# BRIEF AMICI CURIAE OF LEGAL SCHOLARS IN SUPPORT OF RESPONDENTS

## INTEREST OF AMICI CURIAE

Professor Harry First and Professor Eleanor M. Fox respectfully submit this brief amici curiae in support of respondents.[1] Professors First and Fox are professors of law at New York University School of Law.[2] Both teach and write in the area of antitrust law, including international antitrust enforcement.

## SUMMARY OF ARGUMENT

U.S. courts have jurisdiction over plaintiffs' claims under Section 1 of the Sherman Act. Jurisdiction exists because defendants' sales to plaintiffs outside the United States were made in international markets pursuant to a price fixing and market allocation agreement which had "substantial effect" on "trade or commerce . . . with foreign nations." *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). Recognizing such jurisdiction is consistent with the recent attention to the prosecution of international cartels by the United States.

The Foreign Trade Antitrust Improvements Act of 1982 did not cut back Sherman Act jurisdiction over this case. The FTAIA, by its terms, does not apply to conduct involving "import trade or import commerce." The vitamins cartel involved precisely such conduct, an inextricable aspect of the conspirators' efforts to restrain trade in international markets for

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[1] Pursuant to Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part. No persons other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been submitted to the Clerk.

[2] Professor First, while Chief of the Antitrust Bureau of the New York State Attorney General's Office, represented New York and its consumers in the settlement of their antitrust claims against several of the petitioner vitamins manufacturers.

various vitamins and vitamin products. Even if the FTAIA did apply, the Act concerns only what conduct the Sherman Act reprehends, not who can sue under the Sherman Act.

U.S. courts should not be closed to plaintiffs injured by international cartels, operating in international markets, with direct effects on U.S. commerce, only because the plaintiffs' purchases took place outside the United States. Such a rule would be inconsistent with the United States' enforcement efforts in the area of international antitrust enforcement, would be unduly formalistic, would ignore the economic effects of international cartels, diminish the deterrent effect of U.S. antitrust law, and undercut the compensatory function of the private action.

## ARGUMENT

### I. U.S. COURTS HAVE JURISDICTION OVER PLAINTIFFS' SUIT UNDER SECTION 1 OF THE SHERMAN ACT.

This case is the inevitable outgrowth of the internationalization of markets in the late 20th century. This internationalization has attracted interest from prosecutors intent on rooting out and deterring international price-fixing cartels and from private plaintiffs seeking to recover the monetary damages these cartels have inflicted.

Cartels involving foreign trade have received Sherman Act attention from government and private enforcers from the earliest days of the Sherman Act. *See United States v. American Tobacco Co.*, 221 U.S. 106 (1911) (international tobacco cartel); *Thomsen v. Cayser*, 243 U.S. 66 (1917) (private action against anticompetitive behavior by members of international shipping conference).

Although historically international cartels have been the object of intense prosecutorial attention by the Justice Department, *see* Harry First, Structural Antitrust Rules and International Competition: The Case of Distressed Industries, 62 N.Y.U.L. Rev. 1054, 1076, 1077 (1987) ("Between 1939 and 1945, the Department of Justice initiated fifty-two proceedings against international cartels, involving 105 products and 165 firms."), as an international economy continued to develop during the late 1980s and early 1990s, prosecutors renewed their interest in the operation of cartels that affect international markets. The result has been an extraordinary increase in cartel prosecutions. Between 1990 and 1999, the Antitrust Division filed more than 23 international cartel prosecutions, charging more than 80 corporate and 60 individual defendants in the process. *See* International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, Final Report 167 & Annex 4-A (2000). By

1997, 32 percent of corporate defendants and the same number of individual defendants were foreign-based. *Id.* at 167 n.16. Between 1997 and 1999, international cartel prosecutions accounted for more than 90 percent of the fines imposed in criminal antitrust cases annually. *Id.* at 169.

It is not surprising that the increase in government international cartel prosecutions has drawn the attention of plaintiffs victimized by the cartels; this is how our antitrust enforcement system is intended to work. *See* Clayton Act, § 5(a), 15 U.S.C. § 16(a) (prima facie effect of final judgments in government criminal proceedings). Nor is it surprising that some of these plaintiffs, like the plaintiffs in this case, purchased the price-fixed goods outside the United States. Vitamins, like so many goods today, are manufactured and sold "[i]n a world in which economic transactions observe no boundaries." United States Department of Justice and Federal Trade Comm'n, Antitrust Enforcement Guidelines For International Operations § 3.1 at n.51 (1995). Nor is it surprising that there appear to be no similar reported cases arising out of earlier cartel prosecutions. Markets in earlier eras were less interconnected and private antitrust actions less frequent. Further, the effects doctrine, which supports jurisdiction over this cartel's conduct outside the United States, was a contested one for many years, particularly during the 1970s. As the U.S. government began to uncover and prosecute international cartels, however, our trading partners came to realize the extent to which they, too, were victimized by cartel behavior beyond their borders. The result is that criticism of the effects doctrine has faded around the world, and particularly in Europe. *See* International Guidelines, *supra*, § 3.1 at n.51 (discussing the "more widespread" adoption of an effects test).

Thus, no one disputes the propriety of U.S. government enforcers proceeding against the vitamins cartel under Section 1 of the Sherman Act, for the cartelists' conduct (price fixing, output restrictions, and customer allocations) had a "substantial effect" on "trade or commerce . . . with foreign nations," because of its intertwined effect on imports and exports of vitamins. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); International Guidelines, *supra*, § 3.1 (enforcement agencies use "substantial effects" standard for imports; "direct, substantial, and reasonably foreseeable" standard used for foreign commerce "other than imports").

Plaintiffs contend that sales to them were part of this international conspiracy, even though made outside the United States. If this is true, Section 1 of the Sherman Act applies, subject to the same prudential limits which apply to all antitrust claims. Given the international nature of the market for vitamins, and the international scope of the conspiracy, the locus of the sale should be no more relevant than the locus of the seller. The key factor should be whether the cartel from which the plaintiffs purchased had the requisite effect on U.S. foreign commerce. The cartelists understood that the geography of buyers and sellers had nothing to do with economic effect. Section 1 should be interpreted in accord with this economic reality.

## II. THE FTAIA DOES NOT CUT BACK JURISDICTION OVER THIS CASE.

Appellants assert that this case should be dismissed for lack of jurisdiction by reason of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).

The FTAIA, which cut back the reach of the Sherman and Federal Trade Commission Acts to exclude conduct that harms only foreign markets, does not apply to this case. This conclusion follows from an understanding of the circumstances that led to enactment of the FTAIA, Congress's goals in enacting the FTAIA, and the relevant wording and structure of the Act.

The seeds of the Act were sown in the 1960s and 1970s. Economic regulation had expanded, U.S. businesses complained that they were overregulated and handicapped vis-à-vis foreign competitors, and small businesses complained of fear and uncertainty in their export activity lest their conduct be caught by U.S. antitrust law. The fear had an objective basis. U.S. antitrust law was then more proscriptive than that of our trading partners, and some cases had held that U.S. antitrust law followed U.S. corporations in their business abroad even when there was no anticompetitive effect on U.S. commerce and consumers and even though the host country permitted conduct that U.S. antitrust law prohibited.[3] Congress wished to – and did – declare that U.S. antitrust law would no longer follow U.S. firms in foreign markets where only foreign market competition was injured.

Because its objective was to enhance exports, Congress specifically excluded "import trade or import commerce" from the purview of the FTAIA (first sentence, first clause).[4] To delineate the new limits of the Sherman Act, Congress provided that, henceforth, the Sherman Act would not apply to foreign conduct other than import trade unless it had "a direct, substantial and reasonably foreseeable [U.S.-relevant] effect . . . ."[5]

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[3] *E.g.*, *Waldbaum v. Worldvision Enterprises*, 1978-2 Trade Cas. (CCH) ¶ 62,378, 1978 U.S. Dist. LEXIS 14208 (S.D.N.Y. 1978); *Industria Siciliana Asfalti Bitumi, S..A. v. Exxon Research and Engineering Co.*, 1977-1 Trade Cas. (CCH) ¶ 66,256, 1977 U.S. Dist. LEXIS 17851 (S.D.N.Y. Jan. 18, 1977).

[4] Also, consistent with the objective of protecting the freedom of U.S. firms to compete in foreign trade while not intruding on rights of U.S. firms, in subsection 1(B) Congress preserved the cause of action, if any, of an anticompetitively excluded U.S.-based exporter. This clause preserves case law, to the extent it survives modern interpretations, prohibiting members of an export association from agreeing to export exclusively through their association and not through other U.S. exporters. *See United States v. United States Alkali Export Association*, 86 F. Supp. 59 (S.D.N.Y. 1949).

[5] For import commerce, the jurisdictional test was last articulated by this Court in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993):

There was some concern, however, that the FTAIA might be read to create a cause of action where none previously existed. For example, a foreign plaintiff might claim that challenged conduct had *some* direct, substantial and reasonably foreseeable effect in the United States – e.g., saving jobs – and use the FTAIA as a hook for U.S. jurisdiction even if the anticompetitive effects of the conduct were solely abroad. Accordingly, the drafters specified that "such effect[6] [must] give[] rise to a claim under the provisions of this Act [the Sherman Act or the FTC Act], other than this section." H.R. Rep. No. 97-686, at 11 (1982).

The conduct at bar – the vitamins conspiracy – was "conduct . . . involving import trade or import commerce." The conspiracy involved international markets in a number of vitamins and vitamin products – an intricate, tangled, worldwide network of foreign and domestic producers, foreign and domestic victims, imports and exports. Because the cartel conduct involved "import trade [and] commerce," the FTAIA is not applicable to this case, and the *Hartford* test of jurisdiction applies.[7]

This conclusion is borne out by the fact that no one has questioned the U.S. government's criminal enforcement against the vitamin conspirators here and abroad, foreign and domestic, and no claim has been made that the government was subject to additional hurdles of the FTAIA. Indeed, the Government's criminal Informations filed against the vitamins cartel defendants (and to which the defendants pleaded guilty) alleged that

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"[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 769.

[6] "Such effect" refers to the direct, substantial and reasonably foreseeable effect of the challenged conduct on U.S. commerce.

[7] See note 5, *supra*.

> the defendant and its co-conspirators sold and distributed a substantial quantity of vitamins and vitamin premixes subject to the charged conspiracy in a continuous and uninterrupted flow of interstate and foreign trade and commerce *to customers located in states or countries other than the states or countries in which the vitamins and vitamin premixes were produced* (emphasis added).[8]

As a result, according to the Information,

> the activities of the defendant and co-conspirators that are the subject of this Information were within the flow of, and *substantially affected*, interstate and foreign trade and commerce (emphasis added).[9]

Noticeably lacking in the Information are two things: 1) any effort to parse the locations of either the vitamins customers or the vitamins producers; and 2) any language referring to the FTAIA's jurisdictional requirements. Thus, the federal government has viewed this conspiracy as one coming within the jurisdictional reach of Section 1, to which only the *Hartford* "substantial effects" applies, unaffected by the FTAIA. *See* International Guidelines, *supra*, § 3.1.

Appellants argue, nevertheless, that the FTAIA's cutback in jurisdiction was calibrated to the nature of the plaintiff and the situs of its purchases, rather than to the nature of the commerce. This is not the case. The FTAIA concerns the limits of the Sherman Act in reprehending foreign conduct, not which private parties may sue for a violation. This conclusion follows from the FTAIA's language and purpose, and from the structure of the Export Trading Company Act of 1982 and its Title IV (which is

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[8] *United States v. F. Hoffman-La Roche Ltd*, Criminal No. 3:99-CR-184-R, N.D. Tex., at ¶ 10 (filed May 20, 1999), available at http://www.usdoj.gov/atr/cases/f2400/2452.htm.

[9] *Id.* at ¶ 11.

the FTAIA).

First, the same operative language that amends the Sherman Act amends the Federal Trade Commission Act. *See* 15 U.S.C. § 45(a)(3). There is no private right of action under the FTC Act; only the FTC may enforce the Act. If the FTAIA had been meant to delineate which private parties can and cannot sue, the language relied on by appellants ("such effect gives rise to a claim") would have been omitted in the FTAIA amendment to the Federal Trade Commission Act.[10] Instead, the FTC Act amendment says: "such effect gives rise to a claim under the provisions of this subsection, other than this paragraph," that is, a claim under Section 5 (a) (1). *See* 15 U.S.C. § 45(a)(3)(B).

Second, the FTAIA amends Sections 1 to 7 of the Sherman Act (specifying prohibited conduct and the duty of the United States to enjoin it), not Section 4 of the Clayton Act (specifying the elements of private standing and damages). If Congress had meant to amend Section 4 of the Clayton Act, it would have done so, as it subsequently proposed to do in the "Foreign Trade Antitrust Improvements Act of 1985," a bill to cut back private remedies in foreign commerce cases which was never enacted. *See* S. 397, 99th Cong., 1st Sess. (1985).

Third, the structure of the Export Trading Company Act of 1982 also confirms the fact that the FTAIA does not read on private standing and does not parse which particular exploitative transactions are covered. The Export Trading Company Act is an act expressly designed to increase U.S. exports. During the

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[10] Note that the drafters were clearly aware of the differences between the Sherman Act and the Federal Trade Commission Act and did not simply take the language from the Sherman Act *in haec verba*. *Compare* 15 U.S.C. § 6a ("other than import trade or import commerce"; reflects "trade or commerce" language of Section 1 of the Sherman Act) *with* 15 U.S.C. § 45(a)(3) ("other than import commerce"; reflects "commerce" language of Section 5(a)(1) of Federal Trade Commission Act).

time of the drafting of and debate on this legislation, the House of Representatives presented the bill that became the FTAIA – which was intended to be a clean retraction of jurisdiction. The Senate suggested a different approach designed to achieve the same primary end – freeing U.S. firms that wished to export from fears of violating the U.S. antitrust laws. The Senate proposed a regulatory approach, requiring a filing by firms planning to export and the grant of a certificate of immunity for the export transaction to the extent it might harm only foreign markets. Congress could not decide which approach to take, and ultimately enacted both bills. The Senate version became Title III of the Export Trading Company Act of 1982. The House version became Title IV. There was acknowledgment of the duplicative nature of Titles III and IV; they are duplicative because Title III offers exporters immunity for conduct that Title IV puts beyond the reach of the Sherman Act. In no part of the debate was a shrinking of private rights identified as a reason to adopt the House bill in addition to the Senate bill. The overlap was justified on grounds that some firms – and especially small firms that might not have sophisticated counsel – would prefer advice from a federal agency (the Commerce Department) and the security of a Certificate of Review. *See* Eleanor M. Fox, Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?, 19 N.Y.U. J. Int'l L. & Pol. 565, 577-82 (1987).

The FTAIA did not remove jurisdiction over this case. The vitamins cartel is conduct involving import trade and commerce and therefore its treatment under Section 1 of the Sherman Act is not touched by the FTAIA. If plaintiffs are restricted in their rights under the Sherman Act, that restriction must be found outside of the FTAIA.

## III. U.S. COURTS SHOULD NOT BE CLOSED TO PLAINTIFFS INJURED IN THEIR BUSINESS OR PROPERTY BY AN INTERNATIONAL CARTEL WITH SUBSTANTIAL U.S. EFFECTS ONLY BECAUSE PLAINTIFFS' PURCHASES ARE MADE OUTSIDE THE UNITED STATES.

No country today can conceive of its enforcement efforts against international cartels in parochial terms. Each country's efforts in policing international markets contribute to the common economic benefit.

Closing U.S. courts to plaintiffs injured by an international cartel whose effects are felt in international markets that include the United States, on the sole ground that their purchases were made outside the United States, is inconsistent with the role the United States plays in international antitrust enforcement. Indeed, crafting antitrust rules by "metes and bounds," instead of by economic effect, leads to arbitrary results and is inconsistent with the economics of these restraints and with the deterrent and compensatory function of treble damages suits. The better approach would be to use standing and other doctrines which the courts have developed to manage the potential scope of antitrust litigation.

Courts have already recognized that making liability for international cartel behavior turn on whether some aspect of the sales transaction takes place in the United States can be formalistic. *See In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001); *cf. Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001) (no claim for $230 million of price-fixed electrodes invoiced outside U.S.; allows suit for $18 million worth of electrodes that were invoiced in the U.S. but delivered to the plaintiffs outside the U.S., without regard to where the electrodes were manufactured). Line-drawing on this basis may be "archaic," *see Microsoft,* 127 F. Supp. 2d at 716-17 (Greek citizen purchasing from Microsoft, using the Internet; court wonders whether this is a sale in the United States), or random, *cf. Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003) (auctions in New York and London; buyers bid and purchase interchangeably between the two locations).

Formalism is the wrong approach because it ignores the economics of international markets and, therefore, undermines deterrence. Where markets are not economically separable by geography, the success of the cartel depends on controlling sales without regard to geography. In cartels like vitamins, the cartelists recognize that sellers from around the world must be included and sales around the world must be accounted for (as they were). If these cartels are to be deterred, the U.S. private action cannot ignore what happens abroad. Indeed, this is the key insight of this Court in *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978):

> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.

*Id.* at 315.[11]

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[11] The deterrence effects of including sales made outside the United States is more complicated than it was when *Pfizer* was decided. The chance of detection of illegal cartels is likely greater today, in major part because of the Department of Justice's amnesty program but also in part because of the greater investigative efforts of the private bar. *See* Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law,

There is today widespread agreement among nations that international price fixing cartels can no longer be tolerated, but there are still differences in enforcement mechanisms. Japan, for example, has yet to take any action against the vitamins cartel or its Japanese members, although it does pursue other, domestic cartels. *See* Akinori Uesugi, Enforcement Activity Against Cartels: What Is Going On In Japan? at 8 (largest cartel penalties) (Address to International Cartel Workshop, American Bar Ass'n, Feb. 5, 2004), available at http://www2.jftc.go.jp/e-page/speeches/040205ABA.pdf. In Europe, by contrast, large fines have been imposed on international cartels and upheld in the courts. *See, e.g., Kyowa Hakko Kogyo Co. Ltd v. Commission of the European Communities*, Case T-223/00 (Court of First Instance 2003) (upholding fine in lysine cartel), available at http://curia.eu.int/jurisp/cgi-bin/gettext.pl.).

The United States has not let these differences in institutional approach affect its willingness to proceed against international cartels even though such prosecutions, inevitably, involve non-U.S. corporations and non-U.S. individual defendants. Between

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68 Antitrust L.J. 711, 712-14 (2001) (discussing efforts of private counsel in uncovering vitamins conspiracy). Greater potential civil liability might marginally decrease the incentives of parties to seek amnesty from the Government, but the benefits of amnesty remain great, the desire to beat one's competitor to the prosecutor's office will still be quite strong (a true "prisoners' dilemma"), and private investigation and enforcement is ever-present. More importantly, the increase to deterrence of including sales made in the international market, but outside the United States, would likely swamp the marginal effects from the possible diminution in the use of amnesty programs. *See* John M. Connor, Global Price Fixing at 295 (2001) (estimating approximately 75 percent of annual sales of vitamins took place outside the United States) (Table 10.4). *See also* Julian L. Clarke and Simon J. Evenett, The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel, 48 Antitrust Bull. 689, 692 (2003) (exports by vitamins cartel to countries without active cartel enforcement regimes rose more in value than exports to countries with active cartel regimes, supporting hypothesis that vitamins cartel raised prices more in nations without active antitrust enforcement).

1997 and 2003, 32 of the 38 corporations fined in excess of $10 million have been non-U.S. firms (Japanese firms are the largest group by nationality); since 2001, approximately one-third of the individual defendants in international cartel cases have been from outside the United States. *See* James M. Griffin, A Summary Overview of the Antitrust Division's Criminal Enforcement Program (Aug. 12, 2003), available at http://www.usdoj.gov/atr/public/speeches/201477.htm.

Just as there is no reason to decline to prosecute non-U.S. firms because other jurisdictions might have different views of such prosecutions, similarly, there is no reason for the United States to abjure the deterrent and compensatory effects of the private damages action because other jurisdictions might not yet have well-developed private rights of action. If anything, the lack of a developed private damages action in other jurisdictions, and, even more critically, the complete lack of this remedy in less-developed countries, makes the case more compelling for not barring our courts to plaintiffs injured by a cartel operating in international markets just because the plaintiffs' purchases were made abroad.

The United States has a well-developed antitrust system available to compensate the victims of price-fixing. Courts have adopted a number of prudential doctrines to insure that these damages actions are kept within reasonable bounds, particularly doctrines relating to standing. *See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 877 (2004) (concurring opinion of Stevens, J.). Using these doctrines is the appropriate way to balance our policy of compensating victims against the potential for abuse. Completely barring these cases from U.S. courts is not the appropriate way, for it strands these plaintiffs outside the courthouse, with their injuries unrecompensed, and it leaves the profits made from these sales in the hands of the very companies who have violated United States law. Such a result is inconsistent with the important role the United States plays in antitrust enforcement against international cartels.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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