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ANTITRUST LAW SECTION  
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New York City

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# Empagran and the International Reach of U.S. Antitrust Laws

**MR. TUGANDER:** Our next panel will be a discussion of the Supreme Court's 2004 decision in *Hoffman-LaRoche v. Empagran* and the international reach of the U.S. antitrust laws.

The panel will be chaired by Bernie Persky, all the way to my left. Bernie is the head of the antitrust group at Goodkind, Labaton, Rudoff & Sucharow here in New York. Bernie's practice focuses on complex business litigation and class actions, primarily including antitrust, securities fraud and trade regulation disputes.

Bernie is currently a member of the Executive Committee of this Section. He's also written and spoken extensively on a number of antitrust law topics. It is our pleasure to have Bernie here today.

I'll turn the floor over to you, Bernie.

**MR. PERSKY:** Good morning.

As Steve just stated, we are going to spend the next hour and a half or so talking about what I believe is a very interesting and timely topic: The Supreme Court's *Empagran* decision and the international reach of U.S. antitrust laws.

Allow me to introduce our distinguished panel today which we have put together to offer legal, practical and theoretical perspectives on issues raised by the *Empagran* case.

Edward D. Cavanagh is a Professor of Law at St. John's University School of Law where he has taught and written in the fields of antitrust civil procedure and complex procedures since 1982. Prior to entering the academic community, Professor Cavanagh practiced law with the city law firms of Donovan Leisure and Kelley Drye.

In 1986, while on leave from teaching, he served as Assistant Attorney General in the New York State Department of Antitrust Bureau, where he headed up the state's investigation of the Thomson-West merger. In 1997 he became of counsel to Morgan Lewis & Bockius in New York City, concentrating on antitrust litigation and counseling. In 2004 he was named Senior Counsel to the firm.

Harry First is the Charles L. Denison Professor of Law at New York University School of Law and the Director of the law school's Trade Regulation Program. From 1999 to 2001 he served as Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. Professor First's teaching interests include antitrust, regulated industries, international and comparative antitrust, business crime and innovation policy. He's a co-author of

law school casebooks on antitrust and regulated industries, as well as the author of a casebook on business crime, and the author of numerous articles involving antitrust law.

Professor First has twice been a Fulbright Research Fellow in Japan and has served as an Adjunct Professor of Law at the University of Tokyo.

John Shenefield, to my right, is a partner in the antitrust practice group of Morgan, Lewis & Bockius. His practice concentrates on antitrust litigation and counseling. Mr. Shenefield has served as lead counsel in a number of national and regional antitrust litigations. His counseling practice involves issues ranging from mergers and acquisitions to government investigations. Mr. Shenefield is also involved in international antitrust issues and has handled matters before the European Commission and the United Kingdom's Office of Fair Trading. He's also been appointed to the Antitrust Modernization Commission created by Congress.

Before entering private practice, Mr. Shenefield served as Assistant Attorney General in charge of the Antitrust Division from 1977 to 1979 and as the Associate Attorney General of the United States from 1979 to 1981.

Before we turn to our panelists, I would like to provide some brief background information on the *Empagran* case. The case arose out of the DOJ's prosecution of the International Vitamins antitrust conspiracy. The cartel participants were estimated to have earned between nine and thirteen billion dollars in monopoly profits worldwide.

The *Empagran* case was originally brought by domestic and foreign purchasers of vitamins who claim that the implementation of the vitamins cartel resulted in higher prices for buyers, both in the U.S. and abroad. As I'm sure most of you are aware, the Supreme Court granted certiorari in *Empagran* to decide whether foreign purchasers that buy from foreign sellers participating in an international cartel may seek treble damages in U.S. courts under American antitrust laws. Although the Supreme Court held that foreign purchasers could not bring suit in the U.S. for their independent foreign injury, that is the financial injury incurred abroad, independent of the U.S. effects of the international cartel, it remanded the case back to the District of Columbia Court of Appeals. The Court of Appeals will determine whether the allegations of the complaint support the conclusion that the domestic effects of the cartel were inextricably linked to the harm incurred abroad. And if so, whether the suit will then be allowed to go forward.

In *Empagran*, the Supreme Court implied but did not expressly hold that such linkage, namely the interrelationship between the domestic and foreign effects of the cartel's unlawful conduct would bring that conduct within the scope of an exception to the Foreign Trade Antitrust Improvements Act, and thus subject to the treble damages and other remedies provided by U.S. antitrust laws.

We'll lead off today's proceedings with Professor Cavanagh, who will discuss in more detail the *Empagran* case itself, the conflicting case law leading up to it, its holding and rationale, and the current proceedings on remand in the Court of Appeals.

Professor First will then discuss the *Empagran* case from the point of view of the compensatory function of antitrust law, and will offer some suggestions on how to solve the puzzle that *Empagran* presents in a way that's consistent with that function.

Our final panelist, John Shenefield, will offer his insights into the meaning and significance of *Empagran* in a related recent court decision on the business community, and on the advice private counsel should now give in light of that decision. He will also discuss the current proposals before the Antitrust Modernization Commission relating to amending the FTAIA, international antitrust issues and related matters.

We are going to leave about ten to fifteen minutes at the end for questions. I'm not sure with the truncation of time that we will have time for questions, but we'll try. So hold your questions until after everyone speaks.

With that, I will hand over the podium to Professor Cavanagh.

**PROFESSOR CAVANAGH:** Thank you, Bernie.

The defendants in the Vitamins case were all foreign sellers of vitamins and who pled guilty to criminal violations and paid in excess of \$900 million in fines, which are record fines, up until this time. They also paid substantial fines in Europe and Canada in the civil actions filed by foreign regulators.

The private treble damage cases were consolidated in the District of Columbia before Judge Hogan. There were also some 23 state actions involving the price fixing, which to date have resulted in settlement payments in excess of \$2 billion.

The specific case that went before the Supreme Court, as Bernie mentioned, involved purchasers from four different countries: Australia, Ukraine, Ecuador and Panama. The question before the Court was: Does the United States have jurisdiction over transactions that were made abroad by foreign purchasers who were not otherwise participating in the United States market?

To address that issue, it's necessary to look at the Foreign Trade Antitrust Improvements Act which was enact-

ed by Congress in 1982. Now the FTAIA had two basic purposes. One was to clarify the reach of the United States antitrust laws in matters involving foreign commerce. The second thing was to make clear that activities by United States exporters engaged wholly in foreign commerce, where that conduct had no impact on the United States market, would be immune from the antitrust laws. Indeed, the FTAIA was part of an amendment to the Export Company Trading Act of 1982.

With respect to that second purpose, the FTAIA was designed to meet the concern that export companies had been hindered in their efforts to sell abroad because other companies didn't have their hands tied by the antitrust laws. So the idea here was to make sure that the field, at least with respect to exporters, was level.

The first purpose, the idea that we needed to clarify how far the United States antitrust laws go with respect to foreign commerce, requires a little more explication. We must look back historically as to how United States antitrust laws were applied to foreign commerce. The early cases, which are probably typified by the *American Banana* case, simply held that the Sherman Act has no application to conduct outside the United States. That very narrow view was modified somewhat in the mid-20th century by the *Alcoa* case. *Alcoa* introduced the so-called effects test. And the Court, the Second Circuit in *Alcoa*, held that the Sherman Act would apply to extraterritorial acts where those acts were intended to and did affect United States commerce, and hence the effects, but intended to and did affect United States commerce. Now the Court also said very clearly that the Sherman Act by no means applies to all foreign perpetrators that we could catch. Only to conduct that has effect on United States commerce.

In *Alcoa*, and note here the Supreme Court is staying out of this for a long time—*Alcoa* effects test became the standard that most courts were applying.

Now, in the early '70s, the Ninth Circuit in the *Timberlane* case introduced a gloss on the effects test. It said we can't just look at effects, but we also have to look at comity and suggested that we introduce into the analysis a balancing test involving the importance of the United States law, the importance of foreign law, the degree of effect. All of that made the analysis much more difficult. Whenever you start talking about comity, you've got to balance. There is confusion and uncertainty and lack of predictability and hence, the need to introduce some clarity into the analysis.

There was in that regard another triggering mechanism in the '70s, and that was the Uranium cases. The Uranium cases involved an action brought by Westinghouse against the uranium cartel which had 29 members, most of them foreign. The private action was brought against the foreign defendants, many of which were associated quasi-public corporations. In particular, we are

talking about companies from Canada, Australia, the U.K. and South Africa, all of which were very unhappy about being sued in the U.S. and beat a path very quickly to John Shenefield's door in the late '70s.

John, I'm not sure you told them, but I think the answer was that you couldn't do anything about this because they are private lawsuits. But there was a great deal of unhappiness with these lawsuits amongst foreign companies, and pressure in Congress to make clear that the United States antitrust laws shouldn't apply there.

In 1982 you got the FTAIA with that, the dual purpose that I just outlined. Unfortunately, the FTAIA as a statute is a drafting exercise disaster. It is poorly drafted. It is difficult to read. It is dense. It just doesn't make a lot of sense. Courts have talked about its impenetrable language. I always have fun with my students when I show them the FTAIA and say if you were in a legislative drafting class, what grade would you give the drafters. Most of them say F. My reaction is that F is not good enough. We have got to go lower in the alphabet. If we got down to the Q, or R, range that would probably be the right place for us to be in terms of how poorly this statute is drafted. It is drafted as an exception to the antitrust laws. It carves out foreign commerce not involving imports. It carves that out from antitrust liability, but then carves that back into the statute where there is direct, substantial and reasonably foreseeable effects on domestic commerce, and where that effect gives rise to a claim under the antitrust laws. So you are talking here about exception to exception. It is a very difficult statute to read and to parse. Take two Advil before you do it, because that's the only way that it can make any sense.

Fortunately, for about a decade the statute was largely dormant. Not a lot going on in the antitrust area in the '80s, and it was just out there. But in the '90s, as we began to pick up antitrust enforcement and started to pay attention to the international arena, the FTAIA then became an issue and experienced somewhat of a renaissance. But then all of a sudden you have a statute that's been around almost ten years, and there are almost no cases on it. Much of the private litigation that was spawned as a result of the recommitting to international antitrust enforcement—I'm talking about *ADM*, *Auction House*, *Vitamins*, *Bank Austria*, *Statoil*—raised issues as to the application of the Sherman Act in foreign commerce and whether or not the activity was outside of the Sherman Act by virtue of the FTAIA or whether it was within an FTAIA exception.

Two issues that we have to focus on with respect to the FTAIA: Is there a direct, substantial and reasonably foreseeable effect on domestic commerce? Direct, substantial and reasonably foreseeable effect on domestic commerce. The second thing we have to focus on is whether or not that direct, substantial and reasonably foreseeable effect on domestic commerce that creates the jurisdiction

has to be the same effect that also gives rise to this particular claim, of this foreign claim. Or on the other hand, whether once the requisite domestic effect has been shown by some plaintiff, the court has subject matter jurisdiction, irrespective of whether or not that particular domestic effect cited gives rise to this particular claim.

Now, courts have had less trouble with the first. There are a lot of cases around historically that you can borrow from in terms of direct, substantial and reasonably foreseeable effect. The real problem with the FTAIA is that second part, the "giving rise" part; whether that effect has to give rise to "a" claim (a claim by anyone), or "the" claim (a claim by this particular plaintiff). And Justice Scalia on oral argument actually made that point very, very clearly.

In those cases that I mentioned, there seemed to be a consensus at the District Court level in *Bank Austria*, *Statoil* and also in *Vitamins*. There was no jurisdiction there; subject matter jurisdiction was lacking under the FTAIA. Indeed, some courts said that irrespective of whether or not there is a jurisdiction under the FTAIA, these foreign claimants have no standing. Judge Motz's decision in the *Microsoft* cases and the decision in the *ADM* cases (the *Galavan* case in Northern District of California) went off on standing. Standing did not come up. It is one of those issues that the Court did not deal with in this case.

The issue began to percolate up to the circuit level; the Fifth Circuit in *Statoil* took a restricted view of the FTAIA. *Statoil* involved conspiracy to fix prices of heavy lift services in the Gulf of Mexico used by a number of companies. The Court said there was clearly an effect on the United States in those cases for United States consumers and users of those heavy lift services. The foreign users in that case were users in the North Sea. Their basic argument was there was an effect on United States commerce by virtue of this conspiracy in the Gulf, therefore we should be able to sue. Fifth Circuit said no, no jurisdiction here, because the injury to United States commerce arose from what happened in the Gulf of Mexico. It didn't arise from what happened in the North Sea. Cert was denied.

And then in the *Kruman* case in the Second Circuit, and the *Empagran* case itself in the D.C. Circuit, two courts came to an opposite conclusion. *Kruman*, as you know, was eventually settled so that the petition for cert in that case was eventually moot. But the *Empagran* petition for cert was accepted. What the Court basically said in the D.C. Circuit in the *Empagran* case, is if there is an impact on United States commerce and there is a plaintiff who can bring an action, then under the FTAIA a foreign plaintiff is not barred.

So the case comes to the United States Supreme Court. And those of us who had been toiling with this statute had hoped that the Court would give us a defini-

tive construction of the FTIA, particularly Section 6a(2), dealing with whether or not the language should be read as "a" claim, literally, or "the" claim to effectively exclude many of the foreign cases. We were hoping for a definitive construction. We were sorely disappointed by the decision. Although obviously the Supreme Court did render a decision, they did not spend a lot of time parsing this statute. And maybe that's because it may be one task that's just not worth undertaking.

But the key to understanding the *Empagran* case is not in the prior history of this case or in the other cases. The key is oral argument. If you were at oral argument or you had an opportunity to read the transcript, you would see how the Supreme Court decision took shape. For people who think that oral argument in appellate cases is not important, this is one that just clearly belies that contention. You can see how the decision flows right from what happened in the colloquy of the court.

Now, the Supreme Court vacated the decision below. It held that the FTIA precluded exercise of subject matter jurisdiction over the antitrust claims of these foreign plaintiffs. Because even though the unlawful conduct significantly and adversely affected both customers in the United States and customers outside the United States, the adverse foreign effect (on these plaintiffs) was independent of any domestic effect. Thus the Court held that where the foreign effect is independent of any domestic effect, there is no subject matter jurisdiction. So the Court looked at the record very, very narrowly and said what we are presented with here is a discrete question. For purposes of this appeal we are looking at this in the context of injury to foreign buyers; this is independent of injury that occurred in the United States. So the Court really left open and in fact sent back for remand for consideration the question of what happens when the domestic injury and foreign injury are inextricably intertwined. But still, the Court here held on this record there was no subject matter jurisdiction under the Sherman Act.

Now, how did the Court get there? Well, the Court's rationale was two-pronged. First, the Court acknowledged that the wording of the statute was ambiguous. And indeed, on oral argument, early on in oral argument, Justice Souter said to petitioner's counsel, let's assume that as we may have to, that the construction argument is a draw as between the broader interpretation and the narrower interpretation of the FTIA. Let's assume that's a draw. We have to look at something else to break the tie, so to speak, and so how about looking at comity. Now, think about that. I had two reactions to that approach. First, we pay the Supreme Court to construe statutes. That's their job, whether it is hard or not. We don't want them to go off and find an easier way out of the enterprise. Secondly, the FTIA was drafted and enacted specifically to take comity out of the mix. And the answer of petitioner's counsel, Mr. Shapiro, was very clever. After

a moment's hesitation, he said: Maybe comity does apply in the sense where a statute is ambiguous then we should be reluctant to construe it broadly, and in particular in this case where there might be some concern about impinging on foreign sovereigns that we should narrowly construe that statute. And the Court picked up on that in its decision and said that where a broader interpretation could potentially interfere with a foreign nation's ability to regulate its own commerce, then under the doctrine of prescriptive comity, we should be reluctant to interpret United States statutes broadly.

And Mr. Shapiro also noted, as the Court goes on to note, that in fact foreign governments as well as the United States Department of Justice, submitted amicus briefs that suggested that in fact a broad reading of the application of the Sherman Act here would result in some interference with the antitrust regimes of foreign countries. In particular, because we have treble damages, and usually the foreign remedies are much less generous to private parties, you could end up inviting a lot of foreign plaintiffs to the party in the United States. And of course, when Justice Rehnquist hears something like that, that we are going to have an increase in case load, his ears perk up very, very quickly, and he gets very interested in the argument.

So there were amicus briefs from both the United States and foreign governments which said the result, if we find jurisdiction here, would be a flood of cases, foreign cases in the United States seeking treble damages, and we are going to have some very, very unhappy colleagues in the antitrust world. But again, all of this concept, this prescriptive comity concept comes about in the colloquy of oral argument.

An alternative basis for saying that there was no jurisdiction, the Court says, comes from the language and the history of the FTIA.

Now how the Court got there is very, very interesting. Because again on oral argument, they ask counsel: "Counsel, are you aware of any cases prior to 1982, prior to the enactment of the FTIA with factual similarities here where jurisdiction was upheld?" The government said no. Mr. Shapiro said no. Counsel for *Empagran* made some arguments from cases which the others said were distinguishable. But basically, as far as the Court was concerned, prior to the time of the FTIA there would be no jurisdiction here.

Then the Court used that as the basis for its alternative holding: If there was no jurisdiction prior to the FTIA, and the purpose of the FTIA was to limit the reach of the United States antitrust laws, not to extend it, then there can be no jurisdiction here. In other words, for us to interpret this case as one expanding Sherman Act jurisdiction in the foreign arenas would do a serious violence to Congressional intent in enacting this statute.

In so stating, the Court noted some of the ambiguity in the legislative history, and that you can make arguments for or against jurisdiction from the legislative history. Indeed, a literal reading of the statute, when you look at Section 6a(2), may well support plaintiff's position here. But the Court said ultimately, when we look at the legislative history and we look at the language of the statute, we can't say that the FTIAA was designed to expand jurisdiction. It just wasn't. And if we give it that reading, we are going to be expanding jurisdiction. So they kind of backed in. We didn't get the nice parsing of a statute that we wanted. They kind of backed in with this alternative argument to say that there would be no subject matter jurisdiction.

Now, where does that leave us here? What was Justice Breyer trying to do in reaching this decision? We can speculate, and we are probably all going to speculate about this. My sense is this. I think Justice Breyer was looking to get a decision that would get as many people on board as possible. Again, it's a little dicey to try to make conclusions based on the colloquy, but it seemed to me, sitting there watching the argument, Justice Stevens seemed to think there was probably jurisdiction here, and I thought Souter might have thought that too, and maybe Justice Ginsberg. The others, I think, were very much in the other camp. And Justice O'Connor wasn't sitting, so I figured it was at least going to be a five-to-three decision. But I think Breyer was crafty in the way that he articulated the issue, saying that we have got a situation where the foreign harm is independent of the domestic harm. I think because he articulated that issue very, very narrowly, he was able to get the other three shakier people to sign on. So what we ended up with was unanimous opinion, and of course, the door left open for the situation where the foreign injury is inextricably intertwined with the domestic injury.

Thinking about that for a minute, I mean the Court had to know that that was going to happen, number one. And number two, the cure for that seems to be very obvious. If you are the plaintiff, one of the things you are going to plead immediately is that your foreign injury is inextricably bound up with domestic injury. And if that's the case, we are going to have to go back to the Court again very, very soon.

The case was remanded in early November. The D.C. Circuit came down with an interesting opinion that basically said that as we want you to know we are working on this case, and we'll have a decision sometime. But that decision is still pending. I've been worried, I've been watching LEXIS every day, because two years ago I think I spoke here and the *Empagran* decision came down on the date of this panel. But we are now before the D.C. Circuit. The D.C. Circuit is going to have to decide whether or not the case can go forward. They have said that the parties have alleged, properly alleged the inextricable intertwining,

and now they have to decide whether or not that is going to give jurisdiction. That's where we are sitting, waiting for that right now.

Another interesting note here on standing: I think all of these cases could be decided on standing. The courts have judiciously, with the exceptions of the ones I've just mentioned, have judiciously avoided reaching these decisions on standing grounds.

And now I will turn it over to Harry.

**PROFESSOR FIRST:** Ned has given us I think a really good overview of the prior case law under the FTIAA, as well as under Section 1 and 2 relating to the Foreign Commerce Power of the Sherman Act, and of the issues presented in *Empagran*.

I am going to repeat—since law teachers always repeat things, particularly that other teachers do—I will repeat a little bit of it, but maybe with a little different approach.

As Ned pointed out, this is your textbook example of a poorly drafted law. The decision in *Empagran* did give the Supreme Court its first opportunity to construe this law, passed more than twenty years ago. But I think in looking at the Court's decision, the importance of its decision actually extends far beyond the technical question of statutory interpretation, which was the question presented to the Court. I think that the Court took *Empagran* as an opportunity to give us its view of the proper jurisdictional scope of the antitrust laws, as well as their purposes.

Again, as Ned pointed out, *Empagran* is just one of many cases that were brought against the vitamins cartel by antitrust enforcement authorities from around the world, by the plaintiffs in the U.S., and by the state attorneys general. And of course, *Empagran* involves one set of these potential plaintiffs: Non-U.S. purchasers of vitamins suing for the amount by which they were overcharged by the cartel.

Now, actually, a fair amount of the Court's decision in *Empagran* and much of the discussion about *Empagran* I think is also focused on the question of deterrence. And certainly from the point of view of the Justice Department, which cares not for comity, believe me, but cares for deterrence, this was a very important point. Little attention though has been paid to the other important function of antitrust law, hence the title of my talk, which is: "The Compensatory Function of Antitrust Law: Compensating Those Harmed by Anti-competitive Conduct."

So my first rhetorical question is: Why haven't we paid attention to compensation? Just to remind us of the importance of compensation, I have two quotes from Supreme Court decisions. The first, by Chief Justice Berger in *Reiter v. Sonotone*: "Congress designed the Sherman

Act as a consumer welfare prescription." *Reiter* was a class action case brought by consumers, where it was argued that somehow Section 4 of the Clayton Act didn't cover them. The Court said yes, it does. It is consumer welfare we are concerned about. And the second is a quote from *Brunswick*, quoting from House debate on Section 4 of the Clayton Act in 1914. And I like the rhetoric of this quote: "Private damages actions . . . were conceived primarily as opening the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giving the injured party ample damages for the wrong suffered."

I'm going to divide my remarks into these five parts: first, the past as prologue—two great cases plus one; the second, applying antitrust in today's world; third, trying to understand *Empagran* itself; fourth, some possible solutions to what I view as the puzzle of *Empagran*; and fifth, a conclusion.

So, the past as prologue. The jurisdictional language in Section 1 and Section 2 reflects the foreign commerce power of the United States. The Sherman Act applies to agreements in restraint of "trade or commerce . . . with foreign nations." What did Congress mean by that? What's the scope of the foreign commerce power generally?

The first great case, a case that Ned mentioned of course, is the *Alcoa* case, which in part involved a cartel of non-U.S. producers of aluminum ingot, including Aluminum Limited, which was a Canadian company and a defendant in the case. This was a civil suit brought by the Justice Department seeking equitable relief. Judge Hand, as we know, upheld jurisdiction over Limited's activities, over the Canadian company. Although he recognized the power of the United States to reprehend conduct that occurs outside its borders if the effects are felt within, Hand still narrowed the scope of the Act a bit by holding that Congress did not intend to cover any act abroad that might affect the U.S., just those that were intended to affect imports or exports and which actually had some effect on them. This is the basic effects test from *Alcoa*.

The second great case is the *Hartford Fire* case, decided in 1993 by the Supreme Court. *Hartford Fire* was a suit brought by nineteen states as well as numerous private plaintiffs, which alleged, among other things, that reinsurance companies in London had conspired to coerce primary insurers in the United States to restrict the coverage they offered for commercial general liability insurance, as well as for certain forms of pollution liability insurance.

Justice Souter wrote the jurisdictional part of the opinion for a closely divided 5-4 court. Souter wrote: "It is well established by now the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Pretty much the *Alcoa* effects test, except for the minor word "substantial," but pretty close to *Alcoa*. Justice

Souter also took the view that comity played almost no role in the exercise of that jurisdiction. Viewing the question to be whether comity should lead U.S. courts to decline to exercise U.S. jurisdiction, the majority held that principles of international comity would require a declination of jurisdiction only if there were a conflict between U.S. and U.K. law. And there was no real conflict, said the majority, because British law didn't require the defendants to act in a way contrary to U.S. law, nor was it impossible for the English defendants to comply with the laws of both countries.

The dissent was written by Justice Scalia, and he analyzed the case quite differently. For Justice Scalia it wasn't so much a question of the scope of Congress's jurisdictional power as it was a question of how Congress had intended to exercise that jurisdiction over acts affecting commerce. He called it "prescriptive jurisdiction," which he said depends on principles of international law, which Congress presumably intended to follow in enacting the Sherman Act. Comity, he said, becomes prescriptive comity: the respect sovereign nations afford each other by limiting the reach of their laws.

Scalia then returned to the Restatement for the relevant principles of international law, which he felt should guide the decision. He took away the Restatement's overall view that a nation shouldn't exercise jurisdiction with respect to persons or conduct outside the United States "when the exercise of such jurisdiction is unreasonable." So this is the reasonableness test from the Restatement. And although the Restatement lists a number of factors relative to the question of reasonableness, I think one is of particular importance in *Empagran*: as Justice Scalia pointed out, the United Kingdom has a "comprehensive regulatory scheme governing the London reinsurance markets where the London reinsurers work."

The third case, we can call it great or not, is *Trinko*, which is a case with which I think most of us are familiar. *Trinko* was a consumer action alleging that Verizon engaged in monopoly maintenance in the way it carried out its interconnection obligations under the Telecommunications Act of 1996.

The Supreme Court in an opinion by Justice Scalia held that *Trinko* failed to state a claim under the antitrust laws. There were a number of reasons that the Court gave, but one of them involved the existence of a fully functioning regulatory scheme under which both state and federal regulators had the authority to deter and remedy anti-competitive behavior. In other words, the problem was best remedied by the FCC and the New York Public Service Commission, not by an antitrust court.

Now for the second part of my talk: How do we apply antitrust in today's world? As a good law school teacher, I will start with a hypothetical. Suppose that there had been a litigation, let's say after Judge Hand's decision in *Alcoa*, in which a Canadian fabricator that had pur-

chased aluminum from Aluminum Limited, the Canadian company, in Canada, had sued Limited in the United States for treble damages. Would such a suit have been allowed under Judge Hand's opinion? How would that have looked? I think if you look at the decision that Hand wrote, you would say Hand would not likely have distinguished the private plaintiff from the United States government as plaintiff, at least in terms of whether there was jurisdiction under the Sherman Act. In other words, the cartel's conduct had intended effects in the United States which was sufficient, he said, to allow for jurisdiction over the Canadian company under Section 1.

Now, whether the purchaser had a good claim under Section 4 of the Clayton Act for treble damages, whether it was injured in its business or property as a result of any violation of the antitrust laws, is another and separate issue about which he wasn't writing, and which is in a sense not involved when we are thinking about foreign commerce jurisdiction.

Of course, we don't know the answer to my hypothetical. As with all good hypotheticals, there is no real answer, because nobody brought that suit. But what do we take away from the fact that no one brought such a suit? You would think, gee, wouldn't someone do this? Well, of course, in 1938, when *Alcoa* was filed, private treble-damage litigation was quite rare. There was a paucity of private suits. So it's not surprising that when the Supreme Court in *Empagran* turned around and said, tell me what cases like this have been filed, that no one could find any. It would have been quite surprising if there had been any cases to find.

What we have to recognize is that much has happened since *Alcoa*, both in terms of the internationalization of economic transactions and of antitrust. We are in a much more globalized world today, not only in terms of economic transactions, but also in terms of political concerns. In fact, I would suggest that globalization has come to have not only an economic aspect but a political one as well. Globalization, as we know, has its discontents, but it also has led to a spread of antitrust principles, indeed to an extent that I suspect would have been unimaginable to Judge Hand writing his opinion at the end of World War II.

An important aspect of this diffusion of antitrust has been the increase in the importance of multiple enforcers of antitrust laws, and the vitamins cartel is a good example of that sort of enforcement, but not the only one. Multiple enforcement, as we know, increases the opportunity for conflicting decisions, but it also increases the diversity of antitrust enforcement approaches and increases the types of resources available for antitrust enforcement. In a sense, what we are moving to is a more competitive market for antitrust enforcement that will deal with global economic problems.

One of the important assets, I would suggest, employed by enforcers in this market is a national court system. One might argue in fact that, at least to the extent that we can, we should allow these competitive forces to function, allocating enforcement responsibility to those enforcers—and to those courts—best able to carry them out.

In the context of today's world, I would suggest we also need to consider the impact on the functions of antitrust of a decision on whether to allow monetary recovery by plaintiffs in a case like *Empagran*. One function, as we know, is to deter anticompetitive behavior. The Court in *Empagran*, in weighing the arguments—and many arguments were made as to the effect that the decision would have one way or the other—basically said the arguments are a draw. At least from what we know, the Court wrote, it is an empirical question whose answer we do not now know. We can't say what the impact on deterrence would be in allowing the plaintiffs to proceed.

But it is the other function of antitrust law, the compensation of victims, for which it is far easier to draw conclusions. Denying recovery to plaintiffs, like those in *Empagran*, either leaves them completely or likely uncompensated: completely, for those in jurisdictions without antitrust law or without a private right of action; and likely uncompensated for those in jurisdictions without an effective private right of action—which today, as we know, is almost everywhere else in the world.

So the question, I think, is why should we not provide a forum for compensation in the United States, if we can?

So let's move to understanding *Empagran*. First of all, *Empagran*'s concerns. *Empagran* perhaps might be viewed as an effort to close the courthouse door to these plaintiffs. But of course, as Ned pointed out, it didn't do so definitively. If anything, I think actually the Court in *Empagran* was more concerned with stylizing the facts of the case so that it could revisit *Hartford Fire*, and the methodology employed by Justice Scalia in his dissent, than with actually deciding the *Empagran* case in front of it. I take this from the question that Justice Breyer posited in his opinion. You recall Justice Breyer had a former life as a law teacher, so I think he likes hypotheticals too. And this was his hypothetical: "Why is it reasonable to apply this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?" Of course we know this was an international cartel. So what is Breyer talking about when he focuses on "independent foreign harm"? But these are the facts Justice Breyer wanted to pose. Then he goes on to interpret the FTIA in accord with—surprise—principles of "prescriptive comity," pointing out that although Congress might have hoped that foreign countries would adopt systems like our own, "if America's antitrust policies could not win their own

way in the international marketplace for ideas, Congress, we must assume, would not have tried to impose them in an act of legal imperialism, through legislative fiat." Of all the ways we are engaging in imperialism, I never thought that it was through the Sherman Act! But this is the language that Justice Breyer uses.

More importantly, Breyer's approach draws straight from Scalia's dissent in *Hartford*. The Court now states the antitrust laws should be interpreted under principles of prescriptive comity, the exact position Justice Scalia argued for. The Court then approaches that question by asking whether interpretation of the statute is reasonable when foreign interests are involved. That the Court knew it was not deciding the case in front of it can be seen in the concluding paragraphs of its opinion. And you have the opinion in your materials. I urge you to read it and see if you understand it. Recognizing that the plaintiffs argued that the foreign injury was not independent of the domestic injury—this was an international cartel setting prices and output across countries and selling an easily transportable product—the Court remanded the case to the Court of Appeals so that it might consider whether the plaintiffs, after all, might actually have a good claim under the FTAIA.

So how are we to interpret this concluding directive? The statutory argument that I think the Court now sets out at the end of its opinion is that the "direct, substantial, and reasonably foreseeable effect" must give rise to the claim. That is, the domestic effects have to link to foreign harm. This is what Breyer says in the end, this is the possibility that the Court holds out for recovery by non-U.S. plaintiffs purchasing outside the United States.

However the Court doesn't tell us whether, if this is the case, it is a good legal theory under the FTAIA. That's part of the remand. On the *Empagran* remand, the DOJ—actually the DOJ and FTC as amicus—in the D.C. Circuit argued that this is not a good legal theory, that it does not matter under the FTAIA whether the effects are linked or not linked. Because according to the government's view, whether the foreign harm is independent or dependent doesn't matter in terms of the policy considerations which it said underlie *Empagran*. In either event, allowing recovery would be an unreasonable interference with foreign sovereign authority and would adversely affect the deterrent enforcement policies of foreign jurisdictions and the United States, because allowing recovery would undercut that deterrence. So that's the argument that the government has made in the Court of Appeals.

I think there is another policy that we can look at. That is to go back and take consumer welfare seriously, and interpret the statute in a way that carries out the compensatory function of the antitrust laws. As for the concerns of foreign jurisdiction and this alleged comity, one must wonder about whose interests those foreign sovereigns are actually protecting. Why do they want to bar

their own citizens from using our courts to obtain compensation? If prescriptive comity—the phrase used in *Empagran*—does not stop the U.S. from criminally prosecuting their corporations, imposing on them massive fines and putting their executives in our jails, why should it stop us from opening our own courts to their citizens or to the citizens of other countries who actually have been harmed by the actions of these companies? To use Justice Breyer's terminology, why would the assertion of *criminal* jurisdiction be reasonable, but the assertion of *civil* jurisdiction not be?

A final argument relating to the problem in *Empagran* that I will just put in front of you comes from the thread that runs through Justice Scalia's dissent in *Hartford* and his majority opinion in *Trinko*. In both cases the argument was that antitrust should hold back, at least in part, because there was some other effective remedy. But for non-U.S. buyers in *Empagran*, this is not the case. Compensation of those victimized by antitrust violations is not readily available to those plaintiffs outside the United States. If it were, *Empagran* wouldn't have been filed in our courts. So long as we do have jurisdiction over the cartel, even under the narrow linkage theory suggested in *Empagran*, I would argue there is no one else to provide as good a forum as we can, where victims can seek compensation for injury they have suffered. This argument would support a decision to exercise jurisdiction, rather than to abstain from its exercise.

So, some possible solutions to interpreting *Empagran* which you can think about. For cartel cases I offer two suggestions for how to deal with that final paragraph. A familiar way to tell whether there are links between one geographic area and another is to see if they are in the same geographic market. Because the linkage in *Empagran* runs from the U.S. to the foreign country, (we'll call it F1), one could ask: if a hypothetical monopolist in F1 raised its price, would consumers in F1 have purchased in the U.S. or would U.S. sellers have shipped in? If the answer is yes, buyers would have purchased or sellers would have shipped in but this didn't happen because the cartel had set high prices in the U.S., then there is a link between those U.S. domestic effects and the foreign harm. That is, but for the cartel's effect in the U.S., purchasers in F1 would not have been harmed by the cartel agreement in F1. They would have been able to buy in the U.S. The "direct, substantial, and reasonably foreseeable effects" in the U.S. are thus directly linked to harm in F1.

Now, the second approach that might also work is to use a behavioral test. We could ask whether the cartellists have run their cartel to include both the U.S. and F1. And I think this shows us, if that's the case, that the cartel has thought the two geographic areas were economically linked and that they needed to be addressed together. Applying the assumption of economic rationality to cartellists seems both warranted and familiar. They know

what they are doing. And again the “direct, substantial and reasonable foreseeable effects” in the U.S. would be directly linked to harm in F1.

The distribution cases raising FTAA cases turn out to be a little harder. You can try to work through a geographic market test, but it makes recovery in those sorts of cases a little less likely.

Finally, a point that Ned mentioned, which is that the jurisdictional issue is not the end of the game. There are other doctrines which we appropriately use to manage antitrust litigation in our courts, particularly standing and causation; and, of course, for foreign parties and foreign conduct, *forum non conveniens*. So we have other tools that can handle these other kinds of normal problems of antitrust litigation.

In conclusion, I would like to channel the words of Learned Hand from *Alcoa* and use them to think about today’s jurisdictional issues: “We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States [my emphasis].”

Transactions over which we exercise jurisdiction become part of the economic justice that goes on in the world. What we decide does have consequences for the United States. We can increase economic justice in the world if we are willing to extend antitrust’s compensatory function to include those injured outside the United States, so long as we have, even under that narrowed approach that the Court uses in *Empagran*, some degree of jurisdiction.

I leave you with that great quote with which I started, using the great rhetoric of the last century, updated today. We should construe the FTAA and the Sherman Act to open the door of justice to every man, wherever he may be injured by those who violate the antitrust laws, and give the injured party ample damages for the wrong suffered.

Thank you.

**MR. SHENEFIELD:** Bernie, on the assumption that the program means what it says, I have about eight minutes.

First, a word of disclosure. My firm is involved in several of the cases that I’ll mention, including *Empagran*, so be advised.

The question arises: What are we to make of this mess that we have in front of us? Because it is truly a mess. We don’t know the answer to the simplest question about this statute: how does the Sherman Act apply to worldwide cartels in global markets? We just simply don’t know. We don’t know even after the Congress tried its best in 1982. I won’t go through the laborious story of how the act came to be enacted. I will agree with Ned that the statute is full

of what I’ll call demonic intricacy. It is routinely cited as one of the worst statutes drafted in the last twenty-five years. What’s interesting about it is that almost every court that has construed it has relied on the “plain language of the statute,” and then come to diametrically opposed conclusions. The act contains not just exceptions to exceptions, but double negatives, carve-ins and carve-outs and a proviso that’s an exception to one of the exceptions. It is a nightmare. So we don’t know the answer to the central question, after Congress did its best.

We also don’t know the answer to the question after the Supreme Court allegedly did its best. In a decision that was supposed to open the curtains and reveal all, virtually nothing has been shown. Unless you agree with my conclusion, which is that, like the *DaVinci Code*, embedded in the language of this opinion is the clue as to how this is all going to come out. More of that in a moment.

Since *Empagran* came down, the courts have been struggling all around the country trying to deal with the puzzle. In a case here in the Second Circuit, *Bank Austria, Sniado v. Bank Austria*, the Second Circuit took *Empagran* and applied it to the complaint in front of it and concluded rather summarily, I suggest, that the alternative theory that *Empagran* spawned simply wasn’t to be found in the complaint. The complaint in fact did say something about a worldwide cartel. It did say that there was a domestic component to that cartel that was required to be effective in order for the conspiracy to be an overall success. Notwithstanding that, the Court simply failed to find in this rather broad complaint, even liberally construed as it said, the factual predicate for federal jurisdiction. And then in what must be a very unusual declination of the power to act, it said it wasn’t inclined—I think that was the word—wasn’t inclined to let the plaintiffs reword their complaint to see whether they could come within the *Empagran* rule.

On the other hand, in Connecticut, in *Dow*, Judge Covello was far more forgiving on facts that seemed far less promising, from my point of view. There the complaint alleged at least that there was a vertical restraint in the United States that damaged competition in the United States, and as a result, a distributor in India was injured. The facts of the case don’t happen to line up very well with that description, but that was the way the Court looked at the complaint. And in light of that characterization of the complaint, the Judge refused to dismiss that case. So now you have the twin pillars on each side.

In the middle is the Third Circuit in *BHP New Zealand*, where Judge Sloviter sent back to the trial court this whole issue and invited, rather casually, the court to consider evidence—probably involving discovery—on the degree of linkage between the cartel’s U.S. domestic effects on the one hand and the plaintiff’s harm abroad, and indeed on any other issue that the court might think helpful, which is a surefire recipe for never getting to any

results. Since you'll have to do discovery on conduct, on the market, on injury, you might as well try the whole antitrust case and be done with it.

Other than those cases, there is very, very little. There is a drib and a drab here and there. *Skidmore* is a case involving a dismissal on *Empagran* grounds, with no discussion whatsoever. Another case, *OS Recovery*, here in the Southern District, is a dismissal based on *Empagran* without real analysis. And meanwhile, the briefing continues in *Empagran* in the D.C. Circuit.

There, not surprisingly, the *Empagran* plaintiffs have found that their plaintiffs do in fact satisfy this new linkage theory that the Supreme Court has left open. There is an essential economic reality that they have discovered, and that is that vitamins are fungible. The market is global. Therefore, unless the cartel were effective in the United States, it could not have harmed anybody abroad. That establishes jurisdiction, they say, because of the language of the statute, because of the deterrence scheme that's in effect, and finally, because it's fully consistent, so they say, with the decision in *Empagran*. But none of that can be right. None of this, none of that makes much sense at all.

First, and this is the point, if you look past the technical holding in *Empagran 1*, hasn't the Supreme Court really already decided this whole issue? Does anyone really think that it went through the entire exercise in *Empagran 1* only to leave this gaping exception unfilled and unaddressed, which would by definition encompass every worldwide conspiracy case ever tried, as Justice Breyer surely recognized, and would have encompassed the facts in *Empagran* itself.

Sure, the Supreme Court is deferring to the D.C. Circuit. That's judicial good manners. But don't we already know, from the language in *Empagran* and the weight that it accorded comity and all the other factors, how the Court expects the D.C. Circuit to resolve this question?

In short, it is my view that the *Empagran* saga is really over, and it is going to come out very much as Justice Breyer has suggested. It must be the case—contrary to Professor First's view—that mere but-for linkage simply is not going to be enough. Federal jurisdiction cannot depend on whether there is some incidental connection, or on whether there was a forbearance, for instance, of a U.S. seller from cutting his price and not selling abroad. But if that's true, there is going to be that linkage in every single worldwide cartel case. If that's enough, there is no question remaining to be decided.

If linkage alone is enough, Justice Breyer has, as they say, labored and brought forth a mouse. So it must mean there is something more that he's looking for. Deep in the opinion, I suggest, there is a clue as to what he has in mind. As Ned suggested, he discusses pre-FTAIA law, and one of the cases he discusses is *Industria Siciliana Asfalti* out of the Southern District. That case permits an Italian

plaintiff to proceed against an American defendant based on a purely foreign injury. What's important about that case is that the conduct in that case operated to injure both the domestic plaintiffs and the Italian plaintiffs equally. But here's the point. Tellingly, in quoting the lower court opinion, Justice Breyer himself takes language and then italicizes portions of it, and the words he italicizes are the words that Ned picked up, quote, "inextricably bound up with domestic restraints of trade." Later, he quotes, "was injured by reason of an alleged restraint of our domestic trade." Now that language points in the direction, I would say, of much more than simple but-for linkage. If only but-for linkage is sufficient, you are still going to have the comity concerns on which the vast weight of this opinion is placed. You are still going to trigger worries about the deterrence scheme that the U.S. government is properly concerned about. You are still going to trigger the concerns about international enforcement cooperation that the Solicitor General mentioned. None of those concerns is dealt with at all by a rule that is based on simple linkage.

Remember, in *Empagran*, the transactions in which the plaintiff participated are purely foreign transactions. The plaintiffs bought a product abroad from a foreign seller. Who thinks the German government or the Italian government will be any less put out if those plaintiffs all rush into our courts based on the concept of linkage? If the effects in the United States do—and this is the language of the statute—give rise to the claims of say an Ecuadorian plaintiff in the but-for sense, don't the effects in, say, Mexico or Japan or Argentina also give rise to the same claim? Where does it end? There is just simply no limiting principle.

It seems to me there are three possible solutions. The first, and the certain one, is *Empagran 2*. This case is coming back. Justice Breyer or one of his colleague justices will be given the chance to pull the plug on but-for linkage as the basis. And he will do it explicitly. I think he's already done it implicitly.

Second—I think this is highly probable—is the standing doctrine. As Ned has suggested, even though there may be technically subject matter jurisdiction, foreign plaintiffs injured in a foreign transaction can be viewed, it seems to me, as simply too remote, their injury too indirectly linked to the U.S. effects, their role too attenuated to confer antitrust standing. That's the reasoning in *Associated General Contractors*. It is the reasoning in *Brunswick*. It is the reasoning in *Illinois Brick*, and it fits this like a glove.

The third possibility, and I think it is only a possibility, is to rewrite the FTAIA itself. You undoubtedly know, as Ned said, that the Antitrust Modernization Commission has unanimously resolved to study this with a view toward making a recommendation to the President and the Congress. But then when you actually begin putting pencil to paper, as they say in my part of the country, it

ain't that easy. Perhaps something elegant like this would do: "In a case in order for a foreign plaintiff to have a claim that is within U.S. jurisdiction, U.S. effects must be the proximate cause of the foreign plaintiff's claimed injury. But-for linkage is not enough, and we mean it." Maybe that would be a good amendment.

The AMC report will not be made available until the spring of 2007. A lot of things are going to happen between now and then. If the Supreme Court resolves the issue one way or another in *Empagran 2*, I think it highly likely the AMC will look elsewhere for things to do. But if the legal landscape is still uncertain in a little more than two years from now, I think a "fix" solution will be forthcoming. And I'm fascinated to hear what the other panelists suggest that it might be. Thank you.

**MR. PERSKY:** Do we have any time for some questions?

**MR. TUGANDER:** Yes.

**MR. PERSKY:** Any questions from the audience?

**AUDIENCE MEMBER:** I'm curious whether Professor First would like to respond to the last speaker.

**PROFESSOR FIRST:** I always think John Shenefield has excellent points. Oh, you want more than that?

As I said, you know, I frankly think that the Court was not all that interested in *Empagran* itself. I think they are frying bigger fish. This is not the first case in which they are doing it, and that's ultimate jurisdiction. So you know, I still think that there is a way to read the language in *Empagran* in a way that's consistent with economic principles by drawing on market definition, and not necessarily throw the *Empagran* plaintiffs out of court.

As for the question: Does the Court not mean but-for causation, I think the concluding paragraphs talk in those terms, but proximate cause will then come in. Because there is still the standing issue—and standing in antitrust is proximate cause—I'm not sure how those two things are going to work, but it may be on the facts of *Empagran* the plaintiffs would actually satisfy both. Because after all, this was a worldwide cartel. The thing that concerns me about *Empagran* is really the sort of spill-over effects to other cases where the Justice Department may find itself starting to get bitten on what the scope of jurisdiction now is under the foreign commerce power.

I think John is quite right, and Ned as well, in implying that this has been a really difficult interpretive problem and rendered more difficult by having not so many cases. But now we have an international economy, international cartels and lots of enforcement. So these cases are coming forward.

Now, my proposal would be just to repeal the FTIAA and go back to Section 1 and let the courts do what courts

do, which is to handle these cases on a case-by-case basis. Do what Learned Hand did, interpret the statute back to the fundamental principles, and not to that really hard-to-understand statute which we have got now.

**MR. PERSKY:** I wanted to make a comment. As primarily a plaintiff's antitrust lawyer, I think the *Empagran* decision really hasn't solved the basic problem. It shouldn't be that difficult with respect to most international cartels to plead the kind of effect that would at least fit the words of the *Empagran* decision. I mean international cartels often involve fungible products, easily transportable with the possibility of arbitrage from the U.S. to Europe and vice versa. So it really shouldn't be that hard to plead yourself into that test.

As to what the courts do afterwards, perhaps they would use standing or some other concept to limit the reach of the statute. But the *Empagran* decision itself hasn't solved the problem.

Does anybody else want to make a comment?

**MR. SHENEFIELD:** Well, I agree. You have excellent points as well, but those are basically wrong-headed points. It seems to me that just reciting that this is a worldwide cartel doesn't get the job of analysis done. The question is what plaintiffs have sufficient connection with U.S. courts to entitle them to come to U.S. courts and file their cases. It isn't fair I think to say that they have no alternatives, that otherwise they go uncompensated.

I haven't seen an empirical study of it, but in my own limited practice I'm aware there is a fair number of countries that actually don't all have contingent fees, and they don't all have treble damages. But I don't think any principle of fairness suggests that everybody ought to get to come to a U.S. court if they can't get treble damages on the basis of contingent fees. So it seems to me, with respect, I think that you are headed in the wrong direction. And what we ought to be thinking about is what is a sensible rule of allocation of jurisdiction between U.S. courts and courts of other countries, and equally entitled to their prerogatives, and what words give effect to that notion.

**MR. PERSKY:** But allowing such suits would tend to increase deterrence and prevent the cartelists from profiting from their worldwide profits, even though they might have to pay U.S. damages. So I think it does carry out for purposes of the statute where there is this linkage between the domestic and foreign harm.

For example, a worldwide market division agreement where, for example, American companies agree not to sell in Asia or Japan and Japanese companies won't come into the U.S. The folks in Japan who purchase at an inflated price because American companies wouldn't be selling there are just as injured as Americans.

**MR. SHENEFIELD:** Fine, let them go to Japanese courts. In any event, the Department of Justice, which is at least as interested in deterrence as the rest of us, says that this decision harms deterrence. And I'm quite persuaded by that, because I've advised companies that are considering whether to avail themselves of the amnesty program. The amnesty program calculation equation that goes on in the decision-maker's mind is what is the penalty if I go into the program, all things considered. And up to this point, it has been damages. Now, after the statute that was enacted last year, single damages for American plaintiffs or those closely connected to the U.S. economy. Now the equation must contain damages from all around the world. And the question for debate I guess, the question for judgment is: What's the net of that? Does it reduce or increase deterrence to allow all those foreign plaintiffs to come into federal court? And I don't know again of any empirical study, and maybe the law professors amongst us could do something about that, but it is not to be trivialized.

**PROFESSOR FIRST:** Just a couple of responses. First of all, in terms of allowing plaintiffs into our courts, as opposed to saying they can only go—if they are from Japan, they can only go into Japanese courts, I frankly think that what we should be moving to is a system that does not have necessarily that single forum. That courts compete, and if certain courts have comparative advantages and do things better, we in the antitrust community ought to say we like that sort of competition. U.S. courts are pretty good at this. And we've learned a lot, ever since the State of India brought its suit against Pfizer for its damages. We have learned a lot about how to do these cases. I don't see any reason why we can't take advantage of it.

**MR. SHENEFIELD:** It is not a bad practice development idea. I agree with that part.

**PROFESSOR FIRST:** Particularly if one is admitted here, but anyway. The idea of private damages cause of action actually is spreading, much in the same way that the idea of going after cartels spread once the U.S. began enforcing it, enforcing the anti-cartel provisions really strongly against non-U.S. companies. So that idea has spread, and private actions have spread. But we're at a point today where I think no one would argue that private suits in Europe or in Japan are anywhere near as developed. The EC wants to develop it, but there is just not a remedy like we have. So I don't see a reason to stay a hand when the other remedies are ineffective, or not as effective let's say.

The deterrent point is an interesting one which I stayed away from. But just to suggest the complexity of this, and I think it is complex, we know on an empirical basis precious little about deterrence actually. But the question is not whether we deter people from snitching on cartels and seeking amnesty. The question is whether we deter firms from forming cartels, and that's a little different. Obviously, detection is important, so to the extent snitching increases, you are going to be more hesitant to form a cartel. On the other hand, to the extent that amnesty has increased, you'll also be less hesitant to form a cartel. What the net is, is a good question.

The Justice Department doesn't quite put it this way because they want to control the amnesty process, but I don't think there is an empirical answer to the question. And that is why in the end I think that Breyer punted on the deterrence point, because he did have amicus briefs from economists and so forth. But everyone is doing this somewhat theoretically, and no one really knows for sure. That's why thinking about compensation here makes some sense. And I still can't get it through my mind why the government of Japan, which has done zippo against the vitamins cartel, in which three of the major participants were Japanese firms, now comes into our courts and says, sorry, you shouldn't allow our citizens to come to your courts for their damages. Well, you know, I just don't get the comity issue, the comity argument there. And in *Hartford*, the U.K. came in and said oh, no, you can't take our people; and the Court said forget about it, there are effects in the U.S. I think the Court should have said that here.

Now, maybe in the end I just don't like the decision in *Empagran*, I confess. But like anyone who doesn't like one decision, you say, well, wait a second, maybe there is something in here that we can use. And I think there still is, although it may be in the end, John, that the D.C. Circuit is going to reject these arguments. But that's yet to be seen.

**MR. PERSKY:** Any other comments? I think that concludes our session.

Thank you to our fine panelists.

**MR. TUGANDER:** I want to thank Bernie and the panel for a spirited debate. It sounds like we have enough material that we might have to revisit this at next year's conference.

Thank you.