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Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?

By Donald I. Baker*

I. Introduction: Mission Statement

When Congress enacted the Sherman Act in 1890, the framers looked back 267 years to the Statute of Monopolies, which had been enacted by the English Parliament in 1623 as a model for private antitrust actions in the United States. That venerable landmark, which had long since been forgotten in England, made monopolies illegal and allowed anyone who was injured by a monopoly to recover *treble* damages and *double* costs.¹ This idea then turned up in Section 7 of the Sherman Act, but with only *single* costs.²

Suppose that the British government came back to us today and asked: “What have you learned in the 114 years of actually applying this idea that you pinched from us? We never had much experience with it ourselves. Please tell us whether you would recommend that we enact a new Statute of Monopolies of 2004, embodying your language, policies, and experiences in providing private remedies for our consumers and enterprises?”

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¹ Statute of Monopolies, 21 Jam. I, c. 3 (1623) (Eng.). The statute provided a civil remedy for victims of prohibited monopolies: “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.” *Id.* The statute arose out of the celebrated Case of Monopolies (*Darcy v. Allein*), 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602), in which the plaintiff sought to block the defendant from infringing the playing card monopoly that had been granted by Queen Elizabeth.

² Act of July 2, 1890, § 7, ch. 647, 26 Stat. 210, *superseded* by the Clayton Act, § 4, 38 Stat. 731 (1914) (now codified as 15 U.S.C. § 15), and ultimately *repealed* by 69 Stat. 283 (1955).

Putting it this way may sound cute, but the question is serious. The Sherman Act and the Clayton Act probably qualify for National Legal Landmark status, and they have been broadly successful in encouraging active private antitrust enforcement. With private enforcement of competition law having suddenly arrived as a policy goal in the U.K., the European Union ("EU"), and elsewhere, the question is far from hypothetical.³ We should look hard at what we have learned and ask ourselves how much of it we would recommend to *other* friendly governments and parliaments. Or, more provocatively, how much of it would we even recommend to *ourselves* if we were forced to start over from scratch under some sort of "zero based legal budgeting" concept.

II. Some Fundamental Questions

In responding to Her Majesty's Government, the European Commission ("EC"), or some other friendly government, we should start with the premise that the purpose of modern competition law is to protect the competitive process from cartels, unreasonable restraints, and improperly acquired or maintained monopolies; to regulate anticompetitive mergers; to promote business efficiency; and to protect consumers. Our recommended private enforcement system would therefore be evaluated in terms of how successfully it helps to implement these goals without unreasonably deterring legitimate business activities or unnecessarily burdening the judicial system. In other words, how efficient is it likely to be in helping to deter and prohibit illegal conduct, while providing a fair and efficient way of compensating victims?

With that background, let me roll out a laundry list of basic questions:

1. Should there be mandatory trebling of damages for all antitrust violations?

³ The European Commission has recently announced that it will undertake "a study of the conditions governing claims for damages in case of infringement of EC competition rules." See European Commission, EC Open procedure COMP/2003/A1/22, available at http://europa.eu.int/comm/dgs/competition/proposals2/study_tender_specifications.pdf (last visited May 4, 2004) (hereinafter "*EC Private Remedies Notice*"). In explaining it, the Commission stated that, "It is well established that private enforcement of the EC competition rules is lagging behind public enforcement. This negatively impacts on compliance incentives and ultimately the efficiency of the EC competition rules." *Id.*

2. Should there be a one-way cost rule in favor of a prevailing plaintiff? Or, a “loser pays” rule? Or, no cost shifting at all (which is the normal American cost rule)?

3. Should there be joint and several liability with no right of contribution?

4. Should private plaintiffs be able to use government decisions and judgments as *prima facie* evidence of liability?

5. Is “antitrust injury” the right test for standing?

6. Should indirect purchasers be excluded?

7. Should there be a “passing on” defense?

8. Should purchasers in overseas transactions be excluded from domestic remedies?

9. How should the inevitable conflict between private litigation and government amnesty programs be minimized?

10. Should an antitrust enforcement agency ever be able to grant an exemption against private litigation (as under Article 81(3) of the EC Treaty)?

11. Alternative forums for private antitrust claims: can arbitration of antitrust claims be made fair and effective?

Needless to say, I do not expect *everybody*—or maybe *anybody*—to agree with all my answers! This just proves that these questions are worth talking about.⁴

⁴ My questions were formulated before I had seen the *EC Private Remedies Notice*. But, it turns out that issues raised in my questions 1, 2, 4, 6, 7, and 11 are raised in that notice. See generally *id.*

III. Discussion

1. Should There be Mandatory Trebling of Damages for All Antitrust Violations?

Awarding treble damages in antitrust cases was intended by Congress in 1890 to encourage private enforcement of a new law for which no appropriation for public enforcement had been provided. Fear of non-enforcement or minimal enforcement by the Attorney General was certainly an appropriate political concern back then. It also echoes the English Parliament's apparent purpose in 1623, when it declared illegal monopolies that had been granted by Kings and Queens over the centuries and tried to encourage private challenges to the banned monopolies.⁵ In both statutes, treble damages offered a form of bounty hunting.

But, today, much has changed and hence the policy rationale for treble damages must necessarily change. Today, the United States has adequately funded and staffed federal antitrust enforcement agencies and most of the largest private antitrust damage cases are follow-on cases in the wake of the Department of Justice ("DOJ") prosecutions of major cartels. A similar pattern can be seen in countries such as Canada, with major private cases usually following on from prosecutions by reasonably funded government agencies.

The core, modern rationale for *treble* damages must be deterrence.⁶ The cost of wrongdoing must be large and clear in advances; treble damages clearly provide this where the type of wrongdoing is beyond any serious dispute (as in most criminal cartel cases). Yet, this rationale is somewhat diluted by the enormous increase in *public enforcement* against cartels. There is a lot of activity and cooperation among public agencies. Very large *finés* have been authorized by legislatures and collected by enforcers. For example, a Swiss company, Hoffman-LaRoche, has paid over \$1 billion in fines to the United States and the EC after being

⁵ Statute of Monopolies, 21 Jam. I, c. 3 (1623) (Eng.). Obviously, in those circumstances, the prospects of public enforcement against monopolies were virtually nil. The King's favorites, and the heirs of the past Kings, were the likely targets of enforcement under the statute.

⁶ See, e.g., *Empagran S.A. v. F. Hoffman La-Roche, Ltd.*, 315 F.3d 338, 355-57 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 966 (Dec. 15, 2003).

apprehended as the ringleader in the *Vitamins* cartel.⁷ On top of this, significant jail sentences for individual cartel participants have become a practical reality; hence, a critical part of the “cartel deterrence package” in the United States and may help explain why so many of the largest cartels have been led by foreign companies and individuals.⁸

Because no one thinks that price-fixing and market-allocation are socially desirable activities, awarding treble damages on top of large fines in such cases does not allow a lot of debate or dissent. Both remedies are penal and both must necessarily add something to the cartel deterrence package and encourage *enterprises* to develop and police effective compliance programs. Based on my own experience, I would ask whether the *individuals* who actually engage in cartel activities tend to worry about the *company* having to pay large fines or damages, as opposed to worrying about getting caught, fired, and sent to jail themselves.

Once you get beyond the areas that involve Sherman Act *criminal* violations,⁹ the policy case for having a *cross-the-board* penal damage remedy becomes a lot less clear. Civil cases for joint venture, distribution, or licensing violations look a lot more like ordinary tort cases. They may involve serious injuries for which the injured plaintiff(s) should be compensated. But, that is not the policy question at issue here. The question here is: why *every* successful antitrust plaintiff should receive a *bounty* for bringing the case, or why *every* losing antitrust defendant should be hit with a penalty?

There are alternatives. Actual damages could be the normal rule for antitrust violations that do not fall into the criminal category, which would tend to bring us somewhat more into line with the rest of the world and probably reduce the level of conflict discussed

⁷ Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 701 (2001); EC Commission Release, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/1_006/1_00620030110en000100089.pdf (last visited May 4, 2004).

⁸ Baker, *supra* note 7, at 701-702. I also believe that the chance to avoid the likely imposition of jail sentences increases the comparative attractiveness of the DOJ's amnesty program vis-à-vis other's enforcement programs where this risk is not present or probable; and, it helps explain why the U.S. agency has apparently been the recipient of the amnesty applications in most of the recent international cartel cases. *Id.* at 707-710, 713.

⁹ Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978).

below in connection with Question 8.¹⁰ Or, in addition, the trebling of damages could be made discretionary under clarified standards. Or, as an alternative, punitive damages could be allowed for antitrust torts in cases where recidivism is found and deterrence was a key consideration.

The reality is that many antitrust cases turn on ambiguous facts, legitimately contested legal principles, and theoretical economics. The line between winning and losing may be exceedingly fine in such cases, and yet, no matter how close the case, the winner gets a bounty and the loser gets a penalty. This seems to be wrong as a matter of policy. Over-deterrence and unpredictability are recurring problems in various antitrust areas subject to the rule of reason, and the risks of litigating close questions are simply magnified by the presence of mandatory treble damages to punish any "wrong" action. Congress has recognized this reality in a number of discrete instances involving R&D joint ventures and export companies that satisfied certain regulatory standards. In each instance, Congress has provided for single damages.¹¹

The practical effect of mandatory trebling is to tilt the settlement process in the plaintiff's favor because mandatory trebling so inflates the defendant's cost of losing and the plaintiff's value of a victory in a rule of reason case.¹² Is this favoritism something that we really would want to recommend to other nations for all kinds of competition law violations? If so, how would we explain it?

Mandatory trebling can distort judicial decision making on substantive and procedural questions because it necessarily makes judges more reluctant to impose liability in close cases and more willing to erect narrower standing rules. In *Illinois Brick Co. v. Illinois*,¹³ the Supreme Court articulated a concern about the risk of

¹⁰ Interestingly, in Canada, a private plaintiff can only recover for conduct that is criminal in nature. Competition Act, R.S.C., ch. C-34, § 36 (1985) (Can.).

¹¹ Export Trading Company Act, 15 U.S.C. § 4016(b)(1) (1982); National Cooperative Research and Production Act, 15 U.S.C. § 4304(a) (1992). In these instances, Congress also provided a "loser pays" cost rule, to make the litigation less attractive to private plaintiffs. See also Donald I. Baker, *Restating Law and Refining Remedies: The Trading Company Act, The Joint Research Act, and The Local Government Antitrust Act*, 55 ANTITRUST L.J. 499 (1986).

¹² Mandatory trebling has a similar effect on the amount of settlements and deterrence of litigation in cases following on a criminal conviction or guilty plea for price-fixing or market-allocation. However, in such cases the deterrence rationale for mandatory trebling is much clearer.

¹³ 453 U.S. 720 (1977).

double recovery, but the reality that any *double* recovery would be *six fold* recovery was, I am sure, a key reason why the majority was willing to adopt a much narrower standing rule than applies in modern tort law, a bad choice that I shall return to in discussing Question 6.¹⁴

The other side of the coin is that the availability of treble damages necessarily encourages the filing of marginal and/or innovative *antitrust* cases. In other words, treble damages encourage any imaginative lawyer to try to repackage a business tort into an “antitrust” box whenever it is plausible to do so. The famous case in *Copperweld Corp. v. Independence Tube Co.*¹⁵ was not about whether the plaintiff was to be compensated, but whether its common law damages were going to be trebled on a dubious “intra-enterprise conspiracy” theory which had cropped up over the years under Section 1 of the Sherman Act.

Mandatory trebling, despite its English origins, seems to have become a uniquely American concept. Most American state legislatures have followed Congress and adopted mandatory treble damages for violations of state antitrust laws, but no foreign parliament has taken this route.¹⁶

Reflecting on our history, I could not recommend mandatory trebling on *all antitrust violations* to a foreign parliament. The idea still has serious merit when applied to the more serious types of violations generated by cartels—whether local, national, or international. In these instances, a penal remedy is appropriate. Allowing treble damages for only a limited set of cases would

¹⁴ See generally *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁵ *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 771-74 (1984).

¹⁶ Those thinking about private remedies in foreign countries have generally been critical of mandatory trebling in the United States. See, e.g., WOUTER P.J. WILS, *THE OPTIMAL ENFORCEMENT OF EC ANTITRUST LAW: A STUDY IN LAW AND ECONOMICS*, 19 (Kluwer ed., 2002).

The trebling of damages could be looked at favourably as compensating for less than unitary probability of apprehension, but it is too crude a method to serve that function. It appears to overstate the likelihood of apprehension for concealable offenses such as price fixing, and to understate it for other easily detectable offences, including most exclusionary practices.

Id.

necessarily require the foreign parliament to draw a line that we have never attempted to draw in the United States.¹⁷

2. Should There be a One-Way Cost Rule in Favor of a Prevailing Plaintiff? Or, a Loser Pays Rule? Or, No Cost Shifting?

The Clayton Act rule on costs is unusual in that only the plaintiff may ever recover “the cost of suit” upon prevailing. The successful defendant gets nothing. This departs from the normal U.S. rule that each side must pay its own litigation costs, regardless of the result. The normal rule in the rest of the world generally requires that the loser must pay the winner’s reasonable litigation costs. The traditional English cost rule may explain why the Statute of Monopolies allowed the successful plaintiff to recover *double* costs as well as *treble* damages;¹⁸ the plaintiff was given an extra incentive to offset his risk of having to pay the defendant’s costs if he lost.

The one-way cost rule in the Clayton Act simply echoes and enhances the effect of mandatory trebling, as already discussed. It further tilts the risk evaluation and settlement process in favor of the plaintiff. Thus, in at least two instances, involving qualified export companies and joint research ventures, Congress has provided a “loser pays” rule to reduce the threat of litigation against such favored activities.¹⁹ Since the antitrust damage plaintiff is already getting the potential bounty of treble damages, the place where the one-way cost rule seems most important is in equity cases under Section 16 of the Clayton Act. The fact that such a plaintiff can recover costs is definitely an incentive to seek an injunction.

There are alternatives, as I have already noted. Most of the rest of the world uses a “loser pays” rule.²⁰ This generally tends to reduce plaintiffs’ incentive to litigate and would be a particularly

¹⁷ But see discussion above concerning Section 36 of the Canadian Competition Act, allowing private damage recovery only for criminal type violations of the Act.

¹⁸ Statute of Monopolies, 21 Jam. I, c. 3 (1623) (Eng.). See also *Case of Monopolies (Darcy v. Allein)*, 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602).

¹⁹ 15 U.S.C. § 4016(b)(4); 15 U.S.C. § 4304(a) (1992). See also Baker, *supra* note 11.

²⁰ As already noted, Congress attempted to reduce the risk of weak or frivolous litigation against export trading companies by providing a “loser pays” cost rule in lieu of the Clayton Act rule or the normal American cost rule. See 15 U.S.C. § 4001 (1982).

significant deterrent to class action plaintiffs' counsel.²¹ Another alternative is what is normally referred to as "the American rule" of letting each side bear its litigation costs, regardless of outcome.

In advising a foreign parliament, I would advise "use your own normal cost rule, unless you particularly want to encourage competition law cases generally or of a particular type." If the goal were special encouragement, I would recommend that the parliament should adopt the Clayton Act rule of one-way costs, with the case for doing so being strongest in injunctive actions.²²

It would also be possible to differentiate between different types of antitrust cases, just as I have recommended with regard to mandatory trebling of damages. In other words, a legislature could single out price-fixing, market-allocation, and other hard-core violations for one-way cost treatment, while leaving other types subject to the country's normal rule, which in most countries would be a "loser pays" rule.

3. Should There be Joint and Several Liability with No Right of Contribution?

Although Section 4 of the Clayton Act does not explicitly provide for joint and several liability among antitrust defendants,²³ this has been accepted as the rule in antitrust conspiracy cases. When the related issue of whether there was a right of contribution among antitrust co-defendants reached the Supreme Court in 1981, the Court said "no" in *Texas Industries Inc. v. Radcliff Materials Inc.*²⁴

The practical result of this holding is to give antitrust plaintiffs additional leverage, on top of treble damages, in the settlement bargaining process. Not surprisingly, and quite appropriately, any plaintiff will try to pay each defendant off against every other defendant, by accepting low offers to initial settlers, while making escalating demands against those who remain. The final defendant is likely to face a very large settlement demand,

²¹ It does not appear that exceptions to the normal "loser pays" rules have been adopted in the Canadian provinces or the U.K., when some forms of class actions have been authorized.

²² In a "loser pay" system, the Clayton Act result could be replicated by providing that the losing antitrust plaintiff need not compensate the successful defendant for its attorneys fees and litigation costs, in an injunctive action or generally.

²³ See generally 15 U.S.C. § 15.

²⁴ *Texas Indus., Inc. v. Radcliff Materials Inc.*, 451 U.S. 630 (1981).

because at trial, it could be made liable for the total damage caused by the conspiracy less settlements received by the plaintiff(s).²⁵

Whether such a result is desirable as a matter of policy is an open question. In thinking about it, it is useful to review how the Supreme Court looked at the issues in *Texas Industries*. The Court recognized that contribution could more justly allocate damages among the antitrust defendants, but it saw great practical problems in coming up with a workable allocation formula in any particular case.²⁶ Damages might be "allocated according to market shares, relative profits, sales to the particular plaintiff, [each defendant's] role in the organization and operation of the conspiracy or simply pro rata . . . on the theory that each one is equally liable for the injury caused by the collective action."²⁷ Obviously, such uncertainty would invite considerable litigation. The Court therefore suggested that any solution need be legislative.²⁸ This seems correct.

Contribution based on some simple and comprehensible formula offers a fairer system of allocating damage liability than we presently have. Accordingly, although Congress has declined to touch the issue, I would recommend to a foreign parliament that it provide for contribution based on a single variable, such as sales of the product during the conspiracy, when enacting private antitrust legislation. While a multi-factor formula might be fairer in various cases, it could be harder to administer in virtually all cases.

4. Should Private Plaintiffs be Able to Use Government Decisions and Judgments as *Prima Facie* Evidence of Liability?

Section 5(a) of the Clayton Act, enacted in 1914, simply provides that "A final judgment or decree . . . that a defendant has violated said [antitrust] laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as

²⁵ *Id.* at 639. Of course, co-defendants in a conspiracy case can resolve the issue and avoid this risk with a damage sharing agreement based upon whichever formula they agree.

²⁶ *Id.* at 637.

²⁷ *Id.*

²⁸ *Id.* at 647.

between the parties thereto”²⁹

This rule does not apply to *nolo contendere* pleas in criminal cases or consent decrees in civil cases, and thus, it generates real incentives for the target of a government investigation to settle, rather than litigate. Even where the DOJ has a sufficiently strong hand to insist on a guilty plea as a condition for settlement of a criminal case, Section 5(a) concerns will cause the target to bargain hard for a narrower charge and a shorter time period of violation because of the consequences in follow-on civil cases.

The basic Section 5(a) rule makes good sense in terms of efficiency. There are no strong policy reasons to force private victims to re-prove what the government has already established. The case for such a rule may be even stronger in a foreign country where private plaintiffs normally do not have available the full range of discovery devices available to U.S. plaintiffs.

The only basis for criticizing this type of “prima facie evidence” rule is that it increases a defendant’s risk of actually litigating a close civil case against the government. If the government wins, then the defendant(s) face follow-on suits in which the plaintiff(s) do not have to prove liability. The point is well illustrated in the recent DOJ action against Visa and MasterCard in which the United States Court of Appeals for the Second Circuit held that the network rules barring members from issuing American Express and Discover Cards violated the Sherman Act, even though Visa had won a recent Tenth Circuit decision against Discover going the other way.³⁰ Now, Visa and MasterCard face the likelihood of large treble cases from American Express and Discover—cases which they might have avoided if they had entered into consent decrees, rather than litigating against the DOJ.

That said, the “prima facie evidence” rule in Section 5(a) seems a sensible way to save judicial resources and burdens in private litigation, while maximizing the benefits of government-funded enforcement. Accordingly, it is something that we should recommend to the foreign parliament considering private antitrust litigation.³¹

²⁹ Clayton Act, 15 U.S.C. § 16 (2004).

³⁰ *United States v. Visa U.S.A., Inc.* 344 F.3d 229 (2d Cir. 2003); *SCFC, Inc. v. Visa U.S.A., Inc.* 36 F.3d 958 (10th Cir. 1994), *cert. denied*, 515 U.S. 1152 (June 19, 1995).

³¹ Section 20 of the U.K. Enterprise Act of 2002 amends the Competition Act of 1998 to provide that, in private actions, the court is bound by a determination of liability made by the Office of Fair Trading or the Competition Appeal Tribunal.

5. Is “Antitrust Injury” the Right Test for Plaintiff Standing?

To have standing, a plaintiff must be able to show “antitrust injury”—in other words, “injury of the type the antitrust laws were intended to prevent.”³² This is an important doctrine that is much needed in the United States because the lure of treble damages and one-way costs cause a plaintiff to try to turn every possible competition-related dispute into a private antitrust case.

The basic “antitrust injury” rule articulated by the Supreme Court is that the private plaintiff can only recover under the Clayton Act for economic injury that flows from a lessening of competition. This reflects the fundamental U.S. policy that, “[i]t is competition, not competitors, that the Act protects.”³³ Proving an antitrust violation is not enough unless the plaintiff’s injury flows from a lessening of competition created by the violation.

The point is clearly illustrated by the seminal and unanimous Supreme Court decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat*.³⁴ The plaintiffs, a group of bowling alley operators charged that Brunswick, the leading maker of bowling equipment, had made a series of bowling center acquisitions that were illegal under Section 7 of the Clayton Act because the “failing company” doctrine had not been properly applied, and that the plaintiffs’ centers would have been more profitable if some of the Brunswick-acquired centers had gone out of business or been acquired by “less anticompetitive” purchasers.³⁵ The Court flatly rejected this theory, noting that it was essentially the survival of the centers, in whose ever hands, that was the basis for the plaintiffs claim.³⁶ Therefore, to award damages to these plaintiffs would be “inimical to the purposes of these [antitrust] laws” because the plaintiffs’ theory was “designed to provide them with the profits they would have realized had competition been

See Enterprise Act, 2002, ch. 40 (Eng.). See also <http://www.hmso.gov.uk/acts/acts2002/200040--c.htm#20> (last visited May 4, 2004).

³² *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

³³ *Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

³⁴ 429 U.S. 477 (1977).

³⁵ *Brunswick*, 429 U.S. at 489.

³⁶ *Id.* at 487-88.

reduced” by the demise of the Brunswick-owned centers.³⁷

The rule applies equally in an injunctive action, where lesser profits in the future, rather than past losses, may be the focus. Thus, in a post-*Brunswick* merger decision, the Supreme Court made clear that a firm would only establish “antitrust injury,” and hence standing to challenge a merger of its competitors, if it could show that likely predation flowing from the merger threatened the plaintiff with destruction.³⁸ A merger might be illegal because it threatened to bring about a substantial lessening of competition, but this would not generate “antitrust injury” to the competitor-plaintiff in the normal case.

This “antitrust injury” filter is sound, and therefore, is something from the U.S. experience that a foreign parliament should consider including in private antitrust remedies legislation. It is too easy to confuse “injury to competitors” with “injury to competition,” and an explicit “antitrust injury” standard would help minimize the risk.

6. Should Indirect Purchasers be Excluded?

My firm answer is “no.” Indirect purchasers should have standing to sue, but under procedural rules that encourage or even mandate consolidation of their claims with those of direct purchasers.³⁹

As we all know, in its famous, or infamous, decision in *Illinois Brick v. Illinois* in 1977,⁴⁰ the Supreme Court held that only direct purchasers from cartel members have standing to bring federal antitrust suits for recovery of their losses under Section 4 of the Clayton Act.⁴¹ The Court was moved to interpret Section 4 in this way because of concerns about reducing the incentives of direct purchasers to sue, increased complexity of tracing causation in indirect purchaser litigation, and especially the increased risk of *double* recovery, which would become *six fold* recovery under the mandatory trebling feature of Section 4.⁴²

³⁷ *Id.* at 488.

³⁸ *See Cargill*, 479 U.S. at 104.

³⁹ *See* Donald I. Baker, *Hitting the Potholes in the Illinois Brick Road*, ANTITRUST MAG., Fall 2002, at 14.

⁴⁰ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

⁴¹ *Illinois Brick*, 453 U.S. at 736.

⁴² *See generally id.*

The decision was plainly, and not surprisingly, unpopular because it denied some clear antitrust victims access to the federal courthouse to recover for their losses against a class of wrongdoers who attracted little sympathy. It stirred up the political populists who have provided continuing support for federal antitrust legislation from the time of the Sherman Act onward. This political reaction was present in Washington, but became more prominent and effective in state capitals in some major states like California, Arizona, and Minnesota. This led to the so-called "*Illinois Brick Repealer*" statutes, under which indirect purchasers were given the right to sue for treble damages under *state law*. The message was quite simple: "If the Supreme Court bars the door to indirect purchasers under the Clayton Act, we'll just provide a better remedy under state law."

These statutes, which now number about 20, were plainly inconsistent with the "no double recoveries" policy that the Supreme Court had made the cornerstone of its *Illinois Brick* analysis. Accordingly, the United States Court of Appeals for the Ninth Circuit decided that these "*Illinois Brick Repealer*" statutes ought to be struck down under the Supremacy Clause of the Constitution as repugnant to federal law.⁴³ This was not, however, the end of the story. The DOJ, in the spirit of Reagan Administration federalism, urged the Supreme Court to hear the case and reverse the Ninth Circuit.⁴⁴ This the Supreme Court did in *California v. ARC America Corp.* in early 1989.⁴⁵ What the Supreme Court said, this time unanimously, was that there was no evidence that Congress had intended to displace state law in the antitrust area.⁴⁶ In these circumstances, the Court (in an opinion by Justice White, the author of *Illinois Brick*) found that there could not be federal preemption under the Supremacy Clause.⁴⁷

The ultimate Supremacy Clause problem is that the "no double recoveries" policy set forth in *Illinois Brick* was not a creature of Congress. It was made up by the Supreme Court as a policy interpretation of Section 4, without any evidence that Congress had intended to prevent indirect purchasers from recovering under the Clayton Act, let alone evidence that Congress had intended to prevent

⁴³ *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435 (9th Cir. 1987).

⁴⁴ Brief for the United States as Amicus Curiae, *State of California v. ARC Am. Corp.* (Nov. 1988) (No. 87-1862), available at 1988 WL 1026146.

⁴⁵ *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

⁴⁶ *ARC America*, 490 U.S. at 102.

⁴⁷ *Id.*

states from allowing indirect purchasers to sue. The “no double recoveries” policy only makes sense if the states are preempted from establishing “double recoveries” regimes. The Supreme Court was unwilling to do this in *ARC America*, and thus, it opened the door to a burgeoning cascade of state court cases under sometimes quite bizarre statutes.

It is federalism at work. It is not something that we would recommend to our friends in Ottawa, Canberra, or any other federal capital. For them, it is easy enough to say: “Don’t follow *Illinois Brick*. Rather, allow antitrust plaintiffs to sue as you would allow other tort plaintiffs to do, based on proof of reasonably foreseeable injury.” This is not just a federalism message. I would recommend that a unitary state not deny standing to indirect purchasers to seek recovery of whatever losses they can prove.

For us in the United States, we have a much more complicated mess to unwind in the wake of *Illinois Brick* and *ARC America*. We face a world of complexity and uncertainty in which opportunism abounds, judicial efficiency is minimized, and some victims go uncompensated while other plaintiffs, and their attorneys, collect windfalls. Meanwhile, defendants can be subjected to not only multiple recoveries for the same wrong, but also all the costs and uncertainty of litigating the same wrong in different courthouses under different state laws and procedures.

The situation requires a political response in the form of a legislative act that can command reasonably broad support among those interested in antitrust rights and remedies. In the United States, we need a federal “Antitrust Victims Rationalization Act” with the following main features, which I would generally be willing to recommend to a foreign parliament as a way of bringing order and fairness to the “indirect purchaser” issue:

- *Illinois Brick* would be overruled and indirect purchasers would be authorized to sue in federal courts under Section 4 of the Clayton Act, subject to realistic proof requirements. Such a result would be much more consistent with modern tort theory.
- Special case consolidation and managements rules could be enacted to assure that direct purchasers and those purchasing from them could perhaps have their competing claims adjudicated in the same court.

- Specific rules for allocating recoveries between direct purchasers and indirect purchasers probably should be enacted, to streamline what could become a very complicated process. A two-stage, interpleader-like procedure could be created: first, there would be a *total damage trial* leading to a verdict on the defendants' total liability to the plaintiff group; and, this would be followed by a second *damage-allocation trial* among the direct and indirect purchasing plaintiffs. The same fact-finder probably should decide both, and a settlement could be possible at either stage or both.
- In the United States, federal preemption of state remedies in this area would be highly desirable. Or, at the least, defendants should have the right to remove state law cases to federal court and have them consolidated with pending federal claims.⁴⁸

This package of provisions would substantially reduce the mind-numbing complexity and duplication of claims that we have today in the United States. To that extent, it is rational. Maybe it is rational enough to make progress on Capitol Hill, even in the face of loud arguments from those who profit from today's complexity. No one, including consumers and enterprises, is well served by a system that maximizes litigation costs and legal uncertainties. As far as I know, no foreign country or court has adopted the *Illinois Brick* rule. So, they are able to start with a cleaner slate than we have. But, I would still recommend that any foreign parliament consider enacting some case consolidation and damage allocation rules along the lines that I have suggested.

7. Should There be a "Passing On" Defense?

It was almost surely Justice White's search for symmetry that produced the *Illinois Brick* result, as Justice Blackmun lamented in

⁴⁸ It would be necessary to preempt state laws that were not based on normal damage principles, such as the "return of full consideration" statutes (e.g., Kansas, KAN. STAT. ANN. § 50-115 (2004)) and the "per consumer penalty" statutes (e.g., Massachusetts, MASS. GEN. LAWS ch. 93A (2004)). See *Ciardi v. F. Hoffmann-LaRoche Ltd.*, 436 Mass. 53, 762 N.E.2d 303 (2002). These statutes no doubt seek to respond, but in arbitrary ways, to the difficulty noted in *Illinois Brick*, of actually proving damages in indirect purchaser cases.

his dissent.⁴⁹ In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the Supreme Court had recently held, in an opinion also written by Justice White, that there was no “passing on” defense—i.e., the defendant could not defeat the plaintiff’s claim by showing that the plaintiff had passed on the full amount of the overcharge to its customers and hence had suffered no “injury to its business or property” under Section 4 of the Clayton Act.⁵⁰ The Court noted that allowing such a defense would complicate damage cases substantially and increase the plaintiffs’ burden while reducing their incentives to sue.⁵¹

Hanover Shoe always seemed to be a sensible result. Section 4 is concerned both about compensating victims and deterring violations, as reflected in trebling damages, and allowing such a defense would clearly weaken the deterrence aspect of the statute. The issue is wonderfully illustrated by the *Electrical Equipment Cases* in the 1960s.⁵² The defendant manufacturers had clearly overcharged the utilities for turbine generators, transformers, and switchgear, but the utilities had included these overpriced purchases in their regulated rate bases, thus ultimately passing the costs on to consumers. As between the price-fixing manufacturers and the perhaps complacent utilities, the latter were still the more deserving. If the utilities’ claims were defeated on “passing on” grounds, the manufacturers would get a windfall of extra conspiracy-generated revenues. If the utility plaintiffs were allowed to recover, they might be forced by regulators to use at least some of the recovery to reduce their rate bases and hence benefit consumers.

Finally, the risk of an “initial purchaser windfall” from a “no passing on rule” would be largely eliminated by adoption of the

⁴⁹ The *Illinois Brick* plaintiffs, Justice Blackmun wrote in his dissent, “are the victims of an unhappy chronology. If *Hanover Shoe* . . . had not preceded this case, and were it not ‘on the books’ I am positive that this court would be affirming, perhaps unanimously, the judgment of the Court of Appeals.” 431 U.S. at 767. He added that the Court’s effort to “be ‘consistent’ in its application of pass on . . . [is] for me a wooden approach, and is entirely inadequate when considered in the light of the objectives of the Sherman Act.” *Id.* at 766.

⁵⁰ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

⁵¹ *Hanover Shoe*, 392 U.S. at 493-94.

⁵² Between 1961 and 1964, 1,919 separate antitrust cases were filed in 36 districts against General Electric, Westinghouse, and other manufacturers of electrical equipment in the wake of a series of high profile Justice Department price-fixing and bid-rigging indictments. See generally Neal & Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964).

consolidated approach to direct and indirect purchaser claims that I recommended in responding to Question 6. The total overcharge would be initially determined in the trial against the price-fixing sellers, and then the “passing on” issues would be decided in the context of a damage allocation proceeding involving the initial purchasers and various subsequent purchasers in the chain.

8. Should Purchasers in Overseas Transactions be Excluded from Domestic Remedies?

The answer here, I think should be “yes” because it does not make good sense or good international law for a country to impose its domestic law on foreign torts that arise out of foreign transactions. This is an important and politically sensitive subject, but, so far as the United States is concerned, the Supreme Court will answer the question this term in *F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*⁵³

The question is broader than a confusing 1982 statute.⁵⁴ It concerns what the international lawyers refer to as *prescriptive jurisdiction*—jurisdiction to establish laws over individuals, transactions, and disputes.⁵⁵ Thus I would ask: would we Americans recommend that any foreign sovereign that suffers adverse competitive effects in *its territory* should offer a damage remedy under *its law* for all those injured *anywhere in the world* without regard to the situs of a plaintiff’s injury? And, perhaps it could then add a *bounty* to encourage foreign victims to bring their cases in the courts of the legislating sovereign?

International law and comity would suggest that the answer to these questions is a clear “no.” A foreign parliament should be able to set the rules for recovery by its local consumers from domestic sellers for competition law violations, just as it enacts the property, contract, and tort rules governing these same transactions. Establishing the legal rules governing transactions and disputes among its nationals

⁵³ No. 03-724, *cert. granted*, 124 S. Ct. 966 (2003).

⁵⁴ See Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1982).

⁵⁵ We have just written an *amicus curiae* brief for three foreign governments concerned about extraterritorial exercises and extraterritorial jurisdiction in another pending Supreme Court case potentially involving some related issues. The brief questions whether and to what extent the United States can exercise prescriptive jurisdiction (i.e., legislate substantive law) with respect to torts committed abroad by foreigners in violation of “the law of nations.” See Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain, and Northern Ireland as Amici Curiae in Support of the Petitioners, *Sosa v. Alvarez Machain* (Jan. 23, 2004) (No. 03-339).

and residents is an important aspect of sovereignty.

The issue today is focused on the United States because no other nation has adopted the bounty system of treble damages or other special rules strongly favoring private antitrust plaintiffs. The parliaments of other leading countries, including the United Kingdom and some other E.U. Member States, have all recently enacted statutes allowing private actions for competition law violations, but have chosen to do so on a more limited basis (normally allowing only single damages and having a “loser pays” cost rule). These are legislative judgments made by democratic governments after considering the issues.

The much more generous U.S. private claim system clearly makes Clayton Act remedies in U.S. courts the remedy of choice without regard to where the plaintiff’s injuries actually occurred, so long as there is *in personam* jurisdiction over a defendant. The celebrated English jurist, Lord Denning, who was my hero when I studied law in England in the 1950s, incitefully 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.”⁵⁶ But, the thought is not confined to foreign judges and scholars. The United States Court of Appeals for the Fifth Circuit said very much the same thing more recently in relation to antitrust jurisdiction:

[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.⁵⁷

Enlarging the prescriptive jurisdiction of the United States to provide a U.S. antitrust remedy to foreign buyers with no cognizable U.S. nexus will clearly raise conflicts with foreign courts and enforcers.⁵⁸ This includes interference with the sovereignty to

⁵⁶ *Smith Kline & French Labs Ltd. v. Bloch*, 1 W.L.R. 730 (C.A. 1982).

⁵⁷ *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).

⁵⁸ *See, e.g., Rio Tinto Zinc. Corp. v. Westinghouse*, W.L.R. 81 (H.L. 1977) (discovery denied); *British Airways v. Laker Airways*, W.L.R. 544, 588-91 (C.A. 1983) (injunction against U.S. suit); U.K. Protection of Trading Interests Act, 1980, ch. 11 (Eng.) (administrative action authorized to block foreign litigation).

provide remedies that may be more limited than U.S. remedies⁵⁹ and a weakening of their amnesty programs, which I shall discuss shortly. This no doubt explains why five E.U. Member States have filed *amicus curiae* briefs opposing U.S. jurisdiction in *Empagran*.⁶⁰

The argument for expansive U.S. jurisdiction essentially rests on treble damages and the other plaintiff-favoring U.S. rules. It simply boils down to arguing that, because U.S. rules are more penal, deterrence will be increased by allowing suits in U.S. courts by victims, wherever located, of a cartel that injures U.S.-based victims, too.⁶¹ This is not necessarily correct, because of the potential impact on amnesty programs. There are two related issues that go into the deterrence equation—the perceived likelihood of being caught and likely effect if you are caught. Amnesty programs bear on the former, while the penal remedies of jail and treble damages relate to the latter. Even if there were no effect on amnesty, offering foreign purchasers from foreign sellers the unique American remedy of treble damages would be an exercise of judicial imperialism likely to interfere with the legislative sovereignty of other nations.

Such expansive prescriptive jurisdiction is certainly not something that I would recommend a foreign government adopt, but the issue is probably fairly theoretical unless the foreign government is prepared to adopt a penal damages system as well.

9. How Should the Inevitable Conflict Between Private Antitrust Litigation and Governmental Amnesty Programs be Minimized?

Price-fixing, market-allocation, and other cartel activities can sometimes generate enormous profits. Those who are tempted to participate have every incentive to keep their activities secret from their supervisors and/or any broader community. They know that their activities are illegal and they generally keep them secret internally because they want to claim that any “better results” flow from entrepreneurial skill rather than collusion. These realities have

⁵⁹ See Kleus-Heine Lehne, *Hands Off Our Torts*, WALL ST. J., Nov. 18, 2003, at A20.

⁶⁰ Germany and Belgium filed *amicus* briefs in addition to the previously noted brief of the United Kingdom, Ireland, and the Netherlands. See Brief of the Governments of the Federal Republic of Germany and Belgium as *Amici Curiae*, *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.* (2004) (No. 03-724), available at 2004 WL 226388.

⁶¹ See, e.g., *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 315 F.3d 338, 355-57 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 966 (2003).

made the detection of cartels such a difficult exercise for government enforcers everywhere. And, their difficulties have been compounded when the cartel operates on an international basis because critical evidence and key participants are likely to be scattered around the globe.⁶² During the 1990's, the situation has changed with the adoption of new amnesty and leniency programs, which vastly increased the *incentives* for a cartel participant to come forward and reveal a cartel to the governmental enforcers.⁶³ The modern programs have been pioneered by the DOJ,⁶⁴ but the EC and other leading enforcers have adopted leniency/amnesty programs as well.⁶⁵

Typically, the leniency applicant and its employees can receive total or substantial immunity from criminal liability and government-imposed antitrust penalties if it is the first to come forward with credible 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. The Chairman of the U.K. Office of Fair Trading, John Vickers, has explained that the "carrot of leniency" creates "a potential competition—a race to the competition authorities—for those contemplating the illegally agreed suspension of price competition."⁶⁶ The program offered by the DOJ is made stronger and more effective because the Department, unlike most of its foreign counterparts, can offer culpable employees amnesty from criminal

⁶² See *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664 (9th Cir. 2002), *cert. granted*, 124 S. Ct. 531 (2003).

⁶³ 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) [hereinafter *Criminal Law Remedies*].

⁶⁴ See Scott D. Hammond, *Lessons Common to Detecting and Deterring Cartel Activity* (Sept. 12, 2000) (Remarks at the Third Nordic Competition Policy Conference), available at <http://www.usdoj.gov/atr/public/speeches/6487.htm> (last visited May 4, 2004).

⁶⁵ *Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases*, O.J. (C 45), at 3-5 (Feb. 19, 2002), available at <http://europa.eu.int/comm/competition/antitrust/leniency> (last visited May 4, 2004). See also John Vickers, Chairman of the U.K. Office of Fair Trading, *Competition Economics* (Dec. 4, 2003) (Royal Economic Society Annual Public Lecture), available at <http://www.oft.gov.uk/News/Speeches+and+articles/2003/spe05-03.htm> (last visited May 4, 2004); Cartel Immunity Program, Ireland Competition Authority (Dec. 2001), available at <http://www.tca.ie> (last visited May 4, 2004).

⁶⁶ See Vickers, *supra* note 65.

prosecution that would be likely to send them to jail.⁶⁷

There is widespread concurrence that leniency programs have been “spectacularly successful,” in the words of Irish Competition Authority member, Terry Calvani,⁶⁸ and have “proved a formidable tool for encouraging firms to cooperate” according to European Competition Commissioner, Mario Monti.⁶⁹ Amnesty applications have apparently triggered a majority of cartel prosecutions in the United States.⁷⁰ International convergence on amnesty programs has been encouraged because it is “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.”⁷¹

Amnesty and leniency programs are all based on creating sufficient *positive incentives* for the amnesty/leniency applicant to come forward and expose the cartel. Under the present systems, a government, or several governments, may offer an amnesty applicant a complete pass on exposure to government-imposed liabilities, but there is no favorable treatment with respect to the private litigation that is sure to ensue once the government(s) prosecutes the amnesty applicant’s competitors. Thus the potential amnesty applicant must weigh (1) the advantages of amnesty (including no or lower corporate fine and individual immunity) against (2) the prospects that the cartel, if abandoned, will remain undetected and (3) the potential damage exposure that it will surely face if it seeks amnesty.⁷²

⁶⁷ See Baker, *Criminal Law Remedies*, *supra* note 63, at 709.

⁶⁸ Terry Calvani, *Enforcement of Cartel Law in Ireland*, 2003 Fordham Corporate Law Institute (Barry Hawk ed., forthcoming 2004), available at http://www.tca.ie/speeches/tc_law_soc.pdf (last visited May 4, 2004).

⁶⁹ See Mario Monti, *The Fight Against Cartels*, Speech presented at the European Marketing Academy (Sept. 11, 2002), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gfsdoc=SPEECH/02/384/0/AGED/g=ENtype=pdf (last visited May 4, 2004).

⁷⁰ See Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 AM. CRIM. L. REV. 241, 270-71 (2003).

⁷¹ Deputy Assistant Attorney General James M. Griffin, *The Modern Leniency Program After Ten Years, 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> (last visited May 4, 2004).

⁷² Foreign competition lawyers confirm this point: 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

Private damage exposure is definitely part of the amnesty equation. The point was graphically underscored in 2003, when the Japanese trading company, Mitsui, was held liable by a jury in the District of Columbia for \$147 million in treble damages as a result of a cartel that its U.S. subsidiary had exposed to the government and received amnesty.⁷³

The various government enforcers are clearly concerned about potential treble damage exposure weakening the incentives for parties to seek amnesty and expose cartels. This concern is reflected in at least two very recent developments:

- The DOJ has been supporting legislation now passed by the Senate that would make the amnesty applicant only liable for actual damage claims, rather than treble damages.⁷⁴
- The Governments of the United Kingdom, Netherlands, Ireland, Belgium, and Germany have filed *amicus curiae* briefs in *Empagran*, arguing that imposing U.S. treble damages on foreign transactions would weaken *their* amnesty/leniency programs.⁷⁵ The Solicitor General strongly supported their argument in the Government's *amicus curiae* brief in this case.⁷⁶

These actions reflect appropriate concerns by government enforcers. It is bizarre to provide a *penal* system of damage recovery against a party that has *voluntarily* done what the government is encouraging it to do, namely to come forward and expose the cartel on which the suit is based. This penal remedy clearly weakens the incentives for

Carstensen & Shaun Goodman, *Cartel Regulation (United Kingdom)*, ch. 22, 100-01 (Global Comp. Rev. eds., 2001).

⁷³ *Mitsui, others hit with \$147 million antitrust verdict*, FORBES.COM (June 13, 2003), available at http://forbesbest.com/home_asia/newswire/2003/06/13/rtr9999888.html (last visited May 5, 2004).

⁷⁴ See The Standards Development Organization Advancement Act, H.R. 1086, 108th Cong. (2003).

⁷⁵ See 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, *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.* (Feb. 3, 2004) (No. 03-724), available at 2004 WL 226597.

⁷⁶ See Brief of the United States as Amicus Curiae in Support of Petitioners, *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.* (Feb. 3, 2004) (No. 03-724), available at 2004 WL 234125.

the whistleblower to come forward. Likewise expanding the whistleblower's penal exposure globally (as the *Empagran* plaintiffs seek) will reduce its incentive to go to seek amnesty from any foreign agency where the cartel may have some impact in the United States. The disincentive may be strongest vis-à-vis a foreign agency that cannot offer the carrot of immunity for individuals, because its law does not punish individuals.⁷⁷

The global impact of U.S. treble damage litigation is particularly clear in the amnesty area. The EC has abandoned its traditional requirement that a leniency/amnesty applicant make a detailed *written* submission because such submissions have been held to be discoverable in U.S. litigation.⁷⁸ To encourage leniency/amnesty applicants to continue to come forward, the Commission now authorizes detailed *oral* submissions, which are generally taped.⁷⁹

My conclusion is that all enforcers' amnesty programs are definitely weakened by the likelihood that the amnesty applicant faces treble damage exposure in the United States. How much a particular program is weakened is likely to depend on particular circumstances, including the potential amnesty applicant's nexus to the United States and its estimate of its likely damage exposure in the United States. In sum, this is just another instance where mandatory trebling has at least some perverse side effect. This could be largely avoided. As long as there is joint and several liability, granting the amnesty applicant single damage exposure would not leave the cartel victims uncompensated. But, it would encourage plaintiffs to pursue the other cartel participants that they could recover treble damages against.

Thus, my recommendation to a foreign government would be that the whistleblower be offered less civil exposure than other cartel participants. In a joint and several liability system, the whistleblower

⁷⁷ 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*, at 4, Lecture at the XI International Cartel Conference of the Federal Cartel Office, Bonn, Germany (June 19, 2003).

⁷⁸ *In re Vitamins Antitrust Litig.*, 2000-2001 Trade Cases (CCH) 72,914 (D.D.C. 2000), where the EC and the Canadian government had participated as *amici* opposing U.S. discovery of an amnesty before their agencies.

⁷⁹ The tapes are generally transcribed, but control of the transcriptions is retained by the Commission staff.

could never be offered civil amnesty based on an enforcement agency determination that (i) the whistleblower was the principle source of the government's case, and (ii) other co-conspirators were available to compensate cartel victims.

10. Should an Antitrust Enforcement Agency Ever be Able to Grant an Exemption Against Private Litigation as the European Commission can do Under Article 81(3) of the EC Treaty?

This is an important subject that is almost never discussed, at least in the United States. There are at least two circumstances where a government might have an interest in providing immunity against private damage litigation.⁸⁰ The first, as just discussed, is the amnesty situation where the potential defendant has come forward and revealed serious wrongdoing by others. The second is where the law is unclear and potentially worthwhile private activity is apparently being deterred by legal uncertainty and the threat of private actions. The first just raises again the number of amnesty policy question, but the second raises a broader set of issues.

Legal uncertainty can become an important consideration in various joint venture contexts, especially where substantial commercial risks and/or very large capital demands are faced at the initial stage of a project.⁸¹ The United States has a process of advisory opinions that can be sought from the DOJ or the Federal Trade Commission. These agencies issue various forms of "guidelines" designed to provide guidance, but these guidelines give no legal protection against private litigation.

By contrast, in Europe, the EC and the enforcement agencies of Member States can grant exemptions under Article 81(3). They can exempt conduct on broader public interest grounds or because it is not likely to produce an adverse effect. These exemptions can be granted on an *individual application* limited to a certain transaction or contractual provision, or on a *bloc exemption* decision covering types of conduct or arrangements. Many EU Member States have had

⁸⁰ When this power is exercised in Europe under Article 81(3) of the EC Treaty, the Commission's action is primarily concerned with the *validity* of the relevant provision. In other words, if the provision violates Article 81(1) and is not immunized under Article 81(3), then it is void and unenforceable as between the parties. Damage cases in Europe are more likely to arise out of cartel activities, where there is no Article 81 issue.

⁸¹ See Donald I. Baker, *Compulsory Access to Network Joint Ventures: Rules or Roulette?*, 1993 UTAH L. REV. 999 (1993).

similar exemption procedures under their own laws.

This is an idea that is worthy of consideration by any parliament designing a system of private competition law remedies because it does offer an avenue to increased certainty for those engaged in entrepreneurial ideas. But there are also clear downsides as well because this responsibility could divert agency attention and resources from higher priorities and subject it to additional political pressures.

Why there is no such authority in the United States probably reflects the American tradition of “you can’t trust the Government.” It may also reflect a reality that the U.S. antitrust agencies would not want this kind of authority, and the political pressures that might go with it, to grant exemptions in particular cases or areas. The result is that, in the United States, the granting of any exemption, small or large, is almost always a matter for Congress, whose efforts over the years have produced a truly random collection of statutory exemptions.

The one U.S. exception, where the DOJ was given the power to exempt, has not been a particularly happy one. In 1970, Congress enacted the Newspaper Preservation Act in order to preserve alternative news and editorial voices in a given local area.⁸² As part of this legislation, the Attorney General was authorized to immunize and approve so-called “joint operating agreements” under which competing local newspapers could agree on prices to be charged advertisers and subscribers.⁸³ This unusual provision represents a balance of the “pro-consumer direction of the antitrust laws and a congressional desire . . . that diverse editorial voices be preserved despite the unique economics of the newspaper industry.”⁸⁴ The resulting process involved contentious investigations and hearings that took a lot of Antitrust Division resources, but ultimately the applications were approved by the Attorney General, regardless of what the Antitrust Division or an administrative law judge had recommended. Judicial review then ensued, producing some quite complex cases.⁸⁵ Needless to say, the newspaper industry is

⁸² Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (2004).

⁸³ 15 U.S.C. § 1803(b).

⁸⁴ Mich. Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C. Cir. 1988), *aff’d without opinion by equally divided Court*, 493 U.S. 38 (1989).

⁸⁵ For an extreme example, *see id.* In addition to the opinions cited there, the case generated a long district court opinion, Mich. Citizens for an Indep. Press v. Thornburgh, 965 F. Supp. 1216 (D.D.C. 1988), and six dissents from the denial of

particularly sensitive politically, and Attorney General decisions often seemed more driven by politics than careful antitrust analysis.⁸⁶ The results of this type of an exemption-granting process might have been better in a less sensitive area.

My own sense is that legal certainty, or less legal uncertainty, is a desirable goal, and therefore, I can see merit in granting some power to an antitrust enforcement agency to make binding rulings that could not be overturned in private parties in the transaction. On the other hand, having such powers may impose greater political pressures on the agency and divert valuable agency resources from other enforcement duties, as we have seen with the Newspaper Preservation Act experience in the United States.

Therefore, I would not recommend that a foreign parliament grant such power to an enforcement agency unless it was fairly strong and independent (as the EC clearly is). To provide reassurance about both the process and the results, I would recommend that any such process be highly transparent and open to objectors. In other words, it would be like an administrative version of a declaratory judgment proceeding in which all interested parties could intervene, participate, and appeal. But the enforcement agency, rather than a random court, would be the decision-maker.

11. Alternative Fora for Private Antitrust Claims: Can Arbitration of Antitrust Claims be Made Fair and Effective?

In *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*,⁸⁷ the Supreme Court decided for the first time that Section 4 of the Clayton Act did not guarantee an antitrust plaintiff access to a U.S. district court.⁸⁸ Rather, a Puerto Rican car dealer plaintiff could be compelled to take its antitrust case to arbitration in Switzerland because the plaintiff and the defendant manufacturer were bound by a contract which contained a general arbitration clause calling for arbitration in Switzerland.⁸⁹ The Court reasoned that a party that had

rehearing *en banc* by the United States Court of Appeals for the Sixth Circuit, 868 F.2d 1300.

⁸⁶ See Brian Gruley, *Paper Losses: A Modern Epic of Greed and Betrayal at America's Two Largest Newspaper Companies* (1993) (providing a detailed critique of the hearing and approval by Attorney General Meese that was subject to such extensive judicial review in *Michigan Citizens*).

⁸⁷ 473 U.S. 614 (1985).

⁸⁸ *Mitsubishi Motors*, 473 U.S. at 637-38.

⁸⁹ *Id.* at 617-20.

agreed to arbitrate contract-related disputes ought to be held to its word, even though such a dispute involved a federal statutory claim.⁹⁰ Since then, arbitration of antitrust claims has become increasingly common, and so have disputes over exactly what claims have to be arbitrated and what may be left in the district court.⁹¹

It makes considerable sense to arbitrate antitrust disputes that are solely between parties to a contract. These may be disputes arising out of a license or other vertical arrangement, as in *Mitsubishi Motors*, or a dispute among joint venture partners. A cheaper and more expeditious process can be achieved with adequate planning and sometimes a more expert arbitrator, or panel, provided.

However, serious problems arise when the dispute seriously involves a party or parties that are not parties to the contract containing the arbitration clause. Thus, for example, assume that the plaintiff has bought price-fixed goods from one member of a cartel under contracts that contain a general arbitration clause. The plaintiff's claim against the seller is clearly *related to* the purchase agreements, but does not *arise under* the agreements; rather, it is based on the seller's horizontal agreements with its competitors.⁹² If the plaintiff is compelled to arbitrate against the seller, it could still proceed separately, under joint and several liability, against the seller's co-conspirators in district court, but that is hardly a very efficient process.

The other practical problem concerns discovery. While discovery under the Federal Rules of Civil Procedure can be excessive and even abusive, discovery in arbitration can sometimes be the opposite. Some reasonable discovery is generally necessary in antitrust disputes, because facts are so often critical to determining liability and/or damages.

To summarize, I would not recommend to a friendly foreign government that it not go back to the *pre-Mitsubishi Motors* U.S. rule

⁹⁰ *Id.* at 637. The practical implications of this course are explored in Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395 (1993).

⁹¹ See, e.g., *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1517 (10th Cir. 1995) (stating that the plaintiff "may litigate [in District Court] claims not related to the licensing contract just as anyone else with standing may").

⁹² See *Allied Signal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999) (finding that because defendants "could fully comply with the [agreement] and still cause [plaintiff] antitrust injury by charging uncompetitive prices . . . [plaintiff's] antitrust claims do not arise under the [agreement] and hence are not subject to arbitration").

that antitrust claims were never arbitrable.⁹³ Rather, I would recommend that arbitration could be required by statute where (1) the dispute is principally among parties who have agreed to arbitrate their disputes with each other, (2) adequate discovery is provided for under the arbitration clause in the contract or the relevant arbitration rules, and (3) the arbitration panel meets some minimum threshold of qualification and independence.

IV. Conclusion

The enactment of the Sherman Act was an important political event in 1890 as was the enactment of the Clayton Act twenty-four years later. The treble damage remedy enacted in 1890 and the private equitable remedies added in 1914 were probably less noticed than the substantive rules that were being touted to the public, but they were very much part of the *antitrust packages* that were being touted by political leaders. The perceived ineffectiveness of the Sherman Act was part of the 1912 presidential campaign and led to the more detailed provisions of the Clayton Act in 1914.

This political history may help explain why and how the United States has ended up with a private antitrust system that is significantly tilted in the plaintiffs' favor. Trusts, monopolists, and cartels were generators of moral outrage, and it seemed entirely appropriate to treat them to a fairly harsh system, with criminal liability or treble damages as central features.

There is an alternative that may well seem politically rational in other countries, which is to treat antitrust violators as *ordinary tortfeasors*—defendants who have to compensate any victim of a legally cognizable injury to the extent of the plaintiff's proven loss in court.

Accordingly, were we to go to the Parliament in London, Berlin, Ottawa, or Tokyo and discuss the eleven questions that I have just raised, we would likely be met with a more fundamental set of questions: "why is competition law so different from everything else? Why should victims get special bounties and advantages that we do not offer victims of securities frauds or commercial misrepresentations? Are competition law violators really worse than these other culprits?"

The glib answer from the American would be, "It's our history, stupid." But, that is really not a very good answer, however

⁹³ See *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

accurate it might be. Rather, we would have to try to explain why a more plaintiff-leaning model of private enforcement, based on U.S. experience, would be a fairer and more efficient way of compensating cartel and monopolization victims while enhancing deterrence. I very much doubt whether a thoughtful American, in good conscience, could recommend *wholesale adoption* of the U.S. private antitrust remedies to a friendly foreign Parliament. However, the United States has vastly more experience in this area than any foreign country and *some* of our experiences and ideas are worthy of thoughtful study by others.