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Jurisdictional Conflict in Global Antitrust Enforcement

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I. Introduction

The cases that have presented the particular issue this panel addresses—whether a foreign plaintiff can bring a private antitrust action in U.S. court when its injury arose from a transaction occurring on a foreign market—suggest significant challenges to traditional methods of antitrust regulation. They include litigation arising out of price-fixing conspiracies among vitamins manufacturers,[1] providers of heavy-lift barge services,[2] and art auction houses.[3] Each of these cases has involved a conspiracy that can be characterized as global, and not merely because of the different actors and markets involved. First, the effectiveness of the respective cartels depended on the linking of pricing behavior across countries. In *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, for instance, the plaintiffs alleged a worldwide pricing scheme that used the prices set in the U.S. market as a benchmark for the prices set in other countries.[4] Second, the national enforcement strategies used to counter global cartels are linked, as insufficient regulation in some countries might create an incentive for continued anti-competitive behavior even in the countries that do regulate sufficiently.[5] These cases therefore present the kind of global behavior that generates

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[1] Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338 (D.C. Cir. 2003).

[2] Den Norske Stats Oljeselskap A.S. v. Heeremac V.O.F., 241 F.3d 420 (5th Cir. 2001) [hereinafter "*Statoil*"].

[3] Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002).

[4] *Empagran*, 315 F.3d at 340-41.

[5] *See infra* notes 9-11 and accompanying text.

calls for global enforcement—as Michael Hausfeld puts it, "one set of rules, one forum."[6]

At the same time, these cases also present some old questions relating to conflicts of national economic laws, including the limitation of a domestic regulatory law's extraterritorial reach and the reconciliation of inconsistent procedural laws. This comment examines some of those questions, attempting to situate the debate about enforcement against global price-fixing cartels within the framework of international jurisdictional law.

II. The Need to Consider Jurisdictional Restraint in the Application of U.S. Law

The Foreign Trade Antitrust Improvements Act ("FTAIA") limits the application of U.S. antitrust law to export commerce, stating in part that the Sherman Act does not apply to such conduct unless:

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
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> > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> >
> > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
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> (2) such effect gives rise to a claim under [the Sherman Act]. . .[7]

The narrow interpretation of this provision endorsed in *Den Norske Stats Oljeselskap A.S. v. Heeremac V.O.F.*, and forwarded by the defendants in *Kruman v. Christie's International PLC* and *Empagran*, would limit the availability of private actions in U.S. courts to plaintiffs whose injuries were suffered in a transaction on

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[6] Michael D. Hausfeld, *Five Principles of Common Sense Why Foreign Plaintiffs Should be Allowed to Sue Under U.S. Antitrust Laws*, 16 LOY. CONSUMER L. REV. 361 (2004).

[7] 15 U.S.C. § 6A (2001).

U.S. markets.[8] In jurisdictional terms, this view appears to allocate regulatory authority over global cartel behavior on the basis of individual market transactions. Thus, a plaintiff who suffered overcharges in a transaction taking place in the U.S. market could sue in the United States, and one who suffered overcharges in a transaction in Ecuador could sue in Ecuador.[9]

However, as the foreign plaintiffs in *Empagran* and the other cases have argued, and as all the courts have agreed, this is not a satisfactory way to view the wrong that occurred. It is the price-fixing behavior, not the subsequent market transactions resulting in overcharges, that is the real target of regulation.[10] The situs of the plaintiff's injury should therefore not alone determine the regulatory authority of various countries affected by the cartel.[11] In addition, the narrow approach advocated in these decisions fails to recognize the potential regulatory interest, created by the global nature of the cartels, of countries other than the one in which a particular transaction occurred. This interest would arise if under-enforcement in the country on whose market the particular transaction occurred led to under-deterrence of cartel behavior overall, leaving a regulatory gap.[12] The potential for such gaps is most pronounced in

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[8] The narrow interpretation of Section (2) interprets "a claim" to mean the particular claim of the plaintiff. It would therefore bar claims of foreign plaintiffs arising out of foreign market transactions, as such claims would not arise from the effect within the United States under Section (1). *See Statoil*, 241 F.3d at 427 ("the FTAIA. . .demands that the domestic effect 'gives rise' to the [plaintiff's] claim").

[9] Assuming, of course, that a private cause of action is available in Ecuador, a question to which I return below.

[10] *See Empagran*, 315 F.3d at 344-45 (identifying the price-fixing conspiracy rather than the individual market transactions as the relevant conduct); *Statoil*, 241 F.3d at 426 (defining the actionable conduct as "the agreement among heavy-lift service providers to divide territory, rig bids, and fix prices"); *Kruman*, 284 F.3d at 398 ("The illegal act in this case was not the imposition of high prices but the formation of the agreement to fix prices.").

[11] The situs of the injury is, however, relevant to the subsequent jurisdictional restraint analysis. *See infra.*

[12] The Court in *Empagran* noted:

> We are persuaded that, if foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be under-deterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits,

the case of developing countries, where the lack of antitrust laws may leave anti-competitive conduct entirely unregulated.[13] Even countries that do regulate, however, might impose fines or penalties at a level too low to cause full disgorgement of the benefits received by cartel participants. In such situations, other countries, including the United States, might indeed have a valid interest in regulating the cartel.

But recognizing that the United States may have a valid interest in regulating certain conduct is not the same thing as concluding that its laws in fact reach all such conduct. The question raised in these global cartel cases remains, fundamentally, a question about the prescriptive jurisdiction of U.S. antitrust law. When we say that a foreign plaintiff can sue in a U.S. court, in other words, we are not merely providing a forum: we are saying that U.S. antitrust law reaches the conduct in question. The debate over whether the FTAIA permits such actions therefore needs to be more firmly situated within the framework of international jurisdictional law. In particular, it needs to address possible limits on the extraterritorial application of U.S. law when that application would cause regulatory conflict with other countries. The failure of the broad interpretation of the FTAIA is its complete disregard of such limits.

The broad view of the FTAIA endorsed by *Kruman* and *Empagran* permits litigation in U.S. courts by foreign plaintiffs whose own injuries were suffered in a foreign-market transaction. In both cases, plaintiffs established the existence of direct and substantial effects within the United States; the decisions therefore turned on the interpretation of Section 6(a)(2) of the FTAIA. In *Kruman*, the court held that "the 'effect' on domestic commerce need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the Sherman Act."[14] The *Empagran* court applied a slightly different version of this broad test, holding that the effects of the conduct "must give rise to 'a claim' by someone, even

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which may make up for his U.S. liability.

See Empagran, 315 F.3d at 356. This deterrence analysis draws on an earlier case in which the Supreme Court considered whether foreign governments are entitled to assert private antitrust claims in U.S. courts. *See* Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 315 (1978) (suggesting that if "potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators").

[13] *See* Eleanor Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 923 (2003) (noting that many developing countries lack either antitrust laws or the resources to enforce existing laws).

[14] *Kruman*, 284 F.3d at 400.

if not the foreign plaintiff who is before the court."[15] While this approach solves the regulatory gap problem noted above, it will in many situations create regulatory overlap. In cases in which the country where the plaintiff's transaction occurred also regulates, permitting a private claim in the United States, under U.S. law, may create a regulatory conflict.

It is important to note that the conflict will not necessarily arise from a difference in anti-cartel policy itself. In fact, most countries with developed antitrust regimes have similar anti-cartel policies (at least with respect to hard-core price-fixing conspiracies, which are almost universally condemned).[16] Proponents of the broad view seem to suggest, on the basis of this policy similarity, that offering foreign plaintiffs private rights of action does not interfere with foreign policy, in that the private actions enhance deterrence and also provide compensation to the direct victims of the conspiracy. Under the broad view, they argue, U.S. actions do not create conflict at all, but rather serve the shared anti-cartel policy by making additional enforcement resources available.[17]

What this view ignores, however, are the quite substantial differences in policy regarding the implementation of antitrust laws.[18] Many developed antitrust regimes use only administrative and criminal proceedings to enforce against anti-competitive behavior, and have rejected the use of private rights of action. Other regimes may provide for private antitrust litigation, but reject the award of treble damages, viewing the appropriate remedy in such cases as one of compensation alone. In addition, some countries' enforcement strategies include leniency programs, whose effectiveness might be

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[15] *Empagran*, 315 F.3d at 350. On this slightly narrower view, the court explained, the conduct's effect within the United States "must do more than give rise to a government action for violation of the Sherman Act"—it must give rise to a private claim. *Id.*

[16] For a partial survey, *see* Jacqueline Bos, *Antitrust Treatment of Cartels: A Comparative Survey of Competition Law Exemptions in the United States, the European Union, Australia and Japan*, 1 WASH. U. GLOBAL STUD. L. REV. 415 (2002).

[17] *See, e.g.*, Brief for Respondents at 48, F. Hoffmann-LaRoche Ltd. v. Empagran, S.A. (2004) (No. 03-724) (discussing this as a matter of "overlapping jurisdictional regimes" rather than as one of conflict), *available at* 2004 WL 533935.

[18] *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.2 (1995) (noting that different enforcement methods may create conflict even in the absence of conflict as to underlying regulatory policy).

undermined by the availability of private actions.[19] Thus, the application of U.S. law to claims arising out of transactions in those countries would interfere—sometimes quite significantly—with the regulatory choices of other sovereigns. The failure of the broad view is in neglecting to consider the constraints that international law imposes on the extraterritorial application of U.S. law when such conflicts exist.

To make this point more concrete, consider a hypothetical in which the cartel participants are European companies, and, while the cartel's activity has created anti-competitive effects in the United States sufficient to satisfy the first section of the FTAIA, the overwhelming majority of the cartel's effects are felt in Europe. A plaintiff purchases price-fixed goods in France, and subsequently brings a treble damages action in U.S. court against a French participant in the cartel. France has enacted a blocking statute providing that the award of any non-compensatory amounts in such a case will not be recognized in France. In addition, the French government objects to the action in U.S. courts on the ground that the availability of multiple damages in such suits undercuts the leniency programs that are an essential component of French antitrust enforcement mechanisms.[20] Such a case presents direct regulatory conflict. The U.S. policy in favor of treble damages collides with both the French policy of shielding its own nationals from the imposition of excessive damages and a specific mechanism of French antitrust enforcement policy. In such a case, given that the conduct in question is linked less closely to the United States than it is to France,

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[19] The amicus briefs filed by foreign governments in the *Empagran* litigation before the Supreme Court raise this issue. *See, e.g.*, Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae at *28-30, F. Hoffmann-LaRoche Ltd. v. Empagran, S.A. (2004) (No. 03-724), *available at* 2004 WL 226388; Brief for the Government of Canada as Amicus Curiae at *13-14, F. Hoffmann-LaRoche Ltd. v. Empagran, S.A. (2004) (No. 03-724), *available at* 2004 WL 226389. In fact, a similar point is raised by the United States government's submission arguing in favor of the narrow interpretation. *See* Brief for the United States as Amicus Curiae at *19-20, F. Hoffmann-LaRoche Ltd. v. Empagran, S.A. (2004) (No. 03-724) (stating that the broad view "would undermine the effectiveness of the [U.S.] government's amnesty program"), *available at* 2004 WL 234125.

[20] For a similar hypothetical, see the Brief of the Government of Canada at *14, *Empagran* (No. 03-724) ("The conflict with Canadian antitrust regulation and the intrusion on Canadian sovereignty would perhaps be most direct in the case of cartel behavior by Canadian companies that injured Canadian nationals. . .In comparison to Canada's interest, the interests of the United States would be meager. . .").

jurisdictional principles would suggest that the U.S. interest was insufficient to permit a private action in domestic courts.[21]

Arguing that principles of international comity are critical to an analysis of extraterritoriality, of course, does not necessarily mean that *all* actions by foreign plaintiffs are inconsistent with private international law. If, for instance, the defendant in the hypothetical above were a U.S. company, the French regulatory interest would appear weaker. The primary purpose of blocking statutes is to protect companies in the adopting state from multiple damages awards, and a suit against a U.S. defendant would therefore not trigger this interest.[22] In such a case, particularly if the overall effects of the cartel are felt much more strongly in the United States than in Europe,[23] the application of U.S. law appears more reasonable. Or consider a case stemming from a purchase transaction in a country that has an anti-cartel policy on the books, but is unable to enforce it due to a lack of resources. In such a situation, there is little real sovereign conflict that would counsel the invocation of comity. But many actions brought by private plaintiffs, including those brought against European companies and arising out of transactions in Europe, would present real questions of jurisdiction under international law.[24] To ignore the regulatory conflicts that arise in international antitrust cases, as the broad interpretation of the FTAIA does, is to ignore the international law framework within which questions of extraterritoriality should be addressed.

The key question here, of course, is whether the Supreme Court's decision in *Hartford Fire Ins. Co. v. California*[25] has made the analysis of international law constraints impossible. In *Hartford Fire*, the Court addressed the extraterritorial application of U.S. antitrust law generally, and did not speak to the role of comity in

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[21] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

[22] It is true that one might make an additional argument for the foreign regulatory interest in such a case, which is that plaintiffs should not be unjustly enriched. On that view, the foreign interest in preventing multiple damages awards would be implicated by any lawsuit initiated by one of its own citizens.

[23] And the connections of the conduct were therefore stronger in the United States than elsewhere.

[24] It is worth noting that the *amicus curiae* briefs filed by foreign governments in the *Empagran* litigation represent governments that do actively regulate anti-competitive activity.

[25] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

FTAIA analysis in particular.[26] However, the Court held that only in the event of a true conflict would considerations of comity be (even potentially) relevant, and then proceeded to define "true conflict" quite narrowly.[27] It seems unlikely that the Court will reverse that decision,[28] and if a conflict as to the legality of particular conduct under competing antitrust regimes is not viewed as presenting a true conflict, it is difficult to see how a conflict of enforcement mechanisms would be. In other contexts, though, courts have taken competing sovereign interests into account. As I have noted elsewhere, for instance, courts have enforced foreign governing-law clauses in response to transnational concerns, despite the resulting non-application of U.S. antitrust law.[29] Thus, a broader view of the need for jurisdictional restraint—one that transcends the specific doctrine of comity as treated in *Hartford Fire*—might yet be achieved.

III. Private Treble Damages Actions as the Vehicle for Application of U.S. Law

Although the debate over the interpretation of the FTAIA is a debate about the extraterritorial application of U.S. law, the particular remedy at stake—treble damages—is relevant to the degree of regulatory conflict presented. Private treble damages actions under public regulatory law are uniquely American, and the availability of multiple damages awards has been one of the major sources of

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[26] *See id.* at 798 (noting that Congress had expressed no view on the availability of comity when it enacted the FTAIA).

[27] *See id.* at 799 ("No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'") (citing the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES)).

[28] *Hartford Fire* was a 5-4 decision and has drawn substantial criticism. *See, e.g.*, Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42 (1995). In addition, some lower courts have continued to apply comity analysis in cases of antitrust conflict. *See* Spencer Weber Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523, 528 (2002) (noting that "certain lower courts often behave as if *Hartford Fire* does not exist").

[29] And therefore non-availability of treble damages. *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219 (2001). *See also infra* Part IV for a discussion of cases in which courts have dismissed on the basis of *forum non conveniens.*

contention between the United States and other countries regarding international antitrust cases.[30] Although other regimes have indicated growing acceptance of private causes of action in recent years, they have not similarly accepted the use of multiple damages awards.[31] Therefore, the use of private litigation as the vehicle for application of U.S. law, or, more particularly, the award of multiple damages in such litigation, is likely to exacerbate the reaction of foreign governments to that application.[32] In light of this background, it is important to separate the goal of maximizing deterrence by filling possible regulatory gaps from the choice of a particular mechanism by which to achieve that goal.

As the cases highlighting the United States' interest in worldwide enforcement suggest,[33] the policy of deterrence would be satisfied if the overall level of penalty imposed on a cartel is sufficient to make price-fixing behavior affecting the U.S. market unprofitable for cartel participants. But that policy could be satisfied through public regulation rather than through private enforcement: if the aggregate fines imposed by the United States and by other countries were high enough, the conduct would be deterred. While the United States has an additional interest in permitting plaintiffs in the United States to sue, and receive compensation for their injuries, it has no such interest with respect to foreign plaintiffs.[34] The broad

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[30] Buxbaum, *supra* note 29, at 251.

[31] *See generally* Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409 (2004) (discussing the growing availability of private actions in non-U.S. systems, as well as the limitations on such actions). Note that the English High Court has in fact already heard a private claim arising out of the vitamins cartel itself. *See* Provimi Ltd. v. Aventis Animal Nutrition S.A., [2003] E.W.H.C. 1211 (Comm. May 6, 2003).

[32] It is worth emphasizing that in other contexts foreign governments have been quite willing to accept the concurrent application of U.S. and foreign regulatory law. In merger regulation, for instance, the simultaneous exercise of regulatory authority by the European Union and the United States has become commonplace. *See infra* note 47. The availability of multiple damages awards presents an independent obstacle.

[33] *See supra* note 10.

[34] The Supreme Court discussed in *Pfizer* the goal of compensating victims of antitrust injuries, and noted that denying a foreign plaintiff the right to sue "would deny compensation to certain of his victims, merely because he happens to deal with foreign customers." *Pfizer*, 434 U.S. at 314-15. Providing compensation to non-U.S. purchasers, however, does not seem to be a valid sovereign interest of the United States.

view therefore unnecessarily conflates the goal of compensation with the goal of deterrence.

IV. Avoiding Unnecessary Procedural Conflict

The last point I would like to raise in this comment relates to a different kind of conflict that is likely to result from the unrestricted availability of private actions in the United States: conflicts of international civil procedure. Litigating a case in U.S. court when the plaintiff, defendant, and purchase transaction are all located in a foreign country is likely to create substantial procedural conflict. The mechanics of cross-border litigation involving service of process and, especially, the discovery of evidence abroad are not only procedurally complicated, but continue to generate real friction between governments.[35] In addition, a judgment rendered in the United States for multiple damages may not be readily enforceable in other countries.[36] The free availability of private actions in global antitrust cases would therefore create an additional layer of international procedural conflict on top of the conflict already created by differences in antitrust enforcement policy.[37]

These procedural difficulties are both recognized and potentially solved by the doctrine of *forum non conveniens,* which might be invoked to dismiss an antitrust action brought in the United States if a U.S. court found an alternative foreign forum to be more

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[35] In 2003, the Hague Conference on Private International Law convened a Special Commission to review the operation of three of its conventions, including the Service Convention and the Evidence Convention. The submissions by various governments in response to questions regarding these instruments reveal continued conflict in these areas. *See generally* Hague Conference on Private International Law, *Work in Progress on the Practical Application of the Hague Legalisation, Service and Evidence Conventions, at* http://www.hcch.net/e/workprog/se_intro.html (last visited Apr. 28, 2004).

[36] Some countries have adopted blocking statutes preventing local courts from enforcing the multiplied portion of damages awards. Several statutes also include "clawback" provisions, under which the multiple portion may be recovered if it was satisfied by assets of the defendant within the United States. *See generally* Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction,* 6 GEO. MASON L. REV. 505 (1995).

[37] In fact, the vitamins litigation has already generated two separate decisions on the issue of which procedures to use for gathering evidence located outside the United States. *In re* Vitamins Antitrust Litig., 120 F. Supp. 2d 45 (D.D.C. 2000) (addressing jurisdictional discovery); *In re* Vitamins Antitrust Litig., No. 99-197TFH, 2001 WL 1049433 (D.D.C. June 20, 2001) (addressing merits discovery).

convenient.[38] In one recent case, *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, the Second Circuit considered a private antitrust claim brought by a Netherlands Antilles company against two English banks.[39] The court affirmed the trial court's dismissal on the basis of *forum non conveniens*, noting that the private interest factors at stake in the case, including availability of witnesses and documentary evidence, spoke in favor of the alternative English forum.[40] It found that an adequate alternative remedy was available in England, as provisions of the Treaty of Rome permitted private rights of action against anti-competitive conduct.[41] The holding was not affected by plaintiff's evidence that no English court had ever awarded monetary damages in such an action.[42] The court also noted that the absence of treble damages did not render the foreign remedy inadequate.[43]

I do not raise *forum non conveniens* to suggest that the doctrine can solve the difficulties arising from the availability of private actions in U.S. courts in cases of regulatory conflict. Indeed, dismissal on that basis is permissible only when there is an adequate alternative remedy abroad. Thus, a U.S. court would have no authority to order dismissal of a case involving a foreign transaction

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[38] Although dismissal on the basis of *forum non conveniens* was historically not available in cases involving U.S. regulatory law, recent decisions have permitted it. *See, e.g.*, Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603 (2d Cir. 1998) (dismissing an antitrust claim); Howe v. Goldcorp Inv., Ltd., 946 F.2d 944 (1st Cir. 1991) (dismissing a securities law claim); Transunion Corp. v. Pepsico, Inc., 811 F.2d 127 (2d Cir. 1987) (dismissing a RICO claim). *See also* CSR Ltd. v. Fed. Ins. Co., 141 F. Supp. 2d 484 (D.N.J. 2001) (denying dismissal in an antitrust case due to the balance of convenience factors, but noting that "for the purposes of *forum non conveniens* analysis, U.S. antitrust law is not categorically distinct from the antitrust laws that are enforceable in certain other nations. . .[w]hile certain countries may have no parallel legislation, others may provide a sufficiently similar cause of action through their domestic law or through treaty obligations.").

[39] *Capital Currency*, 155 F.3d at 603.

[40] *Id.* at 611.

[41] *Id.* at 610 (holding that Articles 85 and 86 of the Treaty "are roughly analogous to Sections 1 and 2 of the Sherman Act").

[42] *Id.* (concluding that "although English courts have not *yet* awarded damages in an antitrust case, it appears that English courts have the power to do so.") (emphasis in original).

[43] *Id.* (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), for the proposition that the possibility of a lower recovery does not bar *forum non conveniens* dismissal).

if the country in question did not permit private rights of action at all.[44] Rather, I would suggest that the complexities courts recognize and respond to in *forum non conveniens* motions should be recognized earlier, at the stage of determining regulatory jurisdiction, through consideration of restraints on the application of U.S. law. I also note that *Capital Currency*, consistent with *forum non conveniens* cases in other areas of regulatory law, explicitly accepts as adequate private causes of action without multiple damages.[45] This acceptance suggests that at least the multiple portion of damages awards, a factor that is the source of particular contention in the international antitrust enforcement area, need not be viewed as an indispensable element of U.S. enforcement policy.

V. Conclusion

Interpreting the FTAIA to permit private antitrust actions by all foreign plaintiffs, including those injured in transactions in countries which themselves actively regulate cartels, will bring the United States into regulatory conflict with other nations. Although regulatory conflict in the area of antitrust law is certainly not new, it is important to note the general trend of recent years in favor of cooperation in global antitrust efforts. Agencies charged with the enforcement of antitrust laws have entered into bilateral memoranda of understanding with their counterparts in other jurisdictions, facilitating the exchange of information and regulatory assistance in cross-border enforcement;[46] multijurisdictional review of proposed mergers has become commonplace;[47] and commentators have

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[44] *See id.* (emphasizing that a foreign forum is adequate only if the plaintiff would be able to litigate the subject matter of its claim in that forum).

[45] *Capital Currency*, 155 F.3d at 603. The other cases ordering dismissal of claims brought under regulatory law have similarly noted that the absence of treble damages does not render dismissal inappropriate. *See, e.g.*, *Howe*, 946 F.2d at 944; *Transunion Corp.*, 811 F.2d at 127.

[46] The Department of Justice has entered into bilateral memoranda of understanding with regulators in the European Union and a number of countries. *See* United States Dept. of Justice, Antitrust Cooperation Agreements, *available at* http://www.usdoj.gov (last visited Apr. 28, 2004).

[47] Concurrent review has become perhaps most clearly institutionalized between the United States and the European Union. In 2002, regulators adopted a statement of Best Practices on Cooperation in Merger Investigations, establishing an "advisory framework for interagency cooperation." *See* United States Dept. of Justice, US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (Oct. 30, 2002), *available at* http://www.usdoj.gov/atr/

identified growing convergence in substantive antitrust regulation.[48] In this climate of increased cooperation, and in recognition of the shared goal of effective international antitrust enforcement, one might well question the expanded use of an enforcement mechanism that creates additional conflict.

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public/international/docs/200405.htm (last visited Apr. 28, 2004).

[48] *See, e.g.*, Fox, *supra* note 13, at 913 (discussing the WTO's Doha Declaration and its attention to "core principles" of competition law); Gary N. Horlick & Michael A. Meyer, *The International Convergence of Competition Policy*, 29 INT'L LAW. 65 (1995).

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