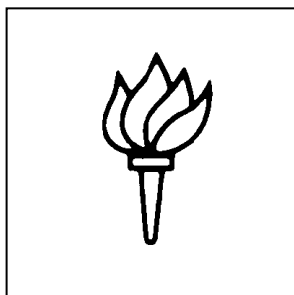


# NEW YORK UNIVERSITY SCHOOL OF LAW

NYU Center for Law, Economics and Organization



## Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance

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# *ESSAY*

## **Free Movement of Judgments: Increasing Deterrence of International Cartels Though Jurisdictional Reliance**

Draft, comments are welcome

*Michal S. Gal*\*

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## Abstract

This article challenges the conventional wisdom that not much can be done under the existing atomistic system of antitrust enforcement to solve the problem of sub-optimal deterrence of international cartels. Low deterrence results from the fact that international cartels are generally prosecuted by only a fraction of the jurisdictions harmed by them and that monetary sanctions in those jurisdictions are generally based on harm to their domestic markets only. To solve this problem, this article proposes a novel legal tool which enables countries to adopt and rely upon foreign findings of international hard-core cartels, provided that the foreign decisions meet criteria that ensure that such reliance is reasonable and fair. As elaborated, this free movement of judgments holds potential to overcome the main obstacles to efficient deterrence and to significantly increase both domestic as well as global welfare. Its costs can also be largely overcome by designing appropriate solutions. The political implications are also not prohibitive. As shown, jurisdictions already rely on foreign judgments that do not significantly differ from the decisions at hand.

## INTRODUCTION

International hard-core cartels are a primary evil of global trade.<sup>1</sup> Such cartels allow firms from different jurisdictions to join forces in order to abuse markets around the world. The considerable harm such cartels often create has led to the realization that they should be vigorously deterred. Yet one of the main obstacles to fighting international cartels involves low deterrence levels. Low deterrence results from the fact that generally only a handful of jurisdictions prosecute international cartels. In particular, small and developing jurisdictions rarely, if ever, bring such cases.<sup>2</sup> This is mainly due to their limited financial and human resources and the high costs of proving the existence of an international cartel. Add the fact that those jurisdictions that do bring such cases generally impose monetary sanctions which are based only on the harm to their own jurisdictions, with the result that deterrence levels of international cartels are far from optimal.<sup>3</sup> The stakes are high: a recent study estimated that between 1990-2005 total overcharge by international cartels were approximately 500 billion \$U.S.<sup>4</sup> During this period the aggregate real monetary sanctions against international cartels reached only 13.5 billion, which

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<sup>1</sup> The U.S. Supreme Court described cartels as "the supreme evil of antitrust." *Verizon Communications Inc. v. Law offices of Curtis V. Trinko*, (2004) 540 U.S. 398, 124 S. Ct. 872. This observation, which was applied to a domestic cartel, has similar applicability in the case of international ones.

<sup>2</sup> See, e.g., Michal S. Gal, *The Globalization of Antitrust*; Margaret Levenstein and Valerie Y. Suslow, *Contemporary international cartels and developing countries: Economic Effects and Implications for Competition Policy* 71 ANTITRUST L. J. 801 (2004).

<sup>3</sup> As U.S. Supreme court Justice Stewart explained, "persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home." *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313 (1978). See also Organization for Economic Co-Operation and Development, *Report On The Nature And Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws* (2002)(hereinafter: "OECD Report"). A 2005 study reaffirmed the finding that financial sanctions against international cartels are significantly below optimal levels. Organization for Economic Co-Operation and Development, *Hard Core Cartels: Third Report On The Implementation of the 1998 Council Recommendation* (2005), p. 25 (hereinafter: "OECD 2005 Report").

<sup>4</sup> John Connor and Gustav Helmers, *Statistics on Modern Private International Cartels* (2007) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=944039](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944039). For additional information on the impact of international cartels see, e.g. OECD Report, *ibid.*

is less than 5% of such overcharges (!).<sup>5</sup> Accordingly, finding more efficient ways to deter international cartels is of utmost importance. Yet attempts to increase deterrence levels have largely failed so far.

This essay proposes a novel solution to this problem. It proposes a legal mechanism that would enhance the enforcement of antitrust laws against international cartels and would thus increase domestic as well as global deterrence and welfare. To this end, this essay contemplates the possibility of allowing domestic courts and antitrust authorities to recognize and apply foreign findings of international hard-core cartels in their own jurisdictions, as long as such reliance meets criteria that ensure that reliance is reasonable and fair (hereinafter "the Adoption Mechanism"). Put differently, the Adoption Mechanism extends the doctrine of collateral estoppel to apply between different jurisdictions. This would enable domestic plaintiffs to focus mainly on the cartel's domestic effects and thus significantly shrink the resources needed to prosecute it. As a result, domestic enforcement may well increase significantly. It would also solve the problem of duplicative costs of enforcement that exists under the atomistic enforcement regime that currently dominates antitrust.

Consider the following example: the EU Commission published a decision which found an international cartel in the market for gas insulated switchgears, which had significant effects on many jurisdictions.<sup>6</sup> Using the Adoption Mechanism, other jurisdictions that were harmed by this cartel could use the EU finding, once it becomes final, as a basis for bringing suits against it in their own jurisdictions. Plaintiffs would only have to prove harm to their domestic markets and that the foreign decision meets pre-specified criteria that ensure that legal reliance is reasonable and fair. This would assist many jurisdictions in overcoming their largest obstacle to efficient enforcement against international cartels; the lack of human and financial resources needed to prosecute it.<sup>7</sup> As a result, deterrence of international cartels may well increase drastically.

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<sup>5</sup> Of course, some of these cartels were sanctioned after 2005, but if we assume a constant flow of international cartels even before 1990, then the comparison between the harm and sanctions during this period is a crude, but nonetheless useful, indication of sub-optimal deterrence levels.

<sup>6</sup> EU Commission, Case COMP/F/38.899 – Gas Insulated Switchgear (January 24, 2007)

[http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38899/non\\_conf\\_de c\\_fin.pdf](http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38899/non_conf_de c_fin.pdf)

<sup>7</sup> Indeed, a somewhat similar claim was recently made in Israel in a private damage suit against the members of the international cartel. However, there the plaintiffs based their arguments of an Israeli law which gives evidentiary weight to a foreign

The proposed mechanism takes advantage of three related facts: (a) international cartels affect more than one jurisdiction and thus a finding of such a cartel has relevance beyond the borders of the jurisdiction where the finding was made; (b) parallel prosecution of international cartels in different jurisdiction benefits all by increasing overall deterrence levels; (c) on a political level, the proposed mechanism leaves an important part of the decision-making process in the hands of the domestic jurisdiction, by allowing it to determine the conditions under which the Adoption Mechanism could be applied, if at all. The Adoption Mechanism can thus be viewed as a means for efficient and effective tool for self-help which enables jurisdictions to overcome the technical capacity and resource constraints that currently plague their enforcement efforts. It thus holds the potential to increase deterrence of international cartels without harming the interests of any other jurisdiction.

I begin by presenting the motivation and justifications for recognizing foreign judgments in domestic cases against international cartels. Accordingly, Chapter One elaborates on the problems of international enforcements, their causes, and the shortcomings of the existing tools to overcome them. Chapter two proceeds to show how the Adoption Mechanism can overcome the major causes of under-deterrence by increasing domestic prosecution while reducing enforcement costs. Chapter three addresses the Mechanism's possible costs and shortcomings and attempts to provide solutions to overcome them. It also submits that the proposed mechanism does not constitute such leap from existing legal tools. The discussion of the overall desirability of the Adoption Mechanism leads to the conclusion that it can have significant positive welfare effects, both on the domestic as well as on the international level. Based on this conclusion, Chapter Four analyzes the conditions for the application of the Adoption Mechanism in practice. It suggests a blue print for the criteria that a foreign decision must meet before it can be adopted. The final chapter concludes the essay and touches upon the possibility of applying the mechanism to other types of anti-competitive conduct as well.

#### I. MOTIVATION: SUB-OPTIMAL DETERRENCE EFFECTS

I commence the analysis by discussing the problematic deterrence effects of the current regime and the solutions suggested to remedy it. The first section elaborates the causes of the failure of existing tools to deter international cartels. The second section analyzes the failure of the tools that are currently applied or that have been suggested to remedy this problem.

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document. Case 936-12-07 ABB Ltd. vs. Kottler et al. Their arguments did not go as far as this essay suggests.

### A. THE PROBLEMATIC DETERRENCE EFFECTS OF THE CURRENT REGIME

As Nobel laureate Gary Becker has long shown, deterrence levels are determined by two main factors: the height of the sanction and the probability that the conduct will be detected and punished.<sup>8</sup> Even if we assume that sanctions against international cartels are generally sufficiently high,<sup>9</sup> the current antitrust system suffers from a severe problem in enforcement levels: only a handful of jurisdictions bring cases against large international cartels that harm their jurisdictions. As a result, deterrence is sub-optimal. This section elaborates on the problem and its causes.

International antitrust currently applies an atomistic model to antitrust enforcement in which each jurisdiction enforces its own laws, and generally bases its sanctions on domestic harm.<sup>10</sup> At most, countries share information and modes of analysis. While this system might generally perform well when dealing with domestic cartels, once it is applied to international cartels it creates two main inefficiencies. First, those countries that enforce their laws parallelly against the same international cartels spend duplicative resources. Second, and more importantly, optimal deterrence of international cartels is dependent on the aggregate enforcement actions of all or most jurisdictions which are affected by the cartel. Yet the number of jurisdictions which, in fact, prosecute international cartels is very small. Most jurisdictions do not prosecute international cartels as they do not have the resources or incentives to engage in such prosecutions, for reasons that will be elaborated below.

This is problematic on both domestic and global levels. On the domestic level, limited enforcement might lead firms to design cartels that would continue to operate in such jurisdictions, even if not elsewhere.<sup>11</sup> In addition, the harm caused by such cartels to the

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<sup>8</sup> Gary S. Becker, *Crime and Punishment: An Economic Approach* 76 J. POL. ECON. 169 (1968).

<sup>9</sup> Under optimal deterrence the height of the sanction should be equal to the gains of the cartel. Quantifying the gain of the cartel is a difficult task. *See, e.g.*, OECD, p. 13. Some jurisdictions use turnover rates as a proxy.

<sup>10</sup> The laws of several jurisdictions permit fines to be assessed on the basis of world-wide turnover. Thus, the cumulative effect of fines in these countries could theoretically account for non-prosecution in other countries. Yet as long as enforcement levels in those jurisdictions are low, this has no significant effect. In addition, in several such jurisdictions the law permits basing fines on only one year's turnover. OECD, 14.

<sup>11</sup> *See, e.g.*, Julian L. Clarke and Simon Evenett, *The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel*, 48 THE ANTITRUST BULL. 289 (2003).

domestic market is never remedied.<sup>12</sup> Indeed, the large proportion of imported products that are traded in small and in developing countries often implies that the anti-competitive conduct of foreign importers will have strong negative effects on them. As Levenstein and Suslow have argued, the estimated harm to such jurisdictions from international cartels is as high as 15% of the financial aid they receive from industrialized countries.<sup>13</sup>

Of no less importance, the aggregation of under-enforcement efforts at the domestic level has non-negligible global implications. Limited enforcement affects the incentives of firms to engage in global anti-competitive conduct. This is because the sanctions imposed by a handful of jurisdictions on cartel members are disproportional to the profits to be had.<sup>14</sup> As the OECD observed, "[t]heoretically, unless a multinational cartel participant is prosecuted and fined in most or all of the countries in which the cartel had effects, the cartel still might have been profitable after paying fines in only some of the countries affected."<sup>15</sup> Indeed, since the decision to join a cartel is primarily a financial one, if anti-cartel enforcement leaves significant profits in the hands of the cartelists, they have strong incentives to engage in such conduct.<sup>16</sup> One study indicated that only 61% of global cartel profits were disgorged from those cartels that were prosecuted. Moreover, if the probability of detection is indeed in the 13% to 17% range as most scholars argue, then ex ante deterrence is far below optimal.<sup>17</sup>

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<sup>12</sup> See, e.g., papers by Prof. John Connor, available at [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=25684](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=25684). In particular see Connor and Helmers *supra*, note ?; John M. Connor, *Latin America and the Control of International Cartels*, in COMPETITION LAW AND POLICY IN LATIN AMERICA (D. Daniel Sokol ed., forthcoming 2009).

<sup>13</sup> Levenstein and Suslow, *supra* note ?, p. 816.

<sup>14</sup> Such arguments were recognized by the U.S. Supreme Court in 1978. See *Pfizer v. India*, 434 U.S. 308, 315 (1978). See also OECD, *HARD CORE CARTELS- RECENT PROGRESS AND CHALLENGES AHEAD*, 38 (OECD Publications, 2000); Dennis W. Carlton, *The Proper Role of Antitrust in an International Setting* forthcoming, COLUMBIA BUS. L. REV. (2009). They were also raised in the *Empagran* case. See Brief of Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724); Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents, *Empagran*, 542 U.S. 155 (No. 03-724). As Connor emphasizes, profits from cartelistic activity in developing may be significant. Connor, *supra* note ?, p. 838.

<sup>15</sup> OECD, *supra* note ?, p. 14.

<sup>16</sup> Other factors might also affect the motivation of cartelists to enter into anti-competitive agreements, such as the morality perceptions of such conduct. See, e.g., Maurice Stucke, *Morality and Antitrust*, COL. BUS. L. REV. 443 (2006).

<sup>17</sup> Connor, *supra* note ?, p. 54. Personal criminal sanctions that can be imposed by several jurisdictions on individuals, and especially imprisonment, serve to reduce such problems. Indeed, while fines can sometimes be passed on to consumers, jail time cannot. Moreover, imprisonment serves to separate, at least to some degree,

International cartel members may thus still find it highly profitable to engage in international anti-competitive activity.<sup>18</sup>

Such low deterrence levels have an added indirect negative effect: they reduce the effectiveness of existing leniency programs, designed to provide a "carrot" for cartel participants to defect from the secret agreement and provide information to the investigators. The "carrot and stick" approach to cartel prosecutions requires that the "stick" – the possible sanction – be sufficiently severe to give effect to the "carrot" – the opportunity to avoid the sanction by cooperating.<sup>19</sup> The immediate conclusion is that if sanctions are limited, so will be the use of leniency programs by existing cartel participants. However, as elaborated below, the effects on leniency programs from increased parallel prosecution are more complicated than this simple analysis suggests, since incentives to deflect are reduced the more jurisdictions apply their laws, unless leniency is coordinated.

Consider the following example which involves the landmark international vitamins cartel. As Connor argues, the vitamins cartel affectively raised prices of vitamins all over the world. Its estimated profits exceeded eight billion U.S.\$.<sup>20</sup> Yet, it was brought to trial only in six jurisdictions.<sup>21</sup> Its aggregate monetary sanctions in these

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the interest of executives and those of the firm. See, e.g., Kirktikumar Mehta, *Recent Developments in EU Anti-Cartel Developments*, 4(1) COMPETITION POLICY INTERNATIONAL (2008); Office of Fair Trade, *The Deterrent Effect of Competition Enforcement by the OFT* (2007)

[http://www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/oft962.pdf](http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft962.pdf), p. 70-3. Yet one can observe that international cartels continue to operate, despite such sanctions, and that at least some of the executives have returned to their industries. See discussion in page ? below. Personal financial sanctions against individuals also do not create sufficient deterrence effects. See, e.g., OCED, *supra* note ?.

<sup>18</sup> A study conducted by Prof. Connor has found that international cartels raise prices on average by 32%. Connor, *supra* note 10. See also Margaret Levenstein and Valerie Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L. J. 801 (2003). These studies imply that international cartels may be highly profitable and thus high fines are needed in order to deter such conduct.

<sup>19</sup> OECD, *supra* note ?, p. ? (near foot 12); Andreas Stephan, *Beyond the Cartel Law Handbook: How Corruption, Social Norms and Collectivist Business Cultures can Undermine Conventional Enforcement Tools* (2008), p. 5 available at <http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP08-29.pdf>.

For an analysis of the vicious circle and virtuous circle of leniency applications and fines see Richard WHISH, *COMPETITION LAW*, ch. 7.

<sup>20</sup> For an analysis of the self-nicknamed "Vitamins, Inc." cartel see, e.g., John M. CONNOR, *GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY* (2<sup>nd</sup> ed., 2007), p. 338; John M. Connor, *The Great Global Vitamins Cartels*, *supra* note ?, p. 101, <http://ssrn.com/abstract=885968>.

<sup>21</sup> These jurisdictions include: U.S., EU, Canada, Brazil, Australia and Korea. Connor, *ibid*, p. 125.

jurisdictions represent merely 11% of worldwide damages.<sup>22</sup> Still, most international cartels are prosecuted by an even lower number of jurisdictions and deterrence effects are often even more limited.

The causes of limited domestic enforcement against international cartels have been elaborated elsewhere.<sup>23</sup> Yet the main causes are specified below, in order to analyze the ability of the Adoption Mechanism to remedy them.

Most importantly, limited enforcement results from limited financial resources for prosecution and the high costs of proving the existence of an international cartel. Bringing a suit against an international cartel is a complicated, costly and lengthy endeavor. Information is often spread over several jurisdictions, and the investigation involves multinational firms, often major players in world markets, which are armed with top lawyers. Add to this the fact that the size or the level of development of a jurisdiction does not affect the "fixed" costs of conducting an antitrust inquiry: such costs are incurred regardless, because the investigatory and analytical steps of the inquiry and prosecution are similar in all jurisdictions. Accordingly, a small financial endowment naturally makes it more difficult for a jurisdiction to bring cases against international cartels.<sup>24</sup> It is thus no surprise that generally only the antitrust authorities of large, developed jurisdictions investigate and prosecute international cartels.<sup>25</sup>

In addition, many developing and small jurisdictions suffer from technical constraints- they have limited skilled individuals that can investigate and prove in court the existence of cartels.<sup>26</sup> Such jurisdictions usually choose not to spend their limited resources on international cartels, but rather prosecute domestic ones. This choice is rational: large, international cartels are generally prosecuted elsewhere, and as a result generally cease their anti-competitive operations.<sup>27</sup> On

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<sup>22</sup> Connor, Great Cartels, *supra* note ?, p. 149.

<sup>23</sup> Gal, Globalized World, *supra* note ?.

<sup>24</sup> Antitrust authorities in developing jurisdictions often have very little financial endowments. Small economies have low endowments in absolute terms, although their endowment might be similar (both financial and human resources) to those of large economies in relative terms, when such an endowment is analyzed as a percentage of their total budges or per capita.

<sup>25</sup> In recent years several developing large, jurisdictions, such as Mexico, South Korea and Brazil, have applied their laws towards international cartels. Such cases are, however, still quite rare.

<sup>26</sup> See CONSUMER UNITY & TRUST SOC'Y, PULLING UP OUR SOCKS: A STUDY OF COMPETITION REGIMES OF SEVEN DEVELOPING COUNTRIES OF AFRICA AND ASIA: THE 7--UP PROJECT (2003), available at <http://cuts.org/pulling.pdf>, at ix.

<sup>27</sup> This is the case especially if the cartel cannot operate without harming the prosecuting jurisdictions. For example, a shipping cartel between the U.S. and Puerto Rico cannot operate solely in the latter. See U.S. Department of Justice, Four

the other hand, domestic cartels will not cease to operate unless they are prosecuted domestically.

An additional factor that plays a role in developing countries' low enforcement levels involves a lack of competition culture which often leads to political influences of large foreign firms that cannot be countered by relatively weak antitrust authorities.<sup>28</sup> Indeed, large, multi-national firms regularly have strong ties with the political and business elite in small and developing jurisdictions. These ties sometimes translate into political pressure not to enforce the laws in international antitrust cases. Furthermore, the high stakes involved in cartel enforcement sometimes lead to blatant corruption in decisions whether to prosecute cartels.<sup>29</sup>

Another factor is the limited ability of some jurisdictions to create a credible threat of enforcement. Consider an example of a shipping cartel that operates worldwide.<sup>30</sup> If trade in a certain jurisdiction is only a small part of the foreign firm's total world operation and thus the gains from trade within it are limited, were the jurisdiction to place significant restrictions on the foreign firms and the costs of compliance would be high, it would most likely choose to exit it and trade only in other jurisdictions. In practice, however, such an exit will rarely occur. This is because the negative welfare effects on the jurisdiction from the exit of the foreign firms may well be greater than the negative effects from its continued operation within its borders. Accordingly, countries with small markets usually have reduced incentives to prevent the cartel from trading within its borders even if it engages in harmful conduct.<sup>31</sup> Indeed, case studies have indicated that large foreign importers

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Shipping Executives Agree to Plead Guilty to Conspiracy to Eliminate Competition and Raise Prices For Moving Freight to and from the Continental U.S. and Puerto Rico (2008). [http://www.usdoj.gov/atr/public/press\\_releases/2008/237849.htm](http://www.usdoj.gov/atr/public/press_releases/2008/237849.htm). As noted above, however, in some cases the cartel is designed to affect trade only in jurisdictions which regularly do not apply their laws to prosecute international cartels.

<sup>28</sup> See, e.g., Michal S. Gal, *The Ecology of Antitrust: Preconditions for antitrust Enforcement in Developing Countries*, in COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES (Brusick, Alvarez, Cernat and Holmes ed., UN, 2004), 22; Pradeep S Mehta & Ujjwal Kumar, *How Free Will The Competition Commission Be?* FINANCIAL EXPRESS (October 18, 2001) <http://www.cuts-international.org/article%20comp.htm>; Stephan, *supra* note ?, p. 10-15.

<sup>29</sup> See, e.g., Stephan, *supra* note ?, p. 5-9. ; Consumer Unity and Trust Society (CUTS), *Pulling Up Our Socks: A study of Competition Regimes of Seven Developing Countries in Africa and Asia* (2003), p. 68-9 <http://www.cuts-international.org/pulling.pdf>. As noted elsewhere, competition law enforcement can only be as strong as all law enforcement. Gal, *Ecology*, *supra* note 28.

<sup>30</sup> This part is based, in part, on Gal, *supra* note 4, Ch. 6. It shall be assumed that the large jurisdiction is also a developed one unless otherwise noted.

<sup>31</sup> *Id.*, at 343.

sometimes use an explicit or an implicit threat of exit, should the small or developing jurisdiction impose upon them limitations which they may agree to if imposed by a large jurisdiction. In addition, the jurisdiction might lack the political clout necessary to enforce any fines or punishments on which it decides.<sup>32</sup>

It should also be mentioned that a growing number of jurisdictions recognize private rights of actions against cartels.<sup>33</sup> For example, Canadian steel producers sued in Canadian courts to recoup damages from the members of the graphite electrodes cartel.<sup>34</sup> Such a course of action is also, however, very limited. Most importantly, private parties must also incur the high costs of proving a cartel.<sup>35</sup> Add in the facts that in most jurisdictions (except the U.S. and Taiwan) the damages that can be recouped cover only actual damages incurred by the plaintiff, that class actions are not allowed,<sup>36</sup> and that private parties generally have much more limited investigatory tools than competition authorities and often rely on the competition authorities to investigate the cartels, with the result that private enforcement currently does not increase deterrence levels significantly.<sup>37</sup>

## B. CURRENT SOLUTIONS

Given the inability of current antitrust tools to effectively deter international cartels, some suggestions have been made to solve this problem. Proposals span from a global solution in the form of an international enforcer, to the lowering of some barriers to domestic enforcement. This sub-chapter sketches the main benefits and drawbacks of each, to indicate the lack of an efficient solution. Against this backdrop, the following chapter analyzes the proposed Adoption Mechanism.

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<sup>32</sup> Levenstein and Suslow, *supra* note ?, p. 845.

<sup>33</sup> According to a recent ICN survey, private actions are generally used in only eight jurisdictions. ICN Cartel Fines Report, *supra* note ?, p. 12.

<sup>34</sup> Levenstein and Suslow, *supra* note ?, p. 845.

<sup>35</sup> As elaborated below, the Adoption Mechanism can solve this problem by allowing follow-on suits. Some commentators suggest that remedies in private cases should be based on compensation rather than on deterrence. *See* Wouter Wils, forthcoming, World Competition (2008).

<sup>36</sup> *Id.*

<sup>37</sup> John M. Connor and Darren Bush, *How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism*, 112 Penn St. L. Rev. 813, 814: "only two [jurisdictions], the United States and Canada, have traditions that allow private plaintiffs to bring antitrust suits for significant damages. The result is a tremendous incentive to cartelize, with few penalties for doing so."

One of the most interesting solutions suggested was the use of competent foreign courts as "enforcers for the world" in private antitrust cases. The idea on which this suggestion is based is that given the joint incentives of all jurisdictions involved, foreign plaintiffs could pursue a legal remedy for the harm caused to them by an international cartel by requesting a foreign court to apply its domestic antitrust laws to remedy such harm, when the conduct also affected domestic markets. Specifically, this solution was tried in the famous *Empagran* case.<sup>38</sup> There, foreign consumers requested that a U.S. court allow them to join a private damage suit brought by U.S. consumers, where an international cartel harmed them all.<sup>39</sup> Similar to the Adoption Mechanism, this suggestion attempted to build on the competence of the courts of some jurisdictions in deciding international cartel cases. Yet it went much further by extending the scope of U.S. law to apply to conduct that can be punishable under foreign law and by transferring the locus of enforcement to foreign courts. This suggestion generated negative reactions from several jurisdictions and was largely rejected by the U.S. Supreme Court.<sup>40</sup> Importantly for our discussion, one of the major reasons for the rejection was that as a matter of "prescriptive comity," the Supreme Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."<sup>41</sup> As elaborated below, the Adoption Mechanism avoids such interference.

Some scholars have suggested the creation of an international or supranational competition enforcement agency that would hear international cartel cases in order to overcome the deficiencies of the current, atomistic system.<sup>42</sup> Under such proposals a global enforcement

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<sup>38</sup> *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155; 124 S. Ct. 2359 (2004)

<sup>39</sup> A literal reading of the U.S Foreign Trade Antitrust Improvements Act, 15 U.S.C. §6a (1982) served as the legal basis for such a case.

<sup>40</sup> The court held that there is no jurisdiction to hear such a case where foreign injury is independent of any effect on U.S. commerce. Yet it left open the question of whether foreign plaintiffs could bring actions in the U.S. if the foreign injury is dependent on the effect of the injury on U.S. business. *Empagran*, *supra* note ?. For analysis of the decision and its implications see, e.g., John M. Connor, *Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels* (2004), available at <http://ssrn.com/abstract=611948>; Alvin K. Klevorick and Alan O. Sykes, *United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on Empagran*, 3(3) JOURNAL OF COMPETITION LAW AND ECONOMICS (2007) 309.

<sup>41</sup> *Empagran*, *supra* note ?, at 164. For a criticism of this decision see, e.g., John M. Connor and Darren Bush, *How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism*, 112 PENN ST. L. REV. 813, 856.

<sup>42</sup> For a discussion of such proposals see, e.g., See Simon J. Evenett, Margaret C. Levenstein & Valerie Y. Suslow, *International Cartel Enforcement: Lessons from*

authority will have powers to collect evidence, conduct interviews, and then compute the global gains from cartelization and levy the appropriate fines.<sup>43</sup> While these suggestions are theoretically sound, they have limited practical applicability, since jurisdictions are careful not to concede their decision-making power to an international body and give up sovereignty.<sup>44</sup> It is noteworthy that regional antitrust agreements are based on a similar aggregation of powers rationale and hold some promise for increased enforcement and deterrence by aggregating the decision-making functions of their members on issues of mutual concern. Most existing regional agreements are, however, limited in scope and funding.<sup>45</sup>

A less ambitious proposal involves the use of the World Trade Organization ("WTO") framework to increase domestic enforcement against international cartels.<sup>46</sup> The envisioned agreement would involve commitments to enact and enforce an anti-cartel law, and to cooperate with investigations launched abroad. This suggestion is fraught with problems. Most importantly, it relies, once again, on domestic enforcement, but with the added stick of punishment if enforcement does not meet certain requirements. It thus does not address the main obstacles to domestic enforcement. Rather, the effects of such obstacles might be worsened if jurisdictions choose to use their limited resources to prosecute international cartels instead of domestic ones, in order to avoid WTO sanction. Moreover, as Evenett, Levenstein and Suslow argue, it is not obvious how a WTO dispute panel might assess whether a government used its investigatory and prosecutorial discretion in a manner entirely consistent with the agreement. The likely outcome is that only those authorities that have not followed certain minimal procedural steps would be found in violation, an outcome that is unlikely to result in significant increases in the probability that cartel members will be punished. As a result, such a WTO agreement would still not ensure that the penalties for cartelization are based on the

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*the 1990s*, 24 *WORLD ECON.* 1221 (2001); Levenstein and Suslow, *supra* note ?, p. 850-1; Aditya Bhattacharjea, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective*, 9(2) *JOURNAL OF INTERNATIONAL ECONOMIC LAW* 293 (2006); Robert Anderson and Frederic Jenny, *Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy*, in Erlinda Medalla (ed.), *COMPETITION POLICY IN EAST ASIA* (2008).

<sup>43</sup> Evenett et al., *ibid.*, p. 1241.

<sup>44</sup> *Id.*

<sup>45</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS* (2005), [http://www.unctad.org/en/docs/ditccplp20051\\_en.pdf](http://www.unctad.org/en/docs/ditccplp20051_en.pdf). Nonetheless, some regional agreements, such as the EU, generally work very well.

<sup>46</sup> Evenett et al., *supra* note ?, p. 1243.

worldwide pecuniary gains.<sup>47</sup> It is thus not surprising that the subject of competition laws has been taken off the WTO negotiation table given the objections of developing countries.<sup>48</sup>

Another method for increasing deterrence involves increasing domestic penalties, especially in those jurisdictions that do enforce their laws against international cartels.<sup>49</sup> Yet increase in fines imposed on cartelists do not increase deterrence sufficiently. Current sanction levels are still far from ensuring that would-be cartel operators could not expect to profit from their anti-competitive conduct.<sup>50</sup> The relatively limited monetary fines imposed by each individual jurisdiction can be explained based on both political and legal grounds. Legally, as long as jurisdictions do not view themselves as global enforcers, sanctions are generally based on harm to their domestic jurisdictions or gains to the cartelists resulting from the anti-competitive harm to their jurisdictions.<sup>51</sup> Politically, were jurisdictions to base their fines on global harm or profits, other jurisdictions might view this as an interference with their sovereignty since their own fines might then seem duplicative.

Probably the most successful venue for increasing deterrence in recent years is the spreading criminalization of cartel offenses and other

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<sup>47</sup> *Ibid.*

<sup>48</sup> The issue was placed on the agenda in 2001:WTO, Ministerial Declaration, WT/MIN(01)/DEC/1 Doha (2001), para. 1, 3, 23-5. It was taken off the agenda in 2004: Doha Work Program – Decision Adopted by the General Council, 1 August 2004, WT/L/579, para 1(g).

<sup>49</sup> Information about the height of fines that can be imposed by different jurisdictions on international cartels can be found in International Competition Network, Cartels Working Group Subgroup 1 – General framework: Setting of fines for cartels in ICN jurisdictions - Report to the 7th ICN Annual Conference (2008) <http://www.internationalcompetitionnetwork.org/media/library/Cartels/Fines%20report%20-%20FINAL.pdf>. For anti-cartel fine by jurisdiction see ICN Anti-Cartel Templates at <http://www.internationalcompetitionnetwork.org/index.php/en/publication/277>. Recently the European Competition Authorities network reached an agreement on a series of principles to converge the calculation of fines for the offense of cartelization. The members agreed, inter alia, that fines will be based on the value of the sales relating to the infringement, as is currently done in the EU. <http://pubs.bna.com/ip/bna/atr.nsf/eh/a0b7f2c8c5>. For a discussion of imprisonment see footnote ? above.

<sup>50</sup> OECD 2005 Report, *supra* note ?.

<sup>51</sup> See ICN Report, *supra* note. Indeed, several jurisdictions base their sanctions on the world-wide total turnover of the companies involved. However, the number of such jurisdictions is limited and their fines are generally based on the turnover of only one year, whereas international cartels generally last much longer.

limitations imposed on top officials.<sup>52</sup> For example, in 2004 the U.S. increased maximum prison sentences from 3 to 10 years.<sup>53</sup> Likewise, in 2002 the UK adopted the Enterprise Act, under which an individual who dishonestly agrees to cartelistic conduct is subject to criminal liability and can be imprisoned up to 5 years and be subject to an unlimited fine.<sup>54</sup> The Act also empowers courts to impose a Competition Disqualification Order under which director can be disqualified and prevented from holding office for a period of up to 15 years.<sup>55</sup> In addition, average jail sentences imposed on cartel offenders in the US have increased in recent years and have reached a new level in the recent marine hose cartel.<sup>56</sup> Undoubtedly, such sanctions increase deterrence. Yet they do not provide a complete solution. For example, Stephan argues that in the UK some of the obstacles include relatively weak public perceptions with regard to the seriousness of the cartel offense and in particular to imprisonment as a suitable sanction, the risk of discouraging cartel members to take advantage of leniency programs, and low deterrence levels if significant custodial sentences do not become the norm.<sup>57</sup> Stephan also notes that those convicted of cartelistic conduct generally did not encounter much difficulty in finding employment as high level executives upon their release from prison.<sup>58</sup> One might argue that such executives are even worth more to firms. This is because they demonstrated that they were willing to take the risk of personal criminal sanctions for cartelistic conduct which was highly profitable for the firm.

Information sharing was also suggested as a method to increase deterrence.<sup>59</sup> Indeed, in the past few years international cooperation in discovering, investigating, and prosecuting international cartels has reached unprecedented levels.<sup>60</sup> While access to evidence and witnesses located elsewhere and cooperation by exchanging know-how and expertise hold some promise, they are generally limited in their effect.

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<sup>52</sup> The jurisdictions which impose such liability include, inter alia, the US, UK, Ireland, Canada and Israel. Australia has recently adopted a draft law which criminalizes cartel offenses.

<sup>53</sup> US Antitrust Criminal Penalty Enhancement and Reform Act 2004, H.R. 1086, Sec. 215.

<sup>54</sup> UK Enterprise Act 2002, sec. 190

<sup>55</sup> *Ibid.*, sec. 204.

<sup>56</sup> See Andreas Stephan, "The UK Cartel Offense: Lame Duck or Black Mamba," p. 42 (on file with author).

<sup>57</sup> *Ibid.* The lengthy sentences in the recent marine hose cartel were induced, inter alia, by the fact that short terms would have resulted in the UK offenders being jailed in the US.

<sup>58</sup> *Ibid.*, p. 35-7.

<sup>59</sup> Levenstein and Suslow, *supra* note ?, p. 849.

<sup>60</sup> OECD 2005 Report, *supra* note ?, p. 30.

Even if information is transferable, the costs of proving the existence of an international cartel might still be prohibitively high, since one still has to go through the process of proving the existence of the cartel in domestic courts. Of no less importance, the leniency programs of some major enforcing jurisdictions, including the U.S. and Canada, promise firms that provide information to the authorities which may lead to the prosecution of an international cartel that they will not make such information public. This promise of non-disclosure is critical to the willingness of many companies to come forward, given the possibility that the information might be used against them in civil damage suits or in prosecutions in other jurisdictions. The fact that there is no harmonized or global leniency policy is the basis of these problems.<sup>61</sup> Since leniency is one of the main ways in which international cartels are currently detected, information sharing is consequently a limited tool for increasing worldwide enforcement and deterrence.

Another venue which is pursued is enhancing the technical abilities of antitrust agencies in developing countries. Technical assistance and capacity building programs, which are often sponsored by large, developed jurisdictions or by international bodies, are designed to create a cadre of domestic enforcers, capable of applying local antitrust laws, to assist domestic agencies in resolving design issues and in confronting and dealing with business practices, and to provide educational and public consulting to staff and officials making difficult decisions about competition policy implementation.<sup>62</sup> Yet such programs, while enhancing human capital, often do not lead the authority to pursue international cartel cases.<sup>63</sup> Oftentimes such programs are limited in scale and scope. Moreover, as elaborated above, it might still be more cost-effective and competition-culture-creating for the authority to use its resources in order to prosecute several domestic cartels instead. Thus, technical assistance programs also generally have limited effects on the prosecution of international cartels.

To sum, conventional wisdom dictates that currently little can be done to increase enforcement of domestic antitrust laws against

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<sup>61</sup> *Ibid.*

<sup>62</sup> See, e.g., Michael W Nicholson, D. Daniel Sokol & Kyle W. Stiegert, *Assessing the Efficiency of Antitrust/Competition Policy Technical Assistance Programs*, Paper prepared for the 2006 ICN Cape Town Conference, Working Subgroup on Technical Assistance Implementation, 3-4; William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOKLYN J. INT'L L. 403 (1997).

<sup>63</sup> For some limitations see, e.g., Kovacic, *ibid.*, 416-7; Kenneth M. Davidson, *Creating Effective Competition Institutions: Ideas for Transitional Economies*, 6 ASIAN-PACIFIC L. & POL'Y J. 71 (2005), p. 123-4.

international cartels. Current solutions are limited in their ability to solve international antitrust enforcement problems. Moreover, the analysis indicated that the obstacles to optimal enforcement of small jurisdictions are unlikely to disappear with time, whereas those of developing jurisdictions will likely disappear only when their level of development changes significantly. Given the shortcoming of the current system, the Adoption Mechanism stands out. The next chapter thus analyzes the ability of this mechanism to increase deterrence and welfare.

## II. THE DETERRENCE AND WELFARE EFFECTS OF THE ADOPTION MECHANISM

The Adoption Mechanism succeeds in overcoming the major obstacles to domestic enforcement efforts by taking advantage of the fact that the cartel is international in scope. Accordingly, it holds an important potential to increase both domestic and global welfare.

Most importantly, the Adoption Mechanism significantly reduces the resource constraint problem- both financial and human. This is because it skips over the costliest, most human-resource intensive and most difficult stage in the trial- proving the existence of an international cartel. The plaintiff need only prove the local elements of the offense (generally damage to local markets) and that the foreign decision meets some pre-specified standards that ensure that reliance is reasonable and fair. Such proof is generally much less complicated and resource-intensive. Resources could thus be saved and cases that ordinarily would not have been brought could now be heard. Moreover, the Adoption Mechanism can also speed up enforcement by going almost straight to the damage stage. In addition, the Mechanism could increase the credibility of decisions against international cartels in developing jurisdictions.

The Adoption Mechanism does not solve all obstacles to domestic prosecution- it cannot solve the credible threat problem. Fortunately, however, this problem is quite minimal in cartel cases, since, by assumption, a cartel is comprised of several potential competitors that can each operate in the market and thus a cartel's threat that it will not serve the market is much less credible than that of a monopolist.<sup>64</sup> Also, the Adoption Mechanism cannot directly counter all political influences not to bring cases against large, multinational firms. However, it can indirectly reduce this obstacle in two important ways. First, successful prosecutions of international cartels serve to strengthen the competition culture by exemplifying to local consumers and suppliers the harm

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<sup>64</sup> Credible threat problems arise more significantly in cases which involve an existing or potential dominant firm- either abuse or merger cases.

from cartels, and by signaling to domestic cartel members that even international ones are not immune from prosecution. Thus, even if not all international cartels will be brought to trial, due to political influences, it would become much more difficult to exercise such influences once the competition culture would create a counter-force. Second, this problem can be largely overcome by allowing private plaintiffs to use the Adoption Mechanism. Usually such parties have limited investigatory tools and often rely on the findings of the domestic competition authority with regard to the existence of a cartel. The Adoption Mechanism broadens their options by allowing them to rely on the findings of foreign courts, thus overcoming negative political influences that might plague the enforcement efforts of the domestic authority.

The Adoption Mechanism can potentially enhance welfare in three related ways. First, it saves duplicative costs of proving the existence of an international cartel in several jurisdictions in parallel. If the existence of an international cartel could be proven in only one jurisdiction and all others could use this finding as a basis for their own cases and concentrate their resources on proving only the element which differs among countries- generally harm to their domestic market- then enforcement resources will be significantly reduced. Second, it remedies the harm created by international cartels to jurisdictions that would not have prosecuted them before. Third, and most importantly, the Adoption Mechanism has the potential to increase international welfare by increasing the deterrence effects, which are now exorbitantly low. Thus, it might well be superior to the existing situation.

What makes the adoption mechanism work? Interestingly, the potential of the mechanism to increase deterrence and welfare is based on the following three facts. The first is that international cartels, unlike domestic ones, affect more than one jurisdiction and thus a finding of such a cartel extends beyond the borders of the prosecuting jurisdiction to all the countries in which the cartel operated. The Adoption Mechanism takes advantage of this positive externality by allowing jurisdictions to rely on the factual findings of a reliable and fair foreign decision-maker. Second, parallel prosecution of international cartels in different jurisdictions benefits all by increasing overall deterrence levels. In other words, there is no rivalry among jurisdictions with regard to bringing international cartels to trial. No jurisdiction seeks to gain a comparative advantage by ensuring that others do not bring cartels to trial. In economic terms there is no zero-sum game. On the contrary: prosecution of an international cartel by any jurisdiction generally creates positive externalities for all others. Thus, there is a joint motivation for increased enforcement and deterrence world-wide.

Indeed, the Mechanism might even increase the incentives of countries to cooperate and coordinate cartel investigations. Lastly, as will be elaborated below, the Adoption Mechanism minimizes the harm to sovereignty relative to other solutions. It is a self-enforced remedy, which is used to solve internal obstacles to efficient prosecution. Moreover, the mechanism does not require the creation of a cooperative international legal regime, although such coordination might increase its effectiveness.

In sum, the Adoption Mechanism holds the potential to significantly improve the deterrence of international cartels and create a more efficient enforcement mechanism. This is not to say that it is without costs. The magnitude of these costs will determine its overall appeal. Accordingly, the next chapter addresses the possible objections that can be raised against it.

### III. POSSIBLE OBJECTIONS TO THE ADOPTION MECHANISM

Naturally, the benefits of our proposal should be weighed against its costs and shortcomings. This chapter addresses the potential objections and costs of the Adoption Mechanism and attempts to provide solutions to minimize them, where possible.

#### A. POLITICAL OBJECTIONS: RELIANCE ON DECISIONS OF FOREIGN JURISDICTIONS

The preceding analysis focused only on deterrence effects. While clearly a central factor, the deterrence effect is not the only relevant consideration of whether or not to apply a foreign decision in one's jurisdiction. Rather, the Adoption Mechanism may encounter sound political objections based on the fact that the adopted decision was reached by a foreign entity. More specifically, this objection can be split into two main concerns: First, harm to sovereignty. Second, that the foreign decision maker will have skewed incentives once he acknowledges the fact that his decision might have applicability beyond his borders. Let me contend with each in turn.

While the Adoption Mechanism allows for the incorporation of the decision of a foreign decision maker into domestic law, its harm to sovereignty is not prohibitive. First, the adopting jurisdiction decides whether and under which conditions to incorporate the foreign decision. The proposed mechanism is based on a fully voluntary system in which each jurisdiction exercises its discretion and sovereign decision-making power in deciding which decisions to adopt, and under which conditions, while furthering a domestic public policy of deterrence by overcoming its existing enforcement problems. In this respect the proposal differs from proposals to create a global enforcement authority, since under the latter proposal the decision-making powers

would be completely external to each jurisdiction. It also largely avoids the shortcomings of *Empagran*, in which it was suggested that foreign consumers could bring suit in a foreign court based on a foreign law. Indeed, under the Adoption Mechanism the foreign decision maker acts, to some extent, as an enforcer for the world, but only in a very limited sense: his decision does not immediately and directly carry sanctions for harm elsewhere. He only performs a factual finding function that he carries out anyway. Moreover, it can be argued that recognition of foreign judgments is based on sovereign equality and respect for the public acts of another jurisdiction.<sup>65</sup> Nonetheless, to minimize the imposition on sovereignty it is suggested that the Adoption Mechanism only apply in civil and administrative cases, and not as a basis for criminal proceedings. It should also be stressed that plaintiffs in each jurisdiction retain their ability not to rely on a foreign finding and to prove the existence of the cartel in its own courts.

Importantly, when one analyzes the legal tools that currently exist, one realizes that the Adoption Mechanism is not so unique in its delegation of decision making to foreign bodies. It is comparable, to some extent, to the system adopted in the Patent Cooperation Treaty ("PCT") which applies to patent applications made through the International Patent Office ("the IPO"), and which was rectified by many countries.<sup>66</sup> The PCT creates a system for reliance on foreign decisions regarding the innovative aspect of a patent application, which is necessary for the fulfillment of conditions for the grant of a patent. Under the PCT, the patent offices of several pre-specified jurisdictions can be designated as international searching authorities ("ISA") that search for prior art which might clash with the requested patent. Domestic patent offices often base their factual findings on those of the ISA once a domestic patent is requested. Thus, the factual findings of an ISA, which are decisions of foreign patent institutions, may be binding in other jurisdictions. Like the Adoption Mechanism, the foreign body performs a fact-finding function and answers a factual question which is similar for all jurisdictions. Moreover, the interests of all jurisdictions in the results of this search are aligned, although to a lesser degree than under the Adoption Mechanism.

Additional examples of judicial reliance also involve cases in which the mutual interest of all states is generally aligned. Within Europe, an EU Council Regulation provide for judicial reliance in civil matters. Under this regulation a court asked to recognize a foreign judgment is

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<sup>65</sup> VED P. NANDA AND DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS (2003), Vol. 4, Section 11.01.

<sup>66</sup> For the list of all 139 contracting countries see [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=6](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=6)

completely bound by the foreign court's findings of fact.<sup>67</sup> The same is true among U.S. states.<sup>68</sup> Indeed, international agreements are less accommodating to reliance on foreign judgments, but still such reliance is sometimes allowed. For example, under The Hague Convention on International Child Abduction, states may "take notice" of a foreign judicial or administrative decision with regard to the question of whether "there has been a wrongful removal or retention."<sup>69</sup> Under the Hague Convention on Choice of Court Agreements, once a dispute between private parties has been heard in one jurisdiction in accordance with an exclusive choice of court agreement between the parties, the courts in other jurisdictions are mandated to apply the decision and "the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction," provided that some conditions regarding procedural and substantive fairness are met.<sup>70</sup> True, the Adoption Mechanism goes one step further than the Hague convention.<sup>71</sup> It applies to issues that affect the interests of the state more strongly and are largely between the state and private parties. Yet the interests furthered by the Adoption Mechanism are generally more aligned among different jurisdictions than in a case for the recognition of private agreements for exclusive jurisdiction. Beyond such specific provisions, many jurisdictions adopt general provisions for legal reliance on foreign judgments and documents. However, such reliance is generally more limited in its evidentiary weight. That is one of the reasons why the Adoption Mechanism should be explicitly applied.

The second concern is that foreign decision makers will make decisions which are not based on fact, once they realize they will be applied elsewhere. This concern is minimal. As noted above, cartel enforcement is not a zero-sum game. Rather, all jurisdictions have aligned incentives to bring international cartelists to trial, to ensure that deterrence is optimal.

Yet in some rare cases there is a chance that the possible reliance on the decision by other jurisdictions might change the decisions of foreign fact-finder. Assume that the three main cartelists are a U.S., an Indian and a Malaysian firm. There is a theoretical possibility that a

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<sup>67</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, articles 34-5.

<sup>68</sup> Article IV, Section 1 of the U.S. Constitution.

<sup>69</sup> Hague Convention On The Civil Aspects Of International Child Abduction (1980), Article 14.

<sup>70</sup> The Hague Convention on Choice of Court Agreements (2005).

<sup>71</sup> The Convention specifically exempts antitrust and other matters which are largely matters between private parties and the states from its scope. *Ibid.*, Article 2, Section 2(h)

U.S. court, acknowledging that its findings will have wide effects beyond its borders, will downplay the role of the U.S. firm in the cartel. Alternatively, it might decide not to find a cartel. Such a decision does not necessarily have to be based on patriotic preferences. Rather, it might be based on short-term concerns to domestic firms and markets. Suppose that a cartel is regularly brought to trial only in the U.S. and in Europe, although its harm is world-wide. The cartel members might still survive the blow financially. However, if all jurisdictions brought suits, the cumulative cost might bring the firms to bankruptcy and they would have to exit the market. The judge might consider that the short-run harm to the U.S. economy might be larger than the benefit.<sup>72</sup> He might then reach a different decision than if the Adoption Mechanism was not applied.

Yet this concern is, in my view, a minor one. Most judges will perform their fact-findings in accordance with domestic law. Otherwise, they might be subject to judicial review. Furthermore, most judges are likely to understand that the adoption of their decision elsewhere will increase enforcement and deterrence levels significantly by ensuring that the cartelists have not profited from their wrongdoings. In the long run, this will profit their jurisdictions as well. Once again, the mutual interest should largely solve the above concern.

Another interesting possibility goes in the opposite direction: a foreign decision maker might have incentives to widen its factual findings even if they are based on shaky grounds in order to increase deterrence. Such widening might also be based on personal considerations: extending the impact of one's decisions beyond his jurisdictional borders. Yet judicial review and the fact that the Adoption Mechanism increases the motivation of the defendants to appeal any decision which possibly increases their risk of parallel suits will reduce such incentives.

#### B. OVER-ENFORCEMENT?

Once we increase the number of jurisdictions that can realistically prosecute international cartels- do we not create over-enforcement?<sup>73</sup>

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<sup>72</sup> See Michal S. Gal, *Reducing Rivals' Prices: Government-Supported Mavericks as New solutions for Oligopoly Pricing*, 7 STANFORD J. OF LAW, BUS. AND FIN. 73 (2001).

<sup>73</sup> The case for over-deterrence in cartel cases is not trivial. Indeed, it can be argued that a strong sanction would deter all cartels and generate overall positive welfare effects. However this analysis disregards error costs and especially the fact that in some cases it is difficult to separate a welfare-reducing cartel from a welfare-enhancing joint venture (type 1 errors). Once such error costs are added into the analysis, it becomes clear that the imposition of a sanction that has no relation to profits from the prohibited acts might deter firms from engaging in pro-competitive conduct in fear that they will then be mistakenly found guilty.

The answer is negative, as long as some conditions are met. Going back to Becker's formula, deterrence levels will be too high only if the height of the sanction, times the rate of detection and prosecution, are not proportional to profits from the anti-competitive conduct. Since the Adoption Mechanism serves to increase prosecution levels, it should be ensured that sanctions are not prohibitively high.

Generally, sanctions in most jurisdictions are based on the harm to their economy or on the firms' local turnover rates- which often serve as a good proxy for the profits of the cartellists.<sup>74</sup> However, suppose, just for the sake of argument, that one jurisdiction decides to impose a sanction which is equal to domestic harm multiplied by 1,000, in order to increase deterrence or even as a way to fill its treasury. If this jurisdiction brings cases based on foreign decisions then, indeed, the result might be over-deterrence. In such situations, the case for making it easier for the jurisdiction to bring suits is much shakier. Two solutions are possible. First, international bodies have an important role to play in setting guidelines for sanctions. Indeed, both the ICN and the OECD have attempted to do, and they regularly monitor sanction levels.<sup>75</sup> Of course, the ICN is a voluntary organization and the OECD has limited membership, but still their guidelines have effect on the conduct of different jurisdictions. Second, should the setting of international norms not be sufficient, the decision-maker might purposefully declare that his factual findings do not apply to the unruly jurisdiction. That way, the Adoption Mechanism could not be applied. That would surely bring the jurisdiction in line with international norms.

Let me also briefly address a concern for under-enforcement: each jurisdiction will wait until the other brings suit, in order to limit its enforcement costs. This concern, while theoretically valid, is unlikely to have effect in practice. Even with the Adoption Mechanism, the main decision-takers in international cartel cases are not likely to change. The US and the EU are prone to remain the principal enforcers, and are unlikely to use the Mechanism but rather continue to reach their own decisions. Moreover, each has a strong incentive in bringing the international cartellists to trial as soon as possible, in order to stop its welfare-reducing effects. Thus, the proposal is unlikely to have negative under-deterrence effects.

### C. FAIRNESS CONSIDERATIONS

Any legal norm must meet procedural and substantive fairness standards. Indeed, the conditions for applying the Adoption

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<sup>74</sup> ICN, *supra* note ?; ICN Templates for fines; OECD Report, *supra* note ?.

<sup>75</sup> ICN, *supra* note ?; OECD Report, *supra* note ?.

Mechanism, elaborated in the next chapter, serve to ensure that the decision was made by an able decision maker, is based on merit, meets public policy standards in the adopting jurisdiction, and was a result of a legal procedure which fulfilled procedural fairness requirements.

Another concern is that the cartelists did not have their day in court in the adopting jurisdiction to prove that the international cartel did not exist, did not operate in the relevant jurisdiction, or that they were not party to it. Once again, the fact that an international cartel operates in more than one jurisdiction is of relevance in countering such a claim, since the cartelists did have their day before the foreign decision maker which dealt with similar issues. Moreover, the foreign decision maker, anticipating that his findings may apply beyond the borders of his jurisdiction, would be more careful in his analysis and his statements with regard to the scope of the cartel elsewhere. Furthermore, the cartelists, anticipating the possible application of the Adoption Mechanism, have a strong motivation to prove the geographical boundaries of the cartel and to bring any counter-argument possible. The Adoption Mechanism can thus be regarded as based on logic which is relatively similar to that on which the doctrine of collateral estoppel is based: preventing a party and its privies from re-litigating issues that were actually litigated and determined in a prior suit by an able and fair decision maker.<sup>76</sup> Finally, the international cartelists will have an ability to prove that their cartel did not affect the adopting jurisdiction in the trial phase which deals with harm.

The Adoption Mechanism might increase the costs of the foreign court and foreign prosecutors in hearing and deciding international cartel cases.<sup>77</sup> This is because the cartel members are likely to spend more resources in challenging the allegations against them. Yet by incurring these extra costs the jurisdiction gains a large benefit: the enforcement of antitrust laws by multiple jurisdictions significantly increases the deterrence of international cartels. Such increased deterrence, in turn, positively affects the welfare of all countries. Inter alia, it will reduce the need for costly litigation in the future. Accordingly, the overall welfare effect of spending such extra resources upfront will easily be positive in the long run. Second, the jurisdiction can easily avoid such costs by deciding that its findings would apply only to its jurisdiction. Then, however, it loses the ability to significantly increase the welfare of its jurisdiction in the long run.

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<sup>76</sup> See, e.g., PETER R. BARNETT, *RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS* (2001); WARREN FREEDMAN, *RES JUDICATA AND COLLATERAL ESTOPPEL: TOOLS FOR PLAINTIFFS AND DEFENDANTS* (1988).

<sup>77</sup> It might also increase the defense costs of the international cartel members. However, such costs are likely to be much lower than the costs they were likely to incur if they had to defend their conduct in multiple jurisdictions.

On the other hand, however, the Adoption Mechanism might reduce the need to spend resources on litigating cases as it increases the incentives of plaintiffs to enter into plea bargains in order to avoid follow-on litigation. The incentives to accept plea bargains that are limited in geographical scope depend, once again, on the balance between the short and the long term incentives of the plaintiff.

#### D. NEGATIVE POLITICAL EXTERNALITIES

A possible political problem might arise from the fact that a domestic court or legislator might decide that the foreign decision maker is not sufficiently competent or that the procedure is not fair and thus the foreign decision cannot be adopted. Yet this problem is not unique to antitrust, and arises whenever a jurisdiction gives weight to a decision taken elsewhere. In addition, this problem can be largely overcome if jurisdictions follow the suggestion elaborated below and create a list of jurisdictions in which it is assumed that reliance on their decisions will be fair. To minimize political problems, such a list can be comprised only of the few jurisdictions which currently bring international cartels to trial, which are all generally characterized by judicial competence and fair procedures. This suggestion also minimizes possible political clashes by basing the list on considerations of enforcement, thereby avoiding the need to make politically challenging decisions regarding the judicial competence of other jurisdictions.

#### E. AVOIDING FOREIGN "MOODS, FADS, OR FASHIONS"

Students of legal realism have long argued that legal decisions reflect the ideology of the decision maker and the culture in which he operates.<sup>78</sup> A legitimate concern thus involves reliance on foreign judgments which apply an ideology which is not in line with the domestic one. This concern is reflected in the famous statement of the U.S. Supreme Court that "this Court ... should not impose foreign moods, fads, or fashions on Americans."<sup>79</sup> While these concerns have

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<sup>78</sup> See, e.g., OLIVER W. HOLMES, THE COMMON LAW 1 (1881) ("The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.")

<sup>79</sup> *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), at 2495. The concern was raised in the context of the interpretation of the constitution. Indeed, this concern has spurred some congressmen to suggest the adoption of the "Constitution Restoration Act," which states that when applying the U.S. constitution "a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law." The bill was not accepted. See also Roger P. Alford, *Symposium: Outsourcing Authority?* 69 ALB. L. REV. 653, 661 (2006).

merit, they have little weight in international hard-core cartel cases. Anti-cartel prohibitions are largely uncontroversial when applied to hard-core cartels. The theory of harm on which such prohibitions are based is grounded in sound economic principles and is accepted worldwide. While some legal differences exist with regard to some elements of the offense, such as the definition of an agreement, such differences are largely minimal with regard to hard-core cartels. Thus, decisions with regard to the existence of such cartels are likely to be based on a common jurisprudence and socio-economic ideology and understanding.<sup>80</sup>

#### F. REDUCED INCENTIVES FOR LENIENCY PROGRAMS

In my view, the most significant possible objection to the Adoption Mechanism is that it might reduce incentives for international cartel members to report their cartels through leniency programs. The fact that a judgment, which was based on evidence obtained through a leniency application, could then serve as a basis for sanctions in third countries in which a leniency agreement was not reached, might significantly reduce such reporting. This is because the costs to the reporting party from sanctions in other jurisdictions might well outweigh its relief from sanctions in the jurisdiction in which it enjoyed leniency.<sup>81</sup> Moreover, the reporting firm may be at a disadvantage relative to its competitors. This is because the reporting firm is unlikely to appeal the decision, and thus the decision with regard to it would be final and could be adopted elsewhere. Yet its rivals might appeal and succeed. The result of these effects is that international cartels might be stronger relative to domestic ones, as cheating on them by way of reporting generates lower rewards.<sup>82</sup> Put even more strongly, absent a solution to this problem, the Adoption Mechanism might even act as an internal enforcement tool among international cartel members.

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<sup>80</sup> Indeed, courts have rejected judicial reliance where substantive rules are dissimilar. See, e.g., *Stein Assocs., Inc v Heat and Control, Inc*, 748 F 2d653 (Fed Cir., 1984)(differences in substantive patent law between Britain and the U.S prevented British reliance on U.S. patent decisions).

<sup>81</sup> For arguments along this line see the brief filed by the U.S. government in *Empagran*, in which it was argued that its leniency program would be imperiled by the increased private antitrust liability that leniency applicants would face should foreign private enforcement through U.S. courts be allowed. See Brief for the United States as Amicus Curiae Supporting Petitioners, *F. Hoffmann-LaRoche, et al., Petitioners v. Empagran et al., Respondents, et al.*, (February 3, 2004), available at 2004 WL 234125. To limit such problems on the domestic level, the U.S. Antitrust Criminal Penalty Enhancement and Reform Act 2004, sec. 213 provides leniency to the cooperating firms and individuals not only as to the federal prosecution but also provides some protection from civil damage exposure by detrebling damages.

<sup>82</sup> See Simon J. Evenett, Margaret C. Levenstein & Valerie Y. Suslow, *International Cartel Enforcement: Lessons from the 1990s*, 24(9) *THE WORLD ECONOMY* 1221 (2001).

Given that leniency programs have been the main driving force behind many current cartel investigations and convictions in both the U.S. and the EU, this concern cannot be overlooked. Moreover, this problem is exacerbated by the fact that both jurisdictions are the main prosecutors of international cartels.<sup>83</sup> Should their evidentiary channels be limited, due to reduced incentives of cartel members to take advantage of leniency programs, even the limited deterrence that currently exists might be further reduced.

What can be done? The problem is that each country decides for itself how to enforce its laws and whether or not to adopt a leniency program. Coordination between jurisdictions is thus voluntary. Nonetheless, all jurisdictions have a joint incentive to ensure that as many international cartels are deterred as possible. Accordingly, one important way to solve this reporting incentive problem is to decide, when structuring the Adoption Mechanism, that those firms which enjoyed leniency in the origin country, would enjoy similar leniency in the adopting country. By doing so, the adopting country recognizes the important role the reporting firm played in bringing the cartel to trial. This would amount, in fact, to a global coordinated policy on leniency that would also serve to overcome some of leniency programs' current shortcomings.

Should certain countries not limit the application of the decision to those firms which did not enjoy leniency, this fact might back-fire on them. This is because the foreign decision-maker can specifically limit the breadth of his decision, so it would be difficult to apply in other jurisdictions. While currently most cartel findings indicate in which countries the international cartel operated, a vaguer description can be used such as "the cartel operated in many countries around the world" without naming the countries in which it operated, or naming only those that acknowledge the leniency applicant. The incentives of the decision-maker whether to be vague or not will thus depend on what he views as possible harmful effects on his jurisdiction's enforcement options. Indeed, the decision maker might be mandated not to mention whether the finding applies in a specific jurisdiction, if that jurisdictions' policy might harm incentives to cheat on cartels through leniency programs.

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The desirability of the Adoption Mechanism is a derivative of the shortcomings of the current system and alternative solutions, the

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<sup>83</sup> John M. Connor, *The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals*, SSRN Working Paper (2008) <http://ssrn.com/abstract=1130204>, table 2.

benefits of the mechanisms and its costs. Given the many ills of the existing system, I believe an experiment with a different enforcement model may be worthwhile. As was shown, the costs of applying the proposed mechanism are not high, and many can be avoided by applying corrective solutions. Its potential benefits, on the other hand, are significant. Given this conclusion, the next chapter focuses on the practical aspects of the proposal.

#### IV. FROM THEORY TO PRACTICE

This chapter examines in detail how the Adoption Mechanism might be implemented in practice. The Mechanism is a novel legal tool with powerful implications. Thus, it is crucial to ensure that it would be fundamentally reasonable and fair to adopt it. Accordingly, this chapter suggests a blue print for such conditions, which should be adopted into domestic law as a basis for the application of the Mechanism.

The importance of setting such conditions is apparent from the following example. Assume that the foreign decision-maker has not engaged in an in-depth inquiry and analysis of the evidence before it, is known to be prone to bribery and has not given the alleged cartel members an opportunity to dispute the allegations. Undoubtedly, relying on this decision is unwarranted and unfair. The incorporation of a foreign decision into a domestic legal system must therefore meet some pre-specified standards, as elaborated below.

Conditions must ensure that the decision meets both substantive and procedural fairness standards. There is no need to create such conditions anew. Rather, we can learn by way of analogy from the conditions set in international treaties and in domestic laws with regard to the application and enforcement of foreign decisions.<sup>84</sup> In addition, we can learn from the doctrine of collateral estoppel.<sup>85</sup> After reviewing such conditions, I posit that the foreign decision must meet the following criteria, elaborated below: (1) the decision was made in accordance with foreign law; (2) the decision clearly and specifically included a factual finding of an international cartel; (3) resolution of the issue was essential to the foreign judgment; (4) the foreign authority met judicial competence requirements; (5) the defendant had a full and fair opportunity to litigate the issue before the foreign decision maker. Let me elaborate each in turn.

##### A. DECISION MADE IN ACCORDANCE WITH FOREIGN LAW

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<sup>84</sup> See, e.g., U.S. *Restatement (Third) of Foreign Relations Law* (1986); Council Regulation (EC) No 44/2001, *supra* note 55, articles 34-35; Nanda and Pansius, *supra* note ?, sections 11-12.

<sup>85</sup> See, e.g., sources cited in footnote 70, *supra*.

The first condition postulates that the foreign decision was made in accordance with foreign law, so that it is enforceable in the country of origin.<sup>86</sup> This condition is necessary to ensure that the foreign decision is based on sound legal principles in the foreign jurisdiction. Such a legal basis need not mirror that of the adopting jurisdiction. Rather, it should be based on the domestic laws of the origin country.

An important question in this respect is whether the decision should be final in the foreign jurisdiction. In my view, there is a strong case for requiring that the decision could not be subject to further review in the foreign jurisdiction before it could be adopted elsewhere.<sup>87</sup> Since the Adoption Mechanism allows for the application of a foreign decision, one must be extra-careful to ensure that the decision is factually well grounded. Allowing the defendant to go through appeal procedures increases the likelihood that the decision is factually based.<sup>88</sup> The downside is, of course, that it lengthens the time that the decision could not be applied elsewhere. Yet the effects of this extended period on deterrence are usually no significant. Generally the cartel terminates its anti-competitive conduct once the original jurisdiction brings it to trial. The additional sanctions that are likely to be imposed on it would thus generally have a forward-looking deterrence effect. Thus, deterrence levels will not be significantly reduced if domestic enforcement took place only after the foreign decision was final.

This requires a minor adjustment to domestic laws: the period for bringing suit based on the foreign decision must be extended since the appeal might take a long time. Otherwise, the Adoption Mechanism might have no relevance in practice. To increase certainty and fairness, however, the plaintiff should be required to start formal proceedings within the regular time frame in order to indicate to the cartel members the possible adoption of the foreign decision, once it becomes final. Such proceedings will then be postponed until the foreign decision is final.

#### B. DECISION CLEARLY AND SPECIFICALLY INCLUDED A FACTUAL FINDING

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<sup>86</sup> For a similar requirement *see, e.g.*, Switzerland's Code of Public International Law, Article 25.

<sup>87</sup> For such a requirement *see, e.g.*, the U.S. the *Restatement (Third) of Foreign Relations Law*, *supra* note ?, at § 482 and the Uniform Foreign Money-Judgments Recognition Act 13 U.L.A. 263 (1962) § 2. Some changes were suggested in the latter yet the requirement that the judgment be final remained unchanged. National Conference of Commissioners on Uniform State Laws, Uniform Foreign Country Money Judgments Recognition Act (2005) § 3(a)(2).

<sup>88</sup> For a similar requirement *see, e.g.*, Switzerland's Code of Public International Law, Article 25.

The foreign decision must clearly include a factual finding of a cartel which specifically relates to its operation within the adopting jurisdiction. The jurisdiction does not need to be specifically named, as long as it is clear from the decision that the decision maker found that cartel operated in it (for example, the decision states that the cartel operated in a region which includes the adopting jurisdiction). This condition ensures that the foreign decision maker applied its fact finding function to the existence of the cartel in the adopting jurisdiction.

#### C. RESOLUTION ESSENTIAL TO THE FOREIGN JUDGMENT

The resolution that an international cartel existed in a specific product market and the years in which it operated must be essential to the foreign judgment (not *obiter dictum*). This condition ensures that the fact finding function was not exercised off-hand. Yet in our case, as compared to other cases of judicial reliance, there is a complication. The fact that the cartel operated in the adopting jurisdiction is generally not essential to the foreign judgment. This is because domestic competition laws only require proof that the cartel operated or affected their jurisdiction. Thus, it should not be required that the fact that the cartel operated in the adopting jurisdiction be essential to the foreign judgment, as long as the other facts- that the cartel was international, that it operated in a specific product market and for specified periods- are essential to the foreign decision.

#### D. JUDICIAL COMPETENCE

The foreign decision must also meet judicial competence standards. This requirement is designed to prevent the adoption of foreign decisions that would not meet local standards of decision-making. Only decisions by reliable and well-functioning decision-makers should be adopted. The analysis should focus both on the aptitude of the decision maker, as well as on its susceptibility to regulatory capture and bribery. Proof of such competence should generally not focus on the individual decision-maker, but rather on the competence of the system, in order to avoid extremely high burdens of proof. As elaborated below, to minimize costs of proof it is also suggested that the adopting jurisdiction create a list of jurisdictions in which judicial competence requirements can assumed to be met with a high degree of probability. Only if unique conditions which suggest otherwise exist in a specific case, would the defendant be allowed to prove otherwise.<sup>89</sup>

In my view, the decision-making body should not be required to be a court. Rather, the Adoption Mechanism should also be applied to

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<sup>89</sup> For example, it has been found that the decision-maker in a specific case took a bribe.

decisions of administrative bodies that have quasi-judicial characteristics and responsibilities.<sup>90</sup> Instead, their decision-making process should be analyzed to ensure that the requirements are met. This is especially important in the area of antitrust, where in many jurisdictions decisions regarding the existence of international cartels are taken by antitrust authorities (such as by the EU Commission), and can then be appealed in courts. Should we not allow such decisions to be used as a basis for the application of the Adoption Mechanism, deterrence effects will be significantly reduced.

#### E. FULL AND FAIR OPPORTUNITY TO LITIGATE

This condition ensures that the defendant had his day in court and that the foreign decision-making process met procedural fairness requirements. The foreign process need not be completely similar to the domestic one. Yet its procedures, while different, must afford the defendant a full and fair trial.

We can learn by analogy from domestic decisions with regard to the applicability of foreign judgments. For example, enforcement of a foreign judgment by a U.S. court requires, *inter alia*, proof of the following:<sup>91</sup> (1) a full and fair trial took place in a competent foreign court; The question here is whether there was an actual opportunity for a party to be heard; (2) the trial took place under regular proceedings; (3) the defendant appeared voluntarily or received due notice of the proceeding; (4) the foreign country's judicial system is likely to secure impartiality between foreign parties and its own domestic parties; (5) no fraud took place in the decision-making process.<sup>92</sup> These conditions mostly ensure procedural fairness and should be required when applying the Adoption Mechanism as well.

I would also add that the burden of proof in the foreign jurisdiction must be at least as high as in the adopting jurisdiction. This condition is almost trivial. If the burden of proof in the foreign jurisdiction is lower than in the adopting jurisdiction, then it cannot be ensured that the same factual decision would have been reached were the case tried in the adopting jurisdiction.

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<sup>90</sup> Indeed, some jurisdictions, including Hungary, Switzerland and Quebec allow for the possibility that decisions by quasi-judicial bodies will also be relied upon in their jurisdictions. Switzerland's Code on Public International Law, Article 25(a); Hungarian Code on Public International Law, Article 72(2); Civil Code of Quebec., art. 3155.

<sup>91</sup> *Hilton v Guyot*, 159 US 113,163-64 (1895).

<sup>92</sup> This condition is required, for example, in the *Restatement (Third) of Foreign Relations Law*. See, e.g., Nanda and Pansius, *supra* note ?, Section 11.02.

In addition, it should be required that potential sanctions in the foreign jurisdiction not be much lower than in the adopting one. This condition is less trivial than the previous one. Supposedly, the height of the sanction is not relevant once the burden of proof is sufficiently high. This is because the burden of proof ensures that the fact-finder could indeed base his findings on the evidence put before him. However, since the production of evidence is costly, the height of the sanction affects the motivation of the defendants to bring evidence to counter the allegations against them. The lower the sanction, the lower their motivation to do so. Thus, unless the possible sanction is not much lower than in the adopting jurisdiction, it cannot be assumed that the defendant invested in bringing forward counter evidence as he would if his case would have been heard in the adopting jurisdiction. Accordingly, this condition must be satisfied.

Finally, adoption should not be allowed if it would be manifestly incompatible with the public policy of the adopting jurisdiction. However, as noted above, the possibility that this will occur in case of international cartels is extremely low.

The fact that a non-negligible percentage of international cartel cases are settled by plea bargains raises an interesting question: Should decisions based on plea bargains be treated as providing the defendant with "a full and fair" opportunity to litigate? The answer, in my view, is positive. The defendant had such opportunity, but chose to forgo it. It is worth mentioning that the opportunity to enter into a plea bargain might be used by the defendant to limit the geographical scope of the decision. For example, if he only acknowledges the existence of a cartel in the prosecuting jurisdiction, the Adoption Mechanism would not apply. The ability of the defendant to achieve this result will depend, *inter alia*, on the balance between the short and long term interests of the plaintiff.<sup>93</sup> Nonetheless, even if plea bargains reduce the ability to apply the Mechanism, its mere existence might still create some positive effects, at least in the litigating jurisdiction. This is because, as noted above, it increases the incentives of defendants to enter into plea bargains in order to avoid follow-on litigation, and thus it reduces the resources needed to prosecute such cartels.

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The proposal would inevitably lead to a new category of litigation, on the applicability of foreign cartel judgments in domestic law. This observation leads to several questions. Will it not be too difficult or costly to determine whether the conditions have been met? Is the risk of

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<sup>93</sup> To ensure that the plaintiff can take into account long term interests it is suggested that the competition law be amended to specifically state so.

judicial error in disputes high? One simple solution to this problem is for the adopting jurisdiction to list the countries that can be assumed to meet the above criteria, rather than require proof in each specific case. Such a list must not need to be complete, provided that it includes those jurisdictions that generally prosecute international cartels. Decisions of jurisdictions included in the list would then be assumed to meet all conditions. The party seeking recognition or applying for enforcement would then only need to produce a complete and certified copy of the foreign decision. The defendant would only be allowed to rebut the assumption in exceptional cases in which strong evidence suggests that the conditions were not met. As noted above, such a list can also limit political problems, as long as it purposefully includes only those jurisdictions that currently apply their laws to fight international cartels, which are all industrialized countries with generally well-functioning and fair decision-making systems. But even if plaintiffs had to prove the above conditions, the task should not be a difficult one. Moreover, the costs of such proof are likely to be incomparably lower than those that plaintiffs would have to incur if they had to prove the existence of an international cartel.

An important issue is whether the application of the Adoption Mechanism should be limited to governmental bodies such as the attorney general and domestic antitrust authorities or whether private plaintiffs could also bring civil suits based on it. In my view private plaintiffs should also be allowed to use this tool. If our goal is increased deterrence of international cartels, then opening the door to private suits will definitely further it. As noted above, private plaintiffs would also serve to overcome some of the obstacles that currently plague domestic enforcement.

One last issue involves clashing foreign decisions. What happens if two or more foreign jurisdictions reach opposite decisions with regard to the existence of a cartel or the regions in which it operated? The solution depends on the jurisdictions involved. If only one of the origin jurisdictions meets the pre-conditions for adoption then there should be no problem to apply the Adoption Mechanism. If both meet the pre-conditions, then use of the Adoption Mechanism should not be allowed. This, of course, should not prevent the prosecution of the international cartel in accordance with regular domestic rules and procedures. In the same vein, the Mechanism should not be applied if the foreign decision is inconsistent with a domestic judgment.

## V. CONCLUSION

The territoriality of antitrust law fundamentally clashes with the increasingly global nature of the most harmful cartels. This is because

in order to create deterrence, a sufficiently high number of jurisdictions must pursue duplicative parallel litigations. Yet the majority of jurisdictions affected by such cartels never take any legal action against them and those who do, generally base the sanctions only on harm to their own jurisdictions. As a result, paradoxically domestic cartels are better deterred than international ones, despite the fact that the latter often create much more harm. Recent attempts to solve this deterrence problem have largely failed. The attempt to use U.S. courts directly as "enforcers for the world" has been rejected by the U.S. Supreme Court; Suggestions to create a global enforcer have not gone beyond a basic theoretical level, due to their political implications; Technical assistance programs designed to increase the ability of developing jurisdictions to enforce their laws have also had limited success due, in part, to limited financial and human resources for enforcement. Additional solutions have also had limited effect on overall deterrence levels. These conditions give a high priority to the development of effective international mechanisms to increase deterrence and welfare.

On this background, our analysis warrants a reconsideration of the ability of most jurisdictions to tackle international cartels. This essay suggests the adoption of an original tool, which enables domestic plaintiffs to rely on foreign decisions with regard to the existence of an international cartel and its scope of operation. Plaintiffs would then need to prove only the harm to their jurisdiction that was created by the international cartel. In addition, several pre-specified preconditions would ensure that the reliance on the foreign decision is reasonable and fair. The analysis indicated that the costs of the Adoption Mechanism are generally not high and that solutions can be devised to minimize its shortcomings. Its potential benefits, on the other hand, to both domestic as well as international welfare, are enormous. Hopefully, these benefits will assist jurisdictions in overcoming the political issues involved- applying a legal decision of another jurisdiction in their own legal system. Yet, as elaborated in this essay, the proposed mechanism is not drastically different than other legal tools which allow jurisdictions to rely and give legal weight to certain types of foreign decisions.

This article focused on the fight against international hard core cartels. However, the application of the Adoption Mechanism can easily be extended to abuses of dominance that affect multiple jurisdictions and, to some extent, to merger decisions. However, the case for such adoption is more difficult: theories of harm from abuse are oftentimes not settled and mergers often have different welfare effects on different jurisdictions. Additional conditions would thus have to be applied to ensure that foreign decisions are in line with domestic

interests. In contrast, the case for the Adoption Mechanism in international hard-core cartel cases is a strong one.

Anti-cartel enforcement applied in parallel in multiple jurisdictions may well be only an intermediate solution in the long and difficult path towards global joint prosecution of international cartels. But until we reach that point, the Adoption Mechanism holds promise to significantly increase deterrence levels and global as well as domestic welfare.