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Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market¹

By Clifford A. Jones²

I. The Domestic Market: The Sherman Act and the Early History of Private Enforcement

At the time of its adoption, the Sherman Anti-Trust Act of 1890 (“Sherman Act”) was unique in its scope and remedies even though it was said to represent a federal declaration of illegality of practices that the common law of England and the American states “had always prohibited.”³ The American states had a history of enforcing antitrust laws even prior to the adoption of the Sherman

¹ Portions of this paper draw on the following works: CLIFFORD A. JONES, *PRIVATE ENFORCEMENT OF COMPETITION LAW IN THE EU, UK, AND USA* (1999) [hereinafter *PRIVATE ENFORCEMENT OF COMP. LAW*]; CLIFFORD A. JONES, *Trilateralism in Private Antitrust Enforcement: Japan, the USA, and the European Union, in COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM* 211-224 (C.A. Jones & M. Matsushita eds., 2002) [hereinafter *Trilateralism in Private Antitrust Enforcement*]; CLIFFORD A. JONES, *A New Dawn for Private Competition Law Remedies in Europe? Reflections from the USA, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW* 95-108 (C. Ehlermann & I. Atanasiu eds., 2003) [hereinafter *New Dawn for Private Comp. Law Remedies*].

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³ W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 18, 98 (1965). Senator J. Sherman, in a speech to the U.S. Senate, 21 CONG. REC. 3: 2456-7 (Mar. 21, 1890), stated that “[i]t does not announce a new principle of law, but applies old and well recognized principles of the common law. . . .” Ironically, Senator Sherman’s view of English common law in this area seems to have been mistaken. Letwin, *supra*, at 51-52.

Act,⁴ and the now internationally famous treble damage remedy⁵ ironically was modeled⁶ on the (imported) treble damage provisions of the English Statute of Monopolies of 1623. The treble damages and attorney fee provisions were inserted in the Sherman Act to encourage private plaintiffs to bring suit, given the likely difficulties of proof and the small size of any one trader's damages.⁷

Although the American treble damage remedy is perceived by some as a tool to punish, the better view is that its purposes are compensatory⁸ or serve the dual goals of deterrence and compensation.⁹ The perception that the new antitrust legislation was vigorously enforced from the outset derives from a few high-profile cases.¹⁰ In fact, the U.S. Department of Justice ("DOJ") did not receive any funds specifically appropriated to enforce the Sherman Act until 1903, some 13 years after its enactment, and in the same period, only 23 federal government actions (an average of 1.77 per year) were brought.¹¹

In the first 50 years of the Sherman Act, only 175 private actions (an average of 3.5 per year) were brought and only 13 were recorded as successful.¹² This number accelerated greatly from 1941

⁴ H.B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 155 (1954).

⁵ 15 U.S.C. § 15 (2004).

⁶ THORELLI, *supra* note 4, at 213. Even more ironically, some 65 different English enactments once provided for double, treble, or quadruple damages. *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 580-81 (1996).

⁷ PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1, at 80.

⁸ L. Vold, *Are Threefold Damages Under The Antitrust Act Penal Or Compensatory?*, 28 KY. L.J. 117, 157-58 (1940).

⁹ *See Atl. Richfield Co. v. USA Petroleum*, 495 U.S. 328, 330 (1990); *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 557 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746, 748, 749 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977); *Perma-Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968).

¹⁰ *E.g.*, *Standard Oil v. United States*, 221 U.S. 1 (1911); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); and *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (1898), *modified and aff'd*, 175 U.S. 211 (1899).

¹¹ THORELLI, *supra* note 4, at 588, 590.

¹² REPORT OF THE U.S. ATT'Y GEN. NAT'L COMM'N TO STUDY THE ANTITRUST LAWS, 378 (1955). The records do not account for settled cases that

to 1985, during which time 29,588 private actions were commenced¹³ (increasing the average to 657.5 per year, although the numbers were much smaller in earlier years)—a statistical explosion.¹⁴ However, one practitioner reckoned that through 1946, there were only ten actual treble damage awards and “treble damages suits did not get started until after the Supreme Court had formulated the rules for the proof of damages in the *Bigelow* case.”¹⁵ New private actions commenced in the United States from 1996 to 2000 averaged 674 per year, with 858 cases filed in 2000 alone.¹⁶ In contrast, the Antitrust Division of the DOJ averaged 25 civil cases and 52 criminal cases filed per year over the same period.¹⁷ Uniquely in the world, private actions brought in the United States historically appear to maintain a nearly 10 to 1 ratio to government enforcement efforts, greater when only criminal cases are considered, despite the changes in U.S. antitrust law and policy that we have seen since the late 1970s.

Private actions have proven to be effective measures to secure compensation for antitrust victims that would otherwise not be forthcoming. Although the litigation in *United States v. IBM Corp.* (six years from complaint to trial and six more years of trial before being dismissed on a stipulation that it was “without merit”) represents the nadir of U.S. governmental antitrust litigation, private litigation has often been successful.¹⁸ Even in the *IBM* litigation, while the government dismissed its case in 1982, “by 1973 Control

may have been in fact successful. Another estimate concluded that, from 1890 to 1940, there were 423 private cases brought. Richard Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 371 (1970).

¹³ ANNUAL REPORT OF THE DIRECTOR, Administrative Office of the United States Courts (1941-1985).

¹⁴ *Id.*

¹⁵ *Nolo Contendere and Private Antitrust Enforcement: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong. 7-8 (1966) (statement of T.C. McConnell, referring to *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946)).

¹⁶ JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2000, Administrative Office of the U.S. Courts, 139 (Washington, D.C., Superintendent of Documents 2000), available at <http://www.uscourts.gov/judbus2000> (last visited May 31, 2001).

¹⁷ ANTITRUST DIVISION WORKLOAD STATISTICS FY 1994-2003, Antitrust Division, U.S. Department of Justice (2003), available at <http://www.udoj.gov/atr/public/12848.pdf> (last visited Apr. 26, 2004).

¹⁸ See PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1, at 83-84. The private actions against IBM were tried in six months.

Data had already settled its private monopolization action against IBM for upwards of \$100 million,” and “senior officers of Control Data boasted that the lawsuit had been the best investment the company had ever made.”¹⁹ More successful private litigation resulted from the heavy electrical equipment price-fixing convictions in the early 1960s. These suits produced 2,233 private actions and settlements of “upwards of \$350 million” by General Electric and others, providing the “real bite.”²⁰ More recently, private damage settlements involving the international vitamins price-fixing cartel and others in excess of \$1 billion have been reached.²¹ However, settlement numbers are not necessarily or even usually *treble* in amount, but are more likely to represent single damages and perhaps attorney fees, as occurred in the corrugated cardboard price-fixing private actions.²² In the *U.S. Microsoft* litigation, private litigation so far has produced settlements totaling at least \$1.5 billion.²³

II. The Early Exports: Footholds in Foreign Markets

The early history of U.S. antitrust law and policy reflects a primary concern for the domestic market and an initial reluctance to intervene in foreign anticompetitive arrangements.²⁴ The DOJ's

¹⁹ M. HANDLER, R. PITOFSKY, H. GOLDSCHMID & D. WOOD, *TRADE REGULATION: CASES AND MATERIALS* 124 (1997).

²⁰ PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1 (citing HANDLER, ET. AL., *supra* note 19). Of course, in the early 1960s, \$350 million was real money.

²¹ See generally Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207 (2003).

²² S.D. Susman, *Mandatory Treble Damages—Time For a New Look?*, COMM'N ON CORPORATE AND ANTITRUST LAW OF THE SECTION OF CORPORATION, BANKING, AND BUSINESS LAW, American Bar Association Annual Meeting (New Orleans, 1981) reprinted as an attachment in *Antitrust Damage Allocation: Hearings before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st and 2d Sess., 170-177 (1981-82) (statement of J. Sims).

²³ S. Regan, *Microsoft antitrust trial starts in Minnesota*, REUTERS, Mar. 16, 2004, available at http://www.reuters.com/locales/newsArticle.jsp;4056e929:aaaaad923762af?type=technologyNews&locale=en_IN&storyID=4573599 (last visited Mar. 18, 2004).

²⁴ See, e.g., *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (Sherman Act inapplicable to foreign conduct); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927) (Sherman Act applies so long as some of defendants' conduct occurred in U.S. and affected domestic commerce); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (Sherman Act applies

interest in international cartels increased with the appointment of Thurman Arnold to head the Antitrust Division in 1938. And, the growing revelations of pre-war cartels, in which some American firms participated,²⁵ gave impetus to more intense scrutiny of the international conduct of firms and new efforts to export antitrust laws to foreign nations. The existence of international cartels and their support of, *inter alia*, Nazi Germany once prompted U.S. President Franklin D. Roosevelt to propose curbing them through the United Nations.²⁶ A brief review of the U.S.-encouraged growth of antitrust laws in foreign countries is worthwhile because, until foreign antitrust laws exist, it follows that no private enforcement of antitrust law in foreign countries will occur.

The dominant role of cartels in the economic development of Europe is well known,²⁷ and prior to 1945, economy by cartels, then conceived of in Europe as respected economic institutions, was the rule.²⁸ The German Cartel Decree of 1923, although ostensibly designed to control cartels in the public interest, served merely to complete the cartelization of the German economy. By 1936, 3,000 cartels existed in Germany and individual firms had lost the right to not participate in a cartel.²⁹ The Allied occupation of Germany following World War II included a decartelization plan. When the “Schuman Plan” for the creation of the European Coal and Steel Community (1952-2002) (“ECSC”) was presented to U.S. Secretary of State, Dean Acheson, on May 7, 1950, Acheson’s first reaction was fear that the plan was a clever cover for a “gigantic European cartel.”³⁰

so long as foreign conduct intended to and did affect commerce in the United States) [hereinafter “Alcoa”].

²⁵ Tony Freyer, *Antitrust and Bilateralism: The US, Japanese, and EU Comparative and Historical Relationships*, in COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM 3, 14-15 (C.A. Jones & M. Matsushita eds., 2002).

²⁶ See Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL’Y J. 1, 2 (1995).

²⁷ See generally Clive Trebilcock, *THE INDUSTRIALIZATION OF THE CONTINENTAL POWERS 1780-1914* (1981).

²⁸ H.G. Schröter, *Cartelization and Decartelization in Europe, 1870-1995*, 25 J. EUROPEAN ECON. HIST. 129, 137 (1996). See also PRIVATE ENFORCEMENT OF COMP. LAW, *supra*, note 1, at 23-28.

²⁹ J. Ferry, *How Do We Get There From Here?—Future Competition Policy in the EEC*, 11 FORDHAM CORP. L. INST. 643, 647 (1984).

³⁰ DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 383 (1969). D. DINAN, *EVER CLOSER UNION?* 23 (1994). Acheson

After the war, the United States pressured its European allies, such as the United Kingdom³¹ and Australia, as well as the recently defeated Japan³² and Germany, to adopt antitrust laws. Japan, then under occupation, was the first to do so, adopting its Anti-Monopoly Act (“AMA”) in 1947. In the United Kingdom, the Sherman Act prohibition model was rejected in favor of an “abuse” system under the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948, which required the approval of Parliament before any remedy (limited to injunction) could be ordered.³³ This so-called “puny infant” was radically altered and essentially supplanted by the Competition Act of 1998, which adopted the prohibition approach and text of the European Community (“EC”) Treaty’s Articles 81 and 82.³⁴

The German Cartel Law followed the aforementioned ECSC Treaty and its broader counterpart, the EC Treaty. Jean Monnet, first President of the ECSC’s High Authority, described the antitrust provisions of the ECSC Treaty by stating that, “For Europe, they were a fundamental innovation: the extensive antitrust legislation now applied by the European Community essentially derives from those few lines in the Schuman Treaty.”³⁵ The competition provisions of the EC Treaty closely follow the ECSC Treaty and bear the

feared objections by the Antitrust Division of the DOJ, which took a dim view of cartels controlling essential war material in light of then recent experience with the powerful cartelized German economy. The now-defunct ECSC placed coal and steel in the then six Member States (France, Germany, Italy, Belgium, the Netherlands, and Luxembourg) under the supranational control of the High Authority in order to make war impossible. The coal and steel industries of the members were essentially administered by the High Authority as to production, allocation, employment, pricing, and quotas. Coal and steel now fall under the general EC Treaty.

³¹ See generally TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880-1990, 234-268 (1992).

³² J.O. Haley, *Harmonized Rules, Peculiar Laws: Recent Developments in Japanese Law*, in TOWARDS WTO COMPETITION RULES 137, 140 (R. Zäch ed., 1999).

³³ PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1, at 36-39.

³⁴ *Id.* at 36-40.

³⁵ JEAN MONNET, MEMOIRS 352-3 [R. Mayne trans.] (1978). Compare Article 65 of the Treaty Instituting the ECSC, Apr. 18, 1951, 261 U.N.T.S. 143, with Article 81 of the Treaty Establishing the EC, Nov. 10, 1997, O.J. (C 340) 3 (1997). Monnet noted that Robert Bowie, the drafter of the Treaty provisions, was a “young Harvard professor. . . who was said to be the leading expert on US anti-trust legislation, which the Americans applied as rigorously as morality itself.”

substantive imprint of the Sherman Act derived from their American ancestry.³⁶ Moreover, the gradual expansion of the European Community has thus spread the competition rules derived from Robert Bowie's "few lines in the Schuman Treaty" to many more countries.

³⁶ The later EC Treaty version of Section 1 reflects a substantive summary of judicial authority under the Sherman and Clayton Acts version:

The following shall be prohibited as incompatible with the common market; all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

From the “Six” original members in 1952 (France, Germany, Italy, Belgium, the Netherlands, Luxembourg) to the addition of The United Kingdom, Ireland, and Denmark in 1973, Greece (1981), Spain and Portugal (1986), and Austria, Sweden, and Finland (1995), the European Community now stands at fifteen. The May 1, 2004 addition of Poland, the Czech Republic, Malta, Cyprus, Latvia, Estonia, Lithuania, Slovak Republic, Slovenia, and Hungary brings the total to twenty-five countries in which EC competition law is directly applicable and directly effective. Moreover, May 1, 2004 was the effective date of the new EC Competition Regulation 1/2003 (“Reg. 1”),³⁷ which substantially revises EC competition law with the first major non-merger procedural and substantive changes in the last forty years.³⁸

Under Article 3 of Reg. 1, national competition authorities who wish to apply their national competition laws to conduct affecting trade between the Member States must also apply Article 81-2 EC and, with some exceptions, must not prohibit what EC law permits. This “Siamese Twin” clause, because national and EC law may be seen as joined at the hip, places additional pressure on Member States to conform their national laws to the competition provisions of the EC Treaty.³⁹ Most important, national competition authorities will now be applying EC law themselves in addition to the Commission’s enforcement activities, and national courts will now be applying the full scope of Articles 81 and 82 of the EC Treaty, instead of being limited by the Commission’s prior monopoly on the application of Article 81(3), the exemption provisions.⁴⁰ Other longer-term candidate Member States (Romania, Bulgaria, Turkey, Croatia, and the Former Yugoslavian Republic of Macedonia) and European Free Trade Area (“EFTA”) states (Iceland, Norway,

³⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,” 2003 O.J. (L 1), 1 [hereinafter “Reg. 1”].

³⁸ See generally Clifford A. Jones, *The Second Devolution of European Competition Law: Empowering National Courts, National Authorities, and Private Litigants in the Expanding European Union*, Paper presented at the European Union Studies Association Conference (Nashville, Tennessee, Mar. 29, 2003) (On file with the author and the European Union Studies Association).

³⁹ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. II [hereinafter EEC TREATY].

⁴⁰ For a discussion of the issues surrounding pluralistic enforcement where the Commission held a monopoly on the application of Article 81(3), see PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1, at 93-112.

Liechtenstein) also apply the substance of EC law either under the European Economic Area Agreement,⁴¹ or under association agreements with the EC. In short, more than thirty countries in Europe now have antitrust laws that are nearly identical to the EC Treaty competition rules, and more may come.

The post World War II efforts of the United States to export antitrust to the world were not limited to the group of countries mentioned above. In an effort to reform the global economy, trade, competition, and financial aspects, the United States proposed the ill-fated Havana Charter,⁴² the demise of which caused the International Trade Organization to be stillborn in the late 1940s. The antitrust code included in that agreement was never incorporated into the surviving patchwork, the General Agreement on Tariffs and Trade ("GATT") or its successor under the World Trade Organization ("WTO"). Since the Singapore Ministerial Conference (1996) of the WTO, various countries have worked toward inclusion of antitrust rules in some form under the WTO.⁴³ Agreement was reached to place the issue on the agenda for the Doha ("Millennium") Round of WTO negotiations⁴⁴ and the Doha Declaration stated that negotiations on that topic would begin at a time to be specified during the Round. However, the Cancun Ministerial Meeting in September 2003, broke up without agreement, and the status of the negotiations is still unclear.

The WTO consists of about 145 countries of which approximately 90 now have antitrust laws in some form.⁴⁵ While not all foreign antitrust laws contain explicit provisions for private enforcement, some, such as Canada⁴⁶ and Japan,⁴⁷ do. And, the large

⁴¹ See T.C. Hartley, *FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 5 (4th ed. 1998).

⁴² HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, Mar. 24, 1948, U.N. Doc. E/Conf. 2/78 (1948), reprinted in U.N. Doc. ICITO/1/4 (1948).

⁴³ See generally *Trilateralism in Private Enforcement*, *supra* note 1.

⁴⁴ C.A. Jones & M. Matsushita, *Global Antitrust in the Millennium Round: The Ways Forward*, in *COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM*, 398 (Jones & Matsushita eds., 2002).

⁴⁵ *Id.* at 402.

⁴⁶ Charles M. Wright & Matthew D. Baer, *Price-fixing Class Actions: A Canadian Perspective*, 16 *LOY. CONSUMER L. REV.* 463 (2004).

⁴⁷ S. Seryo, *Private Enforcement and New Provisions for Damages and Injunctions in Japan*, in *COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM*, 255-291 (Jones & Matsushita eds., 2002).

bloc of countries comprising the EC allow for damage actions and injunctions by implication from the combination of directly effective Treaty rights and national and Community remedy principles.⁴⁸

While the pace of private enforcement exports has not matched the level of substantive growth in antitrust laws across the globe, private enforcement also lagged behind government enforcement in the United States for many years, even when the statutory basis for private enforcement was clear and explicit. In the case of the EC-bloc of countries, competition laws have been seen for over forty years as the exclusive province of government enforcers and the notion of private enforcement still appears in some quarters as not quite right. While time, and perhaps a few successful private actions,⁴⁹ likely will result in some attitude adjustment, the private remedy is thus far not a material factor under most foreign antitrust laws, with the possible exception of Canada. The principle is there, but the practice does not yet exist.

III. The Difficult Years: Extraterritoriality & Blocking Statutes

In the post-*Alcoa* world of the effects doctrine, increasingly aggressive U.S. antitrust enforcement began to create friction with some of our closest allies and greatest trading partners. The Canadian provinces of Ontario and Quebec enacted the first blocking statutes in response to the U.S. investigation in the late 1940s into the Canadian paper industry.⁵⁰ In the 1950s, Canada reacted negatively to a U.S. investigation into a Canadian radio and television patent pool designed to exclude U.S. manufacturers from the Canadian market.⁵¹ And, in the 1970s the *Uranium* litigation⁵² created perhaps even

⁴⁸ See PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1, at 45-78, for a detailed explanation of the road from general Community law principles of direct effect and supremacy to the recognition of private damages actions for breach of Community competition rules. More recently and definitively, see Case C-453/99, *Courage v. Crehan*, [2001] E.C.R. I-6314.

⁴⁹ See Donnadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431 (2004), for examples of a few actions resulting in damage awards in the EU.

⁵⁰ C. Stark, *Improving Bilateral Antitrust Cooperation, in* COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM, 83, 84 (Jones & Matsushita eds., 2002).

⁵¹ See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

⁵² See, e.g., *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1252, 1261 (7th

greater conflict.⁵³ In 1976, Canada enacted an important competition law that has in some respects brought it closer to the U.S. model by adopting a prohibition approach to certain practices such as price-fixing.⁵⁴

The *Uranium* litigation was apparently the impetus for the United Kingdom's adoption of a blocking statute, the Protection of Trading Interests Act of 1980. This Act essentially prohibited U.K. courts from compelling the production of U.K.-located documents, assisting in the enforcement of treble damage judgments, and provided that U.K. nationality defendants could "claw-back" from the assets located in the U.K. of foreign companies any excess over actual damages in a judgment obtained abroad. The target was clearly U.S. antitrust treble damage actions, although the statute does not explicitly say so.

Among the most bizarre procedural sagas was the *Laker Airways* antitrust litigation in the 1980s, several cases involving Sir Freddie Laker, a principal in Laker Airlines, a low-cost trans-Atlantic carrier that failed due to an alleged conspiracy among other airlines (including British Airways, and Sabena) and banks to exclude Laker Airlines from the market. A multitude of diverse litigation ensued in which Laker filed suit in the United States under the Sherman Act,⁵⁵ Midland Bank filed suit in the United Kingdom to keep Laker from continuing his suit in the United States, and obtained an injunction to that effect from the U.K. Court of Appeal.⁵⁶ However, a similar order

Cir. 1980), where the court considered issues raised by the governments of Australia, Canada, South Africa, and Great Britain as to whether the district court could proceed in a case brought by Westinghouse Electric Corporation alleging antitrust violations against 26 foreign and domestic uranium producers. Plaintiff's antitrust action against 12 foreign and 17 domestic corporations engaged in various aspects of the uranium industry obtained final default judgments as to liability against nine defaulting defendants in the United States District Court for the Northern District of Illinois, and also obtained injunctions prohibiting various defaulting defendants from transferring funds out of the United States without approval by the court upon 20 days prior, written notice. *See also* *Rio Tinto Zinc v. Westinghouse Elec. Corp.*, [1978] A.C. 547, [1978] 1 All E.R. 434 (H.L. 1977).

⁵³ *See Stark, supra* note 50.

⁵⁴ *Wright & Baer, supra* note 46.

⁵⁵ *E.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

⁵⁶ *Midland Bank PLC v. Laker Airways Ltd.*, [1986] Q.B. 689, [1986] 1 All E.R. 526 (Q.B. 1986).

in favor of British Airways was reversed by the House of Lords.⁵⁷ The private cases ultimately settled, and the U.S. government discontinued its criminal grand jury investigation against British Airways and others on diplomatic grounds at the request of the U.K. Prime Minister.

After these controversial cases, the DOJ has concentrated on negotiating international antitrust enforcement cooperation agreements with foreign countries and now has agreements with Germany, Australia, Canada, the European Union ("EU"), Brazil, Israel, Japan, and Mexico.⁵⁸ While these agreements do not affect private litigation, they indicate that tensions related to extraterritorial enforcement of U.S. antitrust law have eased as other jurisdictions have become more cognizant of the need for antitrust enforcement. Moreover, since the EU has adopted something akin to the U.S. "effects" doctrine,⁵⁹ what once seemed to be unjustified extraterritoriality on the part of the United States has become more internationally accepted.

IV. The Global Bull Market For Private Enforcement & Obstacles

Given the vast spread of antitrust laws in the global market, the question naturally arises as to why nothing equivalent to the U.S. level of private actions has evolved in foreign jurisdictions. However, this bull market is fairly recent and the time lag is not out of line⁶⁰ with similar experiences within the United States.⁶¹ Most of the comparisons here are directed toward the United States and the EU because the countries applying EU antitrust laws represents the

⁵⁷ *British Airways Bd. v. Laker Airways Ltd.*, [1985] A.C. 58, [1984] 3 All E.R. 39 (H.L. 1984).

⁵⁸ Stark, *supra* note 50.

⁵⁹ See Case 48/69, *Imperial Chem. Indus. v. Comm'n*, 1972 E.C.R. 619, [1972] C.M.L.R. 557 (1972) (the "Dye-stuffs" case) (economic entity doctrine); Case 89/85, *A. Ahlström OY v. Comm'n*, 1988 E.C.R. 5193, [1988] 4 C.M.L.R. 901 (1988) (the "Woodpulp" case) (community implementation doctrine); Case T-102/96, *Gencor v. Comm'n*, 1999 E.C.R. II-753, [1999] 4 C.M.L.R. 971 (1999) (merger jurisdiction). Any difference between the U.S. "effects" doctrine and the formulations in Dyestuffs and Woodpulp is not apparent to the Commission.

⁶⁰ See *supra* text accompanying note 10.

⁶¹ The following draws on *New Dawn for Private Comp. Law Remedies*, *supra* note 1.

largest such group in the world. Some of the following comments have general application, with particular points made about Japan, Canada, and the United Kingdom.

Every competition lawyer and official in Europe knows that the U.S. system offers treble damages, class actions, and contingency fees,⁶² and successful private litigation in the United States is often attributed to these factors. The argument goes that until these aspects of the system are available in foreign jurisdictions, it is simply not worth considering expensive, uncertain private actions. However, this is not automatically the case, and legal advisors must be willing to evaluate particular private antitrust actions to determine if the likely outcome is worth the expense.

A brief discussion of some comparative remedies issues may be helpful in analyzing the prospects for private litigation abroad. Perhaps the single, most-often given reason for the lack of private actions abroad is the absence of the treble damage remedy. This explanation is given far too much weight, especially in Europe and in any jurisdiction where prejudgment interest is available, as discussed below.

A. Damages

In Europe, the Court of Justice (“ECJ”) has made it clear that damages are available as a matter of Community law to persons and undertakings suffering injury from infringements of the competition provisions of the EC Treaty.⁶³ It is submitted that the relatively strict rules of damages applied in the European Court’s Article 288 EC jurisprudence⁶⁴ are minimum standards, and outside the context of the liability of Community institutions or Member States, more generous standards may apply.⁶⁵ Even the Court’s Article 288 EC judgments have recognized and applied the concepts of reasonable

⁶² Contingency fees in antitrust cases are no longer common in the United States with the exception of class actions.

⁶³ See sources cited *supra* note 48.

⁶⁴ “The limits laid down by the case law in regard to actions brought under Article 215 [now 288] of the Treaty are in fact based on the widespread view that, as a matter of principle, compensation may not be recovered for injury caused by the legislature.” Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur S.A. v. Fed. Republic of Germany & Regina v. Sec’y of State for Transp. ex parte, Factortame Ltd. & Others*, (Factortame III), [1996] Q.B. 404, at ¶ 64, [1996] C.M.L.R. 889 (1996).

⁶⁵ See PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1, at 240-41.

estimates of damages and “yardstick” measurements⁶⁶ applied in the United States, so it appears that mainstays of private damage amount calculations in the United States will be supported in Europe.⁶⁷ The case law in Europe imposes the requirement that damages, when available, must be adequate.⁶⁸ This also should be kept in mind when considering the prejudgment interest issue.

While the United States has treble damages, Europe and other jurisdictions do not. Foreign countries seem unlikely to have them in the future, although the development of substantial enhancements is not out of the question. However, this is not the end of the story until attorneys have considered what measure of damages is to be trebled in the United States against what can be awarded in the relevant foreign jurisdiction. If single compensatory damages are adequate, there should be no need for the treble damage inducement in the Community and elsewhere. In the United States, it has long been understood that the Sherman Act’s “failure to provide for prejudgment interest is a shortcoming that leaves a plaintiff less than whole.”⁶⁹

The treble damage provision in the United States does not fully overcome this flaw. As a result, studies have shown that at best treble damages may offset the lack of prejudgment interest. One study of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*⁷⁰ considered that “treble” damages awarded in that case amounted to only twenty-three cents on the dollar due to the absence of prejudgment interest.⁷¹ Another study reached the conclusion that “antitrust damages are currently not trebled” and that one can safely “conclude that awarded [treble] damages are much more likely to be the equivalent of actual damages than treble damages.”⁷²

⁶⁶ A.G. Toth, *The Concepts of damage and causality as elements of non-contractual liability*, in T. HEUKELS & A. MCDONNELL, *THE ACTION FOR DAMAGES IN COMMUNITY LAW*, 186-7 (1997).

⁶⁷ See generally PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1, chs. 17-19.

⁶⁸ See Case 14/83, *Von Colson und Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, at ¶ 28, [1986] C.M.L.R. 430 (1984).

⁶⁹ *Proving Antitrust Damages: Legal and economic issues*, ABA Section of Antitrust Law, 109 n.16 (1996).

⁷⁰ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

⁷¹ V. SARRIS, *THE EFFICIENCY OF PRIVATE ANTITRUST ENFORCEMENT: THE ‘ILLINOIS BRICK’ DECISION*, 17-18 (1984).

⁷² Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*

As a result, the vision of windfall treble damages in the United States perceived from abroad falls rather short of reality. Litigants in Europe and elsewhere should concern themselves more with what they can recover rather than what they cannot. Depending on the length of time from injury to judgment and applicable interest rates, the lack of prejudgment interest alone can reduce nominally treble damages to single damages or less. Conversely, in jurisdictions where prejudgment interest is available, the practical equivalent to double or treble damages in the United States may be at hand. Attorneys should do the arithmetic before concluding that the absence of treble damages makes private damage actions uneconomic.

B. Prejudgment Interest

In general, it is accepted by the Member States and the ECJ that reparation for loss or damage includes an award of interest on the principal sum.⁷³ In the second *Marshall* judgment, the ECJ found that Mrs. Marshall was entitled to receive interest on the award as part of full compensation for gender-based discrimination against her.⁷⁴

With regard to the second part of the second question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purpose of restoring real equality of treatment.⁷⁵

Community antitrust actions may not offer “treble” damages, but the following calculations show that they should offer adequate and attractive compensation through prejudgment interest, which will

54 OHIO ST. L.J. 115, 171 (1993).

⁷³ Cf. A. van Casteren, *Article 215(2) EC and the Question of Interest*, in T. HEUKELS & A. McDONNELL, *THE ACTION FOR DAMAGES IN COMMUNITY LAW* 199, 200 (1997) (“In national law, interest is considered an essential part of the damages.”).

⁷⁴ Case C-271/91, *M. Helen Marshall v. Southampton and S.W. Hampshire Area Health Auth. (Marshall II)*, 1993 E.C.R. I-4367, [1993] C.M.L.R. 293 (1993).

⁷⁵ *Id.* at ¶ 31 (emphasis added). The interest in question included prejudgment interest from the date of the discrimination.

in many cases be the close equivalent of the U.S. treble damage action. Accordingly, treble damage envy in the European Community perhaps should be replaced by a lust for prejudgment interest that is actually attainable.

C. Sample Damages Comparisons: Doing the Arithmetic⁷⁶

A couple of examples may help illustrate the comparison. If we take as our starting point the \$100,000,000 settlement (therefore without any treble damages) received by Control Data from IBM in 1973 and treat it as denominated in Euros in 1995, this gives us a base damages amount and a starting point in time. In Example 1, we shall assume that national or European Community law permits as part of compensation an award of prejudgment interest from the time of injury to the time of judgment at the modest rate of seven percent (7%), compounded annually. In Example 1A, we shall assume that the permitted prejudgment interest rate is a more generous fourteen percent (14%)⁷⁷ based on an often cited, long range rate of return in the U.S. stock market. A European court may be reluctant to use the U.S. stock market as a basis, but EC law provides a basis for a substantial, if not identical rate, if a European or other exchange does not provide a similar rate of return. European Community legislation, the "Late Payments Directive," establishes an interest rate for late payments that is seven points above the European Central Bank's refinancing rate⁷⁸ and ought to assure an attractive prejudgment interest award.

⁷⁶ In the hands of the author, a spreadsheet may be a dangerous weapon, and no warranty of accuracy or suitability is offered! An economist or accounting expert witness normally may be used to present such calculations at trial.

⁷⁷ Some may question whether a European court would allow such a high interest rate. Unless national or Community law expressly fixes the appropriate interest rate, I submit that this is a matter of persuasive advocacy and proof. The rationale for allowing prejudgment interest is compensation for the time value of money not received due to unlawful acts of defendants. If the evidence establishes that such a rate of return reasonably could have been achieved in the appropriate stock market over the appropriate period, the argument is that such a rate is necessary to fully compensate plaintiff for the 'effluxion of time.' *Marshall II*, 1993 E.C.R. I-4367, ¶ 31. Of course, other evidence, such as contractual provisions, might also serve as the basis for arguing that a higher rate should be used. The key is what rate fully compensates a plaintiff for lost use of money, which in turn depends on what could have been earned elsewhere, even if the elsewhere is a foreign stock market.

⁷⁸ Council Directive, 2000/35/EC, art. 3, 2000 O.J. (L 200) 1(d).

For purposes of Examples 1 and 1A, we shall assume that damages accrue evenly over a ten-year period from the beginning of injury through litigation to judgment, prior to appeal.⁷⁹ In other words, assume injury first occurs in 1995 and accrues at the rate of 2.5 million Euros per calendar quarter. Imagine that the statute of limitations is five years, suit is filed on the last day, and litigation results in judgment after ten years.

Using these assumptions, we find that in Example 1 a nominal damages sum of 100 million Euros results in an award of compensation of 147.8 million Euros without treble damages or costs, but based on prejudgment interest compounded annually at the 7% rate. Granted, this is not *treble* damages, but it is nearly 1.5 times damages, which ought to be attractive.

On the other hand, Example 1A applies the same assumptions as Example 1 except that the interest rate used is 14% compounded annually. That calculation results in a compensation award of 220.4 million Euros or about 2.2 times damages.

Both Example 1 and Example 1A are in my view conservative approaches. Neither is a full 3 times the award, but there is no magic to the 3 times multiplier level as an incentive for clients to bring suit. The original version in the Sherman Act provided for double damages, but it was increased to three without any clear scientific basis. Moreover, it may put this in perspective to consider the present value of a U.S. treble damage award in comparison to these numbers. A nominal 300 million Euros treble damage award, reduced to present value at the 7% rate is 222.74 million Euros and at the 14% rate is 133.1 million Euros. Therefore, the U.S. “treble” damage award is less than it seems, and an equivalent actual damage award in the EU or another jurisdiction permitting prejudgment interest is more than expected.

Example 2 uses the same assumptions as Example 1, except that compounding is quarterly and the full damages award is assumed accrued in 1995. Similarly, Example 2A uses the same assumptions as Example 1A except that compounding is quarterly, and the damages are assumed already accrued. I consider Examples 2 and 2A more realistic and typical. Compounding could arguably be done monthly, weekly, or even daily under some types of financial accounts or instruments, and advocates may be able to persuade the judge that more frequent compounding is necessary to award full and

⁷⁹ Postjudgment interest is not considered here.

adequate compensation.⁸⁰

Under Example 2, the use of quarterly compounding and the 7% rate yields a combined damages and prejudgment interest award of 214.2 million Euros, over two-thirds of a treble damage award. Under Example 2A, the same approach at the 14% rate yields compensation of 451.4 million Euros, or nearly 50 percent *more* than treble damages. At the higher rate, EU law may offer 4.5 times damages! It is submitted that litigants in the EU and elsewhere truly do not need the Sherman Act multiplier to have adequate incentive to sue for *full* compensation.

Other jurisdictions vary on whether prejudgment interest is allowed. In Japan, prejudgment interest is available but may be limited to six percent.⁸¹ In Canada, prejudgment interest is available “at a commercial rate from the date when the damage first began.”⁸² The United Kingdom and other Member States of the EU recognize prejudgment interest, as does European Community law itself.⁸³ A bit of spreadsheet analysis may well persuade potential litigants that treble damages as such are not required to encourage what some of our Canadian friends call the “private sheriff.”⁸⁴

While punitive damages are not available in antitrust cases in the United States, Japan,⁸⁵ and most civil law jurisdictions, they are available in principle in Canada⁸⁶ and may become available in the United Kingdom.⁸⁷ At least in the context of jury trials, some successful antitrust practitioners in the United States have expressed a preference for punitive damages over the statutory treble damages

⁸⁰ The more frequently the interest is compounded, the greater the amount of interest that is added into the damages award. It may be wise to settle for a lower interest rate but more frequent compounding of interest. I leave the actual arithmetic as an exercise for the readers and their accountants!

⁸¹ *Trilateralism in Private Antitrust Enforcement*, *supra* note 1, at 221.

⁸² Wright & Baer, *supra* note 46, at 465.

⁸³ See *supra* notes 73 and 77.

⁸⁴ A. Neil Campbell & J. William Rowley, *The Privatisation of Canadian Competition Law Enforcement*, GLOBAL COMPETITION REVIEW 26 (Aug. 2002), available at <http://www.mcmillanbinch.com/AboutUs.aspx?Section1=AboutUs&Section2=Publication> (last visited Apr. 26, 2004).

⁸⁵ Seryo, *supra* note 47.

⁸⁶ See *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595 (S.C. Can.).

⁸⁷ *Trilateralism in Private Antitrust Enforcement*, *supra* note 1, at 232 & 246-50.

remedy.⁸⁸ Moreover, when one considers the possibility of actual damages to include pre-judgment interest combined with punitive damages and costs, in some cases the remedy in Canada or Britain and perhaps other jurisdictions potentially could be more lucrative than the Sherman Act allows.⁸⁹

D. Class Actions

Class actions are the usual vehicle in the United States for aggregation of small consumer claims that would otherwise not be substantial enough (at virtually any likely level of multiplication) to justify the considerable expense of antitrust litigation. In the past, few other jurisdictions offered such vehicles for consumer redress, but signs show that this is beginning to change. As some Canadian antitrust practitioners have noted, "U.S. exports to Canada are booming in a niche market—class actions. From vitamins to pharmaceuticals to polybutylene, Canadian class counsel are importing U.S.-based lawsuits at an ever increasing rate."⁹⁰ While class actions in the United States may not be numerically of great importance, comprising about 20% of private actions, they have a great deterrent effect because of the sheer size of a potential award of aggregated claims.

Some countries are not adopting class actions as such but something more akin to the U.S. *parens patriae* action where the government (state, Member State, or national government as the case may be) brings actions on behalf of its citizens and organizes the distribution or *cy pres* use of the proceeds. In the United Kingdom, the Enterprise Act of 2002 amended the Competition Act of 1998 to provide for the designation of consumer organizations that can file "Supercomplaints" with the competition authorities and obtain damages where there has first been a governmental finding of liability or infringement.⁹¹ General legislation for "Group Litigation Orders," a form of class action, exists, and this U.K. law remedy will be available for competition cases under EC law because general EC

⁸⁸ *Id.* at 240 n.45. Susman won a \$347 million award (before trebling) in the corrugated cardboard litigation.

⁸⁹ PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1, at 232-40.

⁹⁰ D. Kent and H. Clarke, *Class Actions Canadian Style*, CORP. COUNSEL, A3 (Feb. 2003). See also Wright & Baer, *supra* note 46.

⁹¹ Individual plaintiffs may also bring such actions following a governmental declaration of infringement. However, the requirement of an initial governmental decision may actually deter private actions.

law requires nondiscrimination in the U.K. legal system with regard to claims based on EC law.⁹² In the EU, various directives in force⁹³ or proposed⁹⁴ already require the Member States to permit consumer organizations to bring actions and obtain injunctions and some require damages actions to be available.⁹⁵ It appears that EU-level legislation on private antitrust remedies, perhaps to include some form of class or representative actions, may be under consideration.⁹⁶

E. Other Issues

A variety of other issues often surface when comparing U.S. private actions to those available in foreign courts. The right to discovery is more extensive in the United States than anywhere else in the world, at least for private actions. In the absence of effective discovery rules, the number of successful private antitrust suits that may be brought will be limited, perhaps to follow-on cases in the wake of government actions or cases in which written agreements establish the infringements. On the other hand, the EC Commission itself never had oral deposition powers until the adoption of Reg. 1/2003.⁹⁷ Pretrial oral depositions are virtually unknown in civil law systems, as well as in many common law systems. It will be difficult to bring many types of private actions without this power or a substantial equivalent because key evidence may often be solely under the control of defendants' employees. At the same time, American-style discovery rules are anathema in parts of the world, as

⁹² Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur S.A. v. Fed. Republic of Germany & Regina v. Sec'y of State for Transp. ex parte, Factortame Ltd. & Others*, (Factortame III), [1996] Q.B. 404, [1996] C.M.L.R. 889 (1996).

⁹³ Council Directive 98/27/EC, 1998 O.J. (L 166) 51. *See also* Commission Proposal for a Directive of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests (Codified version), COM(03)241 final at 9 [hereinafter *Injunctions*].

⁹⁴ Commission Proposal for a Directive of the European Parliament and of the Council of 30 January 2003 on Measures and Procedures to Ensure the Enforcement of Intellectual Property Rights, COM(03)46 final. *See especially* Articles 7-17, and 20 of the Intellectual Property Rights Enforcement Proposal.

⁹⁵ *See* Commission Proposal for a Council Regulation on the Community Patent, COM(00)412 final at Ch. IV, § 1, art. 30, 42 & 43.

⁹⁶ *See* Clifford A. Jones, *Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check*, 27 *WORLD COMPETITION* 13, 14 (2004). *See also* D. Woods, *supra* note 49, at 444-48.

⁹⁷ *New Dawn for Private Comp. Law Remedies*, *supra* note 1.

the *Uranium* litigation showed. Fundamental changes are unlikely to be made for competition cases only, so the future development of more aggressive discovery methods is somewhat doubtful in the absence of new legislation.

One bright spot on this issue and others is the increasing level of private litigation in Canada, which has many similarities to the United Kingdom, despite the lack of certain features of the U.S. system. Plaintiffs in Canada seem to be overcoming limitations on discovery and contingency fees as described elsewhere in this symposium.⁹⁸ The issue of indirect purchaser standing, as seen in *Illinois Brick v. Illinois*,⁹⁹ seems to be only an issue in the United States. In that case, the Supreme Court ruled that indirect purchasers of price-fixed goods could not sue to recover damages for the inflated prices, and that only direct purchasers could do so. Canada has so far rejected the *Illinois Brick* limitation,¹⁰⁰ as has Japan,¹⁰¹ and the EU probably will as well.¹⁰² Canada lacks treble damages, but has class actions, prejudgment interest, and punitive damages. Canada has European-style cost rules, but this does not seem to have prevented a growing number of private damages class actions from taking place there.¹⁰³ Some observers believe that the “English Rule,” meaning that the loser pays the winner’s costs and attorneys’ fees, at least in part, suppresses private antitrust litigation in Europe. However, I believe that this is not the case. While possible, such a large percentage of this type of litigation is settled that it is doubtful that the costs rules have a decisive role.

V. Conclusion

The export of antitrust from the United States is gradually being followed by the increasing export of private enforcement actions to the foreign courtrooms of the world. As more countries seek to expand the implementation and enforcement of antitrust rules, they increasingly realize that supplemental private enforcement is

⁹⁸ See generally Wright & Baer, *supra* note 46.

⁹⁹ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁰⁰ See *Chadha v. Bayer*, [1999] 45 O.R.3d 29.

¹⁰¹ *Seryo*, *supra* note 47.

¹⁰² The case for non-adoption in Europe is argued in PRIVATE ENFORCEMENT OF COMP. LAW, *supra* note 1, at 193-98.

¹⁰³ See generally Wright & Baer, *supra* note 46.

needed to provide effective levels of enforcement and in particular to compensate victims as well as deter violators. While the United States is still superior as a venue for private damage actions, the courtrooms of the world are improving, and I think it is mostly a matter of time (and perhaps some legislation) before private litigation becomes effective abroad. A 10 to 1, private to public ratio of cases is not required in order to consider the coming bull market in private enforcement a success.

Finally, at this writing, the United States Supreme Court has heard oral argument in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*¹⁰⁴ on April 26, 2004, and is likely to decide the case this term. The case in *Empagran* presents the question of whether foreign plaintiffs who were injured outside the United States by antitrust violations (the Vitamins cartel) directed to the U.S. market may sue in the United States under the Sherman Act. The foreign remedy at present is mostly theoretical, and if the *Empagran* plaintiffs are excluded from suing in the United States, they will likely be left without a meaningful damages remedy despite being victims of one of the most egregious antitrust violations in history. If *Empagran* is affirmed, then other antitrust jurisdictions may be encouraged to continue to develop effective private remedies in their own markets so that their citizens need not depend on the United States for compensation.¹⁰⁵ In a global market, the export of private actions must be expanded for the benefit of the United States as well as the rest of the world.

¹⁰⁴ *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 966 (2003).

¹⁰⁵ One might also argue that the affirmance of *Empagran* would send the message that countries need not provide private remedies since U.S. courts are open to their citizens in some cases. While this is possible, I prefer to think that countries will be more likely to follow up their adoption of antitrust laws by enhancing private enforcement in their own courts.