would not be a prominent feature on the finished good. Therefore, it would be difficult for A to argue that it was "targeted" in the same way as Motorola to avoid an indirect purchaser characterization.

226. In this case, a function of available production capacity, timing and volume of orders, and cheap shipping costs might explain this type of delivery system.

227. We can assume for the sake of this hypothetical that the United States has personal jurisdiction over B, that venue is proper, and that there are no successful *forum non conveniens* arguments.

The first factor operates in two parts. At the threshold, it considers whether the Philippines has relevant antitrust laws governing the export conduct that may provide A redress. If those laws exist, the factor then considers whether the Philippines would itself enforce them against a domestic firm that profits from selling to foreign customers. This becomes particularly relevant if the firm has already been subject to criminal liability in the United States and where the cartel's conduct has little if any negative effect on the Philippines. This is important because, assuming that A's subsidiary is the only entity that made purchases of the price-fixed goods during the period of conspiracy, Japan would have felt no effect and accordingly would have little if any interest in enforcing its own antitrust laws.

The second factor assesses the amnesty program's role in the discovery of the cartel at hand and any associated detriment arising from exposing B to private antitrust liability. In the present case, A may have been able to uncover the scheme on its own, though it is unclear whether it would have had the resources to bring suit itself assuming it was able to pass the pleading stage and reach discovery.

Finally, the third factor contemplates the potential for being overcompensated for conduct that could be adjudicated in a non-US jurisdiction. If, as in the present case, a judgment exists on the issue of whether the defendant conspired with others to fix prices, Professor Gal's collateral estoppel mechanism may provide some reason for US litigants to seek relief from the defendant's home jurisdiction in light of the questionable effect on US commerce, assuming that the country has the requisite antitrust laws and accepts the United States' protective procedural measures in reaching such a judgment. The opposite would be true if no issues had yet been litigated and resolved.

Considering these factors in total, maximizing economic welfare through properly functioning international markets and encouraging the development of international cartel enforcement may in fact counsel against adjudication in the United States *if* recourse for private recovery exists in the foreign jurisdiction. Deference and restraint are justified if it results in net benefit to such global welfare.²²⁸ After all, "[n]ational antitrust should operate in the shadow of the true global market."²²⁹

228. See Fox, *Remedies*, *supra* note 14, at 581.

229. Fox, AMC Hearing, *supra* note 65, at 8.

VI. CONCLUSION

This Note argues that in order to create a suitable environment for international private redress an international comity balancing test should be introduced into US jurisprudence through the opportunity provided by the FTAIA “direct effect” criterion. Though the United States has historically acted as the world’s courtroom for victimized private parties to seek recovering of antitrust injury, worldwide jurisdictions are beginning to develop their own legal regimes of antitrust enforcement, deterrence, and private recompense. To encourage this development, US courts should embrace the current Supreme Court’s approach to comity as one predicated upon global harmonization rather than conflict avoidance.

The recent efforts of resolving the “direct effect” definition dispute have been unfruitful and have ultimately produced puzzling decisions, including one in which foreign defendants were subject to criminal liability under the Sherman Act but not civil liability. The proposed balancing test responds to the current confusion stemming from these efforts by providing an alternative framework through which to realize the statute’s purpose. While the late Justice Scalia cautioned against using comity balancing tests to determine whether to properly subject foreign defendants to US antitrust law, limiting parameters provided by existing case law establish sufficient conditions to permit a balancing test.

This balancing test would guide courts in determining the propriety of extraterritorial application of US antitrust law for specific cases involving proscribed foreign anticompetitive conduct under the auspices of promoting the development of global antitrust enforcement and maximizing world economic welfare. However, instead of weighing traditional comity considerations as in *Timberlane*, the comity balancing test proposed in this Note would focus instead on these objectives, i.e., promoting the development of global antitrust enforcement and maximizing world economic welfare, as an extension of the Supreme Court’s harmonization approach. Ultimately, the balancing test would better allow the United States to contemplate and incorporate foreign interests in whether to apply US antitrust law, promoting international dialogue and encouraging growth of foreign private antitrust recourse.

