IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MOTOROLA MOBILITY, INC.,	)	
	)	
Plaintiffs,	)	Case No. 09-cv-6610
	)	
vs.	)	Judge Joan B. Gottschall
	)	
AU OPTRONICS CORPORATION, et al.,	)	Magistrate Judge Sidney I. Scheinker
	)	
Defendants.	)	

BRIEF OF THE MINISTRY OF ECONOMY, TRADE AND INDUSTRY OF JAPAN AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION

I. INTEREST OF *AMICUS CURIAE*

Defendants in this case include Japanese companies that are alleged to have participated in an international cartel to fix prices for thin film transistor liquid crystal display (TFT-LCD) products in various national markets. *Amicus Curiae*, the Ministry of Economy, Trade and Industry of Japan ("METI"), has significant economic, political, and legal interests in ensuring that companies based in Japan comply with the Japanese legal system, and that Japanese companies running businesses elsewhere comply with "reasonable" jurisdictional requirements of other nations.[1]

[1] While counsel for defendant Sharp Corporation in Japan, Nishimura Asahi, assisted in the drafting of this *amicus* brief, the views expressed herein are those of METI. Further, defendant Sharp Corporation compensated Nishimura Asahi for its assistance in drafting this brief. Except as specifically disclosed, no counsel for a party in this case authored this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae*.

II. ARGUMENT

The Government of Japan strongly opposes assertion of extraterritorial jurisdiction that would unreasonably interfere with sovereign authority and violate fundamental principles of international law, and in this regard, the Government of Japan already has twice submitted *amicus* briefs to U.S. courts in the *Empagran* case, expressing its concerns with the extraterritorial application of U.S. competition laws by foreign companies that have filed suit in U.S. courts, based on U.S. antitrust laws, but that are not affected substantially in the U.S. *See* Br. of the Government of Japan as *Amici Curiae in F. Hoffman-La Roche Ltd. v. Empagran, S.A* at 2 (S. Ct. Feb. 3, 2004)(a true and correct copy of which is attached hereto as **Exhibit A**); Br. of the Fed. Rep. of Germany, United Kingdom of Gr. Britain and N. Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as *Amici Curiae* in *Empagran, S.A. et al., v. F. Hoffman-La Roche Ltd.* (D.C. Cir. Feb. 16, 2005)(a true and correct copy of which is attached hereto as **Exhibit B**).

The Ministry of Economy, Trade and Industry of Japan hopes that the this Court will consider this issue based on the opinion of the Government of Japan argued in these *amicus* briefs.

Dated: October 23, 2013

Respectfully submitted,

MINISTRY OF ECONOMY, TRADE AND INDUSTRY OF JAPAN

By /s/ William C. Meyers
One of its Attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 31, 2013, he caused a copy of the **BRIEF OF THE MINISTRY OF ECONOMY, TRADE AND INDUSTRY OF JAPAN AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION** to be served upon the parties of record via the Court's ECF/electronic mailing system.

/s/ William C. Meyers
William C. Meyers

EXHIBIT A

No. 03-724

In The
Supreme Court of the United States

F. HOFFMANN-LA ROCHE, LTD., ET AL.,

Petitioners,

v.

EMPAGRAN S.A., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE GOVERNMENT OF JAPAN AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

May foreign plaintiffs pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside United States commerce?

PARTIES TO THE PROCEEDING

Petitioners, who were Appellees in the United States Court of Appeals for the District of Columbia Circuit, are as follows: F. Hoffmann-La Roche, Ltd.; Hoffmann-La Roche Inc.; Roche Vitamins Inc.; BASF AG; BASF Corporation; Rhône-Poulenc Animal Nutrition Inc.; Rhône-Poulenc Inc.; Hoechst Marion Roussel S.A.; Rhône-Poulenc S.A.; Takeda Chemical Industries, Ltd.; Takeda Vitamin & Food USA, Inc.; Daiichi Pharmaceutical Co., Ltd.; Daiichi Pharmaceutical Corp.; Daiichi Fine Chemicals, Inc.; Eisai Co., Ltd.; Eisai U.S.A., Inc.; Eisai Inc.; Akzo Nobel Chemicals B.V.; Akzo Nobel Inc.; Bioproducts Incorporated; Chinook Group Ltd.; Cope Investments Ltd.; Degussa AG; Degussa Corp.; DuCoa, L.P.; DCV, Inc.; EM Industries, Inc.; Merck KGaA; E. Merck; Lonza Inc.; Lonza AG; Alusuisse-Lonza Group Ltd.; Mitsui & Co., Ltd.; Nepera, Inc.; Reilly Chemicals, S.A.; Reilly Industries, Inc.; Sumitomo Chemical Co., Ltd.; Sumitomo Chemical America, Inc.; Tanabe U.S.A. Inc. and UCB Chemicals Corp.

Respondents, who were Appellants in the United States Court of Appeals for the District of Columbia Circuit, are as follows: Empagran, S.A.; Nutricion Animal, S.A.; Winddridge Pig Farm; Brisbane Export Corp. Pry, Ltd. and Concern Stirol, on behalf of themselves and all others similarly situated.

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INTEREST OF THE AMICUS CURIAE[1]

Petitioners in this case include Japanese companies that are alleged to have participated in an international cartel to fix prices and allocate markets for bulk vitamin sales in various national markets. The Government of Japan has significant economic, political, and legal interests in ensuring that companies based in Japan shall comply with the Japanese legal system, and that Japanese companies running businesses elsewhere shall comply with "reasonable" jurisdictional requirements of other nations. Japan also has a significant interest in making certain that Japanese companies are not subject to the unreasonable extraterritorial reach of United States competition and class action laws by private foreign plaintiffs who purchased vitamins from Petitioners only in foreign markets and are now seeking treble damages in private lawsuits filed in United States courts against Japanese companies for such foreign purchases.

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3. In accordance with Rule 37.6, the Government of Japan states that Sonnenschein Nath & Rosenthal LLP recently acted as local counsel in Kansas state court for Petitioners Eisai Co., Ltd., Eisai U.S.A., Inc., and Eisai, Inc. ("Eisai") in a related state indirect-purchaser antitrust case, *Stephen L. Cox, et al. v. F. Hoffmann-La Roche, Ltd., et al.*, No. 00 C 1890 (Dist. Ct. of Wyandotte County, Kansas). This case has now settled. In addition, Sonnenschein Nath & Rosenthal LLP acted for Eisai more than four years ago in separate federal proceedings relating to vitamins. At present, Sonnenschein Nath & Rosenthal LLP does not represent Eisai. No counsel for a party in this case authored this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae*.

SUMMARY OF THE ARGUMENT

The Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring actions in United States courts for alleged injuries under United States antitrust laws. There is nothing in the legislative history of the FTAIA, or the Sherman and Clayton Acts it sought to clarify, to suggest that U.S. antitrust jurisdiction over foreign firms in foreign markets should be expanded, nor does this Court's decision in *Pfizer* change the fact that no statute expands such judicial jurisdiction. Giving foreign purchasers the right to damages for purely foreign market transactions undermines the important principle of comity, respect due to a sovereign nation to regulate conduct within its national territory. Such an interpretation of the FTAIA has international public policy implications which would adversely affect the ability of the Government of Japan to regulate its own economy and govern its own society. Therefore, the decision of the Court of Appeals for the District of Columbia should be reversed.

ARGUMENT

I. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982 ("FTAIA"), 15 U.S.C. § 6A, WAS NOT INTENDED TO EXPAND UNITED STATES ANTITRUST JURISDICTION TO REACH ALLEGED INJURIES TO FOREIGN CONSUMERS FOR PURCHASES IN FOREIGN MARKETS FROM FOREIGN CORPORATIONS, NOR WERE THE SHERMAN OR CLAYTON ACTS IT SOUGHT TO CLARIFY.

A. The FTAIA Sought to Clarify the Limits of United States Antitrust Jurisdiction in United States Foreign Commerce, Not Expand that Jurisdiction.

The FTAIA was a part of, and complement to, the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001 *et seq.* Both laws sought to promote U.S. exports by seeking to assure American businesses that they were not subject in foreign commerce to a "stricter regimen of [U.S.] antitrust than their competitors of foreign ownership." H.R. Rep. No. 97-686, at 10 (1982). The FTAIA made clear that:

> American-owned firms that operate entirely abroad or in United States export trade [are freed] from the possibility of dual and conflicting antitrust regulation. When their activities lack the requisite [U.S.] domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors.

Id. The law was enacted to "level the playing field" between U.S. and foreign companies overseas, and to promote foreign antitrust enforcement over foreign conduct in foreign markets by *reducing* the perceived scope of U.S.

antitrust jurisdiction abroad. *See* H.R. Rep. No. 97-686, at 14 ("[T]he clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets" under their competition laws.). There is nothing in the legislative history of the FTAIA to suggest that it was intended to expand U.S. antitrust jurisdiction to subject foreign firms in foreign markets to U.S. law.

B. If the FTAIA Had Been Seen to Expand U.S. Extraterritorial Jurisdiction to Foreign Corporations That Allegedly Injured Foreign Purchasers in Foreign Markets, There Would Have Been a Storm of Criticism by Foreign Governments.

The early 1980s were a time of international tension over the extraterritorial application of U.S. antitrust law. In 1982, many close allies of the United States were concerned that some U.S. antitrust enforcement against foreign persons for conduct in foreign nations, allegedly aimed at causing direct, substantial, and reasonably foreseeable injury in U.S. markets, exceeded established international law standards. *See generally* A.V. Lowe, *Extraterritorial Jurisdiction* (1983). Japan, for example, was concerned about a U.S. private antitrust lawsuit brought against the Japanese color television industry for alleged cartel activity in Japan, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981). In addition, the United Kingdom, Australia, and Canada all passed "frustration of judgments" statutes preventing the enforcement of foreign antitrust judgments inconsistent with their sovereignty and national interests.

See Spencer Weber Waller, 1 *Antitrust and American Business Abroad* § 4:17 (3d ed. 1997).

The Supreme Court also appeared to recognize this tension when it began its analysis in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) by stating its understanding that "American antitrust laws do not regulate the competitive conditions of other nations' economies." By expanding U.S. jurisdiction to give Japanese consumers a U.S. legal claim against Japanese and other manufacturers selling into the Japanese market, the D.C. Court of Appeals' decision has done just that.

C. The Decision in *Pfizer* Does Not Change the Fact that the FTAIA Did Not Bestow on Foreign Purchasers the Right to Damages for Transactions Only in Foreign National Markets, or that Such a Right Was Not Bestowed by the Sherman or Clayton Acts, Which the FTAIA Sought to Clarify.

In *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312 (1978), the Court recognized that "[t]here is no statutory provision or legislative history that provides a clear answer" to whether a foreign government is a person under U.S. antitrust law. The Court concluded that "it seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted." *Pfizer*, 434 U.S. at 312. The dissent criticized "this undisguised exercise of legislative power" by the Court in answering the question judicially. *Id.* at 320. A distinguishing feature in *Pfizer*, absent in the Decision below, is that one of the factors the majority relied upon when creating, *de novo*, this foreign governmental right to sue was that to

not do so "would manifest a want of comity and friendly feeling" for foreign nations. *Id.* at 319. The Decision below seems to ignore considerations of comity.

It is apparent in reviewing the history of Sherman Act anti-cartel enforcement from *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) through *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) that there is no statutory provision or legislative history to the Sherman and Clayton Acts that justifies the Decision below. The Court would go well beyond what it did in *Pfizer* if the Court of Appeals' decision were affirmed, given the lack of any consideration of its impact on foreign sovereign jurisdictions.

II. INTERPRETING THE FTAIA TO ALLOW FOREIGN PURCHASERS OF GOODS IN FOREIGN MARKETS TO BRING SUIT AGAINST FOREIGN CORPORATIONS UNDERMINES COMITY, THE PRINCIPLE OF THE SOVEREIGN EQUALITY OF STATES TO GOVERN WITHIN THEIR NATIONAL TERRITORIES.

Since the seventeenth century and the rise of the nation state, the cornerstone of public and private international law has been that nation states are equal sovereigns, entitled to mutual respect and deference in the exercise of their sovereignty. As J.L. Brierly, the Oxford scholar, wrote in 1928:

> At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states.

> When a state exercises an authority of this kind over a certain territory it is popularly said to have 'sovereignty' over the territory[.]

J.L. Brierly, *The Law of Nations* 162 (6th ed. 1963). Judicial comity reflects this principle in declining to prescribe where matters are more appropriately adjudicated elsewhere, thereby respecting the sovereign equality of states. *See generally Hilton v. Guyot*, 159 U.S. 113 (1895); *see also* Restatement (Third) of Foreign Relations Law § 403 (1986) (outlining the limitations on a state's jurisdiction to prescribe, including the consideration of the likelihood of conflict with regulation by another state). The Court of Appeals extended U.S. jurisdiction, without clear Congressional direction, so as to interfere with the regulation of transactions between producers and consumers in foreign national markets unrelated to the U.S. market. Doing so alters and, as discussed below, undermines Japanese sovereignty over the Japanese market and Japanese people. *See* Restatement (Third) of Foreign Relations Law § 403(3) (indicating that in exercising jurisdiction over a person or activity, "a state should defer to the other state if that state's interest is clearly greater"). "[S]tatutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part).

III. AFFIRMING THE DECISION BELOW WOULD HAVE SERIOUS ADVERSE IMPLICATIONS, WHICH CANNOT BE FULLY ANTICIPATED, FOR REGULATION OF THE JAPANESE ECONOMY AND SOCIETY BY THE GOVERNMENT OF JAPAN.

Japanese law and policy already address the interests of Japanese consumers with regard to transactions that impact the Japanese market. Japan has the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade ("the Antimonopoly Act"), Law No. 54 of April 14, 1947, which is enforced by competent authorities such as the Japan Fair Trade Commission ("JFTC"). Prime Minister Koizumi has stated that one of his government's goals is "[t]he enhancement of the JFTC system as the guardian of the market to establish [in Japan] a competition policy appropriate for the 21st century." *Annual Report on Competition Policy in Japan (January-December 2001)*, JFTC Doc. No. DAFFE/COMP(2002)27/21, at 3 (quoting Prime Minister Jun-ichiro Koizumi, Policy Speech (May 7, 2001)). However, U.S. lawyers will become antitrust prosecutors for the Japanese market if the Decision below is upheld.

Japanese law does not provide for treble damage awards in antitrust claims. Treble damages would be viewed as punitive damages, mixing civil and criminal liability. The Supreme Court of Japan has ruled that foreign judgments may not be enforced in Japanese courts beyond the level of actual compensatory damages. *Ore. State Union No-su-kon I v. Mansei Ko-gyo Co.*, 51 MINSHŪ 2573 (Sup. Ct., July 11, 1997).

If the Decision below is upheld, a large number of lawsuits, including class action lawsuits, requesting

punitive damage awards and an automatic award of attorneys' fees to prevailing plaintiffs are likely to be filed against persons (including juridical persons) in Japanese territory by persons having no connection to the United States. The Government of Japan is concerned that exercise by U.S. courts of such extraterritorial jurisdiction against its sovereign will would be inappropriate. Furthermore, the coexistence of class actions with punitive damages in the United States adds to the difficulties. If the Decision below is upheld, it would cause "forum shopping" in U.S. courts by plaintiffs from all over the world who seek large punitive damages awards through class action lawsuits.

Encouraging Japanese and other foreign consumers with no connection to the United States to file lawsuits under U.S. law could have a severe impact on Japanese interests. Private plaintiffs may selectively choose to sue only one or two alleged participants in an international cartel, and those selected defendants have no right of contribution from the remaining cartel participants. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). This means that if U.S. courts exercise such extraterritorial jurisdiction, a worldwide foreign plaintiff class could seek damages of scores of billions of dollars from just two or three Japanese defendants. This could, at the least, put Japanese firms at a serious competitive disadvantage with other firms in that industry. In *Radcliff*, 451 U.S. at 646, the Court recognized that there were "far-reaching" policy questions raised by an antitrust defendant's claimed right to contribution, which were beyond the courts' competence to resolve. That can be no less true with respect to the Decision below.

The likely impact of applying Federal Rule of Civil Procedure 23, relating to class actions, to a worldwide class of foreign consumers also raises a number of questions. Is it practicable to join consumers as a class in up to 150 national markets, with disparate market structures and conditions? Is it practicable to certify a worldwide class of foreign consumers potentially speaking hundreds of languages? How is a U.S. District Court to decide what is the "best notice practicable" to global class members? United States rules presume that class members wish to participate unless they give notice of opting out. Making that determination for Japanese consumers in the Japanese market, without the input of the Japanese government, is a concern. Who is to assure that the U.S. class action lawyers are properly serving the interests of their Japanese "clients"? Are Japanese government views of effective representation to be taken into account by the U.S. court?

The Government of Japan is fully confident that the U.S. government would never seek to expand its extraterritorial jurisdiction in such a dramatic fashion as to governmental enforcement. However, it is particularly troublesome that this right to, at the least, interfere with Japanese governmental regulation of the Japanese market would be given to private U.S. attorneys with little experience in international diplomacy and cooperation.

There is a network of international relationships among national antitrust authorities which provides lines of direct communication to lessen or remove sovereign national conflicts. Japan and the United States have a bilateral antitrust cooperation agreement. *See* Agreement Between the Government of Japan and the Government of the United States of America Concerning Cooperation on

Anticompetitive Activities, Oct. 7, 1999. Japan and the United States are members of the Organisation for Economic Co-operation and Development ("OECD"). The 1995 Recommendation of the OECD Council recognizes the need for Member countries to "use moderation and self restraint in the interest of cooperation in the field of anticompetitive practices." *See* Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. No. C(95)130/FINAL (July 27, 1995). The Council encourages Member countries to exchange information, coordinate action, consult, and conciliate. Furthermore, there is the International Competition Network ("ICN"), in which the antitrust agencies of many of the world's governments consult to harmonize standards and promote best practices in antitrust enforcement. *See* http://www.internationalcompetitionnetwork.org (last visited Jan. 27, 2004). There is no comparable network by which foreign antitrust agencies, or their governments, can consult with private U.S. antitrust lawyers or with U.S. courts having jurisdiction over global class actions. The Government of Japan is concerned that neither national governments nor national courts are well suited to supervising and resolving the conflicts that would result if the Decision below is not reversed.

CONCLUSION

The FTAIA should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring suits in United States courts for alleged injuries under United States antitrust laws. Accordingly,

the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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EXHIBIT B

ORAL ARGUMENT SCHEDULED FOR APRIL 20, 2005
01-7115

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPAGRAN, S.A., *et al.*,

Plaintiffs-Appellants,

v.

F. HOFFMAN-LA ROCHE LTD, *et al.*,

Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES
(CASE NO. 03-724) AND ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(CASE NO. 1:00 CV 1686)

BRIEF OF THE FEDERAL REPUBLIC OF GERMANY, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, JAPAN, THE SWISS CONFEDERATION, AND THE KINGDOM OF THE NETHERLANDS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the United States, the Federal Trade Commission, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands all of which are appearing as *amicus curiae* before the United States Court of Appeals for the District of Columbia, the parties appearing before the district court and in this court are listed in the Brief for Appellants, dated January 10, 2005.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants, dated January 10, 2005.

C. Related Cases

The case on review was previously before this Court of Appeals (No. 01-7115) and the Supreme Court of the United States (No. 03-724).

CERTIFICATE OF COUNSEL
REGARDING THE FILING OF A SEPARATE AMICUS BRIEF

Pursuant to Circuit Rule 29(d), the Governments of the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands hereby certify that a separate *amicus curiae* brief is necessary because their interests markedly diverge from those of other *amici* filing in this case. This *amicus* brief expresses the views of foreign governments on the effects of United States extraterritorial jurisdiction on their sovereignty, on the enforcement of their antitrust laws, and on recognized principles of international comity. These views are distinct from those expressed by the parties or the United States Government.

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BRIEF OF THE FEDERAL REPUBLIC OF GERMANY, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, JAPAN, THE SWISS CONFEDERATION, AND THE KINGDOM OF THE NETHERLANDS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEES

INTERESTS OF *AMICI*

The Governments of Germany, the United Kingdom, Japan, Switzerland and the Netherlands are committed to strict compliance with their antitrust laws. However, they strongly oppose the assertion of extraterritorial jurisdiction that would unreasonably interfere with sovereign authority and violate fundamental principles of international law. Each country's antitrust laws prohibit price-fixing cartels, impose substantial penalties for antitrust violations, and may provide specific private remedies. The differences in these legal systems and, in particular, the damages remedies awarded to private plaintiffs, reflect deliberate policy choices that should be respected by the United States' commitment to international comity.

The Governments' legal systems regulate competition within their boundaries. *See* Germany, Gesetz gegen Wettbewerbsbeschränkungen (Act Against Restraints of Competition, "ARC"), §§1 & 130(2), available at http://www.bundeskartellamt. de/wEnglisch/index.shtml?navid =68; *Information*

Leaflet on Domestic Effects at 1, available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/99_Inlandsauswirkung_e.pdf (ARC applies within the territorial boundary of Germany); UK, Competition Act of 1998, 1998 ch. 41 §2(3) ("only if the agreement, decision or practice is . . . implemented in the United Kingdom"); UK, Enterprise Act of 2002, 2002 ch. 40 §190(3) (criminal cartel offense only applicable to agreements implemented, in whole or in part, in the United Kingdom); Japan, Antimonopoly Act, "tentative translation," available at http://www2.jftc.go.jp/e-page/legislation/ama/ama.pdf; Japan Fair Trade Commission, available at http://www2.jftc.go.jp/e-page/aboutjftc/role/q-3.htm (regulates "trade between Japan and foreign countries if such trade restrains competition in the Japanese market"); Switzerland, Federal Act on Cartels and Other Restraints on Competition ("LCart") of 1995, including 2004 amendments, unofficial translation available at http://www.weko.admin.ch/imperia/md/images/weko/40.pdf ("applies to private or public enterprises that are party to cartels or to other agreements affecting competition, have market power or take part in mergers"); the Netherlands, Competition Act, as amended in 2004, available at http://www. nmanet.nl/en/Images/14_26063.pdf (prohibit undertakings which "prevent[], restrict[] or distort[] . . . competition on

the Dutch market, or part thereof"); Articles 81 & 82 of the European Community Treaty.

Each Government vigorously enforces its laws prohibiting unreasonable restraints of trade. *See, e.g., Global Competition Review*, 1-7 (June 2004) (Germany's enforcement efforts are second only to those of the United States). Violations of these acts may result in substantial penalties. During 2003-04, the Bundeskartellamt (Germany's Federal Cartel Office) reviewed more than 2,770 mergers and imposed fines of more than €750 million against cartels. From April 1, 2003 through March 31, 2004, the United Kingdom's Office of Fair Trading ("OFT") "opened 1,140 complaint cases under the [Competition] Act, of which 46 involved possible cartel activity," launched 41 investigations and "imposed total penalties of £19.6m (£18.9 after leniency)." Office of Fair Trading, *Annual Report and Resource Accounts* 2003-2004, Objective 3, available at http://www.oft.gov.uk/NR/rdonlyres/66C1FDA3-B75D-44A5-AF9E-0D3A0B4725DE/0/objective3.pdf. The Japan Fair Trade Commission issued ¥8,517 million in surcharge payment orders during 2000 and ordered surcharge payments totaling ¥10.4 billion during the 2001-2003 period, available at http://www2.jftc.go.jp/e-page/aboutjftc/role/statis.htm. In 2002, the Dutch Competition Authority imposed fines totaling €99.6 million and, in 2003, imposed fines totalling €135.5 million.

Annual Report 2002, available at http://www.nmanet.nl/en/service_and_contact/ downloaden/; fact sheet 2003 available at http://nmanet.nl/nl/Images/11_ 15943.pdf. The Dutch Competition Authority is also vigorously investigating a major cartel in the Netherlands involving the majority of construction companies in the earthworks, roadworks and hydraulic engineering sector and is preparing to impose heavy fines. NMa Starts Accelerated Sanctions, available at http://www. nmanet.nl/en/nieuws_en_ publicaties/persberichten/0424.asp. During 2003, Switzerland initiated 46 preliminary investigations and carried out 23 full investigations and 46 from the previous year. While anticompetitive practices were declared unlawful by the LCart of 1995, Switzerland's Competition Commission may impose direct fines for first time infringements after March 31, 2005 due to recent changes in the law. Annual Report available at http://www.weko.admin.ch/ publikationen/00188/index.html?lang=en. The EU imposed fines equaling €855 million against some of the Defendant-Appellees in the case at bar. The total amount of fines imposed by the EU in cartel cases between 1986 and 2002 is €3.788 billion. *See The Fight Against Cartels*, available at http://europa.eu.int/ comm/competition/citizen/cartel_ stats.html. The EU and ten of its member states may impose fines of up to 10% of an entity's cartel profits.

The Governments of Germany, the United Kingdom, Japan, the Netherlands and Switzerland have established penalties and private rights of action for antitrust violations. However, instead of adopting the United States system of treble damages, each has opted for a single damages regime. The Governments have substantial interests in protecting the integrity of their legal systems.

INTRODUCTION

This case raises fundamental questions critical to the worldwide enforcement of antitrust law. Plaintiffs advocate that U.S. courts are authorized to exercise jurisdiction over foreign anticompetitive conduct involving foreign transactions that cause foreign harm, even when the effects on U.S. domestic commerce are indirect and do not play a substantial role in bringing about that foreign harm. They argue that because foreign purchasers could not avoid harm from defendant's global cartel by buying products in the U.S. at lower prices, plaintiffs' harm in the foreign market from the price-fixing cartel "depended" on prices being raised in the U.S. market (*i.e.*, the domestic effects).

However, this expansive interpretation of the "domestic-injury exception" to the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §6a ("FTAIA"), would obliterate its general rule that foreign antitrust harm arising from foreign transactions by foreign purchasers is not recoverable in a U.S. court.

It would reinterpret U.S. antitrust court jurisdiction to encompass every international cartel and nearly every other antitrust claim affecting markets in more than one country or region; it would interfere with the enforcement of competition laws in every country, particularly those with significant leniency programs; and it would override the policies of each of the *amici* and mot other countries because their laws do not provide for private treble damages recovery. International cooperation, so central to effective global antitrust enforcement, would be adversely affected and worldwide antitrust enforcement would suffer from this undermining of foreign leniency programs.

The Supreme Court's decision in *F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, 124 S. Ct. 2359 (2004) ("*Empagran*"), recognized that basic norms of international comity are integral to the interpretation of U.S. court jurisdiction over private antitrust claims for foreign transactions causing foreign harm. This Court should ensure that U.S. court jurisdiction is limited to those rare situations where the foreign conduct creates a domestic effect that is directly and inextricably bound to the foreign harm. Merely identifying a domestic effect or proclaiming it to be a byproduct of the anticompetitive conduct is not sufficient. Otherwise, U.S. court jurisdiction over foreign-based claims would be unlimited

and the legal systems of approximately 100 nations would be overridden to include treble damages and attorneys fees for private actions.

Past disputes over expansive applications of U.S. antitrust jurisdiction have led to serious disagreements between the United States and other governments, and the Supreme Court expressed deep concern that these mistakes not be repeated. In this spirit, we respectfully request that this Court consider our argument.

ARGUMENT

We applaud the decision of the Supreme Court in *Empagran* that generally denies antitrust jurisdiction of United States courts over private claims for foreign injuries to foreign plaintiffs participating in foreign markets. At most, the Court left open the possibility that such claims could be asserted in a narrow set of cases where the "foreign injury was *'inextricably bound up with . . . domestic restraints of trade' and the plaintiff 'was injured . . . by reason of an alleged restraint of our domestic trade.'*" *Empagran*, 124 S. Ct. at 2370 (emphasis in original, quoting *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.*, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977) ("*Industria Siciliana*")).

Plaintiffs-appellants would overturn that ruling by having this Court conclude that their injuries resulted in part from elevated U.S. prices. Plaintiffs'

theory would give U.S. courts jurisdiction over private treble damages claims by foreign purchasers without regard to any other contact with U.S. markets. Surely, this cannot be what the Supreme Court meant when it emphasized the rule of statutory construction which assumes that "legislators take account of the legitimate sovereign interests of other nations" and that a "reasonableness" test should be applied to avoid "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." 124 S.Ct. at 2366 & 2367. Indeed, it is these concerns that caused the Court to quote approvingly from Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶273 (Supp. 2004) ("*Antitrust Law Treatise*") that the FTAIA must not be read so that "[e]ffectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier." Congress, the Court said, did not seek to "impose" its antitrust policies on the international marketplace by "an act of legal imperialism[] through legislative fiat." 124 S.Ct. at 2369.

A. Fundamental Principles of International Law and Prescriptive Comity Limit U.S. Court Jurisdiction Over Foreign Injuries

Interpreting the FTAIA as authorizing United States jurisdiction over foreign injuries to foreign parties whose only U.S. connection is that the same or

similar conduct produced an effect on U.S. commerce would upset the basic concept of jurisdiction in international law. *See generally Oppenheim's International Law* 457-58 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1992) ("right to exercise jurisdiction depends on there being between the subject matter and the State exercising jurisdiction a sufficiently close connection to justify that State in regulating the matter and perhaps also to override any competing rights of other States"). Every sovereign state has an equal right to prescribe and enforce its law in accordance with the principles of international law regarding jurisdiction. *See* Vaughan Lowe "Jurisdiction" in *International Law* 329, 330 (Malcolm D. Evans ed., 2003) ("The legal rules and principles governing jurisdiction have a fundamental importance in international relations, because they are concerned with the allocation between States . . . of competence to regulate daily life – that is, the competence to secure the *differences* that make each State a distinct society.") (emphasis in original); *see also Restatement (Third) of Foreign Relations Law of the United States* §402(1)(1987) ("*Restatement (Third)*").

The primary basis for jurisdiction in international law is "territoriality." In accordance with this principle, a state may exercise its authority to prescribe and enforce its law over all persons and things within its territory. A state's authority to exercise jurisdiction extraterritorially generally is limited to very few situations.

The most widely recognized and accepted exercises of such jurisdiction are (i) a state's power to extend the application of its law to its nationals wherever they may be (the "nationality principle"), and (ii) a state's power to protect its own safety and vital interests when threatened by the serious crimes of foreigners outside its territory (the "protective principle").

These international principles of nationality, territoriality and protectiveness have long been accepted in United States law. *See, e.g., The Antelope*, 23 U.S. 66, 122 (1825) ("No principle is more universally acknowledged, than the perfect equality of nations .... It results from this equality, that no one can rightfully impose a rule on another."); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921 (D.C. Cir. 1984) (territoriality is "the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power"). Recognizing these norms, the Supreme Court's *Empagran* opinion instructed that in construing ambiguous statutory commands such as the domestic-injury exception in the FTAIA, a court "ordinarily . . . [should] avoid unreasonable interference with the sovereign authority of other nations." 124 S. Ct. at 2366. Thus, the Court referenced the *Restatement (Third)*'s interpretation of U.S. law as holding that even where there is a basis for extraterritorial jurisdiction in international law, "a state may not exercise jurisdiction to prescribe law with

respect to a person or activity having connections with another state *when the exercise of such jurisdiction is unreasonable*." *Id.* §403(1) (emphasis added) (cited in *Empagran*, 124 S. Ct. at 2366); *accord Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

B. An Expansive Interpretation of United States Court Jurisdiction Would Shift Private Claims To United States Courts And Interfere With The Policy Choices Made By Other Jurisdictions

No other country has adopted the United States' "bounty hunter" approach that permits a private plaintiff to present an antitrust claim to a jury and to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Clayton Act §4, 15 U.S.C. §15. Under United Kingdom law, private claims for breaches of competition law (either that of the UK or the EC) are brought as actions for a breach of statutory duty. United Kingdom law generally provides for only single damages.[1] The usual UK cost rule, in which attorneys' fees are paid by the losing party, applies. Such claims are heard by judges rather than juries. The United Kingdom recently enacted a statute to encourage the use of private actions for competition law violations, but

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[1]In exceptional cases the law in the United Kingdom (except Scotland) allows for exemplary damages.

expressly chose to do so on a limited basis.[2] The Government White Paper that led to this statute noted that many U.S. commentators "view the number of private antitrust cases in the US as too high" particularly because of "unscrupulous lawyers . . . quick to file vexatious actions – attracted by the prospect of treble damages." It therefore recommended "a system in the UK where private actions are less inhibited than at present – but in doing so . . . [were careful to] guard against the risks of the US system." UK Dept. of Trade & Industry, *A World Class Competition Regime*, "Real Redress for Harmed Parties" ch. 8 at 47-48 (Government White Paper Cm 5233, July 2001).

The German ARC similarly allows for private rights of action according to the general rules of German civil law. It provides that a person who violates a section of the ARC or a decision of the cartel authority which "serves to protect another" is "liable for the damages arising from the violation." ARC §33. In reaction to German judicial decisions restricting claims for private damages under the ARC, the German Government has proposed an amendment that would allow

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[2]These amendments to UK competition law (i) allow private claimants to rely on a finding of infringement of the Competition Act or Articles 81/82 of the EC Treaty in pursuing a damages action in the civil courts; (ii) expand the role of the Competition Appeal Tribunal to hear private damages claims; and (iii) enable class actions by consumer groups to be brought before the Competition Appeal Tribunal.

those who make direct purchases from cartels to file damages claims; it also would eliminate the bar to recovery by a participant and broaden the category of persons who may obtain injunctive relief.[3] Associations, including consumer associations, are given extended rights to "skim off" the benefits gained through a violation of competition law in private law suits. Under the ARC, private damages are based on actual harm and the proposed amendments make this calculation simpler (by excluding "passing-on-deference"). Additional criminal and administrative sanctions under German law may be imposed only in a state prosecution.

Under Japan's Antimonopoly Act, a private party may recover single damages from any entity which violates the Act. Private actions may be brought under two theories, "absolute liability" and "liability through fault." The Act provides for strict liability by mandating that any entity which violates the act "shall be liable to indemnify the person injured." Antimonopoly Act §25(1). However, prior to filing a claim for damages under absolute liability, the private party must wait for a final and conclusive decision from the Japan Fair Trade Commission. *Id.* at 26(1). That prior approval does not apply to fault-based claims where private actions may be pursued under the Civil Code. MINPŌ, art.

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[3]The Bundestag heard the first reading of the 7th Amendment to the ARC on September 10, 2004. One purpose of the amendment is to strengthen civil law sanctions.

709. Like Germany, Japan views treble damages as a sanction and does not use its civil laws as a tool to impose sanctions. Such enforcement is left to criminal and administrative processes.

The Netherlands allow a private damages action to be brought in their Civil Courts. The Civil Court will accept the decision of the Netherlands' National Competition Authority as proof of anticompetitive behavior. The Civil Court, therefore determines only the amount of damages which should be imposed in a particular case. The Netherlands also limits recovery to single damages.

Chapter 3 of Switzerland's LCart does allow for private rights of action. Pursuant to this chapter, a person may claim (i) removal or cessation of the activity in question, (ii) damages or reparation, or (iii) return of illicitly earned profits. Private recoveries are limited to single damages.

A broad reading of the domestic-injury exception to the FTAIA expanding the jurisdiction of the United States private claim system, as plaintiffs urge, would ignore the laws of these sovereign nations and override their deliberate policy decisions not to adopt a liberal, jury-based private treble damages system. It would apply U.S. law by fiat and make United States courts the forum of choice; it would ignore the domestic laws applicable where the primary injuries occurred and would fail to require a substantial connection between the U.S. and the foreign

jurisdiction. Enlarging the prescriptive jurisdiction of the United States to provide a U.S. antitrust remedy to foreign buyers with only a limited U.S. nexus would attract even more litigants and increase the number of private antitrust claims filed in United States courts. As the Supreme Court recently noted in another context, "[j]udicial oversight under the Sherman Act" should not be expanded without clear direction from Congress lest it "distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by" private litigants. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872, 883 (2004); *see also Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2782 (2004) (Breyer, J. concurring) (necessity for "respect[ing] the sovereign rights of other nations by limiting the reach of its laws and their enforcement"). The same rationale reinforces the basic principle that the policy choices of foreign countries limiting the scope of private antitrust actions should be respected.

C. Expanding United States Court Jurisdiction Would Undermine the Effectiveness of Other Countries' Leniency Programs

The Supreme Court in *Empagran* also recognized "that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement

policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." 124 S.Ct. at 2368 (citing *amici* briefs of Germany, Canada and the United States). Price-fixing and other cartels are elusive and dangerous; they operate in secret and severe penalties make voluntary disclosure perilous. These problems are compounded when the cartel operates in international commerce because evidence of the existence of the cartel often is difficult to collect and the participants often are scattered among several jurisdictions.

Prior to the 1990s, traditional tactics such as plea bargains had only limited success in discovering and punishing international cartels. Cartels were not uniformly prohibited, enforcement practices varied widely, and potential whistle-blowers were unwilling to reveal themselves without formal assurances of protection. *See generally* Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693, 707-09 (2001).

To counteract these limitations, enforcement authorities developed leniency programs offering amnesty, cooperated on collecting evidence, and shared leads and information to the extent compatible with their respective laws to prosecute cartels operating across borders. The United States Department of Justice

formalized and expanded its corporate leniency program in 1993.[4] In 2004 Congress revised the criminal standards and procedures to permit companies and their employees to obtain immunity for being the first to reveal a conspiracy and for cooperating with the government in its prosecution of other conspirators. Antitrust Criminal Penalty and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 666 (June 22, 2004). Significantly, these 2004 amendments to the Clayton Act not only granted immunity from criminal prosecutions but also limited leniency participants' private liability to single damages.

Germany, the United Kingdom, the Netherlands, Switzerland and European Community as well as other countries now have specific leniency programs.[5] *See* Germany's Leniency Programme;[6] the United Kingdom's leniency policy set forth

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[4]*See* Scott D. Hammond, *Lessons Common to Detecting and Deterring Cartel Activity* (Sept. 12, 2000) (Remarks at the 3rd Nordic Competition Policy Conference), available at http://www.usdoj.gov/atr/public/speeches/6487.htm; *see also* U.S. Department of Justice, *Corporate Leniency Policy*, available at http://www.usdoj.gov/atr/public/guidelines/0091.htm (issued Aug. 10, 1993); U.S. Department of Justice, *Leniency Policy for Individuals*, available at http://www.usdoj.gov/atr/public/guidelines/0092.htm (issued Aug. 10, 1994).

[5]Seventeen of the 25 EU member states currently have leniency programs in place.

[6]Available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/00_Bonusregelung_e.pdf.

in the OFT's Guidance as to the Appropriate Amount of a Penalty;[7] the Netherlands' Leniency Guidelines;[8] Switzerland's Ordinance regarding the Sanctions for Unlawful Restrictions of Competition;[9] *European Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases*, OJ C45, at 3-5 (Feb. 19, 2002).[10] The Japanese Government has introduced a bill in the Diet to amend the Antimonopoly Act and create a leniency program. *See* Main Features of the Bill to Amend the Antimonopoly Act, Japan Fair Trade Commission Press Release (October 14, 2004).[11]

Typically, a leniency applicant receives total or substantial immunity from criminal and civil antitrust penalties by being the first to present credible or material evidence of a cartel before the enforcement authority has knowledge of the cartel or has begun an investigation. The terms of these programs vary with each country's assessment of the mix of incentives and penalties that comport with

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[7]Available at http://www.oft.gov.uk/nr/rdonlyres/4546166b-0413-45e4-8c8f-208cc3cdc325/0/oft423.pdf.

[8]Unofficial translation available at http://www.nmanet.nl/en/Images/14_8180.pdf. The 2004 amendments introduced, *inter alia*, this leniency program.

[9]Available at http://www.weko.admin.ch/imperia/md/images/weko/46.pdf.

[10]Available at http://europa.eu.int/comm/competition/antitrust/ leniency.

[11]Available at http://www2.jftc.go.jp/e-page/pressreleases/2004/october/041014.html.

its economy and policy objectives. These programs are a deliberate effort to balance interests of disclosure, deterrence and punishment. *See* John Vickers, *Competition Economics,* Royal Economic Society Annual Public Lecture (Dec. 4, 2003) (UK Chairman of the Office of Fair Trading) (the "carrot of leniency" creates "a potential competition – a race to the competition authorities – for those contemplating the illegally agreed suspension of price competition").[12]

There is widespread concurrence that leniency programs have been "spectacularly successful." Terry Calvani, *Enforcement of Cartel Law in Ireland,* in International Antitrust Law & Policy: Fordham Corp. Law Inst. 2003, 8 (Barry Hawk ed. 2004). They are the basis for a majority of cartel prosecutions in the United States. *See* Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 Am. Crim. L. Rev. 241, 270-71 (2003); R. Hewitt Pate, *International Anti-Cartel Enforcement*, Speech presented at 2004 ICN Cartels Workshop (Nov. 21, 2004) (U.S. leniency program is "the cornerstone of [its] international anti-cartel enforcement program").[13] The European Commission's experience is similar. *See* Mario Monti, *The Fight Against Cartels*, Speech presented at EMAC (Sept. 11,

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[12]Available at http://www.oft.gov.uk/NR/rdonlyres/882FDED2-B562-4D10-92F5-D23C58E4D493/0/spe0503.pdf.

[13]Available at http://www.usdoj.gov/atr/public/speeches/206428.htm.

2002) (the "leniency scheme has proved a formidable tool for encouraging firms to cooperate").[14]

The Governments, however, are concerned that an expansion of U.S. court jurisdiction over foreign claims from foreign anticompetitive conduct would make the leniency programs less attractive to whistle-blowers. Expanding the scope of U.S. treble damages liability for participants in foreign amnesty programs – an inevitable byproduct if this Court exercises subject matter jurisdiction – would "jeopardize[] the success of the corporate leniency program in Europe since the incentive to disclose information to the authorities voluntarily will be reduced if companies must fear private class actions in the United States brought by plaintiffs from all over the world."[15] An expansion of U.S. private actions to encompass injuries suffered abroad by foreign consumers will require cartel participants to

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[14]Available at http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/384&format=HTML&aged=0&language=EN&guiLanguage=en.

[15]Otto Graf Lambsdorff, *Antitrust Law as a Regulatory Factor in a Globalized Market Economy*, Lecture at the XI International Cartel Conference of the Federal Cartel Office, Bonn, Germany (June 19, 2003) (former German Minister of the Economy); *accord* Deputy Assistant Attorney General Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* (Nov. 18, 2003) (exposure to massive judgments in United States courts that are based on foreign injuries to foreign plaintiffs will create "a major disincentive" to "companies who are contemplating exposing cartel activity") (available at http://www.usdoj.gov/atr/public/speeches /201509.htm).

pay unpredictable and unbounded damages, whereas they face no damages if the cartel otherwise had not been detected. Under these circumstances, cartel detection and deterrence is likely to be diminished and consumer welfare will not be served.

D. Cooperation And Coordination, Which Are Essential To Effective Global Antitrust Enforcement, Could Be Jeopardized By Needless Conflicts Over Jurisdiction

Effective antitrust enforcement in an increasingly global economy depends on close governmental cooperation and coordination as well as respect for the decisions of other nations. Neither commercial transactions nor anticompetitive behavior by private firms is constrained by national boundaries. Antitrust enforcement officials throughout the world have placed a high priority on closely knit international investigations[16] and on formalized international procedures for

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[16] *See* Mario Monti, *Competition Enforcement Reforms in the EU: Some Comments by the Reformer* (April 4, 2003) (speech presented at Georgetown University by European Union Competition Commissioner and available at http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/200&format=HTML&aged=0&language=EN&guiLanguage=en); *accord* R. Hewitt Pate, *Anti-Cartel Enforcement: The Core Antitrust Mission* (May 16, 2003) (head of Antitrust Division, U.S. Department of Justice) ("Cooperation among antitrust authorities will remain an essential means of detecting and prosecuting international cartel activity.") (available at http://www.usdoj.gov/atr/public/speeches/ 201199.htm); Akinori Uesugi, *Where Japanese Competition Policy is Going - Prospect and Reality of Japan*, 28 (October 7, 2004) (speech before Fordham Corporate Law Institute, The 31st Annual Conference on International Antitrust Law and Policy, available at http://www2.jftc.go.jp/e-page/policyup

gathering information and prosecuting anticompetitive acts with transnational effects. Seven countries (Australia, Brazil, Canada, Germany, Israel, Japan and Mexico) and the European Union have adopted memoranda of understanding with the United States[17] that allow competition authorities to assist each other, allocate enforcement responsibility, and commit each country to refrain from infringing on the other's actions. The law of the United Kingdom permits its enforcement authorities to arrange for the exchange of information with other countries to assist their civil and criminal law investigations. For example, the U.K./U.S. Mutual Legal Assistance Treaty provides that the United Kingdom will "offer assistance in respect of requests from the United States of America made pursuant to the Treaty for assistance in anti-trust and competition law investigations." *Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Amending*

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dates/speeches/041007uesugi.pdf) ("there is a real need for competition authorities throughout the world to come together to develop closer cooperation").

[17]These Memoranda Of Understanding are available at http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

the Treaty on Mutual Legal Assistance in Criminal Matters done at Washington on 6 January 1994 (May 1, 2001).[18]

But such cooperation depends on reciprocal respect for the enforcement practices, priorities and jurisdiction of the other country. This would be undermined by jurisdictional actions that could, as the Supreme Court noted, be viewed as "legal imperialism." One high profile example of international concern is illustrated by the *Uranium Cartel* case. *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980). It involved private antitrust litigation in the United States that "outraged" foreign governments because the defendant foreign cartel had been supported by foreign governments when they responded to "anticompetitive" actions by the U.S. Government that had closed its market to foreign producers. Indeed, the British House of Lords earlier denied discovery requests from U.S.

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[18]Available at http://195.166.119.99/Files/kfile/CM5375.pdf. *See also Agreement Between the Government of the U.S. and the Commission of the E.C. Regarding the Application of Their Competition Laws* (Sept. 23, 1991) (available at http://www.usdoj.gov/atr/public/international/docs/ec.htm) as modified by the *Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws* (June 4, 1998) (available at http://www.usdoj.gov/atr/public/international/1781.htm); *Agreement Between the Government of the U.S. and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices*, 27 U.S.T. 1956, T.I.A.S. No. 8291 (June 23, 1976). Cooperation between competition authorities in international organizations such as OECD and ICN (International Competition Network) complement these agreements.

courts. *See Rio Tinto Zinc Corp. v. Westinghouse*, [1978] W.L.R. (H.L. 1977); *see also Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (private U.S. action contrary to permanent injunction issued by the U.K. Court of Appeal). Nor are these mere isolated examples. *See, e.g., International Ass'n of Machinists and Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd o.g.*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (private action challenging OPEC, *i.e.*, government oil pricing cartel).

These cases are noteworthy because they generated intense reaction and retaliation against the United States which affected intergovernment cooperation. The private actions in the *Uranium Cartel* case caused several countries to enact statutes blocking discovery of documents and other information needed to prosecute foreign defendants. *See Restatement (Third)* at §442, n.4 (1987) (listing acts and their amendments). For example, the British Protection of Trading Interests Act of 1980, ch. 11, still authorizes the Secretary of State for Trade and Industry to prohibit compliance with laws or orders issued by "any overseas country" for regulating international trade "insofar as [the laws] apply or would apply to things done . . . outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom." *Id.* §1. This statute also

restricts enforcement of treble damages judgments and allows both firms and persons conducting business in the United Kingdom to sue in the UK to "claw back" the penal portion of the foreign judgment when they are forced to pay more than compensatory damages. *Id.* §§5-6.

E. Domestic Effects Are Not "Inextricably Bound" With Foreign Injuries Where The Effect In The U.S. Market Is Indirect and Insubstantial and "Does Not Bring About" The Foreign Injury

Principles of international comity and the practical realities of international enforcement of the antitrust laws warn against expansively interpreting the FTAIA's "domestic-injury exception" to justify U.S. antitrust jurisdiction without fully comprehending the consequences. In the case at bar, plaintiffs' injuries occurred in foreign nations and plaintiffs are foreign nationals.

Plaintiffs argue that anticompetitive conduct raised prices in the U.S. and that foreign buyers could not avoid supracompetitive prices in foreign markets by shifting their purchases to the U.S. market. This attempt to link domestic and foreign effects through the domestic-injury exception would obliterate the FTAIA's rule limiting antitrust jurisdiction of foreign claims for harms in foreign markets because such a "linkage" would be present in every cartel where the

relevant market crosses international boundaries.[19] *See* Kenneth S. Reinker, *Case Comment: Roche v. Empagran*, 28 Harvard L.J. & Publ Pol'y 297, 304 (2004) ("[S]ince markets are not completely independent, the harm caused by foreign price fixing can never be completely separable from harm done to the domestic economy. Thus, there will almost always be some domestic harm caused by international price fixing.") As the *Antitrust Law Treatise* (Supp. 2005) correctly observes:

> To interpret "linkage" of foreign and domestic injury this broadly would have undermined the entirety of the Court's opinion, which unambiguously held that foreign plaintiffs injured by a conspiracy that also injured American purchasers could not sue under the Sherman Act. Clearly the Court did not have this conception of linkage in mind because it repeatedly asserted its assumption that the conspiracy was worldwide and that it resulted in higher prices in *both* the United States and abroad. (p. S-12) (emphasis in original).

Plaintiffs presented a similar argument to the Supreme Court in *Empagran* when they relied on three cases involving world-wide market division as the basis for asserting jurisdiction over foreign harms that had some identification with domestic effects. In each of those territorial allocations, one effect of the cartel was to protect each member from competition in its home territory. *See Timken*

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[19]A typical incident of every cartel is to prevent arbitrage whereby buyers can purchase the product at noncartel prices. *See Antitrust Law Treatise* S-12 (Supp. 2005).

Roller Bearing Co. v. United States, 341 U.S. 593, 595 (1951); *United States v. National Lead Co.*, 332 U.S. 319, 325-28 (1947); *United States v. American Tobacco Co.*, 221 U.S. 106, 171-72 (1911). Like a global price-fixing cartel, the foreign harm in a market allocation cartel depends on the other members staying out of the "home" market of U.S. participants. However, the Supreme Court in *Empagran* distinguished each of these market division cases from the claims therein because the plaintiff in each of the earlier cases was the U.S. government for whom different rules applied regarding jurisdictional availability, public interest motives and remedial scope. The *Empagran* Court, therefore, expressly doubted that "this Court would have awarded similar relief at the request of private plaintiffs." 124 S. Ct. at 2370. The inevitable relationship between domestic and foreign *effects* of foreign anticompetitive conduct is not enough to establish domestic jurisdiction over a foreign-based claim.

The *Empagran* Court made clear that a significant connection between the domestic effects and foreign injuries must be shown by the plaintiff before jurisdiction over the latter arguably can be found in a U.S. court. Even then, the effect in the U.S. market must be directly and inextricably linked to the foreign harm. *See Industria Siciliana.* As the *Antitrust Law Treatise* explains, "[u]nder the court's holding, a foreign plaintiff injured by either an export transaction or in

a purely foreign transaction cannot obtain subject matter jurisdiction under the Sherman Act." (S-11) The mere fact that both United States purchasers and foreign purchasers paid more for a product because of a global price-fixing cartel is too indirect and insubstantial to create jurisdiction over the foreign purchasers' claims. Any other result would fail to give proper respect to prescriptive comity and the authority of a foreign sovereign to apply its law to transactions between foreign purchasers in its territory.

CONCLUSION

For the foregoing reasons, we urge that the Court find that it does not have subject matter jurisdiction over plaintiffs' claims for foreign harm and affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

This brief complies with the type-volume limitations for Fed. R. App. P. 32(a)(7)(B) because it contains 5850 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) & 6 because it was prepared in Times New Roman 14 point typeface in WordPerfect.

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Ann Weymouth