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 AMICI CURIAE LAW PROFESSORS RALF MICHAELS, HANNAH BUXBAUM and HORATIA MUIR WATT IN SUPPORT OF RESPONDENTS

Arthur R. Miller
1545 Massachusetts Ave.
Cambridge, MA 01238
Telephone: 617-495-4111

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

UNITED STATES CASES

Page

FOREIGN CASES

UNITED STATES AGREEMENTS

FOREIGN STATUTES & TREATIES

MISCELLANEOUS

INTEREST OF THE AMICI CURIAE[1]

Amici Curiae are law professors from diverse national backgrounds who teach and write extensively in the fields of international jurisdiction and conflicts of law.[2] As international law specialists, they seek to promote an approach to the regulation of international economic activity in U.S. courts that is based on jurisdictional principles recognized by international law. Amici believe that neither the interpretation of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(a) (the "FTAIA") that was endorsed by the court below, nor the contrary interpretation adopted in other courts, incorporates the full jurisdictional analysis mandated by international law. Their interest is in providing this Court with an intermediate view that accounts for international law limits on the exercise of jurisdiction

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[1] Amici Curiae file this brief with the written consents of all parties, which are submitted with this brief. This brief was authored by the amici listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No person or entity other than the Amici Curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Ralf Michaels has been a professor of law at the Duke University School of Law since 2002, and has held fellowships at the Max Planck Institute for Foreign Private Law and Private International Law in Hamburg, Germany and at Harvard Law School. *See* www.law.duke.edu/fac/Michaels/profile.html. Hannah Buxbaum has been a professor of law at the Indiana University School of Law—Bloomington since 1997 and is the author, among other articles, of *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 Yale J. of Int'l L. 219 (2001). *See* www.law.indiana.edu/directory/hbuxbaum.asp. Horatia Muir Watt has been a professor of law at the Sorbonne (University of Paris) since 1994 and is co-director of the Comparative Law Research Institute of Paris (UMR Paris I-CNRS) and Secretary General of the "Revue critique de droit international privé", the leading French law review on private international law. *See* http://panjuris.univ-paris1.fr/pages/cvmuir1.html.

without sacrificing U.S. regulatory interests when international law does not so require.

SUMMARY OF THE ARGUMENT

The questions of interpretation of the FTAIA that are presented concern the extraterritorial application of U.S. antitrust law. Neither the broad interpretation of the FTAIA that is endorsed by the court below, nor the narrow interpretation favored by petitioners, would take fair account of both the regulatory interests of the United States, on the one hand, and the need for jurisdictional restraint in response to the legitimate interests of foreign governments, on the other. Such an analysis requires two steps: establishing a jurisdictional basis for regulation, and then considering the exercise of jurisdictional restraint.

The holding of the court below that the United States has a jurisdictional basis to regulate a worldwide price-fixing agreement, even with regard to effects on markets outside the United States, is consistent with international law. Restricting that jurisdiction to effects felt in the United States might lead to underdeterrence and therefore impair the U.S. interest in protecting its markets. We therefore respectfully submit that the decision of the Court below should be affirmed to the extent that it recognizes the existence of that jurisdictional basis for regulation. However, relevant issues of jurisdictional restraint have not yet been raised by the parties and the court below has not (yet) engaged in the necessary second step. This second step, which we refer to below as a jurisdictional restraint analysis, would require attention (presumably by the Court below), with briefing directed to two kinds of factors. First, there are factors connecting the particular issue with a given country; these include the parties' nationality and the relative importance of effects of a worldwide cartel on a particular market. Second, the court below must consider whether the country in which the plaintiff suffered its injury effectively regulates cartels, and whether the exercise of U.S. jurisdiction over the plaintiff's claim would cause a conflict with that country's regulatory efforts. If an analysis of these factors leads to the conclusion that no conflict exists, then the exercise of jurisdiction is legitimate under international law. On the other hand, if there is a conflict, jurisdiction is legitimate only if the U.S. interests are stronger than those of other countries.

ARGUMENT

I. THE DECISION BELOW DOES NOT ADDRESS INTERNATIONAL LAW RELEVANT TO BOTH THE NARROW VIEW OF THE FTAIA ADVOCATED BY PETITIONERS AND THE BROAD VIEW ADVOCATED BY RESPONDENTS. ITS JURISDICTIONAL ANALYSIS IS THEREFORE INCOMPLETE.

A. Determining a court's jurisdiction to regulate worldwide cartels requires a two-step analysis.

The issue of statutory interpretation before this Court concerns the extraterritorial application of U.S. antitrust law. The effects of the vitamin cartel's price-fixing activity were felt on both U.S. and foreign markets. When courts assert jurisdiction over such cartels based on the effects felt within their countries, several countries may have entirely legitimate overlapping claims to jurisdiction. U.S. regulation of the cartel activity, in a private damages action based on such effects, therefore requires analysis of international law limits on the reach of domestic regulations. Whether at the initial stage of determining jurisdiction or at the subsequent stage of considering whether a court should abstain from exercising jurisdiction, a court analyzing the extraterritorial application of U.S. law must engage in a two-step analysis. First, it must establish a jurisdictional basis for the application of U.S. law. Determining that such a basis exists simply recognizes that the United States has a legitimate interest in regulating the international activity in question. *See* IA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 270b, p. 336 (2d ed. 2000) ("[I]n an interdependent world economy everything affects everything else. Yet no one would suggest that the Sherman Act should govern all international economic conduct. Accordingly, we must identify the ways of distinguishing those international matters affecting United States commerce sufficiently to warrant attention from our law."). Once that jurisdictional basis has been established, the courts must then go on to consider whether international law requires jurisdictional restraint. This step recognizes that "[w]henever foreign commerce or conduct is involved, a foreign government may also have an interest in the transaction . . . . Accordingly, attention must be given to whether and how to ascertain another state's interests and to defer to them . . . ." *Id.*

B. This two-step analysis is consistent with existing U.S. case law and necessary for the effective regulation of global cartels.

Both the agencies charged with enforcement of U.S. antitrust laws and courts charged with interpreting the reach of those laws view jurisdictional restraint as a principle that is critical to effective regulation of anticompetitive conduct. The International Antitrust Enforcement Guidelines ("IAEG") take note of the "broad concept of respect among co-equal sovereign nations," and outline the particular factors that the agencies weigh in their enforcement decisions when considering the competing interests of other nations. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,107, at § 3.2. Cases in this Court and in the lower courts have held that the application of U.S. antitrust law must be restrained in response to such considerations.[3] Although in *Hartford Fire*

[3] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.,* 595 F.2d 1287, 1296 (3d Cir. 1979) ("foreign policy, reciprocity, comity, and

this Court indicated that the doctrine of comity was not relevant in situations involving no "true conflict," it did not eliminate entirely the analysis of factors counseling restraint.[4]

The concept of jurisdictional restraint in the application of U.S. law has found frequent expression in the doctrine of comity. *See Hilton v. Guyot*, 159 U.S. 113, 163-66 (1895). Similarly, although using different terminology, the Restatement (Third) of Foreign Relations Law of the United States uses the notion of a "reasonableness" test to capture these international law limits on legislative jurisdiction or its exercise. *See* Restatement § 403. *See also* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 Law & Pol'y Int'l Bus. 1, 2 (1992) (casting it as an "international law presumption."). The need for jurisdictional restraint also underlies the application of *forum non conveniens* in cases – even those involving claims brought under U.S. regulatory laws – that involve significant foreign interests. As then-Chief Judge Breyer noted in dismissing a securities law claim, "The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes." *Howe v. Goldcorp Invs., Ltd.*,

limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction"); *see also* Restatement (Third) of Foreign Relations Law of the United States § 415 (1982) (the "Restatement") (applying a jurisdictional rule of reasonableness to antitrust regulation).

[4] *See Hartford Fire Ins. Co. v. California,* 509 U.S. 794, 798 (1993); *see also Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736-37 (S.D.N.Y. 1997); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 846-47 (9th Cir. 1996) (applying a jurisdictional restraint analysis post-*Hartford Fire*).

946 F.2d 944, 950 (1st Cir. 1991).[5] Such an analysis of jurisdictional restraint is consistent with the judicial role, as this court has maintained in various procedural contexts. *See* Spencer Weber Waller, *Antitrust and American Business Abroad*, § 21: 21-31 (3d ed. 1997) (referring to "decisions like *Asahi, Aerospatiale*, and the *forum non conveniens* cases, all of which permit consideration of a broader range of factors in deciding whether U.S. courts should assert personal jurisdiction, use United States discovery rules, or dismiss cases in favor of foreign tribunals") (internal references omitted).[6]

The considerations of jurisdictional restraint are particularly important in cases involving global price-fixing, a form of anti-competitive activity very different from that presented in *Hartford Fire*. Indeed, in *Hartford Fire* itself, the conclusion that there was no true conflict between U.S. and U.K. antitrust laws, and that a further analysis of jurisdictional restraints was not required, may be ascribed to the fact that the conduct in question caused no effects on reinsurance markets within the United Kingdom, and therefore did not implicate a substantial regulatory interest of

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[5] S*ee also Capital Currency Exch., N.V. v. Nat'l Westminster Bank plc*, 155 F.3d 603 (2d Cir. 1998) (dismissing an antitrust claim despite the unavailability of treble damages in the foreign court); *CSR Ltd. v. Fed. Ins. Co*., 146 F. Supp. 2d 556 (D.N.J. 2001) (allowing *forum non conveniens* in antitrust litigation even if the foreign court does not provide for treble damages, but denying request in the case because of unavailability of plaintiff's witnesses in Australia).

[6] We take no position on whether this second step should be considered as a matter of jurisdiction or of abstention. We doubt, however, that a waiver by defendants with regard to possible jurisdictional restraint would preclude the court below from engaging in such an analysis. The jurisdictional restraint analysis in this case concerns the interests of foreign nations, and private parties cannot easily waive such public concerns.

that country with regard to effects.[7] Global cartels, by contrast, present a very different question in that they create effects both inside and outside the United States. *See* Areeda & Hovenkamp, *supra*, at pp. 380-81 ("the reinsurance contracts involved in [*Hartford Fire*] affect American risks *exclusively* and thus involve a stronger American interest than, say, a foreign cartel that ships the cartelized product everywhere, including the United States.") (emphasis in original). The problem is therefore not one of mediating between different substantive policies in the country where the effects were felt and that where the conduct occurred. Rather, the problem in this case is one of mediating between various countries in which the effects were felt, but where the substantive policies on the illegality of price-fixing are similar. The possible conflict is not one of substantive policy, in other words, but of potential interference with other countries' methods of enforcement. "[T]he number of disputes over so-called extraterritorial applications of national laws, whether by the United States, the European Union, or others, has dropped dramatically. Discussions today tend to focus on better ways of coordinating these many national-level regimes . . . ." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 961 n.1 (7^{th} Cir. 2003) (Wood, J., dissenting). While such conflicts are not necessarily less controversial (as the amicus curiae briefs filed by foreign governments in this case demonstrate), they require an analysis different from that used in *Hartford Fire*.

[7] Because in our view *Hartford Fire* dealt with a situation different from the one presented in this case, this brief does not take a position on whether its definition of "true conflict" is unduly narrow.

C. Such a two-step test appears to be consistent with congressional intent as reflected in the legislative history of the FTAIA.

Although the legislative history of the FTAIA may not be conclusive, it seems to support the view that Congress had such a two-step analysis in mind. On one hand it appears that Congress did not want to deny a jurisdictional basis entirely with regard to victims who suffered injuries abroad, as long as the conduct leading to their injuries also had substantial effects on the U.S. market. *See* H.R.Rep. No. 97-686, at 10 (1982) ("This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States") (citing *Pfizer Inc. v. Gov't of India*, 434 U.S. 308 (1978)); *see also Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 352-55 (D.C. Cir. 2003) (analyzing legislative history). On the other hand, it seems quite clear from the legislative history of the FTAIA that Congress, in establishing a basis of jurisdiction (step one), did not intend to foreclose considerations of jurisdictional restraint (step two). *See* H.R.Rep. No. 97-686, p. 13 ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction") (*citing Timberlane,* 549 F.2d at 613).

D. Neither the narrow interpretation of the FTAIA advocated by petitioners nor the broad interpretation endorsed by the court below fully incorporates both steps of the jurisdictional analysis required by international law.

The narrow view of jurisdiction that petitioners advocate is incorrect in suggesting that the United States has no jurisdictional basis to regulate the activities of the vitamins cartel under step one of the analysis above. Petitioners argue that "[s]ales of goods in foreign countries that do not themselves affect U.S. commerce have no special importance to the United States, and the United States has no interest in regulating such transactions." Br. For Petitioners ("Pet. Br."), at 24. As we submit below, this view needlessly prevents application of U.S. law in cases in which that application would further important regulatory interests of the United States, and would at the same time be entirely consistent with principles of international law. The broad view, on the other hand, although correctly recognizing the existence of a jurisdictional basis to regulate, is incomplete in that it ignores jurisdictional restraints entirely and could lead in particular cases to the application of U.S. law in violation of international law. We therefore submit that the finding of the court below regarding *jurisdictional basis* should be upheld, but that provision should be made for a subsequent consideration of *jurisdictional restraints* in further proceedings below.

II. U.S. REGULATION OF THE ACTIVITY OF THE VITAMINS CARTEL, THROUGH PRIVATE ACTIONS BROUGHT BY PLAINTIFFS WHO SUFFERED INJURIES OUTSIDE THE UNITED STATES, RESTS ON A JURISDICTIONAL BASIS RECOGNIZED BY INTERNATIONAL LAW.

A. A State Has Jurisdiction to Regulate Conduct That Has Effects On Its Territory.

This Court has long recognized the effects doctrine in the context of antitrust regulation. *See Hartford Fire,* 509 U.S. at 796 ("it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"). Although other countries have historically opposed this basis for jurisdiction, it is by now so widespread that it can almost be considered a principle of customary international law. Several countries have enacted statutes explicitly providing for jurisdiction based on effects.[8]

The effects doctrine has even been accepted by countries that were formerly strictly opposed to it. The United Kingdom, for instance, had long resisted the effects doctrine. *See In re Westinghouse Elec. Corp., Uranium Contracts Litigation*, 1978 1 All E.R. 434 (H.L. 1977) (per Lord Hacking: "For many years now, the U.S. has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law."). A 1998 statute, however, now regulates agreements that "have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom." *See* United Kingdom Competition Act of 1998, § 2 (1) and (3).

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[8] *See, e.g.*, for Germany, § 130 (2) Gesetz gegen Wettbewerbsbeschränkungen (GWB) v. 26.8.1998 (BGBl I S. 2546) [Statute against non-competitive behavior], *reprinted at* http://www.bundeskartellamt.de/GWB_E.pdf (english translation); for Japan, see Shogo Itoda, "Competition Policy of Japan and its Global Implementation," in Clifford Jones & Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System*, 61, 62 (2002) ("Any activities that have adverse effects on competition in the Japanese markets are subject to the Antimonopoly Act regardless of the nationality of companies"); for Canada, *see* Ronald T. Hughes & Michele J. Lawford, *Jurisdiction Issues in Prosecutions under Section 45 of the Competition Act*, in 2000 Papers of the Canadian Bar Association Annual Fall Conference on Competition Law 479, 489 (explaining legitimate interest of jurisdiction over conspiracies that target the Canadian market); *see also* Jürgen Basedow (ed.), *Limits and Control of Competition with a View to International Harmonization*, 27-29 (2002) (summing up recent developments with respect to the effects doctrine in various countries). For an overview of the adoption of the effects doctrine abroad, *see* Ivo Schwartz & Jürgen Basedow, *Private International Law – Restrictions on Competition*, III-35 Int'l Enc. of Comp. L., at 14ff. (1995).

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Similarly, the European Union now appears to follow the effects doctrine. *See* Restatement § 415 reporter's note; *Gencor Ltd. v. Commission* (Case T-102/96, [1999] E.C.R. II-753, no. 90).

B. The Relevant Activity Is the Agreement to Fix Prices, Not the Individual Market Transactions.

What remains disputed is the proper content of the effects doctrine. As the court below correctly observed, the relevant activity for purposes of the effects doctrine is the conduct of the cartel in fixing prices, not the individual market transactions in which petitioners suffered resulting overcharges. *See Empagran,* 315 F.3d at 344. The other circuit courts that have addressed the interpretation of the FTAIA in this context agree on this point. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002); *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.,* 241 F.3d 420, 426 (5th Cir. 2001), *cert. denied, sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The United States therefore has a jurisdictional basis to regulate the price fixing conduct if it creates the requisite effect on U.S. markets, even if certain of the transactions implementing it take place outside the United States and do not, in isolation, have an effect on the U.S. market. This result is consistent with the policies behind antitrust law, which is directed at preventing anticompetitive agreements, not simply isolated instances of implementation. This view of the "effects test" is shared by other countries. *See, e.g.*, Art. 81 (a) (formerly 85) of the Treaty Establishing the European Community (Consolidated Version) O.J. C 325/33 (focusing on "agreements between undertakings . . . which directly or indirectly fix purchase or selling prices or any other trading conditions") (emphasis added). Although the European Court of Justice has held that implementation in the EU was necessary to trigger jurisdiction (Cases 89/85, 104/85, 114/85, 116-117/85 &125-129/85, A. Ahlström OY v. E.C. Commission ("WoodPulp"),

[1988] E.C.R. 5193), the jurisdiction so established is not restricted to implementing acts. The EU Commission has in fact (in a non-extraterritorial case) enforced this provision even against parties to an agreement who argued that there was no evidence of actual implementation at all. *See* Commission Decision of 10 July 1986 relating to a proceeding under Article 85 (now 81) of the EEC Treaty (IV/31.371 - Roofing felt), 1986 O.J. L/232/15, ¶ 86, upheld on appeal: Case 246/86, *SC Belasco and others v. Commission* [1989] E.C.R. 2117 ("[N]either the state of mind of the non-members when they entered into such agreements as to their intention of abiding by them, nor the fact that the non-members did not in fact observe the agreement (as some evidence suggests) would affect the Commission's finding that the agreements were made and that the non-members were parties to them.").

Indeed, in addressing the activities of a worldwide cartel, it would be inconsistent with the effects doctrine to base jurisdiction on the "transactions" with the purchasers as the relevant act; those transactions are merely the consequences of price-fixing. A focus on the individual implementing acts in different markets does not capture the global character of the cartel. If the vitamins cartel had been directed solely at the U.S. market, U.S. market participants would have been able to acquire vitamins from other markets at lower prices. A global cartel is effective only if it covers all, or at least all significant, markets. As a consequence, a country detrimentally affected by the cartel has an interest in regulating that cartel globally. *See also Empagran*, 315 F.3d at 341 (noting respondents' argument that the cartel used fixed U.S. prices "as a benchmark for the world's vitamin prices" in order to avoid arbitrage).

C. Because Jurisdiction Based on Effects is Jurisdiction to Regulate Conduct, the Place of a Specific Injury is Not Relevant for the Effects Doctrine.

Petitioners read the effects test to mean that jurisdiction over conduct is limited to the effects within the territory.[9] This is an incorrect reading of the effects doctrine. No principle exists in international law (aside from jurisdictional restraint arguments responding to the interests of other sovereigns) that limits jurisdiction, once it is established that there are effects on a particular country, to the effects in that country. Although effects are what triggers jurisdiction, it remains the anti-competitive conduct, not the effects, that is the subject of regulation.

In addition, there may be other legitimate grounds for jurisdiction. For example, when the conduct takes place within the United States, the United States has a jurisdictional basis to regulate that conduct, regardless of where the injuries occur. U.S. courts have recognized this approach in other areas of the law. *See, e.g.*, Ian Brownlie, *Principles of Public International Law*, 299 (5th ed. 2003) ("The principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition, and is but a single application of the essential territoriality of the

[9] *See* Pet. Br., 24 ("Sales of goods in foreign countries that do not themselves affect U.S. commerce have no special importance to the United States, and the United States has no interest in regulating such transactions."); *see also* Br. For the Gov't of Canada as Amicus Curiae Supporting Reversal ("Canada Br."), at 9 ("The transactions on which respondents base their claims under the Sherman Act occurred wholly outside of the territory of the United States . . . . Moreover, the transactions giving rise to respondents' claims had no effect on United States commerce. No effects on U.S. commerce or on U.S. foreign commerce . . . were alleged to have resulted from the transactions at issue here.").

sovereignty, the sum of legal competences, which a state has.”). In the context of securities regulation, see *Bersch v. Drexel Firestone, Inc*., 519 F.2d 974, 985 (2d Cir. 1975) (“We have no doubt that the activities within the United States . . . were sufficient to authorize the United States to impose a rule with respect to consequences flowing from them *wherever they might appear.*”) (emphasis added) (footnote omitted). *See also,* Restatement § 415(1).

D. Regulation only with regard to injuries suffered in the United States can lead to underregulation, which is not required by international law.

Petitioners’ view that regulation in each country must be limited to injuries suffered in that country would lead to underregulation. “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.” *Pfizer,* 434 U.S. at 315; *cf. Kruman,* 284 F.3d at 403; *Empagran,* 315 F.3d at 355-57; *Den Norske,* 241 F.3d at 435 (Higginbotham, J., dissenting).

Amici curiae for foreign governments submit that the danger of underdeterrence does not exist, because they themselves regulate price-fixing cartels heavily. *See, e.g.*, Br. of the Gov’ts of the Fed. Republic of Germany & Belgium as Amici Curiae in Support of Petitioners (“Germany & Belgium Br.”), at 13-14. To the extent that effective regulation exists in a foreign market, the risk of underdeterrence, and thus the U.S. interest in regulation, are reduced *with regard to that market*. But amici curiae overlook the fact that there are other markets, especially in developing countries, where such regulation is absent. *See, e.g.*, Germany & Belgium Br., at 17 ("The near-universal acceptance of an effects test . . . means that rarely, if ever, will a global conspiracy go unregulated and unpunished under other countries' competition laws . . . . This fact has been recognized on both sides of the Atlantic."). This failure to consider other countries is widespread: "[M]ost prior studies of the impact of these cartels have focused on the better-documented effects on wealthy, industrialized countries."[10] Yet the effects on those countries, and therefore the risk of underdeterrence, are substantial. A recent study shows that "cartels have adversely affected a not insignificant portion of the trade, and therefore the trade balance and consumption, of developing countries" (Levenstein, *supra* note 9, at 11), and finds that in 1997 alone "the total value of potentially 'cartel-affected' imports to developing countries was $51.1 billion" (*id*. at 9). It may be true that "more than 100 countries now have competition laws in one form or another" (William J. Kolasky, *The International Competition Network Guiding Principles for Merger Review* (Sept. 20, 2002), (*available at* http://www.usdoj.gov/atr/public/speeches/200234.htm). "But having a law is only the beginning. Implementing the law sensibly is what really matters." (*id*.). Indeed, "there has been relatively little activity on the part of developing country governments or developing country consumers to respond to these cartels even after they have been shown to exist," because those countries do "not have the legal, political, or bureaucratic resources necessary to prosecute international

[10] Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy* at 3 (2004), (*available at* http://www-unix.oit.umass.edu/~maggiel/ALJ.pdf, forthcoming in Antitrust Law Journal).

cartels."[11] If the effects on these countries remain unconsidered, the danger of underdeterrence is very real.

Such underregulation is not generally mandated by international law. All bases of jurisdiction rest on the legitimacy of regulation by a sovereign state when that regulation is necessary to further its interests and there is a genuine link between those interests and the regulated activity. Such regulation must be confined, under a jurisdictional restraint analysis, if it would seriously impair the interests of other countries. However, when no interests of other countries would be impaired substantially by regulation, there is no rule of international law that requires states to regulate below the level necessary to further their own interests. Whether underregulation is not an actual danger because other countries enforce effectively, or whether U.S. interests must yield to the overwhelming interests of other states, necessarily depends on a case-by-case analysis. *See infra* Part III.

It should be noted that other countries, in the public enforcement of antitrust laws, take transactions on foreign markets into account when determining applicable penalties. The European Commission, in the vitamins cartel case, has, at least officially, endorsed a strict territoriality principle: "By virtue of the principle of territoriality, Article 81 of the Treaty is limited to restrictions of competition in the common market and Article 53 EEA is limited to restrictions of competition in the EEA market. In the same way, the US antitrust authorities only exercise jurisdiction to the extent that the

[11] Levenstein & Suslow, *supra* note 9, at 3, 37; *see also* Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 Va. J. Int'l L. 911, 916 (2003) (noting that many developing countries "either do not have an antitrust law, or they have an antitrust law that is not given serious regard by their polity, or they simply do not have the resources to enforce the law.").

conduct has a direct and intended effect on US commerce." (Commission Decision of 21 November 2001 (Case COMP/E-1/37.512 *Vitamins*), 2003 O.J. L 6/1, no. 773). Although effects on the European market are necessary to trigger jurisdiction, the Commission takes extraterritorial transactions into account when calculating the level of fines to impose. It refers several times to the world-wide market (*see* no. 667) and the "effective economic capacity" of the cartel members (no. 678), which in itself depends on their worldwide business. "The Commission considers it appropriate [in determining fines] to appraise the relative importance of an undertaking in each of the vitamin product markets concerned on the basis of their respective worldwide turnover. This is supported by the fact that each cartel was global in nature, the object of each was, *inter alia*, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market." (no. 681). In other words, the European Commission likewise fears underdeterrence and combats it by taking worldwide turnover, including transactions outside the European Community, into account in determining the remedy necessary for deterrence.

III. EVEN WHEN THE EFFECTS OF A GLOBAL CARTEL ON U.S. MARKETS CREATE A JURISDICTIONAL BASIS FOR REGULATION, INTERNATIONAL LAW MAY RESTRAIN THE EXERCISE OF THAT JURISDICTION WITH REGARD TO INJURIES SUFFERED ABROAD.

A. Certain Factors may require the court to exercise jurisdictional restraint.

The establishment of a jurisdictional basis to regulate is only the first step. At the second stage of the analysis, a court must examine both the jurisdictional nexus of the case with each of the relevant countries and the particular conflict of regulatory policy presented. In the case of global hard-core price-fixing cartels, when all countries agree on their substantive illegality,[12] relevant connecting factors would include, in addition to the place of the market where plaintiff's injuries were suffered:

(1) *the nationality of the plaintiff*. This factor is relevant in that countries have a legitimate interest in providing their own nationals with adequate remedies for injuries they suffer. *See Brownlie*, *supra*, at 301-2, with references; Restatement § 403(2)(b).

(2) *the nationality and principal place of business of the defendant*. The defendant's nationality and principal place of business create national interests because a country may have a legitimate interest in protecting its own nationals from what it considers excessive claims for damages, or a legitimate interest in regulating its own corporations even with respect to conduct engaged in and effects caused abroad. *See Timberlane,* 549 F.2d at 614 n. 33 (and accompanying text); Restatement § 403(2)(b); Br. of the Gov't of Japan as Amicus Curiae in Support of Petitioners ("Japan Br."), at 9 ("This could, at the least, put Japanese firms at a serious competitive disadvantage"); Germany & Belgium Br., at 2 ("Germany also has an interest in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs . . . .").

(3) *the place of the price-fixing conduct*. "Congress did contemplate that the effects test would encompass not only conduct committed outside of the United States having effects within the United States, but also conduct committed within the United States having effects both within and

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[12] This brief is confined to situations like outright price-fixing, where no conflict as to the legality of the conduct in question exists. This brief also does not address the analysis appropriate in non-antitrust contexts such as securities law cases.

outside the United States" (*In re Microsoft Corp. Antitrust Litigation*, 127 F. Supp. 2d 702, 715 (D. Md. 2001), *cert. denied, sub nom. Dickson v. Microsoft Corp*., 123 S. Ct. 2605 (2003); *see also United Phosphorus*, Ltd. v. Angus Chem. Co., 131 F. Supp. 2d 1003, 1009 (N.D. Ill. 2001), *cert. denied*, 124 S. Ct. 533 (2003), *but cf. In re Copper Antitrust Litig.*, 117 F. Supp.2d 875, 887 (W.D. Wis. 2000) (denying jurisdiction despite conduct in the United States for "mostly foreign plaintiffs."); Restatement § 415(1).

(4) *the proportion of the cartel's global effects felt in the United States as compared to other countries. See Timberlane,* 549 F. 2d at 615; Restatement § 403(3). The interests of the United States in worldwide regulation are stronger (and those of other countries in avoiding such regulation weaker), the more the global effects are felt in U.S. markets relative to other markets.

* * *

It is important to note that merely because these connecting factors link the activity to multiple countries does not necessarily create a regulatory conflict. Rather, two additional factors are relevant, speaking not to jurisdictional nexus but to enforcement:

(5) *effective regulation in the market country sufficient to achieve deterrence of cartel activity*. Effective regulation in the market country is relevant because it may be sufficient to achieve deterrence of cartel activity with regard to injuries suffered in that country, thereby reducing the U.S. interest in regulating. (*See* IAEG, *supra*, at § 3.2 nos. (7) and (8); Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1491, Art. 6; Restatement § 403(2)(c)). Even if regulation by the countries whose governments submitted amicus briefs in this case is effective with regard to their markets, merely nominal regulation that might occur in other foreign markets would not similarly reduce the U.S. interest with regard to those markets.

(6) *the existence of conflicting regulatory antitrust enforcement mechanisms in the market country*. Conflicting antitrust mechanisms can (but do not automatically) create conflicts, because one country's enforcement mechanisms may undermine or be inconsistent with those of another country. In particular, to assume jurisdiction over the claims of foreign plaintiffs may undermine foreign leniency programs. *See infra*.

B. When no conflict with the regulatory policies of the market country exists, international law does not require the United States to restrain its jurisdiction with regard to injuries suffered in that country. Indeed, positive comity may favor the exercise of jurisdiction in such cases.

The interpretation advocated by Petitioners, and adopted by the Fifth Circuit in *Den Norske*, results in a rigid rule that a private U.S. antitrust action is unavailable if the particular market transaction that injured the plaintiff occurred in another country. This rule overshoots the mark. Although Petitioners recognize that the fundamental concern underpinning regulatory restraint is that application of U.S. law may "infring[e] the prerogatives of foreign sovereigns," (Pet. Br. at 9), the rule they propose would eliminate jurisdiction in cases in which no such infringement would occur. When no conflict exists, a jurisdictional restraint analysis is unnecessary. This is in accordance with *Hartford Fire*, in which the majority and dissenting opinions agreed that a conflict required a comity analysis (although they disagreed on whether the case in fact presented a conflict). *See also, Steele v. Bulova Watch Co.,* 344 U.S. 280, 289 (1952) (in a trademark case, where the other nation involved had withdrawn a conflicting foreign registration, stating that "[w]here, as here, there can be no interference with the sovereignty of another nation," extraterritorial application of U.S. law was appropriate).

This case involves outright price-fixing – a form of anti-competitive behavior on which the substantive policies of all countries are agreed. *See* Germany & Belgium Br., at 12 ("[H]ard-core cartels . . . are prohibited almost universally"); Canada Br., at 1-2 ("[N]aked price-fixing cartels are subject to the same criminal denunciation in Canada as in the United States"); Br. of the United Kingdom of Great Britain & N. Ireland, Ireland & the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners ("United Kingdom Br."), at 2 ("The competition laws of the United Kingdom, Ireland, the Netherlands, and the European Community . . . outlaw most horizontal cartels"). Despite the worldwide agreement on substantive anti-cartel policy, however, several of the amici curiae correctly point out that conflict may nevertheless arise from differences in methods of regulation. *See, e.g*., Germany & Belgium Br., 28-30; *see also* Areeda & Hovenkamp, *supra*, at 413 ("[E]ven where two jurisdictions would protect competition from private restraints or monopolies, they may differ greatly in their substantive provisions, procedures, and remedies."). Some countries do not recognize private actions at all. Countries that do permit private actions may have substantially different policies regarding the availability of non-compensatory damages, one-way fee shifting, and class action certification. *See* Joseph P. Griffin, *Jurisdictional and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 Geo. Mason L. Rev. 505, 516 (1998) ("These basic differences among systems are compounded by numerous aspects of American antitrust practice that are not often found outside the United States"); Buxbaum, *supra* note 1, at 251 (noting widespread foreign objection to treble damages remedies). The agencies charged with public enforcement have explicitly recognized the conflict over private actions, not just over anti-competition policy, as relevant to the jurisdictional analysis (IAEG, *supra*, at § 3.2).

However, differences in regulation methods alone do not automatically raise a conflict. Rather, the question is whether in the particular case the regulatory interest of the foreign sovereign is impaired. This is not the case, for instance, when the country on whose territory the plaintiff suffered its injuries has a policy against price-fixing, but does not enforce against cartel behavior at all. This is true for some developing countries; *see supra*. It may also be true with regard to developed countries, which might condemn a particular cartel but leave its regulation to the United States (a situation that may not be presented in the case before this Court with regard to the countries that submitted amicus briefs). If the country in which the market transaction took place has a policy against cartels but no interest in regulating the cartel activity, or does not apply its own laws to extraterritorial conduct, then permitting an action in the United States will not cause regulatory conflict with that sovereign. Moreover, the U.S. interest in preventing underdeterrence is at its strongest in such a case, in that the other country is not itself engaged in enforcement activity that would lead to deterrence of cartel behavior.

In such situations, recognized principles of positive comity may even counsel in favor of the exercise of U.S. jurisdiction. Multiplication and balkanization of antitrust enforcement raise enforcement costs, and may make enforcement in small markets prohibitively costly. For similar reasons, governmental antitrust authorities have developed, on the basis of positive comity, measures to collaborate in the enforcement of antitrust policies. When one country's authorities are in a better position to regulate, another nation's authorities may stay their proceedings pending enforcement. *See* IAEG, *supra*, at § 3.2, Illustrative Example 1. Similar coordination is possible, and may be desirable, with regard to private litigation by plaintiffs from countries that are not opposed to the assumption of jurisdiction in U.S. courts.

In pursuing such an interest in bundling litigation, the United States is not alone. This concern also informs Article 6(1) of the Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Foreign Judgments (2001 O.J. L 12/1), for instance, under which "[a] person domiciled in a Member State may also be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled." Under this provision, the English High Court recently allowed an action brought in England by a German purchaser of vitamins from a German seller in Germany, as long as there was one jurisdictional nexus to England (here: one of the defendants was an English corporation). *See* High Court of Justice, Queens Bench Division, 6 May 2003, *Provimi et al. v. Aventis S.A. et al.*, 2003 EWHC 961 (Comm), [2003] 2 All E.R. (Comm) 683. Thus, even though jurisdiction of U.S. courts here could "make[] 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" (United Kingdom Br., at 13), the English decision "may pave the way for the English courts to become the courts of choice by plaintiffs located in other European countries." Bruce A. Baird et al., *Corporate Leniency Applications*, 2004 Global Competition Review, (*available at* http://www.globalcompetitionreview.com/ara/international.cfm.)

C. Jurisdiction in the United States should be restrained when another country's regulatory interests are stronger and would be impaired by the application of U.S. law.

1. Exercise of jurisdiction with respect to injuries suffered on foreign markets, especially against corporations from those markets, can lead to conflicts with foreign countries.

A conflict can arise when the availability of a private action in the United States conflicts directly with foreign regulatory activity. For instance, countries may utilize particular regulatory programs, including leniency programs, whose operation would be undermined by the availability of private actions in the United States. *See* Canada Br., at 13 (noting that "upholding U.S. jurisdiction in this case would conflict with and impede effective administration of Canada's immunity program"); Germany & Belgium Br., United Kingdom Br.; Japan Br. This particular conflict has in fact been recognized as problematic by the U.S. enforcement agencies as well. *See* Br. for the United States as Amicus Curiae Supporting Petitioners. Similarly, awarding treble damages in actions against foreign corporations for injuries suffered in markets outside the United States that have effective regulatory systems can lead to conflict with these corporations' home countries. The blocking or clawback statutes adopted by many countries are usually aimed at protecting their own nationals from the imposition of treble damages awards.[13]

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[13] *See* Japan Br., at 8-9; Germany & Belgium Br., at 2 (identifying Germany's interest in avoiding "treble damages in private lawsuits against German companies"). *See also* Council Regulation (EC) No 2271/96 of 22 November 1996, protecting against the effects of the extra-territorial

2. When such a conflict occurs, courts may exercise jurisdiction only if the U.S. interests are stronger than those of other countries.

When such a conflict occurs, it must be resolved through an analysis of the countries' respective interests. If the exercise of jurisdiction would severely impair the interests of a foreign nation, but only marginally further U.S. interests, jurisdiction should not be exercised. This may be the case, for example, when the defendant is a foreign national, and the injury occurred in a foreign market that has effective regulation. *See* Canada Br., at 14 (noting that "[t]he conflict with Canadian antitrust regulation and the intrusion on Canadian sovereignty would perhaps be most direct in the case of cartel behavior by Canadian companies in Canada that injured Canadian nationals."). In such a case, exercising jurisdiction might risk impairment of Canada's interests in regulation. In addition, U.S. interests with regard to injuries suffered in countries in which effective regulation and

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application of legislation adopted by a third country, and actions based thereon or resulting therefrom, 1996 O.J. L-309/1 Art. 1 and 11; Council Regulation (EC) No 2238/2003 of 15 December 2003 protecting against the effects of the application of the United States Anti-Dumping Act of 1916, and actions based thereon or resulting therefrom, [2003] O.J. L-333/1, Art. 2 and 3. Likewise, the First Secretary (Trade Policy) of the British Embassy, Washington, D.C. has remarked that "The primary purpose of the [British Protection of Trade Interests Act 1980, which provides a clawback provision] is to provide protection to *British* businesses threatened with the application of the laws of a foreign country to conduct occurring outside that country. Nicholas Davidson, *U.S. Secondary Sanctions: The U.K. and EU Response*, 27 Stetson L. Rev. 1425, 1427 (1998) (emphasis added). *See* Canada Br., at 14 ("United States jurisdiction under the facts of this case would also conflict with Canadian antitrust regulation by undermining Canada's national policy of allowing civil recourse only up to the amount of actual damages plus costs"); Japan Br., at 9 ("This could, at the least, put Japanese firms at a serious competitive disadvantage.").

deterrence occur might be minimal, because such regulation greatly reduces the risk of underdeterrence.

If, on the other hand, the relevant connecting factors in a particular case point strongly toward the United States, the exercise of jurisdiction might be reasonable even when the country on whose market the injury occurred does have an interest in regulating the conduct. For instance, if the defendant is a U.S. corporation and the effects felt in the United States are significantly larger than those felt elsewhere, then the concepts of jurisdictional restraint may not counsel deference to foreign law solely because the transaction causing plaintiff's injury arose in a foreign market. *See* Areeda & Hovenkamp, *supra*, at 411 ("Often the conflict with other nations can be minimized by emphasizing relief against the American defendants rather than the foreign nationals."). In such a situation, the interest of the country in whose market the injury occurred is hardly impaired even if that country has a policy against treble damages, because the primary concern underlying such a policy is the protection of local corporations from treble damages. In addition, that country's leniency program may be less seriously impaired, because the minor benefit the defendant could hope for from the leniency program of such a country would likely be relatively unattractive when weighed against the more substantial risks faced in the United States. And, importantly, in cases such as this one that involve both U.S. and foreign defendants, the exercise of jurisdiction may be justified as against a U.S. defendant even if the jurisdictional restraint analysis were to prevent the exercise of jurisdiction as against a foreign defendant.[14]

[14] Jurisdiction of differing geographic scopes as to different defendants was recently exercised, for example, in *Schwartz v. Visa International Corp***.,** No. 822404-4, 2003 WL 1870370, at *61, *74 (Cal. Super. Ct. Apr. 7, 2003), in which a nationwide class was established under California state law as to a California-based defendant, but only a California class

CONCLUSION

The decision below should be affirmed to the extent that it holds that there is a jurisdictional basis permitting private actions in the United States to recover damages for injuries suffered abroad.

Respectfully submitted,

Arthur R. Miller
1545 Massachusetts Ave.
Cambridge, MA 01238
Telephone: 617-495-4111

J. Douglas Richards
Michael M. Buchman
Milberg Weiss Bershad
Hynes Lerach LLP
One Pennsylvania Plaza
New York, NY 10119
Telephone : 212-591-5300

Joe R. Whatley, Jr.
Whatley Drake LLC
P.O. Box 10647
Birmingham, AL 35202
Telephone : 205-328-9576

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was created as to a New York-based defendant, based on somewhat different considerations concerning the appropriate reach of California state law.

Steven A. Kanner
Much Shelist Freed Denenberg
Ament & Rubenstein, P.C.
191 North Wacker Drive
Chicago, IL 60606-1615
Telephone: 312-521-2000

Counsel for Amici Curiae