No. 03-724

IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *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 UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, IRELAND AND THE KINGDOM OF THE NETHERLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICI CURIAE* [1]

The Governments of the United Kingdom, Ireland and the Netherlands ("the Governments") are committed to the rule of

[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no persons other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief. Counsel of record for each of the parties has given written consent to the filing of this *amici curiae* brief and such consents have been submitted to the Clerk. S. Ct. R. 37.3(a).

law as essential to a global trading and investment system and to an international civil society. However, the Governments in general are opposed to assertions of extraterritorial jurisdiction in private antitrust cases where foreign claimants seek to recover from foreign defendants solely for foreign injuries not incurred in the country in which the private suit is filed. Such litigation contravenes basic principles of international law and may impede trade and investment as well as undermine public enforcement by the Governments of their competition laws. It also would interfere with a sovereign nation's right to regulate conduct within its territory.

The competition laws of the United Kingdom, Ireland, the Netherlands, and the European Community (of which we are member states) outlaw most horizontal cartels and provide access to an independent judiciary for litigants. The Governments support vigorous enforcement of both foreign and domestic competition laws and authorize both public and private claims. Their enforcement systems differ, but the general approach to private claims reflects carefully considered decisions about the best methods for detecting and deterring cartels and compensating victims.

The Governments are concerned that the Court of Appeals' expansive reading of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §6a ("FTAIA"), will undermine their respective choices regarding the proper balance of public and private enforcement. Thus, they have a substantial interest in this litigation and in the proper interpretation of the FTAIA.[2]

[2] The United Kingdom, Australia and Switzerland also submitted their views on extraterritorial jurisdiction of U.S. courts under the Alien Tort Statute, 28 U.S.C. §1350, in an *amicus* brief in *Sosa v. Alvarez-Machain* (U.S. S. Ct. No. 03-339) (filed January 23, 2004).

STATEMENT

While the competition laws applicable in Ireland, the Netherlands and the United Kingdom vary by country, they uniformly condemn most horizontal cartels, provide for enforcement by a public authority and grant cartel victims a right to compensation. All three states are members of the European Union ("EU"), one of the pillars of which is the European Community ("EC"). EC competition law applies to cases affecting trade between member states and takes precedence over domestic laws.

Article 81 of the EC treaty[3] regulates "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." Such agreements are prohibited except in circumstances where there are countervailing benefits to consumers. Article 82 of the EC treaty prohibits abuse by firms in dominant positions within the common market or in a substantial part of it. In practice these prohibitions produce controls that are broadly comparable in scope to the provisions of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 & 2, although there are differences of detail (e.g., there is no *per se* or rule of reason test). A private person or enterprise can sue to enforce either Article under procedures authorized by member states. *See Garden Cottage Foods, Ltd v. Milk Marketing Bd.* [1984] A.C. 130 (1983) 3 CMLR 43 (UK House of Lords). EC law is territorially-based and thus applies only to injuries arising from conduct or transactions implemented in the Community. *See In re Wood Pulp Cartel* [1985] CMR 474, *aff'd sub. nom., A. Ahlstrom Osakeyhito v. Comm'n*, [1988] 4 CMLR 901 (1988).

[3] The original treaty numbers regarding competition law (Articles 85 & 86) were changed by the Treaty of Amsterdam to 81 & 82.

The United Kingdom's domestic competition laws, which have been substantially revised in the past six years, apply to cases affecting trade within the United Kingdom and are designed to protect its economy and its consumers against competition abuses. The Competition Act of 1998's provisions similar to EC Articles 81 and 82 "appl[y] only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom." 1998 ch. 41 §2(3). Companies may be fined heavily; individuals are subject to criminal sanctions. Enterprise Act of 2002, 2002 ch. 40 §188. The criminal cartel offense applies only to conduct or implementation in the United Kingdom. *Id.* at 190(3).

An action for private damages can be brought in the United Kingdom courts or through a simplified procedure in the Competition Appeal Tribunal. *See id*. at §18 (incorporating Competition Act §47A); *see also Courage v. Crehan*, [2001] ECR I-6297; *Capital Currency Exch., N.V. v. Nat'l Westminster Bank*, 155 F.3d 603, 610 (2d Cir. 1998) (infringements of Articles 81 and 82 "give rise to an action for damages" in the UK). Persons injured by the vitamin cartel in the United Kingdom were allowed to sue British subsidiaries in the UK courts for private damages. *See Provimi Ltd. v. Aventis Animal Nutrition S.A.*, [2003] E.C.C. 29. In such proceedings, costs can be awarded at the general discretion of the courts or Tribunal.[4] The UK competition laws also allow for special procedures for class actions brought on behalf of consumers with their consent.

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[4] The competition laws of the United Kingdom prohibiting cartel agreements are enforced by the Office of Fair Trading (OFT). Between April 1, 2002 and March 31, 2003, the OFT "opened 1,141 complaint cases (including 31 cartel cases) under the Competition Act of 1998. . . . [and] launched an investigation . . . in 54 cases." Office of Fair Trading, *Annual Report and Resource Accounts* 2002-03, at 56 (available at http://www.oft.gov.uk/News/Annual+report/2002.htm). The OFT imposed total penalties of £35.8 million. *Id*. In addition, 414 mergers and merger proposals were reviewed by the OFT during this reporting period. *Id*. at 64.

Ireland's competition regime similarly condemns concerted and unilateral anticompetitive conduct. *See* Ireland Competition Act, 2002, §§4 & 5. It proscribes cartel conduct where either the object or effect of the restraint prevents, restricts or distorts competition in the state. "[C]artel enforcement is a central mission for the Competition Law Authority" and is subject to criminal sanctions. *See* Terry Calvani, *Enforcement of Cartel Law in Ireland*, 2003 Fordham Corp. Law Inst. __ (Barry Hawk ed. forthcoming 2004). Fines of up to €4 million or ten percent of annual turnover may be imposed on companies and persons may be sentenced up to five years imprisonment. In addition to public enforcement, a private right of action allows injured parties to seek both equitable relief and compensatory damages. Ireland Competition Act at §14. Class actions are not permitted under Irish law.[5]

The Netherlands' National Competition Authority ("NCA") vigorously enforces its competition laws.[6] The Competition Act prohibits bilateral conduct that has as its "object or effect the prevention, restriction or distortion of competition within the Dutch market, or a part thereof." Competition Act, Statute Book 1977, 242, art. 6. Abuse of a dominant position is similarly prohibited. *Id*. art. 24. Private damage cases may be brought in Civil Court which will accept the decision of the NCA as legal proof of the anticompetitive behavior, limiting the civil case to a determination of damages.

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[5] Criminal penalties were substantially increased in 2002 as were the Competition Authority's investigatory powers. For discussion of the evolution of competition policy in Ireland, *see* John Fingleton, *Political Economy In Ireland*, 2001 Fordham Corp. Law Inst. 569 (Barry Hawk ed. 2002).

[6] Fines for 2002 totaled €99.6 million, higher than any other country in proportion to its Gross Domestic Product. Annual Rep. of the Nma and DTe 13 (2002) (available at www.nmanet.nl/en/service_and_connect/downloaden/). Its competition enforcement budget is the third highest (after New Zealand and Australia) measured on the same basis.

SUMMARY OF ARGUMENT

The decision below would permit United States courts to hear private claims by foreign plaintiffs seeking redress for antitrust injuries allegedly suffered by them in Australia, Ecuador, Panama and Ukraine from sales of vitamins there and in other foreign countries by foreign sellers. These injuries do not arise from any contacts or relationships with plaintiffs in the United States. The argument that treble damages for foreign injuries can be recovered in a United States court because the conduct at issue also resulted in injuries to *other* parties who made purchases in the United States is a complete *non sequitur*. These unrelated injuries were the basis for other private actions in United States courts and have been fully compensated. In addition, such a rule potentially would permit virtually any significant commercial transaction to be the basis for private United States treble damage claims, usurping the enforcement systems of other countries to United States private actions.

This decision would provide substantial encouragement for widespread forum shopping, might impede competition law enforcement programs in the United Kingdom, Ireland and the Netherlands as well as the European Community, and would undermine respect for national sovereignty. The court of appeals' ruling has the potential for generating needless friction between foreign and United States legal systems and could lead to less, not more, cooperation and coordination of competition laws by all nations. It would wrongly expand the extraterritorial reach of the United States antitrust laws beyond this Court's or, to our knowledge, any foreign court's exercise of jurisdiction. International law principles recognize that a nation may prescribe laws and adjudicate claims beyond its own territory only where its assertion of jurisdiction does not infringe the rights of other nations to determine the law applicable to conduct within their own territories.

Ironically, the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. §6a ("FTAIA"), on which the disputed jurisdiction relies, was adopted to limit the antitrust jurisdiction of United States courts over private claims to those based on antitrust injuries suffered from transactions in United States commerce. This narrower reading is more consistent with recognized canons of construction that statutes are to be interpreted to avoid conflict with international law and the law of other states. *See Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

ARGUMENT

The United Kingdom, Ireland and the Netherlands as well as the European Community vigorously enforce their competition laws and reserve their harshest penalties for domestic and international horizontal cartels which fix prices, allocate markets, restrict output, and rig bids.[7] These enforcement systems rely on international coordination and continued respect for the values and judgments reflected in each nation's processes.

I. EXPANDING THE JURISDICTION OF UNITED STATES COURTS TO COVER FOREIGN INJURIES TO FOREIGN PLAINTIFFS COULD INTERFERE WITH GLOBAL ANTITRUST ENFORCEMENT

Expanding the antitrust jurisdiction of United States courts to permit private treble damage claims for injuries to foreign plaintiffs for conduct outside the United States—where those

[7] Hoffman-LaRoche, for example, was fined €462 million for its role in the eight vitamin cartels. Mario Monti, European Commissioner in charge of Competition Policy, *The Fight Against Cartels* (Sept. 11, 2002) (speech presented at EMAC and available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/02/384|0|AGED&lg=EN&type=PDF).

injuries have no effect on United States commerce—radically departs from current practices. It could impair rather than enhance public enforcement by undermining other countries' ability to enforce their competition laws.

A. Cooperation And Coordination Are Essential To Effective Global Antitrust Enforcement

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 thus place a high priority on closely knit international investigations.[8]

Formalized international procedures for gathering information and prosecuting anticompetitive acts with transnational effects are growing. *See* Charles S. Stark, *International Cooperation in the Pursuit of Cartels*, 6 Geo. Mason L. Rev. 533 (1998). Seven countries (Australia, Brazil, Canada, Germany, Israel, Japan and Mexico) and the European Union have adopted memoranda of understanding with the United States[9] that allow agencies to assist each other, allocate enforcement responsibility, and commit each country not to infringe on the other's actions. The laws of the United Kingdom, Ireland and the Netherlands also permit

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[8] *See* Mario Monti, *Competition Enforcement Reforms in the EU: Some Comments by the Reformer* (April 4, 2003) (speech presented at Georgetown University and available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/03/200|0|RAPID&lg=EN&display=); *accord* R. Hewitt Pate, *Anti-Cartel Enforcement: The Core Antitrust Mission* (May 16, 2003) ("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).

[9] These MOUs are available at http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

their enforcement authorities, within certain limitations, 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 updated on May 1, 2001, 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 the Treaty on Mutual Legal Assistance in Criminal Matters done at Washington on 6 January 1994* (May 1, 2001).[10] But such cooperation depends on reciprocal respect for the enforcement practices, priorities and jurisdiction of the other country.

B. Expanding United States Court Jurisdiction Could Undermine Leniency Programs

Price fixing and other cartels are elusive targets despite cooperation and coordination among national or regional enforcement authorities. Cartels can generate enormous profits; they operate in secret because they are illegal; and severe penalties make voluntary disclosure by members of the cartel risky and perilous. These problems are compounded when the cartel operates in international commerce because evidence of the cartel is difficult to gather; procedures differ among countries; and the participants are scattered among several jurisdictions.

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[10] 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/docs/1781.htm).

Prior to the 1990's traditional tactics such as plea bargains had only limited success because cartels were not condemned by all countries and enforcement practices varied widely among countries. In addition, 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 this failure, competition enforcement authorities have developed leniency programs and cooperated on collecting evidence, offering amnesty and prosecuting cartels operating across borders. The United States Department of Justice formalized and expanded its corporate amnesty program in 1993 and established standards and procedures whereby companies and their employees could obtain immunity for being the first to reveal a conspiracy and for cooperating with the government in its prosecution of the other conspirators. *See* Scott D. Hammond, *Lessons Common to Detecting and Deterring Cartel Activity* (Sept. 12, 2000) (Remarks at the 3rd Nordic Competition Policy Conference).[11] The development of amnesty programs has grown, and the authorities in the United Kingdom, Ireland, the Netherlands and EC as well as other countries have adopted specific programs. *See* John Vickers, Chairman of the Office of Fair Trading, *Competition Economics* (December 4, 2003) (Royal Economic Society Annual Public Lecture); *Cartel Immunity Program*, Ireland Competition Authority (Dec. 2001); *Leniency Guidelines*, Netherlands Competition Authority (June 28, 2002); *European Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases*, OJ C45, at 3-5 (Feb. 19, 2002).[12]

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[11] Available at http://www.usdoj.gov/atr/public/speeches/6487.htm.

[12] Mr. Vicker's speech is available at http://www.oft.gov.uk/News/Speeches+and+articles/2003/spe05-03.htm. The Irish program is available at www.tca.ie; the Netherlands program at www.nmanet.nl/nl/Wet_

Typically, the leniency applicant can receive total or substantial immunity from criminal and civil antitrust penalties if it is the first to come forward with credible or material evidence of a cartel before the enforcement authority has knowledge of the cartel or has begun an investigation. The terms vary as each country assesses the proper mix of incentives and penalties. These programs are a deliberate effort to balance interests of disclosure, deterrence and punishment. *See* John Vickers, *supra* (the"carrot of leniency" creates "a potential competition—a race to the competition authorities—for those contemplating the illegally agreed suspension of price competition").[13] Private lawyers also report that in determining whether to seek leniency and provide evidence, companies specifically weigh the public fine and private damages exposure against the probability of detection. *See* Laura Carstensen & Shaun Goodman, *Cartel Regulation* (*United Kingdom*) ch. 22 at 100-01 (Global Comp. Rev. eds., 2001).

There is widespread concurrence that leniency programs have been "spectacularly successful." Terry Calvani, *supra* (also predicting that Ireland's "Immunity Programme" will "prove to be a most valuable arrow in the Authority's quiver"). They are the basis for a majority of cartel prosecutions by the United States. *See* Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 Am. Crim. L. Rev. 241, 270-71 (2003). The European Commission's experience is similar. *See* Mario Monti, *The Fight Against Cartels*,

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en_regelgeving/NMa_Richtsnoeren; the EC program at http://europa. eu.int/comm/competition/antitrust/leniency.

[13] The OFT leniency policy can be found at http://www.oft. gov.uk/business/legal+powers/ca98+leniency. htm. Press releases which concern fines for cartels uncovered as a result of the OFT's leniency policy can be found at http://www.oft. gov.uk/news/press+releases/2 003/pn+18-03.htm; http://www.oft.gov.uk/news/press+releases/2002/pn+ 06-02.htm.

supra (the "leniency scheme has proved a formidable tool for encouraging firms to cooperate").

The international convergence of amnesty programs has become effective because it is "much easier and far more attractive for companies to simultaneously seek and obtain leniency in the United States, Europe, Canada, and in other jurisdictions where the applicants have exposure." James M. Griffin, *The Modern Leniency Program After Ten Years, A Summary Overview of the Antitrust Division's Criminal Enforcement Program* (Aug. 12, 2003).[14] The Governments, however, are concerned about any policy or action that would make the programs less attractive to whistle-blowers. Competition authorities in the United Kingdom, Ireland and the Netherlands have all concluded that the proposed expansion of United States jurisdiction over private treble damages claims could have an adverse effect on international cartel enforcement. Enforcement officials from Germany[15] and the United States agree.[16] The issue here is that participants in leniency programs receive no immunity from

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[14] Presented at ABA Annual Meeting, available at http://www.usdoj.gov/atr/public/speeches/201477.htm.

[15] A former German Minister of the Economy has noted that "the Empagran decision jeopardizes 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." 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).

[16] *See* 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).

private damage actions. The expansion of United States jurisdiction and the accompanying availability of private treble damages may discourage potential whistle-blowers from providing evidence. When coming forward to expose secret agreements, they may be required to pay much greater damages than if the cartel otherwise would have not have been detected. If these forecasts are borne out by experience, cartel detection and deterrence will be diminished and consumer welfare will not be served.

C. An Expansive Interpretation of United States Court Jurisdiction Would Shift Most Private Claims To United States Courts

No other country has adopted the United States' unique "bounty hunter" approach that permits a private plaintiff 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. The rules governing United States treble damage actions strongly favor private antitrust plaintiffs. They provide for generous class action certifications, broad discovery rules, virtually irrebutable presumptions of liability based on successful government actions, jury trials, subsidized contingency fee arrangements, asymmetrical rules on payment of attorneys' fees, and no contribution among defendants. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* ch. 10 (5th ed. 2002). The parliaments of the United Kingdom, Ireland and the Netherlands all recently enacted statutes allowing private actions for competition law violations, but have chosen to do so on a more limited basis.

Expanding the jurisdiction of this generous United States private claim system could skew enforcement and increase international business risks. It makes United States courts the forum of choice without regard to whose laws are applied, where the injuries occurred or even if there is any connection to the court except the ability to get *in personam* jurisdiction over the defendants. Lord Denning best captured these

anomalies when he observed: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982).[17] Enlarging the prescriptive jurisdiction of the United States to provide a US antitrust remedy to foreign buyers with no cognizable US nexus will attract even more litigants and will increase the number of private antitrust claims filed in United States courts. There is no apparent justification for such a shift. While additional penalties could marginally increase deterrence, in this circumstance where international public enforcement is diminished, the likely effect may be to lessen overall detection. As this Court recently noted, "[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).

Today, private antitrust actions authorized in the United Kingdom, Ireland and the Netherlands apply to a range of competition offenses and generally provide for only single damages.[18] The "loser pays" rule for attorneys fees applies in

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[17] *See also Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F.3d 420, 427-28 (5th Cir. 2001), *cert. denied sub nom., Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002):

> [A]ny entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States.

[18] The Irish statute and the law in the United Kingdom (except Scotland) allow for exemplary damages when appropriate.

As an historical aside, the original English Statute of Monopolies of 1623, 21 Jam. c.3:d, provided for treble damages and double costs

each country and competition law claims are heard either by judges or by administrative tribunals unlikely to be swayed by emotional appeals common to United States treble damages jury trials. *See, e.g.*, U.K. 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) (noting 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," and recommending "a system in the UK where private actions are less inhibited than at present—but in doing so . . . [being careful to] guard against the risks of the US system"). The absence of multiple damages and the different attorney fee authority in the United Kingdom, Ireland and the Netherlands are not simple oversights.

II. EXTENDING PRIVATE ANTITRUST LITIGATION OVER FOREIGN ANTITRUST INJURIES RISKS GENERATING SERIOUS CONFLICTS

Conflicting national antitrust policies can lead to public differences between nations, usually "because two or more nations with legitimate jurisdictional claims have required or permitted inconsistent conduct." Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 Geo. Mason L. Rev. 505, 517 (1998). Policy differences may create public enforcement discrepancies, but these conflicts generally are best resolved directly by discourse between governments. *See, e.g.*, *General Elec./ Honeywell*, EC Case No. COMP/M.2220 (July 3, 2001);

"wherein all and every such person and persons which shall be so hindered, grieved disturbed or disquieted . . . shall recover three times so much as the damages which he or they sustained . . . and double costs."

Boeing/McDonnell Douglas, EC Case; No. IV/M.877 (July 30, 1997).[19]

However, intense international disagreements also have arisen from private antitrust actions where such conflict is neither inevitable nor justified. Some well-known examples are:

- The *Uranium Cartel* case, *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980), involved private antitrust litigation in the United States and "outraged" foreign governments because the defendant foreign cartel supported by foreign governments responded to "anticompetitive" actions by the U.S. Government that had closed its market to foreign producers. The British House of Lords in turn denied discovery requests from U.S. courts. *See Rio Tinto Zinc Corp. v. Westinghouse*, [1978] W.L.R. (H.L. 1977).
- The *Ocean Shipping* cases involved unilateral attempts by the United States to alter long-estab-

[19] As noted, our countries recognize that distinctive approaches and differing structures may in some instances result in inconsistent analyses and outcomes—and that some friction may be inevitable. But antitrust enforcement authorities both in Europe and the United States agree that the resolution of those differences should be through bilateral and multilateral discussion and cooperation, not the unilateral exercise of jurisdiction through private antitrust damage actions. *See* Mario Monti, *Competition Enforcement Reforms*, *supra* (outlining international enforcement cooperation and substantive multilateral initiatives such as the International Competition Network and the World Trade Organizations which are focusing on "outlawing hard-core cartels" and "international cooperation"); *see also* Deputy Assistant Attorney General Deborah Platt Majoras, *GE-Honeywell: The U.S. Decision* (Speech before the Antitrust Law Section, State Bar of Georgia, Nov. 29, 2001) (While the United States had "no power to change EU law, other than by persuasion, ... we believe it is important that we discuss this issue in depth . . . [in order for] a multilateral effort to develop a specific convergence agenda.") (available at http://www.usdoj.gov/atr/public/speeches/ 9893.htm).

lished shipping practices setting uniform rates by shipping companies with the acquiescence and assistance of many governments. *E.g., In re Ocean Shipping Antitrust Litig.*, 500 F. Supp. 1235 (S.D.N.Y. 1980).

- Other examples of disputed assertions of jurisdiction include *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (private U.S. action allowed contrary to permanent injunction issued by the U.K. Court of Appeal) and *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 oil pricing as a cartel).

These cases are noteworthy because the retaliation they generated against the United States has had significant long-standing effects. The private actions in the *Ocean Shipping* and *Uranium Cartel* cases caused several countries, including the United Kingdom, to enact statutes blocking discovery of documents and other information needed to prosecute foreign defendants. *See Restatement* (*Third*) *of Foreign Relations Law of the United States* §442, note 4 (1987) ("*Restatement* (*Third*)") (listing acts and their amendments). For example, the British Protection of Trading Interests Act of 1980, 1980 ch. 11, authorizes the Secretary of State for Trade and Industry to refuse to comply with laws or orders issued by "any overseas country" for regulating international trade if the laws "insofar as they 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 damage 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

III. THE INTERPRETATION OF UNITED STATES ANTITRUST LAW SHOULD BE CONSISTENT WITH PRINCIPLES OF INTERNATIONAL LAW

Finally, interpreting the FTAIA as authorizing United States court jurisdiction for all foreign injuries caused between foreign parties, whose only connection with the United States is that the defendant's conduct also had effects within the United States, is contrary to basic principles of international law regarding the allocation of jurisdiction between states. It is foundational that 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*) at §402(1).

In order to prevent conflicts between jurisdictions, international law has developed a number of widely accepted grounds upon which jurisdiction may be exercised. But there is one thread that runs through all. The common basis is

> a single broad principle according to which the 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.

Oppenheim's International Law 457-58 (Sir Robert Jennings & Sir Arthur Watts ed. 9th ed. 1992).

It follows, therefore, that the primary ground of jurisdiction which is universally recognized 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. By contrast a state's authority to exercise jurisdiction extraterritorially is much more limited, the most widely recognized cases being that (i) a state's powers 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 vital security interests when threatened by the activities of foreigners outside its territory (the "protective principle"). In addition, (iii) the more controversial "effects doctrine" suggests that in certain circumstances a state may exercise jurisdiction over events that have a clear effect in its territory, even if the planning and execution takes place elsewhere. *See, e.g., Hartford Fire Ins. Co. v. California*, 475 U.S. 764, 796 (1993) ("*Hartford Fire*"); *Gencor Ltd. v. Commission of the European Communities*, Case T-102/96, 1999 E.C.R. II-753; *see generally, Restatement* (*Third*) at §402(1), 403(2).

These principles of international law have long been accepted in United States law. As this Court recognized in *The Antelope*, 23 U.S. 66, 122 (1825), "[n]o 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." *See also Laker Airways*, 731 F.2d at 921 (territoriality is "the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power"). Similarly, principles of international law inform the interpretation of statutes. *See The Charming Betsy*, 6 U.S. (2 Cranch) at 118 ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains") (quoted in *Hartford Fire*, 509 U.S. at 814-15 (1993)); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). This Court applied both the principle of territoriality and the canon of

construction recognizing the law of nations in *EEOC v. Arabian Amer. Oil Co*. 499 U.S. 244, 248 (1991). There the Court restated the "long-standing principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States' . . . [because this rule] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." (quoting *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949))

Given the potential for conflict which can arise from the exercise of extraterritorial jurisdiction, states have increasingly sought to establish procedures for cooperation and coordination when asserting jurisdiction. Examples include a series of Agreements between the European Communities and the United States of extraterritoriality in respect to antitrust law: (i) the Agreement of 23 September 1991 regarding the application of their competition laws, *supra*; (ii) the Exchange of Interpretive Letters of 31 May and 31 July 1995; and (iii) the Agreement of 4 June 1998 on the application of positive comity principles in the enforcement of their competition laws, *supra*. *See also* Recommendation of the Council of the OECD of 28 July 1995 concerning Cooperation between Member Countries on Anti-Competitive Practices affecting International Trade.[20]

Similarly the *Restatement* (*Third*) interprets United States 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). Thus, as *Alcoa* acknowledged,

[20] OECD Doc. No. C(95) 130 (Final) (1995) (available at http/www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html).

even when the United States antitrust laws are applied to foreign conduct with an effect in the United States, the assertion of jurisdiction over claims for foreign conduct must be consonant with "the limitations customarily observed by nations upon the exercise of their powers." *United States v. Aluminum Co. of Amer.*, 148 F.2d 416, 443 (2d Cir. 1945). This ruling was confirmed in *Hartford Fire* noting that United States antitrust prohibitions are limited to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796.

This limiting principle of reasonableness—absent from the decision below—has been deployed by the United States courts to minimize conflicts with the jurisdiction of other states. Most notably United States courts have invoked comity as means of resolving jurisdictional conflicts. *See Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976) *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). This approach seeks to balance the interests of the respective States in exercising jurisdiction to regulate the activities in question.

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the forseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors

> should identify the potential degree of conflict if American authority is asserted. . . . Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

Timberlane, 549 F.2d at 614-15.

These factors were recognized in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*, 473 U.S. 614, 629 (1986), when this Court, in holding that the parties' choice of forum should be respected, expressly weighed "concerns of international comity, respect for capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." As the *Areeda Antitrust Treatise* concludes, jurisdiction over a transaction is given "to one country or another on the basis of its primary contacts, including . . . the relative strength of each state's policies bearing on the matter." Phillip E. Areeda and Herbert Hovenkamp, 1A *Antitrust Law* 276 (2d ed. 2000).

Applying the restraint required by the principle of reasonableness or the practices of comity to the present case, it is relevant that the plaintiffs' injuries occurred in foreign nations, that plaintiffs are foreign nationals, and that the effects of the plaintiffs' injuries were felt only in foreign lands. The only United States connection is that the defendants' conduct caused separate injuries to United States and foreign nationals in United States commerce—and that these latter injuries to private claimants have been subject to private class action claims in United States courts which were settled by substantial payments by the Defendants. Thus, the nexus between the United States and plaintiffs' claims is virtually nonexistent, while the relationship between plaintiffs and several foreign jurisdictions is immediate and substantial.

CONCLUSION

For the foregoing reasons, we urge that the jurisdiction of United States courts to hear private antitrust treble damage claims not be extended to apply to injuries that result from purely foreign commercial transactions and that the decision below be reversed.

Respectfully submitted,

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