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Private Antitrust Law Enforcement in Cases with International Elements

Volumes 1 and 2

Volume 2

Alen Balde

Submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy

School of Law
College of Social Sciences
University of Glasgow

January 2016
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1 Introduction

Is the transborder standard proposed in Chapter 5 of this thesis merely an idealistic solution to legal questions raised by the Empagran litigation, or is it an approach\(^1\) that can be adopted immediately in future antitrust litigation?

The aim of the thesis is to address legal and practical needs\(^2\) and to provide solutions. This thesis submits that the transborder standard is the appropriate solution to these needs.\(^3\) Assuming that the adoption of a transborder standard is the appropriate solution to these needs, the question of the compatibility of the proposed transborder standard with the existing system of antitrust law enforcement needs to be examined. In assessing the compatibility, there are two possibilities: either the transborder standard is an idealistic solution (i.e. of such a nature that it is distinct from the existing system of antitrust law enforcement and its implementation will require some legislative changes), or it is of such a nature that can be directly adopted by adjudicating courts.

A conclusion of the research undertaken is that a transborder standard can be directly applied without any need for legislative changes. A transborder standard is an approach\(^4\) and therefore it is related to the reasoning of the U.S. courts (and litigants) and has nothing to do with substantive (i.e. material) or procedural law areas of U.S. antitrust law. It could be argued that a transborder standard provides an explanation of the required relationship between anticompetitive effects (antitrust injury) within the U.S. and the litigated (foreign) private antitrust injury and, therefore, it is a matter of substantive law

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\(^1\) For the nature of transborder standard see Chapter 5.
\(^2\) See Chapter 5, subsection 3.
\(^3\) See Chapter 5.
\(^4\) Ibid.
which regulates the subject matter jurisdiction of U.S. courts in antitrust litigation. It has been demonstrated in earlier chapters that the substantive law requirement to grant subject matter jurisdiction of U.S. courts was elaborated by the Supreme Court’s *Empagran* judgment in such a way that (foreign) private antitrust injury may potentially be litigated before the U.S. courts on the condition that the injury is not independent from the anticompetitive effects (antitrust injury) within the U.S.\(^5\) In contrast with the Second Court of Appeals’ *Empagran* decision\(^6\) and with post-*Empagran* case law\(^7\) (where the U.S. adjudicating courts elaborated this ‘dependency’ requirement between anticompetitive effects (antitrust injury) within the U.S. and the litigated (foreign) antitrust injury in the form of ‘direct causation’ (i.e. anticompetitive effects in the U.S. have to be the direct cause of (foreign) antitrust injury), this thesis proposes that this ‘dependency’ requirement has to be addressed in the form of a transborder standard.

This chapter examines the reasoning of pre-*Empagran* courts with two objectives. Firstly, to show that a transborder standard is compatible with the existing reasoning of the U.S. courts, and consequently, compatible with the existing system of antitrust law enforcement. Secondly, to provide some examples that provide guidance for understanding the requirement of ‘simultaneous and essential’\(^8\) that has to exist in order to determine a factual situation as ‘transborder’.

In addition, this chapter applies the transborder standard to some of the pre-*Empagran* U.S. antitrust cases to indicate the extent to which the reasoning of the U.S. adjudicating courts might have been altered if the transborder standard had existed at the time of the adjudication.

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\(^5\) See Chapter 2, subsection 3.1.7.3.
\(^6\) See Chapter 2, subsection 3.1.7.4.
\(^7\) See Chapter 3, subsection 6.2.
\(^8\) See Chapter 5, subsection 2.2.
2 Reasons to Assess the Compatibility of a Transborder Standard with the System of Antitrust Law Enforcement

In the section above it is submitted that a transborder standard is an approach that can be directly adopted in U.S. antitrust litigation to address the existing legal and practical needs without a need for legislative changes in substantive and procedural antitrust law. The analysis undertaken below provides support for this conclusion.

At the preliminary stage of the analysis that follows, it is important to stress the awareness that the analysis may lack clarity if assessed in isolation. In Chapter 2 it was explained that the Supreme Court in Empagran did not reject the alternative theory claim, but this alternative theory claim was never assessed or applied in post-Empagran cases’ reasoning. It is submitted that this omission is of no relevance to the argument that a transborder standard can and should be adopted in deciding whether subject matter jurisdiction can be conferred on the U.S. courts. The analysis in Chapter 6 demonstrated that pre-Empagran case law on subject matter jurisdiction and statements on private antitrust law enforcement in the selected pre-Empagran cases do not generally support (apart from a few examples) the acceptance of a transborder standard. Therefore, the next logical step is to conduct an analysis in order to find evidence to support the submission that a transborder standard is compatible with the existing system of U.S. antitrust enforcement.

While conducting the analysis of pre-Empagran cases for the purpose of Chapter 6, the judgments of the U.S. courts revealed that they encompass much more than merely case law on subject matter jurisdiction and statements on private antitrust law enforcement. The judgments of the U.S. courts include dicta and show the reasoning that adjudication court followed to deliver decisions on the dispute under antitrust litigation.

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See Chapter 2, subsection 3.1.10.
See Chapter 3, subsection 5.2.
Chapter 7: Transborder Standard – Compatibility

3 Reasoning in Pre-\textit{Empagran} Cases that Supports a Transborder Standard

A transborder standard requires an assessment of factual situations (including commercial arrangements) as a whole and not in separate segments.\(^\text{11}\) Thus, where this integral approach in assessing the factual situation is substituted by adjudicating courts for separating and isolateing categories of facts,\(^\text{12}\) the reasoning is founded on a distorted perception of the factual situation and consequently leads to a questionable decision.

The necessity\(^\text{13}\) to indentify and understand the nature of the connection between facts\(^\text{14}\) inside and outside of the U.S. can find support in the \textit{Swift}\(^\text{15}\) case, where the adjudicating court explained that perpetrators can perform and adopt several specific acts and courses of conduct to reach the direct object of conspiracy. The present thesis does not oppose this proposition, supported by the adjudicating courts in the \textit{Empagran} litigation\(^\text{16}\) and post-\textit{Empagran} courts,\(^\text{17}\) that the existence of a worldwide conspiracy on its own is not a sufficient condition for granting subject matter jurisdiction to the U.S. courts in private antitrust litigation with a foreign injury. It is a completely different question, however, where the conspirators set up their commercial arrangements so as to prevent private parties from litigating before the U.S. courts where the injury suffered from these commercial arrangements can only be categorised as foreign. The remaining part of this section will set out four arguments and provide additional examples from pre-\textit{Empagran} cases that may be used to support a transborder standard. The arguments are the following: the inextricability argument (subsection 1) that was mentioned in the \textit{Empagran}

\(^{11}\) See Chapter 5, subsection 2.

\(^{12}\) See explanation of the existing dichotomy in the reasoning of the U.S. courts of categories of ‘domestic’ and ‘foreign’ in Chapter 5.

\(^{13}\) For the significance that the existence of the connection between facts inside and outside the U.S. has on the legality of commercial arrangements, see Chapter 5.

\(^{14}\) I.e. anticompetitive conduct, anticompetitive effect, antitrust injury, nationality of litigants (see Chapter 5).


\(^{16}\) See Chapter 2, subsection 3.1.2.

\(^{17}\) See Chapter 3, section 6.
ligation but never examined; the hub argument (subsection 2) that was not mentioned either in the Empagran litigation or in post-Empagran cases; the same critique is valid also for the scheme argument (subsection 3); relevance attributed by pre-Empagran courts to the international dimension of factual situations (subsection 4). This section concludes with further arguments that cannot be classified by one common denominator, but can still be relied on in support of the transborder standard.

3.1 The Inextricability Argument

The inextricability argument was mentioned in the Empagran litigation\(^\text{18}\) in support of the decision that a foreign private antitrust injury that is independent from anticompetitive effect (antitrust injury) within the U.S. cannot be granted subject matter jurisdiction of the U.S. courts. Nevertheless, none of the courts in the Empagran litigation elaborated the substance and conditions for the foreign antitrust injury to qualify as inextricably connected with anticompetitive effect (antitrust injury) within the U.S.

Therefore, the only way to understand the inextricability argument is to examine pre-Empagran cases where the adjudicating courts used this argument as part of their reasoning in the process of reaching a decision.

The pre-Empagran case that was directly cited as a precedent of the inextricability argument in the Empagran litigation was Industria Siciliana Asfalti. In this case the adjudicating court used the inextricability argument to explain that the foreclosures and imposition of anticompetitive prices merge into a single antitrust injury.\(^\text{19}\) The private plaintiff in this case was a non-U.S. national who suffered a private antitrust injury outside the U.S. The injury was caused by the defendants’ activities that averred to be in violation of the Sherman Act.\(^\text{20}\) More specifically, the adjudicating court explained that the imposition of anticompetitive prices which damaged the plaintiff were

\(^{18}\) See Chapter 2, subsection 3.1.7.3.


\(^{20}\) Ibid.
inextricably bound up with the domestic restraints of trade (i.e. trade in the export of design and engineering services was restrained\(^{21}\)), which had enabled the defendant to enforce the reciprocal transaction.\(^{22}\) The reasoning in the judgment also shows that the fact that a non-U.S. private plaintiff suffered antitrust injury in a territory outside the U.S., and the fact that this non-U.S. plaintiff did not import or export from or into the U.S., were not relevant\(^{23}\) to granting the subject matter jurisdiction to the U.S. courts.

This thesis submits that particular prudence is required to avoid any inference on the nature of inextricability based on a factual situation present in the Industria Siciliana Asfalti case. In Industria Siciliana Asfalti the non-U.S. plaintiff suffered an antitrust injury because of a commercial agreement it had concluded with the defendant, who was a U.S. national. Nevertheless, it is submitted that the Industria Siciliana Asfalti judgment cannot be considered to establish a precedent that (foreign) private antitrust injury can be granted subject matter jurisdiction of the U.S. courts only if suffered by one of the parties to a commercial agreement concluded directly with a defendant, and this private antitrust injury derives from the substance of this concluded commercial agreement. There are four reasons that support this submission.

Firstly, neither the Empagran litigation\(^{24}\) nor post-Empagran cases\(^{25}\) require that only in a situation where foreign private antitrust injury that is suffered by one of the parties of a commercial agreement in relation to the substance of this concluded commercial agreement can be granted U.S. subject matter jurisdiction. Secondly, an analysis of the factual situation should not be limited merely to an analysis of the form (face) of the concluded commercial agreement. The analysis has to consider the wider economic context, and the transaction concluded by the private parties may be merely a link in a chain of circumstances and so merely one part in the entire transaction.\(^{26}\) Thirdly, conspirators may take part in anticompetitive conduct and consequently cause

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\(^{21}\) Ibid.

\(^{22}\) Ibid.

\(^{23}\) Ibid.

\(^{24}\) See Chapter 2, subsection 3.1.7.

\(^{25}\) See Chapter 3, subsection 6.2.

\(^{26}\) See analysis in Chapter 6, subsection 3.2.4.
private antitrust injury to (non)-U.S. plaintiffs even if they are not signatories to the commercial arrangements agreed with other conspirators, or commercial arrangements agreed between other conspirators which harmed private party. Fourthly, other cases are analyzed further in this subsection where adjudicating courts used the inextricability argument despite the factual situation being such that the private plaintiff who suffered antitrust injury was not in a commercial arrangement with defendants.

Another pre-Empagran case where the inextricability argument was used is the Carpet Group case. The adjudication court in this case stated that the plaintiffs’ antitrust injury is inextricably intertwined with the defendants’ wrongdoing, and that such injury is precisely the intended consequence of the defendants’ boycott. The factual situation in this case was that the plaintiff attempted to effectuate a plan to assist U.S. retailers in purchasing goods directly from non-U.S. manufacturers. In response to this plaintiff’s business plan, the defendants who were of U.S. nationality addressed these non-U.S. manufacturers and other non-U.S. companies who may support these non-U.S. manufacturers to join the plaintiff’s plan to refrain from taking part in effectuating the plaintiff’s plan, otherwise the U.S. companies would need to take retaliation measures. This pre-Empagran case can be used as an example in support of the position that the existence of inextricability between antitrust injury and anticompetitive effects cannot be determined merely between parties who agreed on certain commercial arrangements between themselves.

The elements of inextricability can be noted also in the General Electric Co. case. There was no element of antitrust injury litigated or adjudicated in this pre-Empagran case. Nevertheless, the importance of General Electric Co. can be attributed to the part of the judgment where the adjudicating court stated that an arrangement between a non-U.S. company and a U.S. company where the former agrees to refrain from importing goods into the U.S. and the latter agrees to refrain from exporting goods out of the U.S. in the future are connected, market division agreements.

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27 Ibid.
3.2 The Hub Argument

The hub argument was present in pre-Empagran cases at the time of the Empagran litigation. Nevertheless, neither the litigants nor the adjudicating courts in the Empagran litigation or in post-Empagran cases formulated their reasoning with the help to associate their arguments by making reference to the hub argument.

Basically, the hub argument helps to identify which of the companies that are parties to an antitrust cartel holds the main role in effectuating this antitrust cartel. In a situation where this company is located or performs its business activities in the U.S., the functioning of the world-wide antitrust cartel may not be properly stopped unless this company that has the leading role in running the antitrust cartel is made a defendant in antitrust action.

The hub argument was used in two pre-Empagran cases. In the General Electric Co.30 case, the adjudicating court explained that the U.S. company that was a party to a world-wide cartel was the motivating factor that governed contracts concluded between non-U.S. companies that took part in the cartel to maintain its dominant position as a U.S. company in the U.S. protecting itself from non-U.S. competitors. In the Laker Airways v. Pan American case, the adjudicating court explained that the U.S. was the key fact of the configuration of the antitrust cartel in that the U.S. was its hub and the various countries in Europe were its spokes.31 The adjudicating court then stated that the hub of the antitrust cartel is a far more logical place where witnesses and documents that can prove the functioning of the cartel will have to be transported.32

3.3 The Scheme Argument

The scheme argument is another argument that was present in U.S. antitrust law at the time of the Empagran litigation, but was never raised or argued either in the Empagran litigation or in post-Empagran cases.

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The benefit that the scheme argument has for private plaintiffs was pointed out in the *Well Fargo*\(^3^3\) case, where the adjudicating court explained that for plaintiff it might be easier to attack the entire scheme of defendant than to view the domestic and foreign activities of the defendant separately. The significance of this statement can be better understood if presented together with the statement in the *General Electric Co.*\(^3^4\) case, where the adjudicating court explained that the decision by a U.S. court may be different depending on whether the court evaluates the whole picture or individual figures in it.

The scheme argument is an elaboration of the reasoning in the U.S. cases where the courts pointed out that it is necessary to look at the system and not at the elements.\(^3^5\) In the U.S. courts’ view, the character and the effect of a conspiracy are not to be judged by dismembering them and viewing the separate parts, but only by looking at the situation as a whole.\(^3^6\) This means that the jury has a duty to look at the whole picture and not merely at the individual figures in it.\(^3^7\) In relation to this, it is important to note that not merely the facts, but also the evidence has to be looked at as a whole to see whether a conspiracy may be inferred.\(^3^8\)

Basically, the scheme argument gives support to the transborder standard in that it shows how the connection between different facts actually determines the nature of an antitrust cartel. The analysis of the U.S. antitrust cases that applied the scheme argument in their reasoning enables a distinction between U.S. antitrust cases to be made based on whether the relevance of the connection between facts that form an antitrust cartel is to activities performed by the

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37 Ibid.
parties forming the cartel (objective scheme) or the relevance is to parties who
form the cartel (subjective scheme).

The objective scheme argument can be relied upon to submit that only by
looking together (i.e. jointly) at different conducts, performances and other
types of activities performed by the defendants can the real nature (extent and
legality) of commercial arrangements be established.

The objective scheme argument gives support to the transborder standard in
that all the facts that adjudicating courts have to determine what are the
essential factors that when exist simultaneously determine the real nature of
the factual situation and the antitrust cartel.

The statements in pre-Empagran cases that identify the essence of the objective
scheme argument are the following: the acts charged may be lawful, but bound
together as the parts of a single plan makes these parts unlawful;\(^\text{39}\) acts
(insufficient by themselves to produce a result) and forces of nature require
further acts and intention to produce result that law seeks to prevent;\(^\text{40}\) the acts
in themselves are wholly innocent, but if they are part of the sum of acts which
is relied upon to effectuate the conspiracy, they come within prohibition;\(^\text{41}\)
organizations can have an innocent character and the ultimate end sought can
be lawful, but if unlawful means are adopted than there cannot be justification;\(^\text{42}\)
means can be lawful on their own, but when these means are employed to accomplish the unlawful purpose of a commercial agreement
between perpetrators, there can be no justification\(^\text{43}\) (the result, not the means
used, gives character to the conspiracy\(^\text{44}\)); parts can be valid, but if their use is


prohibited, then the whole thing is invalid, i.e. the scheme is condemned;\footnote{ U.S. v. Bausch & Lomb Optical Co., 321 U.S. 707,724, 64 S.Ct. 805, 816, 88 L.Ed. 1024 (1944).} if individual contracts are integral parts of the whole commercial arrangement, then these contracts are illegal and cannot be considered as completely isolated happenings;\footnote{ U.S. v. Bausch & Lomb Optical Co., 321 U.S. 707,720, 64 S.Ct. 805, 816, 88 L.Ed. 1024 (1944).} a scheme may also be made possible by the use of funds and legislation enacted in a non-U.S. country;\footnote{ See U.S. v. Sisal Sales Corp., 274 U.S. 268,274, 47 S.Ct. 592, 71 L.Ed. 1042 (1927).} it is not individual contracts that should be examined but the entire transaction which contracts are part of, so the focus has to be on the chain of events;\footnote{ U.S. v. South-Eastern Underwriters Ass’n., 322 U.S. 533,546,547, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944); U.S. v. National Lead Co., 63 F.Supp. 513,525 (S.D.N.Y.1945); U.S. v. General Elec. Co., 82 F.Supp. 753,887 (D.N.J.1949).} the assessment has to be practical one, drawn from the course of business;\footnote{ U.S. v. South-Eastern Underwriters Ass’n., 322 U.S. 533,547, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944) case; U.S. v. Singer Mfg. Co., 374 U.S. 174,194, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963) (combination or conspiracy is to be proven by what the perpetrators actually did rather than by the words they used, citing case).} the relevance of a scheme is that you look at case (activities of perpetrator) as whole;\footnote{ Steele v. Bulova Watch Co., 344 U.S. 280,285, 73 S.Ct. 252, 97 L.Ed. 319 (1952); U.S. v. Minnesota Min. & Mfg. Co., 92 F.Supp. 947,964 (D.Mass.1950); U.S. v. General Elec. Co., 80 F.Supp. 989,1004 (S.D.N.Y.1948).} acts that are in themselves legal lose that character when they become part of an unlawful scheme;\footnote{ Steele v. Bulova Watch Co., 344 U.S. 280,286, 73 S.Ct. 252, 97 L.Ed. 319 (1952); Vacuum Oil Co. v. Eagle Oil Co. of New York, 154 F. 867,872-874 (C.C.N.J.1907); Associated Press v. U.S., 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1944); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690,707, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).} certainly each fact is meaningful primarily as part of a pattern, and the complete pattern is the most important datum of all;\footnote{ Overseas Motors, Inc. v. Import Motors Ltd., Inc., 375 F.Supp. 499,531 (E.D.Mich.1974); U.S. v. General Elec. Co., 80 F.Supp. 989,1004 (S.D.N.Y.1948).} when anticompetitive conduct is directed at both foreign and domestic markets, the success of an anticompetitive scheme in foreign markets may enhance the effectiveness of an anticompetitive scheme in the domestic market;\footnote{ Kruman v. Christie’s Intern. PLC, 284 F.3d 384,403 (2d Cir.2002).} when a foreign scheme magnifies the effect of the domestic scheme, and plaintiffs who are affected only by the foreign scheme have no remedy under the U.S. laws, and the perpetrator of the scheme may have a greater incentive to pursue both the foreign scheme and the domestic scheme than the domestic scheme alone\footnote{ Ibid.} (i.e. the U.S. markets suffer when the foreign scheme is not deterred because the
domestic scheme may have a greater chance of success when it is supplemented by the foreign scheme);\textsuperscript{55} activities within the U.S. and outside the U.S. were part of an infringing scheme,\textsuperscript{56} therefore, it is easier for the private plaintiff to attack the entire scheme than if the activities within the U.S. and outside the U.S. are viewed separately.\textsuperscript{57}

In contrast to the objective scheme argument, the subjective scheme argument requires the analysis of who are the parties that form an antitrust cartel and what contribution does cooperation make between the parties of the antitrust cartel to the nature (extent and legality) of commercial arrangements.

The subjective scheme argument provides support to the transborder standard in that it is important to determine the parties to an antitrust cartel because without their cooperation in the antitrust cartel, this cartel would not be possible and private parties might not suffer antitrust injury.

The statements in pre-\textit{Empagran} cases that set out the essence of the subjective scheme argument are the following: acts by the perpetrators become part of a general plan and purpose to affect the private parties’ (competitors’) commerce;\textsuperscript{58} if companies stand alone, this is innocent, but if there are arrangements under which companies control the entire market, then this becomes an instrument of restrain\textsuperscript{59} (i.e. the U.S. cartel members make the international cartel workable); it is important to mention that it is necessary to look not only at the form but also at the substance of the transgression\textsuperscript{60} (e.g. one U.S. conspirator is not formally part of the negotiated cartel or is not conducting business in a non-U.S. market, but can still be considered to form part of the cartel);\textsuperscript{61} if an act performed by one is lawful but if performed by many in concert becomes a conspiracy and public wrong, and if the result of this

\textsuperscript{55} Ibid.
\textsuperscript{56} \textit{Wells Fargo & Co. v. Wells Fargo Exp. Co.}, 556 F.2d 406,429 (9th Cir.1977).
\textsuperscript{57} N.33.
\textsuperscript{58} N.44.
\textsuperscript{60} \textit{U.S. v. National Lead Co.}, 63 F.Supp. 513,527 (S.D.N.Y.1945).
conspiracy is hurtful to the public or the individual, then the act is prohibited;\textsuperscript{62} conspirators entered a scheme (conference) whose purpose was to prevent competition between the members of the conference and eliminate competition with other providers of the same service;\textsuperscript{63} the perpetrators created a scheme to monopolize the U.S. and non-U.S. countries and this scheme was masterminded from headquarters in the U.S.;\textsuperscript{64} the participation of the U.S. business in the market allocation scheme was critical to its success;\textsuperscript{65} in this regard it is possible to state that some (non-U.S.) conspirators are indispensable parties to the cartel and therefore the U.S. courts have subject matter jurisdiction;\textsuperscript{66} U.S. and non-U.S. companies divided up the world market, set prices for which to sell products within their exclusive markets, agreed on mutual cooperation and assistance in eliminating competition with those not part of the cartel, and agreed on participation in these foreign cartels that result in restricting export from the U.S.;\textsuperscript{67} lack a link between subject present within the U.S. with an anticompetitive scheme or anticompetitive activities by producers outside the U.S.\textsuperscript{68}

In a situation where the objective scheme argument and the subjective scheme argument are applied together to the same factual situation under adjudication, private parties who suffer antitrust injury outside the U.S. in relation to transactions or activities by U.S. and/or non-U.S. companies performed within and/or outside the U.S. may succeed in demonstrating that their private foreign antitrust injury is not independent from anticompetitive effect (antitrust injury) within the U.S., and consequently should be granted the subject matter jurisdiction of the U.S. courts.


\textsuperscript{63} Thomsen v. Union Castle Mail S.S. Co., 166 F. 251,253 (2d Cir.1908).


3.4 Consideration of the international Dimension in the Factual Situation

The overview of pre-Empagran cases\(^{69}\) shows that antitrust litigation encompassed factual situations that were not limited exclusively to the national territory of the U.S. Chapter 2 elaborated\(^{70}\) that the Supreme Court in its Empagran decision paid considerable attention to the relationship between international antitrust cartels and (foreign) antitrust injury, and determined that it is possible for private plaintiffs to be granted subject matter jurisdiction to litigate their (foreign) antitrust injury before the U.S. courts.

Chapter 2\(^{71}\) presented the novelty of the alternative theory that the Supreme Court’s Empagran decision introduced into the adjudicating process of the subject matter jurisdiction of the U.S. courts, and the analysis presented in Chapter 3\(^{72}\) showed that none of the post-Empagran U.S. courts attempted to elaborate and apply the alternative theory of subject matter jurisdiction to the adjudicating process. Does this mean that no other U.S. court, except the Supreme Court in the Empagran litigation, is aware of the particularities of international antitrust cartels? Furthermore, does this also mean that no other U.S. court, except the Supreme Court in the Empagran litigation, is aware of the nature and extent of private antitrust injury that these international antitrust cartels can cause to private parties?

The analysis that follows shows the extent to which pre-Empagran courts considered it relevant to include in their adjudication analysis facts that are located in or associated with the U.S. and facts that are located in and associated with non-U.S. territory. In addition, the analysis demonstrates the awareness of some U.S. courts of the need to apply U.S. antitrust law to factual situations that extend beyond the national territory of the U.S.

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\(^{69}\) See Chapter 5.
\(^{70}\) See Chapter 2, subsections 3.1.7.3. and 3.2.
\(^{71}\) See Chapter 2, subsection 3.1.10.
\(^{72}\) See Chapter 3, subsection 5.2.
3.4.1 The Worldwide Relevant Geographical Market

The recognition in the Lantec\textsuperscript{73} case of the possibility of the relevant geographical market being global illustrates of the need to look beyond the national territory of the U.S. Because this thesis deals with private antitrust law enforcement, it is important to emphasize that the rationale of the U.S. courts\textsuperscript{74} in the adjudication process requires the determination of the extent of the relevant geographical market (and consequently this market being of worldwide nature) not from the perspective of the alleged antitrust law wrongdoers (i.e. the defendants in private antitrust law litigation), but from the perspective of private parties (i.e. consumers) who buy products from the defendants. It is submitted that the determination of relevant market from the perspective of affected private parties is also in conformity with the Empagran litigation\textsuperscript{75} and post-Empagran cases\textsuperscript{76} to the extent that concluding transactions outside the U.S., suffering injury outside the U.S., and consuming goods outside the U.S. do not have a determinative role in granting the subject matter jurisdiction of the U.S. courts.

Pre-Empagran cases do not demonstrate a recognition of the worldwide relevant market only at the declaratory level. The El Cid\textsuperscript{77} case formulated a requirement that the factual situation should be determined by assessing the worldwide market and the extent to which the U.S. market forms part of this worldwide market. In a situation where the U.S. adjudicating court determines that there exist even the slightest direct connection between U.S. commerce and a market outside the U.S. then, according to the Transor\textsuperscript{78} case, the market outside the U.S. cannot be perceived as a non-U.S. market, but as a U.S. one. This statement can be interpreted to mean that the market outside the U.S. and the market inside the U.S. are considered as one market and, as such, relevant in

\textsuperscript{73} Lantec, Inc. v. Novell, Inc., 306 F.3d 1003,1026 (10th Cir.2002).

\textsuperscript{74} See Lantec, Inc. v. Novell, Inc., 306 F.3d 1003,1027 (10th Cir.2002); El Cid, Ltd. v. New Jersey Zinc Co., 551 F.Supp. 626,632 (S.D.N.Y.1982).

\textsuperscript{75} See Chapter 2, subsection 3.2.

\textsuperscript{76} See Chapter 3, subsection 6.4. and section 7.


the sense that private antitrust injury suffered within such a market should be granted the possibility to be adjudicated before the U.S. courts.

3.4.2 The Existence of World Trade

The recognition of a worldwide market is only one example that shows the awareness of the U.S. courts of the necessity to analyze the ties between commerce inside the U.S. and commerce outside the U.S.

Another example that shows the awareness of the U.S. courts of the necessity to consider the relationship between commerce within the U.S. and commerce outside the U.S. is the recognition of the existence of world trade.

The U.S. court in the Metallgesellschaft case explained that in a global economy, the U.S. and non-U.S. markets are interrelated and influence each other so it is sometimes difficult to put strict economic boundaries around any particular (territorial) market. This is because, as the State of Kuwait case showed, the nature of world trade may require that the defendants control the U.S. and non-U.S. markets. The U.S. court in the Galavan Supplements case stated it clearly that a worldwide combination and conspiracy (i.e. international cartels) can affect the U.S. market as well as non-U.S. markets.

3.4.3 Commercial Arrangements that Have a Worldwide Dimension

This thesis does not analyze pre-Empagran cases merely with the purpose of finding a reasoning that the U.S. courts recognize that a worldwide conspiracy can affect the U.S. market as well as non-U.S. markets. A more important purpose of this analysis is to find explicit examples in the reasoning of U.S. courts where the adjudication analysis focused on determining the nature of the

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79 Metallgesellschaft AG v. Sumitomo Corp. of America, 325 F.3d 836,842 (7th Cir.2003).
81 Galavan Supplements, Ltd. v. Archer Daniels Midland Co., 1997 WL 732498,3 (N.D.Cal.).
connection between facts taking place outside the U.S. and facts present inside the U.S.

In the *Den Norske* case, the adjudicating court assessed the connection and interrelatedness between prices in the U.S. market and prices in non-U.S. markets\textsuperscript{82} recognizing that a worldwide price-fixing scheme and the inclusion of the U.S. market in such a scheme are necessary to generate monopoly profits for the companies involved in this scheme,\textsuperscript{83} and these are also necessary to prevent arbitrage that would otherwise equalize unequal prices around the globe, as speculators can resell goods purchased in the U.S. to buyers in non-U.S. markets.\textsuperscript{84} Therefore, an antitrust cartel may find it impossible to fix prices anywhere without a worldwide conspiracy,\textsuperscript{85} and the defendants have no concerns about participating in such an antitrust cartel as liability for their commercial arrangements in the U.S. can be compensated (i.e. cross-subsidized) with the profits that the defendants obtain from their operations outside the U.S.\textsuperscript{86}

A similar type of analysis of the dependency of a price-fixing agreement, i.e. a price-fixing agreement being successful in the U.S. only under the condition that there exists a price-fixing agreement that is successful outside the U.S., is to be found in the *Kruman*\textsuperscript{87} case.

Pre-*Empagran* courts did not analyze the connection between the U.S. and non-U.S. markets only in relation to price-fixing agreements. The U.S. court in the *National Lead*\textsuperscript{88} case determined as illegal under U.S. antitrust law (world-wide patent pool) the agreement to divide the world into exclusive trade areas and to suppress all competition in each of these areas among the member of the combination, as well as all commerce of goods entering or leaving the U.S.

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\textsuperscript{82} *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,427 (5th Cir.2001).

\textsuperscript{83} *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,435 (5th Cir.2001) (dissenting opinion).

\textsuperscript{84} Ibid.

\textsuperscript{85} Ibid.

\textsuperscript{86} Ibid.

\textsuperscript{87} *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,401 (2d Cir.2002).

market (i.e. world wide territorial allocation). This division of global territory\textsuperscript{89} and participation of U.S. companies in an international cartel\textsuperscript{90} was confirmed in the *National Lead*\textsuperscript{91} case, where non-U.S. companies joined U.S. companies in carrying out a program to restrain international commerce and to establish an international combination or conspiracy in restraint of trade. An international conspiracy (in the form of a patent pool) between U.S. companies and non-U.S. companies that restricted the export of goods from the U.S. market to non-U.S. markets was also condemned in the *Zenith Radio*\textsuperscript{92} case.

### 3.4.4 The Necessary Coexistence of Facts within the U.S. and Facts outside the U.S.

The necessity of cooperation of U.S. companies in the U.S. and non-U.S. companies in the market outside the U.S. with the purpose of achieving a desired outcome in the U.S. was also considered as a relevant element in the adjudication process in the *Hartford Fire*\textsuperscript{93} case.

A similar reasoning was applied in the *In Re Uranium Antitrust Litigation*\textsuperscript{94} case, where U.S. corporations conspired with non-U.S. corporations to fix the price of uranium in the world market, and this conduct of the parties of the cartel outside the U.S. and within the U.S. intended to affect the uranium market in the U.S. The defendant's purpose of acquiring dominion and control of the tobacco trade at the world level was also present in the *American Tobacco*\textsuperscript{95} case, where the defendants used various methods around the world to monopolize the trade by driving competitors out of business. Another example of competition on the worldwide market for the particular good (roller bearings) is the *Timken Roler*\textsuperscript{96} case, where members of an antitrust cartel agreed on


\textsuperscript{94} *In re Uranium Antitrust Litigation*, 617 F.2d 1248,1254 (7th Cir. 1980).


contracts with the purpose of regulating and restricting this competition. A commercial arrangement with the same purpose between members of an antitrust cartel, i.e. to abolish competition in foreign trade (between the U.S. and non-U.S. countries) and obtain its share of international markets, was present in the *U.S. Alkali Export Ass’n*97 case.

In the *Pacific*98 case, the nature of the defendants’ business activity was such that it was performed simultaneously within and outside the U.S. The adjudicating courts stated that the U.S. courts do have subject matter jurisdiction to apply U.S. laws to the part of a business activity that takes place in the U.S.

In the *Hamburg Americanishe Packet*99 case, the adjudicating court went a step further in the sense that it did not merely state the existence of connections between acts performed within the U.S. and acts performed outside the U.S. The adjudicating court qualified the nature of the connections between these facts by stating that acts to be performed in the U.S. are as material and essential as those to be performed outside the U.S. and cannot be separated.100 In contrast to the *Pacific*101 case, the adjudicating courts in the *Hamburg Americanishe Packet*102 case granted subject matter jurisdiction to apply U.S. laws in this type of factual situation not only to acts performed within the U.S. but also to other acts performed outside the U.S., otherwise, in the court’s view, a different decision would lead to international complications.

The subject matter jurisdiction of the U.S. courts to apply U.S. antitrust laws to those defendants’ activities performed outside the U.S. was also recognized in the *Continental Ore*103 case. The factual situation in this case was such that the

100 Ibid.
101 N.105.
102 N.99.
U.S. and non-U.S. companies performed a joint action\(^{104}\) with the purpose of eliminating their competitor from a non-U.S. market. The adjudicating courts applied the scheme argument\(^{105}\) and found the defendants liable under U.S. antitrust law. In the adjudication court’s view, such a decision effectuates the purpose of the Sherman Act\(^{106}\).

### 3.4.5 The Complexity of Commercial Agreements and Carefulness in Identifying their Nature

It is important to bear in mind that a commercial arrangement put in place by the members of an antitrust cartel may include a variety of different actions, performed by different members of the antitrust cartel in different countries. Therefore, the adjudication process needs to be conducted in a way to understand the contribution that each member of the cartel, by performing the designated actions, makes to the functioning of the cartel.

There are a few pre-*Empagran* cases that can be listed as examples of the complex nature of commercial arrangements by an antitrust cartel. There may be an agreement between a U.S. and non-U.S. companies that the latter will sell products within the U.S. for the same prices as the U.S. company;\(^{107}\) there may be an agreement between a U.S. and non-U.S. companies that the U.S. company will buy the latter’s outlets located in the U.S. so that it would be only the U.S. company who would sell goods in the U.S.;\(^{108}\) there may be an agreement between U.S. and non-U.S. companies about territories to which these companies are allowed to export their goods\(^{109}\) and the amount of goods that

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\(^{104}\) *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,706, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

\(^{105}\) *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,707, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

\(^{106}\) Ibid.


these companies are allowed to export to designated territories,\textsuperscript{110} and a controlling mechanism was set up to monitor the members of the cartel to make sure they conducted their exports as agreed;\textsuperscript{111} a mechanism can be set up to protect members of the anticompetitive cartels to protects each other against (foreign) competitors not members of the antitrust cartel;\textsuperscript{112} agreement to divide up world territories.\textsuperscript{113} The U.S. courts explained that the place where the contract is signed and its wording of where the anticompetitive effects should take place, and the names of parties to the contract that are specifically written on the form of the contract, may not be sufficient to understanding the extent of the antitrust cartel and sufficient to know all the parties to the antitrust cartel.\textsuperscript{114} For example, to determine the identity of the parties to the antitrust cartel, it may be necessary to examine who had responsibility for the content of the agreement,\textsuperscript{115} who are the direct or indirect owners of the parties concluding the agreement,\textsuperscript{116} who is actually running the parties of the antitrust cartel,\textsuperscript{117} and whether some companies participate as beneficiaries in foreign cartels.\textsuperscript{118} The \textit{American Tobacco}\textsuperscript{119} case can be used as an example where the adjudicating court stated in general terms that the nature of the combination and the determination of who the parties are to the antitrust cartel can be assessed from the point of view of stock ownership or from the standpoint of the principal corporation, accessory or subsidiary corporations viewed independently, including the foreign corporations in so far as by the contracts made by them

\textsuperscript{119} U.S. v. \textit{American Tobacco Co.}, 221 U.S. 106,184, 31 Sup.Ct. 632, 55 L.Ed. 663 (1911).
they became co-operators and consequently, the combination comes within the prohibition of antitrust laws.

### 3.4.6 The Existence of International Competition

The pre-**Empagran** cases considered in the subsections above have one thing in common, i.e. they provide evidence on how the U.S. courts analyzed the necessity and nature of facts present in the U.S. and in non-U.S. countries with the purpose of determining the nature and extent of the antitrust cartel.

There is a completely different group of pre-**Empagran** cases where the U.S. courts went a step further and recognized the possibility of international competition.

The **Eurim-Pharm** case can serve as an example that the existence of international competition may affect the way in which the U.S. courts determine the legality of certain commercial arrangements that might traditionally be considered as illegal. The adjudication court in this case explained that possibilities of international competition can contribute to the amount and prices of goods sold in the U.S. and thus rule out the possibility that the existence of a world-wide price-fixing and market allocation conspiracy on its own is sufficient to create anticompetitive effects in the U.S.\(^\text{120}\) Another example of how international competition may affect the opinions of the U.S. courts is the **McElderry**\(^\text{121}\) case, where the adjudicating court considered the possibility that U.S. companies may compete with non-U.S. companies on the market outside the U.S. In this situation the adjudicating court would grant subject matter jurisdiction to the U.S. courts. In relation to the exclusion from the non-U.S. market, is relevant to also mention the **National Bank of Canada** case, where the adjudicating court accepted the existence of anticompetitive effects in the U.S. and outside the U.S., and that it was sufficient that there were effects in the U.S. and these effects did not need to predominate,\(^\text{122}\) but what is important here is that the adjudicating court analysed and concluded further

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that the plaintiff was excluded from this wider market. A similar reasoning can be found in the *Price Line* case, where the subject matter jurisdiction of the U.S. courts was granted on the basis of commercial arrangements between the U.S. and non-U.S. companies with the purpose of preserving the commerce of goods between the U.S. and non-U.S. markets. A similar reasoning on the application of U.S. antitrust law to a commercial arrangement where the performance of the U.S. company may affect commerce between the U.S. and non-U.S. countries can also be found in the *Pfizer* case. The suppression of competition in the U.S. and outside the U.S. was determined in the *Den Norske* case as grounds for filing a complaint before the U.S. courts (i.e. the FTAIA applies to global conspiracies that result in foreign injury). The adjudicating court in the *Imperial Chemical Industries* case took the same approach when it stated that the suppression of competition in international trade is in and of itself a public injury. The application of the U.S. philosophy of free competition at the international level was also confirmed in the *Daishowa International* case and in the *U.S. Alkali Export Ass’n* case. The *U.S. Alkali Export Ass’n* case made it explicit that the cartelization of the world is considered as a violation of U.S. antitrust law, so even the U.S. export association should not engage in any arrangements that would affect other U.S. companies exporting goods from the U.S. and competing on the global market. A similar statement can be found in the *Timken Rolers* case, where the adjudicating court confirmed the applicability of U.S. antitrust laws to free competition with non-U.S. countries that exists as a consequence of events at the world level.

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123 Ibid.
126 *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,422 (5th Cir.2001).
127 Ibid.
128 Ibid.
130 *Daishowa Intern. v. North Coast Export Co.*, 1982 WL 1850,3 (N.D.Cal.).
133 N.131.
In the *Aluminium Co. of America*\(^{135}\) case, the adjudicating courts stated that the assessment of commercial arrangements has to occur in light of effective competition in the future. Considering the statements listed above, it can be concluded that for the assessment of competition, it may not be sufficient to look only at the situation within the U.S. market, but a global perspective is required. An example that can be used in support of this orientation is the *In Re Microsoft*\(^{136}\) case, where the adjudication courts stated that the Internet has made the concept of territorial borders obsolete, and making a distinction for jurisdictional purposes on the basis of geographical boundaries seems somewhat archaic.

### 3.5 Additional Elements in the Pre-*Empagran* Adjudication Process that Support the Application of a Transborder Standard

#### 3.5.1 Respect of Economic Reality

In the *Concentrated Phosphate*\(^{137}\) case, the adjudicating court required at the consideration of the economic reality of the relevant transactions. The reason for this requirement can be found in the *Aluminium Co. of America*\(^{138}\) case, where the adjudicating court explained that changes in the circumstances in which companies perform their activities are relevant to the relationship with and effect on competition.

Therefore, it is important to follow the guidance provided in the *Continental Ore*\(^{139}\) case, where the adjudicating court stated that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. This means that the same scheme

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\(^{139}\) N.36.
argument as was presented in the section above\textsuperscript{140} was relied on in the sense that the jury has a duty to look at the whole picture and not merely at the individual figures in it.\textsuperscript{141}

The importance of economic reality in assessing the legality of the factual situation under adjudication does not automatically lead to the conclusion that the application of the U.S. antitrust law is unlimited. There are two limitations present in pre-\textit{Empagran} cases in this regard.

Firstly, the \textit{Laker Airways - Sabena}\textsuperscript{142} case stated that the jurisdiction of the U.S. courts is not asserted extraterritorially irrespective of the fact that the U.S. courts apply the territorial effect doctrine in establishing the subject matter jurisdiction of the U.S. courts. The reason why subject matter jurisdiction exists in this type of factual situations, where anticompetitive effects are present in the U.S., is that not all of the causative factors producing the proscribed result may have occurred within the territory.\textsuperscript{143} The fact that some factors that cause anticompetitive effects in the U.S. may occur in non-U.S. countries was also stated, for example, in the \textit{Hurt}\textsuperscript{144} case. This is the reason why, for example, in the \textit{Caribbean Broadcasting}\textsuperscript{145} case, the adjudicating court stated that the location of the provider of services is irrelevant in determining anticompetitive effects on U.S. domestic or import commerce.

Secondly, the adjudicating court in the \textit{Caribbean}\textsuperscript{146} case demonstrated that the U.S. courts do not apply U.S. antitrust laws to regulate the competitive conditions of other nations’ economies. Examples that show this type of limitation on the application of U.S. antitrust laws are the \textit{McElderry}\textsuperscript{147} case and

\textsuperscript{140} See subsection on scheme argument in section above.

\textsuperscript{141} N.36.

\textsuperscript{142} \textit{Laker Airways Ltd. v. Sabena}, Belgian World Airlines, 731 F.2d 909,923 (D.C.Cir.1984).

\textsuperscript{143} Ibid.

\textsuperscript{144} \textit{Hunt v. Mobil Oil Corp.}, 550 F.2d 68,74 (2d Cir.1977).


the Power East\textsuperscript{148} case, where the factual situation was such that the service provider was a non-U.S. company, with no operation within the U.S., who did not provide services to or from the U.S., and there was no competition between this non-U.S. company and U.S. companies outside the U.S. In these two cases, the subject matter jurisdiction of the U.S. courts was not granted despite the fact that the injured private parties were U.S. nationals who enjoyed services provided by the service providers outside the U.S.

Nevertheless, as the Aluminium Co. of America\textsuperscript{149} case shows, it is important to take into consideration the competitive conditions in non-U.S. markets with the purpose of assessing the legality of a commercial situation.

3.5.2 Assessment of Factual Situations from an International Perspective

In Chapter 6\textsuperscript{150} it was explained that the pre-Empagran cases show that the U.S. courts, in adjudicating subject matter jurisdiction, based their decisions on the fact that there was a direct connection with the U.S. (i.e. anticompetitive effects in the U.S., anticompetitive conduct in the U.S., litigants being U.S. nationals, signing and/or implementing a contract within the U.S.). One of the critiques raised in this regard was that on the basis of the transborder standard, the U.S. courts should assess the factual situation in its integrity,\textsuperscript{151} i.e. consider facts present in the U.S. and outside the U.S., and establish the nature of the relationship between these facts.

Nevertheless, the analysis of pre-Empagran cases shows that some pre-Empagran judges did conduct reasoning by looking at the factual situation under adjudication in terms of how it fits into (i.e. what is its relationship with) the wider international context. This distinction between the courts’ reasoning and rationale behind the decision on subject matter jurisdiction is quite remarkable.


\textsuperscript{150} See Chapter 6, subsection 3.2.

\textsuperscript{151} See Chapter 6, subsection 2.1.
The statements in pre-Empagran cases that show how adjudicating courts assessed the factual situation under adjudication in a wider international context are the following: the competitive position on the market is assessed with regard to the control of sources and secure possession of them (in the U.S. and outside the U.S.) and not with regard to the amount of sources available;\(^{152}\) there is a possibility that the exclusion of foreign competition who can bring goods into the U.S. affects the state of competition within the U.S.;\(^{153}\) there may be a conspiracy, but is also necessary to establish whether conspirators transact business in respect of activities in furtherance of the conspiracy;\(^{154}\) the essence of the violation is the illegal agreement itself rather than the overt acts performed in furtherance of this agreement,\(^{155}\) so anticompetitive conduct is not the imposition of high prices pursuant to an illicit agreement, but the alleged agreement by the defendants to fix prices in foreign auction markets;\(^{156}\) the abstention of a U.S. company from a foreign market can still make this company party to the cartel,\(^{157}\) and this requires at the consideration not only of the form but also of the substance of the transgression,\(^{158}\) so a combination or conspiracy has to be proven by what parties actually did rather than by the words they used;\(^{159}\) a commercial agreement for the division of the global market is formed in a way that the U.S. is not mentioned, but this does not mean that the U.S. market was not the object of substantial international interest, so the companies who are part of such an agreement are considered liable.\(^{160}\)

\(^{152}\) See U.S. v. Aluminum Co. of America, 91 F.Supp. 333,358 (S.D.N.Y.1950); See also U.S. v. Aluminum Co. of America, 148 F.2d 416,434 (2d Cir.1945).

\(^{153}\) U.S. v. Aluminum Co. of America, 148 F.2d 416,426 (2d Cir.1945).


\(^{155}\) Kruman v. Christie’s Intern. PLC, 284 F.3d 384,398 (2d Cir.2002).

\(^{156}\) Kruman v. Christie’s Intern. PLC, 284 F.3d 384,399 (2d Cir.2002).

\(^{157}\) See n.61.

\(^{158}\) N.60.


3.5.3 Awareness of the Particularities of the Factual Situation under Adjudication

Do the U.S. courts understand and apply precedents in their adjudication process by showing awareness of the particularities of the factual situation and nature of the decision as it was formulated in the precedent? This question is beyond the scope of the thesis. Nevertheless, it is worth remembering that the analysis in Chapters 2 and 3 shows that neither the two courts in the Empagran litigation nor post-Empagran courts provided a convincing explanation of how precedents were used or referred to in their adjudication process to support their decision on the factual situation under adjudication.

This critique may not necessarily indicate how the U.S. courts in general use precedents. In fact, there are a few statements in pre-Empagran cases where the adjudicating courts clearly stated that they were aware of potential differences between precedents and the factual situation under adjudication. These statements are the following: in the application of the law it is important to bear in mind that each case is governed by its own facts; the circumstances of the case are important; conclusory allegations do not suffice; the issues involved must be determined in accordance with the more recently established antitrust principles and not by those that were well recognized in an earlier day; the U.S. courts bow to the lessons of experience and the force of better reasoning by overruling a mistaken precedent; U.S. jurisdiction is precedent-based but not static; allegations and decisions in different cases can be compared and applied to the case under adjudication; the U.S. courts control

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161 See Chapter 2, subsection 3.2.
162 See Chapter 3, subsection 6.4 and section 7.
169 E.g. this was done in de Atucha v. Commodity Exchange, Inc., 608 F.Supp. 510,515 (S.D.N.Y.1985).
the access to their forums,\textsuperscript{170} and the assessment of the facts in order to determine the existence of subject matter jurisdiction should not be so strict, as facts presented for the purpose of establishing jurisdiction are often closely intertwined with the merits of an antitrust claim\textsuperscript{171}.

### 3.5.4 The Relationship between Anticompetitive Effects and Antitrust Injury

The purpose of the thesis is to determine the nature of the required relationship between anticompetitive effects (antitrust injury) within the U.S. and the litigated (foreign) private antitrust injury. This thesis submits that this type of relationship should be determined in the form of a dependency connection and on the legal grounds to be found in the Supreme Court’ \textit{Empagran} decision.\textsuperscript{172} In contrast, the Second Court of Appeals in the \textit{Empagran} litigation\textsuperscript{173} and post-\textit{Empagran} cases\textsuperscript{174} require this type of relationship to be in the form of direct causation. The analysis of pre-\textit{Empagran} cases shows\textsuperscript{175} that it is not possible to talk about causation between anticompetitive effects and antitrust injury but only between anticompetitive conduct (antitrust violation) and anticompetitive effects (antitrust injury being part of them).

With regard to the question of how to establish whether the litigated (foreign) private antitrust injury is dependent (i.e. not independent) from anticompetitive effects (antitrust injury) in the U.S., there are few examples in pre-\textit{Empagran} cases that show awareness on the part of the U.S. courts of what can potentially contribute to the existence of foreign antitrust injury. These statements in pre-\textit{Empagran} cases are the following: there may exist an international market for goods and this market can have substantial contacts with the U.S., and its headquarters where it is determined how the defendants are expected to...


\textsuperscript{171} \textit{Carpet Group Intern. v. Oriental Rug Importers Ass’n, Inc.}, 227 F.3d 62,72 (3d Cir.2000).

\textsuperscript{172} See Chapter 2, subsections 3.1.7.3. and 3.2.

\textsuperscript{173} See Chapter 2, subsection 3.1.7.4.

\textsuperscript{174} See Chapter 3, subsection 6.2.

\textsuperscript{175} See Chapter 6, subsection 4.2.5.
conduct business can be located outside the U.S.;176 U.S. and non-U.S. market
can be affected by anticompetitive conduct performed in the U.S., but this fact
on its own is not sufficient to determine the nature of foreign antitrust injury. as
there may exist other market variables in non-U.S. markets that have intervened
to affect pricing decisions,177 or there may be other commercial arrangements in
non-U.S. markets,178 or there may be numerous complex transactions and this is
an additional factor to be evaluated in order to determine how markets
interact.179

3.5.5 Importance of the Relevant Market

In the subsection above180 it was presented that pre-Empagran cases do
recognize that the geographical relevant market may have a worldwide
dimension.

The full extent of the importance of the relevant market when litigating
(foreign) private antitrust injury before the U.S. courts is evidenced by the
following statements from pre-Empagran cases: for the subject matter
jurisdiction of the U.S. courts to be established, it is important that consumers

176 In re Copper Antitrust Litigation, 117 F.Supp.2d 875,879 (W.D.Wis.2000).
S.Ct. 1562, 23 L.Ed.2d 129 (1969) (in relation to reasons that affected the entrance of the U.S.
947,960,961 (D.Mass.1950) (in relation to commercial arrangements under which U.S. firms
(D.N.J.1953) (in non-U.S. markets the standards of industrial behaviour may be different from
p.317 (relevance of local and national pride in buying goods produced locally and resistance
to sales of goods produced in countries different from the one where they are sold, and presence
of tariff walls), p.318 (political and social changes in international trade and trade regulation in
foreign countries); Timken Roller Bearing Co. v. U.S., 341 U.S. 593,607, 71 S.Ct. 971, 95 L.Ed.
1199 (1951) (tariffs, trade barriers, empire or domestic preferences, and various forms of
parochialism); U.S. v. Imperial Chemical Industries, 105 F.Supp. 215,237 (S.D.N.Y.1952)
(mentions tariffs, quota restrictions, governmental restrictions on foreign exchange as potential
obstacles to U.S. goods entering non-U.S. markets); U.S. v. Westinghouse Electric Corporation
& Mitsubishi, 471 F. Supp. 532,543 (N.D.Cal.1978) (tariffs, variation in cost of sales, advertising,
sales promotion, local consumer preference are mentioned as examples that affect competition
of U.S. goods in foreign markets).
179 N.177.
180 See subsection 3.4.1. of this chapter above.
are affected within the relevant market;\textsuperscript{181} the adjudicating court must establish the relevant market;\textsuperscript{182} as restraint of trade can be determined only by reference to a relevant market,\textsuperscript{183} and only those conspiracies which unreasonably restrain competition in a particular market are proscribed,\textsuperscript{184} in this regard it is important that the U.S. forms part of the relevant market;\textsuperscript{185} the private party is required to allege facts demonstrating a causal connection between the defendants’ conduct outside the U.S. and the price increase in the U.S.\textsuperscript{186}

This means that in a situation where the litigated (foreign) antitrust injury can be determined to take place within the relevant market and the U.S. forms part of this relevant market, the subject matter jurisdiction of the U.S. courts may be established, and foreign private antitrust injury can be litigated before the U.S. courts.

### 3.5.6 Simultaneous Antitrust Litigation

One of the characteristics of the transborder standard is the recognition that there may be private antitrust litigation taking place simultaneously before national courts within the U.S. and in non-U.S. countries between the same private parties in relation to the same antitrust violation.\textsuperscript{187}

This thesis submits that the U.S. courts should enforce U.S. antitrust law in this situation under the condition that subject matter jurisdiction exists, but at the


\textsuperscript{185} N.148.


\textsuperscript{187} See Chapter 5.
same time the U.S. courts should consider applying some correction before delivering their final decision.  

In general, pre-Empagran case law shows that the U.S. courts are not against simultaneous private antitrust litigation before national courts in different countries. The statements in pre-Empagran cases that show this include the following: concurrent jurisdiction does not necessarily entail conflicting jurisdiction; the mere existence of dual grounds does not oust either one of the regulating forums, so each forum is ordinarily free to proceed; if the rules regarding enforcement of foreign judgments are followed, there will seldom be a case where parties reach inconsistent judgments; the violation of domestic public policy may justify not enforcing the foreign judgment; when the availability of an action in the domestic courts is necessary to a full and fair adjudication of the plaintiff’s claims, a court should preserve that forum, and this is particularly true in a situation where the foreign forum did not offer the remedy sought in the domestic forum, and there is nothing problematic in a situation where a private plaintiff seeking remedy that is not available in domestic a forum seeks it in a foreign forum.

### 3.5.7 Determination of Antitrust Remedy

This thesis proposes a transborder standard. This proposal requires analysis that clearly shows how the transborder standard affects private litigation in the future. The introduction of a transborder standard is merely the first step in the development of private antitrust law enforcement within the international

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188 See Chapter 5, subsection 2.5.
190 Ibid.
192 Ibid.
193 *Laker Airways Ltd. v. Sabena*, Belgian World Airlines, 731 F.2d 909 (D.C.Cir.1984), p.929 cases, but it is important to point at the explanation of p.932,n.73, where the same adjudicating court stated that slight advantages in substantive or procedural law in the foreign court do not signify an actionable evasion of domestic public policy.
context. This means that the present thesis cannot predict and provide solutions to every potential issue that may arise during the course of private antitrust litigation in the future.

One of these issues that would require additional analysis is the nature, purpose and extent of private antitrust remedy within the international context. Nevertheless, it is worth mentioning the position of the U.S. courts in relation to factors that should be taken into consideration in formulating the antitrust remedy. The statements in pre-

Empagran cases that can serve this purpose are the following: antitrust remedy is formed in existence of competitive conditions that would be in accordance with the law; antitrust remedy should be an assurance that there would be no antitrust violation in the future; in formulating antitrust remedy, the adjudicating court needs to establish how market conditions may change in the future; non-U.S. courts cannot supersede the right and obligation of the U.S. courts to decide whether the U.S. Congress has created a remedy for those injured by trade practices adversely affecting the U.S.; any victimized person is entitled to a remedy, so the non-U.S. nationality of the plaintiff or sovereignty do not play a role in deciding who is entitled to a remedy; it is not relevant that the litigants are of U.S. nationality, otherwise the fundamental goals of antitrust laws could be seriously frustrated; U.S. jurisdiction is not supported by every conceivable repercussion of the action objected to in the U.S., but only under the condition that the U.S. market is affected, whether it is interstate commerce (i.e. within the U.S.) or commerce between the U.S. and a non-U.S. country; only those injuries to U.S. commerce which reflect the anticompetitive effect

196 See Chapter 5.
197 Some of the issue that this thesis will not consider are mentioned in Chapter 6.
198 N.135.
200 Ibid.
203 N.148.
204 N.80.
either: a.) of the violation or b.) of anticompetitive acts made possible by the
violation, constitute effects sufficient to confer jurisdiction \(^{207}\) (e.g. acts outside
the U.S. may be essential steps in the course of business consummated outside
the U.S.); \(^{208}\) the perpetrators' conduct that gives rise to a claim by a private
party has to be an integral part of commercial activity that has substantial
contact with the U.S.; \(^{209}\) if U.S. commerce is affected by the conspiracy, subject
matter jurisdiction exists, \(^{210}\) and if this conspiracy causes antitrust injury to a
private party, this private party has jurisdiction irrespective of whether the
harm felt in the U.S. is the source of the injury to the plaintiff, because treble
damages suits serve a single function, i.e. the protection of U.S. commerce; \(^{211}\)
not all persons or entities injured abroad are precluded from recovering under
U.S. antitrust laws; \(^{212}\) in a situation where the defendants (of U.S. and non-U.S.
nationality) are found jointly liable, the plaintiff could look to any one
defendant for full satisfaction of the damage award. \(^{213}\)

The statements just listed show that in general, the U.S. courts are not against
adjudicating antitrust remedies to (i.e. compensating) private parties of U.S.
and non-U.S. nationality who suffer antitrust injury outside the U.S. The reasons
why the U.S. courts are willing to adjudicate compensation to private parties
who suffer foreign antitrust injury are the following: a.) the U.S. courts first
have to establish that they have subject matter jurisdiction as anticompetitive
effects are present within the U.S.; b.) adjudicating antitrust remedies is a
consequence of enforcing (applying) U.S. antitrust law to factual situations; c.)
adjudicating antitrust remedies means protecting the goals of U.S. antitrust law.

\(^{207}\) N.205.

\(^{208}\) American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n, 701 F.2d 408,414 (5th Cir.1983).


\(^{210}\) Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420,439 (5th Cir.2001) (dissenting
opinion).

\(^{211}\) Ibid.

(S.D.N.Y.1986).

\(^{213}\) In re Uranium Antitrust Litigation, 617 F.2d 1248,1262 (7th Cir.1980).
4 The Reasoning in Pre-*Empagran* Cases that would Require Additional Consideration under the Transborder Standard

The analysis in the previous section shows that the reasoning of the U.S. courts supports the transborder standard. Nevertheless, this does not mean that the application of the transborder standard would not require certain modifications to the existing manner in which the U.S. courts adjudicate the factual situations that are brought before them.

The impact that the introduction of the transborder standard may have on the courts’ reasoning is analyzed in this section from two perspectives. Firstly, this section will address the pro-active role that the pre-*Empagran* U.S. courts had in determining the path of the adjudication process (subsection 4.1). Secondly, it will provide examples of how the application of the transborder standard may affect the type of issues (questions) that become relevant in the process of formulating the judgment (subsection 4.2).

4.1 The Pro-Active Role of Adjudicating Courts

The analysis of the *Empagran* litigation showed that adjudicating courts took an active role in: a.) determining the characteristics of the factual situation that they had to adjudicate (i.e. adjudicating the assumed type of factual situation); b.) delivering their decisions without providing convincing arguments. U.S. courts played a similar type of active role in post-*Empagran* cases, where they recognized the supremacy of the Supreme Court’s *Empagran* decision, but no post-*Empagran* case based its reasoning on this Supreme Court judgment. Post-*Empagran* courts adopted the Second Court of Appeals’ *Empagran* decision without providing any elaborate explanation of why the factual situation under

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214 See Chapter 2, subsection 3.1.6.
215 See Chapter 3, subsections 4.1. and 5.1.1.
adjudication never satisfied the required type of connection between anticompetitive effects (antitrust injury) and (foreign) private antitrust injury.\textsuperscript{216}

Therefore, it is important to analyze whether a similar type of pro-active role was assumed by the adjudicating courts in pre-\textit{Empagran} cases.

### 4.1.1 Adjudicating Courts Showing Awareness of Their Pro-active Role in the Adjudication Process

The statements in pre-\textit{Empagran} cases that show explicitly that the U.S. courts are aware of their pro-active role in the adjudication process, which may be considered as crossing the boundaries of pure adjudication analysis, are the following: in cases where foreign nations were equalized by adjudication courts with U.S. states, dissenting judges expressed the critique\textsuperscript{217} that this should not be adjudicated by courts,\textsuperscript{218} as this would be understood as an innovation in statutory interpretation,\textsuperscript{219} and therefore be considered as judicial activism;\textsuperscript{220} adjudicating courts assuming without deciding that the plaintiffs’ allegations amount to antitrust violation;\textsuperscript{221} the adjudicating court first stated that the plaintiff lacks allegation on a particular aspect of conspiracy,\textsuperscript{222} but nevertheless, the adjudicating court still inferred that what was not alleged was still present\textsuperscript{223} - this approach is problematic because to establish antitrust violation, it is not enough to present theories or rely on assumptions, but the plaintiffs have to provide some evidence of some actual interference with the natural course of trade;\textsuperscript{224} the adjudicating court assumes the existence of the

\textsuperscript{216} See Chapter 3, subsections 6.2.2. and 6.4.


\textsuperscript{221} \textit{Clayco Petroleum Corp. v. Occidental Petroleum Corp.}, 712 F.2d 404,406 (9th Cir.1983).


required anticompetitive effect within the U.S.\textsuperscript{225} despite the fact that the anticompetitive effect is not alleged, as the plaintiff interprets incorrectly the legal requirement of the required type of anticompetitive effect;\textsuperscript{226} the adjudicating court assumes competition between U.S. and non-U.S. service providers on markets outside the U.S. despite the fact that the records shows otherwise;\textsuperscript{227} the adjudicating court states that the effects outside the U.S. are substantial\textsuperscript{228} despite no record or analysis being available in this regard, and the only available information being that the plaintiff is excluded from a non-U.S. market; the adjudicating court assumes that the U.S. company engages in a conspiracy that is taking place outside the U.S.;\textsuperscript{229} the adjudicating court states that direct economic effects that one U.S. company causing to another U.S. company with regard to the trade of goods that both U.S. companies import to the U.S. is probably in the non-U.S. country;\textsuperscript{230} the adjudication court states that it is for the jury to infer the necessary causal connection between the respondents’ antitrust violations and the petitioners’ injury;\textsuperscript{231} the adjudicating court states that anticompetitive effects are substantial in the non-U.S. market and the consequences within the U.S. are speculative,\textsuperscript{232} - the problem is that this statement is not substantiated by an explanation of the grounds on which this conclusion was reached, and by analysis of who may be affected within the U.S. and why the conditions in non-U.S. markets are actually affected.

\subsection*{4.1.2 Adjudicating Courts narrow down Factual Situation}

In some pre-\textit{Empagran} cases it is possible to notice that the adjudicating courts do not decide on factual situations as a whole, they deliver the decision only in

\footnotesize{\textsuperscript{225} Sniado v. Bank Austria AG, 174 F.Supp.2d 159,166 (S.D.N.Y. 2001).}  
\textsuperscript{226} Ibid.  
\textsuperscript{227} N.121.  
\textsuperscript{228} Liamuiga Tours, Div. of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd., 617 F.Supp. 920,925 (E.D.N.Y.1995).  
\textsuperscript{230} Timberlane Lumber Co. v. Bank of America, N.T. and S.A., 549 F.2d 597,615 (9th Cir.1976).  
\textsuperscript{231} Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690,700, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).  
\textsuperscript{232} N.228.}
relation to some of the facts, and without explaining why the remaining facts are left undecided.

The examples in pre-\textit{Empagran} cases that show this characteristic of the U.S. courts are the following: despite a commercial agreement between U.S. and non-U.S companies with regard to the quality and prices of the goods that are to be sold in the U.S. and in non-U.S. countries,\textsuperscript{233} the adjudicating court narrowed down the adjudication to commerce that is only present within the U.S.;\textsuperscript{234} the factual situation was such that on the one hand, the defendants were engaged in anticompetitive activities and causing anticompetitive effects within the U.S., and on the other, the defendants affected the export of goods from the U.S., but the adjudicating court did not adjudicate this second part, i.e. where the export trade was affected;\textsuperscript{235} the adjudicating court first accepts the allegations of global effects as correct,\textsuperscript{236} but then narrows down the analysis for the purpose of the application of the subject matter jurisdiction test to the presence of anticompetitive effects within the U.S.;\textsuperscript{237} the adjudicating court subdivided the factual situation into a conspiracy in the U.S. and activities performed in furtherance of the conspiracy outside the U.S.\textsuperscript{238} without any reason for such separation; the adjudicating court first stated that the commercial arrangements were such that they had a world-wide dimension,\textsuperscript{239} but the adjudication analysis was narrowed down to the fact that the conspiracy was performed in the U.S. and that the importation of goods entering the U.S. and goods leaving the U.S. was affected;\textsuperscript{240} the adjudicating courts accepted as true the allegations that U.S. and non-U.S. firms conspired to fix the prices of goods in the world market,\textsuperscript{241} but then the adjudicating analysis was narrowed


\textsuperscript{236} Ibid.

\textsuperscript{237} Ibid.

\textsuperscript{238} \textit{American Banana Co. v. United Fruit Co.}, 213 U.S. 347,355,359, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

\textsuperscript{239} See n.60.

\textsuperscript{240} See \textit{U.S. v. National Lead Co.}, 63 F.Sup. 513,524 (S.D.N.Y.1945).

\textsuperscript{241} N.94.
down only to anticompetitive effects within the U.S.; the commercial activity has consequences inside and outside the U.S., but the adjudicating courts only considered it relevant to focus on the situation within the U.S.; the adjudicating court first explains how the defendants arranged the functioning of the conspiracy, and that its effects are taking place on a global scale, but then the court puts emphasis only on the facts that happened within the U.S., but in the end considers the conspiracy as global, declaring it illegal under U.S. antitrust laws, and despite this reasoning, the adjudicating court grounded its decision on activities and effects only within the U.S.; the adjudicating court first explained the existence of a world patent pool, but then considered only the amount of U.S. foreign commerce affected.

The extent to which the application of the transborder standard will alter the adjudication analysis of the U.S. courts in relation to factual situations depends on the particular antitrust litigation. Nevertheless, it is possible to state that the transborder standard does not accept that some facts are excluded from the adjudication analysis merely because they are of a non-U.S. character (i.e. take place or come from non-U.S. countries).

### 4.1.3 Adjudicating Courts are Confused by the Factual Situation

There are some examples in pre-Emagran cases where adjudicating courts delivered their decision without establishing the precise factual situation upon which they were expected to adjudicate. Examples are the following: the litigant was present before the U.S. court, and the anticompetitive effects were present in the U.S.; nevertheless, the adjudicating court applied the

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242 In re Uranium Antitrust Litigation, 617 F.2d 1248,1253 (7th Cir.1980).
244 N.99.
245 Ibid.
246 Ibid.
247 Ibid.
250 See also explanation in subsection 4.1.4. of this chapter below.
jurisdictional rule of reason analysis as elaborated in the *Timberlane* case despite knowing the place where the anticompetitive conduct occurred;\(^{251}\) irrespective of the fact that adjudicating courts first stated that the market at issue was international,\(^{252}\) private plaintiffs activities are then explained to take place on a foreign market (i.e. outside the U.S.),\(^{253}\) and no analysis is undertaken in relation to the connection between the non-U.S. and the U.S. markets, but all that the adjudicating courts considered as relevant were activities conducted in the non-U.S. market;\(^{254}\) the adjudicating courts attributed activities to the defendant despite the fact that the record does not support such conclusion;\(^{255}\) the adjudicating court, in relation to a cartel that operates on a global scale, first stated that the plaintiffs’ alleged facts that the defendants caused anticompetitive effects within the U.S.,\(^{256}\) and the goods entering the U.S. are only certain percentage of goods that defendants sell worldwide,\(^{257}\) but then the adjudicating court stated that the plaintiff still has to demonstrate that the defendants prevented him from marketing the goods in the U.S., otherwise there would be no demonstrated anticompetitive effects present in the U.S.\(^{258}\)

### 4.1.4 Adjudicating Courts Deliver a Limited Decision in Relation to the Factual Situation that is before them for Adjudication

In a situation where private parties litigate before the U.S. courts in relation to a factual situation that may have different elements and may extend to private parties within different countries, anticompetitive conduct and anticompetitive effects within and outside the U.S., it is expected that the adjudicating courts deliver their decisions by addressing every element of the factual situation.


252. N.176.


258. Ibid.
Examples in pre-*Empagran* cases show that this may not necessarily be the reality of the U.S. adjudication process. These examples are the following: allegations of the perpetrators being engaged in business with non-U.S. countries\(^{259}\) and their commercial arrangements to monopolize commerce with non-U.S. countries\(^{260}\) were not analysed; foreign elements present in the trade of goods from the U.S. to a non-U.S. country were determined as insignificant by the adjudicating court;\(^{261}\) the position of the plaintiff is assessed only in relation to the potential competitor outside the U.S.\(^{262}\) without assessing the state of competition within the U.S.; the commercial arrangements of the perpetrators extended to the U.S. and non-U.S. countries,\(^{263}\) but the adjudicating courts then narrowed down their analysis only to conduct and effects in relation to the U.S.\(^{264}\) and stated that there was no need to put any emphasis on some of the perpetrators being of non-U.S. nationality, performing lawful activities outside the U.S. under the law of non-U.S. countries,\(^{265}\) so no assessment was conducted in relation to commercial arrangements in the wider world market; the adjudicating court first explained that in a global economy, domestic and foreign markets are interrelated and influence each other, therefore sometimes it is difficult to put strict economic boundaries around any particular country,\(^{266}\) and the court then stated that a global conspiracy to inflate prices could have anticompetitive effects on the U.S. economy whether the conspiracy occurred within the United States or abroad,\(^{267}\) but then the court in its analysis of the facts did not follow this explanation of global economy to establish whether this ‘global’ nature of the conspiracy was present, as the court focused all the adjudication on the fact that the plaintiff traded and obtained goods in the


\(^{261}\) N.137.

\(^{262}\) N.146.


\(^{266}\) N.79.

\(^{267}\) Ibid.
U.S.;268 the adjudicating court first stated that the conspirators had impacted on the worldwide market and the U.S. market,269 but then the court narrowed down the adjudication (for standing purposes) only to the U.S. market,270 therefore no relationship between the U.S. and non-U.S. markets was analyzed to establish whether the worldwide market had any relevance to determining the issue of the defendants' conduct constituting antitrust violation in the first place; the adjudicating court determined that there was a conspiracy that affected the world market,271 but then considered only the analysis of anticompetitive effects within the U.S. as relevant;272 the adjudicating court determined that the agreement to divide up world territories was unlawful,273 but then considered only the state of competition affected within the U.S. as relevant;274 the adjudicating court first explains that the character and effects of a conspiracy can be judged only by looking at the conspiracy as a whole,275 but then narrows down its decision to the fact that eliminating a participant from the U.S. market is sufficient to cause antitrust injury (and separately addresses the issue of eliminating a firm from a non-U.S. market);276 the adjudicating court, in deciding who is the private party entitled to protection, relied on the formulation of the nature of effects that is required to be present within the U.S.,277 and did not pay any attention to the fact that the nature of the antitrust injury suffered by the private party was related to goods that this party should bring into the U.S.278

The application of the transborder standard requires an assessment of the factual situation as a whole, and not the modification of the facts according to

268 See ibid.
269 Galavan Supplements, Ltd. v. Archer Daniels Midland Co., 1997 WL 732498,4 (N.D.Cal.).
270 Ibid.
271 N.132.
272 N.97.
273 N.113.
275 N.36.
278 Ibid.
which facts take place within the U.S. and which take place outside the U.S.\footnote{For further analysis see Chapter 5, section 2.} Therefore, in situations where adjudicating courts apply the transborder standard in future litigation, it is expected that the courts would not deliver decisions only in relation to some parts of the factual situation,\footnote{The same applies to subsection 4.2.1. of this chapter above.} or decisions that are not based on an analysis of how the facts are interconnected.

### 4.1.5 Adjudicating Courts Grasp at Undisputed Authorities on which to Base their Reasoning

Adjudicating courts rely on precedents\footnote{See subsection 3.5.3. of this chapter above.} to conduct their adjudication process, but at the same time they look for other sources that may help them to determine the wider context within which they are expected to provide a correct decision.

Sometimes, the U.S. courts recognize that the sources (material) on which they should rely in formulating their reasoning does not exist or is confusing. Consequently, the adjudicating courts are required to perform a role that may exceed the process of adjudication. Examples in pre-	extit{Empagran} cases that indicate this type of activity by adjudicating courts include the following: the delineation between the legal and the illegal in the antitrust field is unclear;\footnote{\textit{U.S. v. Aluminum Co. of America}, 91 F.Supp. 333,415 (S.D.N.Y.1950).} the dependency of adjudication on judicial thoughts with respect to economic and legal philosophies;\footnote{N.135.} examining prior law and theory which have evolved in relation to both substantive violations and the purposes of the remedy under the Sherman Act, it is perhaps possible to formulate a more or less concrete delineation of the standards that should be met in seeking a just decision upon the complicated facts of this case;\footnote{Ibid.} when theories of law begin to lose touch with the realities of normal behaviour, it is highly desirable that the theories undergo a bit of modification;\footnote{\textit{U.S. v. Aluminum Co. of America}, 91 F.Supp. 333,416 (S.D.N.Y.1950).} courts have been invested with jurisdiction to
create and develop antitrust law in the manner of the common law courts;\textsuperscript{286} while courts speak of determining congressional intent when interpreting statutes, the meaning of antitrust laws has emerged through the relationship between all three branches of government;\textsuperscript{287} for the interpretation of statutory text, the adjudicating court relied on academic writing;\textsuperscript{288} whether economic consequences warrant the relaxation of the scope of enforcement of the antitrust laws is a policy matter committed to congressional or executive resolution, and is not within the province of the courts whose function is to apply existing law;\textsuperscript{289} an interest balancing formula is not suitable for conducting assessment of the economic realities of modern commerce, which may underlie the reluctance of most courts to strike a balance in favour of not applying domestic law.\textsuperscript{290}

The introduction of a transborder standard tries to provide an approach to the U.S. courts that is known, solid, and in conformity with existing legal and practical needs.\textsuperscript{291} This means that the application of a transborder standard in future litigation may help the courts not to feel that they are on their own.

4.2 Making the Adjudication Process More Elaborate

The analysis of pre-\textit{Empagran} cases under a transborder standard is not undertaken with the purpose of challenging the plausibility of existing case law. This task would not be appropriate. The transborder standard did not exist at the time when pre-\textit{Empagran} cases were adjudicated, and the adjudication process in those cases might not have required additional data, i.e. data that may be considered relevant from the transborder standard perspective\textsuperscript{292}.

\begin{footnotesize}
\begin{enumerate}
\item U.S. v. \textit{Nippon Paper Industries Co.}, Ltd., 109 F.3d 1,9 (1st Cir.1997) (concurring opinion).
\item U.S. v. \textit{Nippon Paper Industries Co.}, Ltd., 109 F.3d 1,10 (1st Cir.1997) (concurring opinion).
\item N.253.
\item For further explanation see Chapter 5.
\item Ibid.
\end{enumerate}
\end{footnotesize}
At the same time, it is important to bear in mind that the analysis in the section above\textsuperscript{293} submits that pre-\textit{Empagran} cases do hold reasoning that supports (i.e. can be considered to be in conformity with) a transborder standard. The question that logically follows is to what extent the application of a transborder standard alters the existing reasoning\textsuperscript{294} of the U.S. courts.

The simplest and most practical way to answer this question is to consider, on a case-by-case basis, the approach taken by particular pre-\textit{Empagran} courts in particular cases, and then add the missing elements (in the form of facts and questions that need to be answered) that would be required under the transborder standard.

The examples that show the impact of the transborder standard on the reasoning of adjudicating courts are the following:

In the assessment of U.S. companies competing with non-U.S. companies on a non-U.S. market, the U.S. courts should not concentrate on what the stimulations U.S. companies already had,\textsuperscript{295} but on whether the U.S. companies met the minimum requirements to satisfactorily compete with non-U.S. firms;

There is a confusing statement on the relationship between antitrust injury suffered by a non-U.S. plaintiffs and antitrust injury suffered by U.S. consumers;\textsuperscript{296} what the court should do instead is to assess the anticompetitive effect in the U.S. and bear in mind that the type of injury in non-U.S. countries is different from the antitrust injury in the U.S. (e.g. conducting business in a foreign country, prices may be higher in a foreign country); in addition, it is also unclear how the adjudicating court is expected to establish a connection, and the adjudicating court should bear in mind that the injury suffered by the plaintiff may be different from the injury suffered by consumers in general;

\textsuperscript{295} This was done in the \textit{U.S. v. Concentrated Phosphate Export Ass'n.}, 393 U.S. 199,208,209,210, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968).

In assessing the location where the transaction took place, it is not sufficient merely to state that the transaction was concluded outside the U.S. (and therefore did not form part of the U.S. market); instead, the reason why the transaction took place outside the U.S. and the existence of a possibility to conclude the same transaction in the U.S. should be established. In this way, it is possible to establish the existence of a transborder standard and also whether the prices inside and outside the U.S. were set up by a conspiracy so that the place of purchase cannot influence the difference in the potential injury that plaintiff suffers;

Some activities and effects/injury taking place outside the U.S. were understood as taking place on a foreign market; instead, it should be analyzed whether these markets and the U.S. market can be determined as a single, global market;

In a situation where there are identifiable private parties within the U.S., there is no need to achieve the objective of deterrence by allowing foreign injury to be litigated before the U.S. courts. This argument is not valid anymore merely because of the Empagran litigation;

The fact of the anticompetitive effect and the antitrust injury falling outside the U.S. should not be crucial on its own, but the adjudicating court needs to establish whether there exists a connection with effects and injury suffered within the U.S.;

The perception that a worldwide conspiracy should be addressed by every country dealing separately with conditions within its own territory, as laws and policies may vary, is not in conformity with the economic reality. If a


298 This was done in the de Atucha v. Commodity Exchange, Inc., 608 F.Supp. 510,517,518 (S.D.N.Y.1985); In re Copper Antitrust Litigation, 117 F.Supp.2d 875,897 (W.D.Wis.2000).


301 This is the position taken by the adjudicating court in the Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287,1298 (3d Cir.1979).
commercial arrangement takes place in several countries, and each company and each conduct and effect within those territories is required to achieve a designated goal, then the adjudicating courts, regardless of where the litigation takes place, should take this into consideration;

The assessment of a commercial arrangement entered into by companies outside the U.S. used to be conducted in relation to what this means for the U.S. market only, but looking at these commercial arrangements from a transborder standard perspective requires the adjudicating courts to start asking whether the commercial arrangements were to target only the U.S. market or the U.S. competitors, or whether the commercial arrangements were required by conditions on the market in general, regardless of the U.S. market being one of the markets where goods/services enter;

The adjudication court took into consideration the commercial arrangement between a U.S. company and a non-U.S. company with regard to the sale of goods produced in the U.S. in the non-U.S. market, and in this context the adjudicating courts attributed relevance to the fact that the injury was suffered outside the U.S. and to the fact that the plaintiff did not sell products to consumers or retailers in the U.S., but the adjudication courts did not analyze the factual situation from the perspective that other U.S. companies are obstructed from competing in the non-U.S. market, or from the perspective that U.S. consumers/retailers may obtain goods only outside the U.S. In this type of situation it may be useful to be reminded of the inextricability argument in relation to injuries caused to the plaintiff and effects on the U.S. and to the fact

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302 This was done by the adjudication court in the U.S. v. The Watchmakers of Switzerland Information Center, 1962 U.S. Dist. LEXIS 5816,154 (S.D.N.Y.).
305 This question may be relevant within the analysis of S. Megga Telecommunications Ltd. v. Lucent Technologies, Inc., 1997 WL 86413,9 (D.Del.), where the adjudication courts refused subject matter jurisdiction to the private plaintiff because the private plaintiff did not show any intention to sell goods to the U.S. or to U.S. consumers; a similar reasoning is also present in Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864,869,870 (10th Cir.1981) and in Raubal v. Engelhard Minerals & Chemicals Corp., 364 F.Supp. 1352,1356 (S.D.N.Y.1973) even if in the latter case, the requirement of selling goods in to the U.S. was elaborated within the context of the foreign plaintiff lacking standing; the adjudicating court had a different opinion in Papst Motoren Gmbh & Co. KG v. Kanematsu-Gosyu (U.S.A.) Inc., 629 F.Supp. 864,868 (S.D.N.Y.1986) whereby the requirement of anticompetitive effect within the U.S. can be satisfied regardless of whether the private plaintiff shows intent to sell goods in the U.S.
306 See section 3 above.
that such commercial arrangement would not be possible without the participation of U.S. firms (this means that the adjudication should not stop at looking only at the place where the antitrust injury took place);

This same critique should also apply to the adjudication of the case where the court refused protection under U.S. antitrust laws to a U.S. company who provided services outside the U.S. because of the particularities of this service, and this U.S. company suffered injury because of the conduct in the U.S. and with participation of other U.S. companies who excluded this U.S. provider from a non-U.S. market.\textsuperscript{307} The court explained that the affected U.S. provider of services should enjoy the protection of the laws of this non-U.S. market. This argument of the adjudication court makes even less sense if compared with the reasoning in a case\textsuperscript{308} where the adjudicating court granted protection to a non-U.S. private plaintiff who was excluded from a non-U.S. market due to the fact that U.S. consumers were injured. Another argument that can be used in support of this reasoning is the definition of the geographical market that requires an analysis of the region where consumers purchase the products at issue,\textsuperscript{309} or, alternatively, the argument of the unique nature of tourist services, where the location of the facilities themselves is actually a geographical component of the definition of the product market;\textsuperscript{310}

Adjudicating courts refused subject matter jurisdiction to a non-U.S. plaintiff because the plaintiff obtained a service outside the U.S. for a need that was outside the U.S. from non-U.S. companies,\textsuperscript{311} but it seems that the adjudicating courts did not consider the fact that such provision of services was a consequence of an arrangement at a global level that caused anticompetitive effects in the U.S. and in non-U.S. markets.\textsuperscript{312} In addition, the adjudicating court

\textsuperscript{307} This factual situation was present in the \textit{Liamuiga Tours, Div. of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd.}, 617 F.Supp. 920,924 (E.D.N.Y.1995) case, and there is a bit of confusion in the judgment itself where the adjudicating court on p.925 states that there is no evidence of anticompetitive practices.


\textsuperscript{310} Ibid.

\textsuperscript{311} \textit{Den Norske Stats Oljeselskap As v. HeereMac Vof}, 241 F.3d 420,426 (5th Cir.2001).

\textsuperscript{312} \textit{Den Norske Stats Oljeselskap As v. HeereMac Vof}, 241 F.3d 420,416 (5th Cir.2001).
should have questioned the lack of possibility for a private plaintiff to obtain the service from a U.S. company;

in a situation where a worldwide anticompetitive cartel exists, it is difficult to understand the argument provided by the adjudicating court\textsuperscript{313} that a world-wide cartel can cause anticompetitive prices within the U.S. only if the importation of goods into the U.S. is affected or the manufacture and sale of goods in the U.S. is restricted,\textsuperscript{314} because in reality, there may be other means to achieve a problematic level of prices within the U.S., e.g. by worldwide price fixing and market allocation schemes,\textsuperscript{315} and it is, therefore, surprising that the adjudicating court did not elaborate its argument accordingly;

In relation to the comment just expressed, it is important to emphasize that the transborder standard does not support the argument\textsuperscript{316} for a private plaintiff to be granted subject matter jurisdiction of the U.S. courts as soon as an (international) conspiracy causes anticompetitive effects within the U.S. The reason why the transborder standard cannot support this argument is that the analysis of the Empagran litigation\textsuperscript{317} and post-Empagran cases\textsuperscript{318} has provided sufficient explanation that for foreign antitrust injury to be litigated before the U.S. courts, a private plaintiff has to establish the required type of relationship between anticompetitive effects (and antitrust injury) within the U.S. and the litigated foreign antitrust injury (and anticompetitive effects outside the U.S.). Irrespective of this problematic reasoning by the adjudicating courts in the Kruman\textsuperscript{319} case, the factual situation in this case reveals a possibility that conspirators may set up commercial arrangements under which goods are available only outside the U.S. irrespective of whether the potential consumers are of U.S. or non-U.S. nationality. It is submitted that such factual situations

\textsuperscript{313} This argument was made in the Eurim-Pharm GmbH v. Pfizer Inc., 593 F.Supp. 1102,1107 (S.D.N.Y.1984).
\textsuperscript{314} The requirement of manufacture of goods in the U.S. was considered insufficient on its own to establish subject matter jurisdiction of the U.S. courts in Ferromin Intern. Trade v. UCAR Intern., Inc., 153 F.Supp.2d 700,706 (E.D.Pa.2001).
\textsuperscript{315} N.186.
\textsuperscript{316} The argument that is criticized here was elaborated in the Kruman v. Christie's Intern. PLC, 284 F.3d 384,397-401 (2d Cir.2002).
\textsuperscript{317} See Chapter 2.
\textsuperscript{318} See Chapter 3.
\textsuperscript{319} Kruman v. Christie's Intern. PLC, 284 F.3d 384 (2d Cir.2002).
are transborder and all (potential) consumers who obtained or could not obtain goods because of anticompetitive conduct should be granted the subject matter jurisdiction of the U.S. courts; the reasoning\textsuperscript{320} may be correct that the U.S. courts should not be required to adjudicate litigation in a situation where one U.S. company is eliminated from operation on a non-U.S. market by a conspiracy between another U.S. company and a non-U.S. company, but the adjudicating courts should think about the possibility that both U.S. companies were competing for sources that the latter intended to import into the U.S. In such a situation it is not possible to exclude the potential anticompetitive effects in the U.S. and consequently the excluded U.S. company should be granted the subject matter jurisdiction of the U.S. courts;

The adjudicating court considered it appropriate to grant subject matter jurisdiction to the U.S. courts because the commercial arrangements between U.S. exporters (?) affected U.S. taxpayers,\textsuperscript{321} but the question that the adjudication court should really have asked is whether competition within the U.S. was affected, and whether the arrangements among the U.S. exporters were required to win the competition with foreign companies in order to obtain a competitive advantage on markets outside the U.S.;

There is nothing to object to in the argument that non-U.S. companies outside the U.S. helped U.S. companies in conducting business in a particular way consequently causing anticompetitive effects within the U.S.,\textsuperscript{322} but the question that should be analyzed is whether non-U.S. companies set up their arrangements only to help U.S. companies, or was the arrangement such that it may be considered as a new general policy that applies to all companies with which the non-U.S. companies are in a business relationship, irrespective of the country where the business partners perform their activities.

\textsuperscript{320} Presented in the \textit{Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.}, 671 F.2d 876,884 (5th Cir.1982).

\textsuperscript{321} N.137.

5 Conclusion

The analysis of the reasoning in pre-Empagran cases from a transborder standard perspective provides two quite distinct conclusions. On the one hand, there exist elements in the courts’ reasoning which are in conformity with (i.e. they provide support to) the transborder standard. On the other hand, there are numerous elements in the courts’ reasoning that the application of the transborder standard would alter.

One of the major findings of the analysis conducted in this chapter is the awareness of the U.S. courts that the adjudication process should not be limited to understanding the factual situation from a formal point of view (i.e. looking merely at the surface of the facts before the court), but the adjudication analysis should be conducted to understand the substance of a factual situation in a real-life context.

This awareness of the U.S. courts that understanding the nature of the economic reality, including the particularities of conducting business on a global scale, can be further used to understand why there may be so many examples and arguments within courts’ reasoning where adjudication did consider facts (irrespective of how strongly they were presented to the adjudication court) beyond the national territorial borders of the U.S.

Unfortunately, this was not always the case. This means that the analysis in this chapter showed a similar type of limitation in the courts’ reasoning where the courts did not necessarily base their decision on an analysis of the whole factual situation. There is no clear explanation in the judgments why some courts modified the factual situation to consider as relevant only those facts that were connected to the U.S.323

It is difficult to know whether this modification of the factual situation has anything to do with the courts’ pro-active role in conducting the adjudication

323 This connection was either in the form anticompetitive conduct and/or its consequences, or in the form of the nationality of the litigants.
process or with the courts’ lack of guidance on how to deal with antitrust litigation in the international context.

Instead of judging or criticizing the courts’ adjudication process, this chapter tried to present the application of a transborder standard in a way that may serve as guidance to the courts on what elements to pay more attention to in future litigation.
Chapter 8: Conclusion

The analysis in this thesis shows that the Empagran litigation presents an important step in the development of antitrust law enforcement within the international context. This conclusion has been reached by a comparison of factual situations and the reasoning of courts in pre-Empagran cases with factual situations and the reasoning of courts in the Empagran and post-Empagran cases.

This thesis submits that the Supreme Court of the United States has opened a possibility for foreign private antitrust injury to be litigated before the U.S. courts. The Court did this by formulating the Empagran decision in a way that explicitly denies the protection of the U.S. courts only to foreign private antitrust injury that is independent from anticompetitive effects in the U.S. The Empagran litigation ended without providing any indication of how to determine dependency.

Post-Empagran case law did not attempt to address the questions that remained unanswered after the Empagran litigation. The analysis of post-Empagran case law shows that post-Empagran courts sometimes even misinterpret the decisions delivered in the Empagran litigation.

The analysis of post-Empagran case law shows a trend among the U.S. courts of deliver their decisions on the litigated foreign injury by invoking the requirement that private plaintiffs need to satisfy the proximate causation rule. The decisions that the U.S. courts have delivered on this issue do not show any willingness, commitment or desire to explain what is needed to satisfy the proximate causation requirement. The only information that private litigants are given is that they have not satisfied the proximate causation requirement.

Irrespective of this very passive approach by the U.S. courts in determining the conditions under which private plaintiffs can satisfy the proximate causation requirement, this thesis submits that the requirement of proximate causation may be considered an obstacle to private plaintiffs litigating their foreign claims in the U.S.
This thesis understands the Supreme Court’s *Empagran* decision as establishing the required type of relationship between anticompetitive effects in the U.S. and the litigated foreign private antitrust injury not within a framework of ‘causation’ but in a framework of ‘connection.’ In fact, the present thesis demonstrates that all pre-*Empagran* courts considered the question of causation only in the context of the relationship between anticompetitive conduct and antitrust injury, and never between anticompetitive effect and antitrust injury.

Therefore, this thesis develops and proposes a transborder standard as an alternative to proximate causation. The transborder standard requires courts to understand commercial arrangements in their totality, not by modifying the nature of the arrangement by focussing on what facts are ‘domestic’ and what facts are ‘foreign’. There may be situations that are transborder in the sense that all the facts are so interconnected that they can exist only if they take place simultaneously, and the existence of each of them is sine-qua-non for the existence of the rest of them.

After the *Empagran* litigation, the existence of private antitrust law enforcement at an international level cannot be ignored. Therefore, it is important for adjudicating courts to bear in mind that in private antitrust litigation, disputes should be resolved in a way that provides protection to private parties. The public interest of the countries concerned should not predominate.

At the same time, it is important for the courts to enesure that in protecting private litigants, they do not allow them to abuse the system by obtaining compensation from courts in different countries.

**Application of the Transborder Standard to the *Empagran* Litigation**

The next part of the thesis illustrates the application of the transborder standard by hypothetically applying it to the *Empagran* litigation. There are three reasons for performing this task:
The *Empagran* litigation itself was the catalyst for undertaking the research and developing this thesis. Therefore, it is appropriate to discuss the extent to which a transborder standard is a suitable response to the questions that triggered adjudication concerns at various stages of the *Empagran* litigation.

The real significance of the introduction of a transborder standard to private antitrust litigation is only possible to determine by analyzing the extent to which the existence of tranborder standard at the time of the *Empagran* litigation would have impacted on the course of the *Empagran* litigation (i.e. submissions by litigants and reasoning by adjudicating courts) and on the outcome of the case.

This thesis introduces a new concept of ‘a transborder standard’ requiring a novel approach to: a.) the analysis of the factual situation under adjudication, and b.) the theoretical analysis of the possibility of litigating foreign private antitrust injury before the U.S. courts. Consequently, it is useful to provide a factual example of how the application of a transborder standard would function in practice. As the *Empagran* litigation was analyzed in great detail at the very beginning of the thesis, its factual situation has been chosen as suitable for illustrating the application of the transborder standard.

The application of the transborder standard is a three-step approach for the court seized of the litigation, and is possible only in factual situations that are of a transborder nature. Therefore, the first step is to determine whether the *Empagran* factual situation is of a tranborder character.¹

If the answer to this question is positive, then the transborder standard can be applied as the second step in deciding whether the litigation can take place before a U.S. court. The U.S. courts in the *Empagran* litigation would be required to consider whether adjudicating the claim would be in conformity with the goals of U.S. antitrust laws and with the purpose of U.S. private antitrust law enforcement, i.e. whether private parties who suffer antitrust injury due to

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¹ See Chapter 5, subsections 2.1., 2.2., and 2.3.
a violation of U.S. antitrust laws are entitled to protection and compensation in the form of antitrust damages.²

If the answer is positive, then there is a third step to be taken in the application of the transborder standard. U.S. courts need to assess whether any adjustments are required to the decision that granted antitrust remedies to private plaintiffs in the Empagran litigation. In this regard, the U.S. courts would be required to determine whether it is appropriate for them to grant the Empagran private plaintiffs antitrust remedies irrespective of the fact that the private plaintiffs are also conducting private antitrust litigation for the same suffered antitrust injury before non-U.S. courts.³

1.1 Step 1: The Transborder Nature of the Empagran Factual Situation

1.1.1 Location of Relevant Facts

The analysis of whether there exists a transborder factual situation can only be conducted under the condition that there exist relevant facts on both sides of the U.S. national territorial borders, i.e. within and outside the U.S.

In Empagran, the vitamin manufacturers and distributors who practised anticompetitive conduct were U.S. companies⁴ and non-U.S. companies.⁵ They operated worldwide⁶ and internationally,⁷ i.e. within U.S. territory⁸ as well as

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² See Chapter 5, subsection 2.4.
³ See Chapter 5, subsection 2.5.
⁵ Ibid.
⁸ Ibid.
outside the U.S.\textsuperscript{9} Their antitrust conduct, including meetings and agreements among them, took place both within\textsuperscript{10} and outside the U.S.\textsuperscript{11}

This conduct affected commerce in the U.S.\textsuperscript{12} and commerce in other (i.e. non-U.S.) countries\textsuperscript{13}. In other words, the anticompetitive conduct affected virtually every market where these companies operated. They distributed and sold their products around the world\textsuperscript{14} and they operated worldwide.\textsuperscript{15}

Consequently, the antitrust conduct caused direct, substantial, and reasonably foreseeable effects on U.S. commerce\textsuperscript{16} (i.e. in the U.S.\textsuperscript{17}) and on foreign commerce\textsuperscript{18} (i.e. outside the U.S.\textsuperscript{19}). The effect of the conduct was to raise the prices of vitamin products sold in the U.S.\textsuperscript{20} and outside the U.S.\textsuperscript{21}

Thus, the conduct had an effect on consumers in the U.S.,\textsuperscript{22} i.e. those who purchased vitamin products in the U.S.,\textsuperscript{23} and on consumers outside the U.S.,\textsuperscript{24} i.e. those who purchased vitamin products outside the U.S.\textsuperscript{25} Therefore, the conspiracy (cartel) injured customers both in the U.S.\textsuperscript{26} and outside the U.S.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{9} Ibid.
\item \textsuperscript{11} Ibid.
\item \textsuperscript{13} N.7.
\item \textsuperscript{14} Empagran S.A. v. F. Hoffman–La Roche, Ltd., 315 F.3d 338,340 (D.C.Cir.2003).
\item \textsuperscript{15} Ibid.
\item \textsuperscript{17} Empagran S.A. v. F. Hoffman–La Roche, Ltd., 315 F.3d 338,340,344 (D.C.Cir.2003).
\item \textsuperscript{18} Empagran S.A. v. F. Hoffman–La Roche, Ltd., 315 F.3d 338,358 (D.C.Cir.2003).
\item \textsuperscript{19} N.14.
\item \textsuperscript{20} F. Hoffmann–La Roche, Ltd. v. Empagran S.A., 542 U.S. 155,159,162 (2004).
\item \textsuperscript{21} Ibid.
\item \textsuperscript{22} F. Hoffmann–La Roche, Ltd. v. Empagran S.A., 542 U.S. 155,164 (2004).
\item \textsuperscript{24} F. Hoffmann–La Roche, Ltd. v. Empagran S.A., 542 U.S. 155,164 (2004).
\end{itemize}
Consumers who purchased goods in the U.S. concluded transactions with members of the conspiracy in the U.S., and those consumers who purchased goods outside the U.S. concluded transactions with members of the conspiracy outside the U.S.

Thus, the U.S. consumers who concluded transactions in the U.S. brought their claim based on injuries they suffered in the U.S., and non-U.S. consumers who concluded transactions outside the U.S. brought their claim based on injuries they suffered outside the U.S. Thus the facts were similar both within and outside the U.S.

This was true for the operation of the antitrust conspiracy, the activities of its members, the relationships between the conspiracy members, and the consequences that the conspiracy had. The factual scenario is a sufficient justification for further analysis to determine the nature of the relationship between the facts within and outside the U.S.

### 1.1.2 Reasons for the Existence of Relevant Facts

The relationship between the facts within and outside the U.S. cannot be determined properly without understanding the operation of the commercial activity and its consequences.

The judgments delivered during the Empagran litigation provide a limited explanation of why the price-fixing conspiracy was shaped in a particular way. Allegedly, members of the conspiracy intended to inflate the prices of various

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28 N.6.
30 N.7
33 See Chapter 5, subsection 2.3.
34 In this regard, see subsection 1.1.3.
vitamins irrespective of whether they were being sold within or outside the U.S.\textsuperscript{35}

The vitamin products that members of the conspiracy were selling were fungible and readily transportable.\textsuperscript{36} Therefore, the members of conspiracy had to find a system that would enable them to sustain the anticompetitive prices of the products both within and outside the U.S. This meant that they had to keep the prices of the vitamin products they sold in the U.S. in equilibrium with the prices of the vitamin products they sold outside the U.S.\textsuperscript{37} This is why the conspiracy had to avoid a system of arbitrage.\textsuperscript{38}

The conspirators tackled this problem by fixing a single global price for the vitamins and by creating barriers to international vitamin trade in the form of market division agreements that prevented bulk vitamins from being traded between the U.S. and non-U.S. countries.\textsuperscript{39}

They achieved this by first setting anticompetitive prices for products they were selling in the U.S., and then setting anticompetitive prices for products they were selling outside the U.S. This meant that the members of the conspiracy first fixed the price of the products sold in the U.S., and this price then served as a benchmark for the price of vitamins outside the U.S.\textsuperscript{40} In other words, without anticompetitive prices within the U.S., the members of conspiracy (the sellers) could not have maintained the anticompetitive price of products sold outside the U.S.\textsuperscript{41} Thus, the international price-fixing arrangement could not

\begin{itemize}
\item \textsuperscript{38} Ibid.
\item \textsuperscript{39} Ibid.
\end{itemize}
have been maintained without setting anticompetitive prices in the U.S.\(^{42}\) Or, to put in another way, anticompetitive effects in the U.S. (higher prices in the U.S.) were a necessary link in creating antitrust injury (higher prices) outside the U.S.\(^{43}\)

A similar explanation derives from allegations that control of the U.S. market was necessary for the conspiracy to succeed.\(^{44}\) Control of the U.S. market was necessary to prevent arbitrage destroying supra-competitive pricing.\(^{45}\) The members of the conspiracy had to take the global vitamin market into account.\(^{46}\) If the price of vitamins is affected in the U.S., then the price of vitamins will also be affected outside the U.S.\(^{47}\) Therefore, they had to make adjustments, set and fix the price of vitamins in relation to world market conditions.\(^{48}\) When price changes were made and supply shifted in the U.S., injuries were caused to those who bought vitamins outside the U.S.\(^{49}\)

The members of the conspiracy set a single global price. In addition, they concluded a market division agreement\(^{50}\) that created barriers to international vitamin trade.\(^{51}\) This arrangement was necessary to prevent purchasers outside the U.S. obtaining vitamins from U.S. suppliers or from people who bought vitamins in the U.S. (at lower prices than the inflated price for which members of the conspiracy sold vitamins outside the U.S.) and sold them to purchasers outside the U.S.\(^{52}\)


\(^{44}\) Ibid.


\(^{46}\) Ibid.

\(^{47}\) Ibid.

\(^{48}\) Ibid.


\(^{50}\) N.39.

\(^{51}\) Ibid.

\(^{52}\) Empagran S.A. v. F. Hoffmann–LaRoche, Ltd., 417 F.3d 1267,1270 (D.C.Cir.2005).
1.1.3 Type of Connection between the Relevant Facts

The existence of facts within and outside the U.S.\(^5\) and the finding that the aim was to control the global market of vitamin products and to achieve the highest revenue possible\(^4\) do not assist in determining the relationship between anticompetitive effect (antitrust injury) within the U.S. and anticompetitive effects (antitrust injury) outside the U.S.

For a foreign private antitrust injury to be litigated before the U.S. courts, it has to be dependent from anticompetitive effects (antitrust injury) within the U.S.\(^5\) This thesis submits that a foreign private antitrust injury can satisfy this requirement under the condition that private plaintiffs can prove that their foreign private antitrust injury is of a transborder character (nature). To do so, private plaintiffs have to prove that facts within and outside the U.S., including the litigated foreign private antitrust injury, exist simultaneously, and that one injury cannot exist without the other (i.e. that their existence is sine-qua-non for the success of the conspiracy and for the foreign private antitrust injury).\(^6\)

Indeed, there are classifications of the factual situation in the Empagran judgments, but they are too general and, consequently, do not provide sufficient indication of their transborder character. The classifications in the judgments are: price fixing conspiracy,\(^7\) global conspiracy,\(^8\) massive international cartel\(^9\), global nature of the defendants’ conduct.\(^10\) These classifications merely describe the nature of the anticompetitive conduct. The nature of the anticompetitive

\(^{53}\) See subsection 1.1.1.

\(^{54}\) See subsection 1.1.2.

\(^{55}\) See Chapter 2, subsection 3.1.7.3

\(^{56}\) See Chapter 5, subsection 2.2.


conduct is not a sufficient indication of whether the foreign private antitrust injury is of a transborder character.\textsuperscript{61}

Classifications that determine the character/nature of the vitamin market are more useful. These classifications are: global market for bulk vitamins,\textsuperscript{62} the vitamin market is a single, global market,\textsuperscript{63} control of the global market is in the hands of the conspirators.\textsuperscript{64} These classifications can be beneficial in attempting to determine whether the situation is of a transborder character, but unfortunately, they do not provide an explanation of the significance that the facts occurring outside the U.S. have for the factual situation within the U.S. and for the foreign private antitrust injury.

The significance of facts within and outside the U.S. and their sine-qua-non relevance to their mutual co-existence can be deduced from the combination of the following elements:

- The goods (i.e. vitamin products) that the members of the conspiracy manufactured, distributed and sold around the world were of a fungible nature\textsuperscript{65}, readily transportable\textsuperscript{66}, and globally marketed.\textsuperscript{67}

- The conspiracy fixed vitamin prices around the world\textsuperscript{68} to obtain a single global price.\textsuperscript{69} Vitamin sellers around the world agreed to fix prices\textsuperscript{70} and

\textsuperscript{61} See Chapter 2, subsection 3.1.2.
\textsuperscript{63} Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267,1271 (D.C.Cir.2005).
\textsuperscript{64} N.45.
\textsuperscript{66} Ibid.
\textsuperscript{67} N.52.
\textsuperscript{68} Empagran S.A. v. F. Hoffman-La Roche, Ltd., 315 F.3d 338,343 (D.C.Cir.2003).
\textsuperscript{69} N.39.
consequently raised, stabilized, and maintained the price of vitamins\textsuperscript{71} as agreed.

- The conspiracy exercised global market power.\textsuperscript{72} There are only a small number of vitamin producers\textsuperscript{73} but there are significant barriers to entry.\textsuperscript{74}

- The members of the conspiracy divided the global market between themselves by market division agreements\textsuperscript{75} and by allocating market shares\textsuperscript{76} amongst themselves. They created barriers to the international vitamin trade in the form of market division agreements that prevented bulk vitamins from being traded between the U.S. and non-U.S.\textsuperscript{77} At the same time, U.S. and non-U.S. manufacturers and distributors agreed to leave each other’s markets.\textsuperscript{78}

- The members of the conspiracy also eliminated arbitrage.\textsuperscript{79} To achieve this, control of the U.S. market was necessary for the conspiracy to succeed,\textsuperscript{80} otherwise it would not have been possible to maintain supra-competitive prices within and outside the U.S.\textsuperscript{81} By avoiding arbitrage, the members of the conspiracy were able to keep prices outside the U.S. in equilibrium with prices within the U.S.\textsuperscript{82} They fixed prices for vitamins sold in the U.S. and these prices acted as a benchmark for the world’s vitamin prices in other markets.\textsuperscript{83} With this arrangement in place, the

\textsuperscript{71} N.14.
\textsuperscript{72} Empagran S.A. v. F. Hoffman–La Roche, Ltd., 315 F.3d 338,344 (D.C.Cir.2003).
\textsuperscript{73} Empagran S.A. v. F. Hoffman–La Roche, Ltd., 315 F.3d 338,344 (D.C.Cir.2003).
\textsuperscript{74} N.14.
\textsuperscript{75} Empagran S.A. v. F. Hoffmann–LaRoche, Ltd., 417 F.3d 1267,1271 (D.C.Cir.2005).
members of the conspiracy ensured that if they caused prices in the U.S. to be affected then they also affected prices around the world. 84

The combination of all the above points shows the precise type of connection in Empagran between the foreign private antitrust injury and the anticompetitive effects in the U.S. Purchasers were able to obtain vitamins only from a small (limited) number of manufacturers and producers. Irrespective of the fact that vitamins are fungible and that there should be no difficulties in their transportation around the world, members of the conspiracy altered the conditions of the vitamins market globally, so that purchasers did not have any chance to benefit from competition between the vitamins sellers. Members of the conspiracy prevented this competition from taking place. Purchasers outside the U.S. could purchase goods only outside the U.S. from members of the conspiracy that were selling vitamins in the national territory where the purchasers tend to use the goods. It is not possible for purchasers to buy vitamins within one territory (e.g. in the U.S.) and import them to another territory (e.g. outside the U.S.). In addition, the sellers are not free to determine the price for which to sell vitamins to the buyers. Both sellers in the U.S. and sellers outside the U.S. are required to comply with the price that was set by the conspiracy. This means that purchasers, including the ones outside the U.S., are not free to choose between sellers from different national territories, and do not have the possibility to benefit from price competition.

Therefore, the analysis of the factual situation in the Empagran litigation support the arguments delivered during the litigation that: the members of the conspiracy made, set and fixed arrangements with regard to the world market conditions; 85 purchasers outside the U.S. were injured by paying higher prices charged by the global conspiracy (rather than from super-competitive prices in one particular market); 86 the prices that private plaintiffs paid for vitamins outside the U.S. were a direct result of the increases in the U.S. prices even

84 N.45.
85 N.45.
though they bought the vitamins outside the U.S.;\(^{87}\) super-competitive pricing in the U.S. gave rise to foreign super-competitive prices from which the private plaintiffs claim injury;\(^{88}\) the prices of vitamins outside the U.S. are a result of the anticompetitive effects of price changes and supply shifts in the U.S. trade;\(^{89}\) the members of the conspiracy were able to sustain super-competitive prices outside the U.S. only by also maintaining super-competitive prices in the U.S.\(^{90}\) (the prices in the U.S. causing anticompetitive effects in the U.S.).\(^{91}\)

Analyzing the factual situation in the Empagran litigation within a transborder analytical framework leads to the conclusion that the litigated foreign private antitrust injury is of a transborder character, and therefore not independent\(^{92}\) but dependent on anticompetitive effects (antitrust injury) in the U.S. The members of the conspiracy affected the competitive conditions within and outside the U.S., and the arrangements they put into place were such that anticompetitive effects and antitrust injury outside the U.S. would not be able to exist without anticompetitive effects and antitrust injury in the U.S.


\(^{92}\) As was the position of the litigating courts in the Empagran case, see Chapter 2, subsection 3.1.7.
1.2 Step 2: Protection of the Affected Private Plaintiffs

The analysis in the subsection above\(^{93}\) shows that the factual situation in the *Empagran* litigation is of a transborder character. The next step is to apply U.S. private antitrust law enforcement to a situation where there is tranborder anticompetitive conduct that regulates the supply of specific products in a transborder market and in this way affects transborder commerce. The application of the U.S. private antitrust law enforcement system should not be altered merely because private plaintiffs suffer their private antitrust injury in a transborder context. If the private litigants in the *Empagran* litigation had been able to prove the elements required under the U.S. private antitrust law enforcement system, the *Empagran* adjudicating courts should have protected the private rights (in the form of remedies) under U.S. antitrust law.

The private plaintiffs in *Empagran* demonstrated the existence of anticompetitive conduct,\(^{94}\) the existence of anticompetitive effects that this anticompetitive conduct caused not only outside but also within the U.S.,\(^ {95}\) and the private antitrust injury they suffered due to the anticompetitive conduct.\(^ {96}\)

The private plaintiffs in *Empagran* who were domiciled in several non-U.S. countries stated explicitly that they purchased the vitamins outside the U.S. directly from the vitamin companies or their alleged co-conspirators\(^ {97}\) (i.e. the defendants) at inflated prices that were caused by the defendants’ conspiracy.\(^ {98}\) The payment of inflated prices for the vitamins injured the private plaintiffs.\(^ {99}\) This loss suffered by the private plaintiffs was the type of loss that a violation of the Sherman Act would be likely to cause.\(^ {100}\)

\(^{93}\) Subsection 1.1.

\(^{94}\) Ibid.

\(^{95}\) Ibid.

\(^{96}\) Ibid.


\(^{100}\) N.98.
The private plaintiffs in *Empagran* have also paid particular attention to providing an explanation of the source of the antitrust injury they suffered, i.e. of antitrust causation.\(^{101}\) They attributed their injury: unlawful price-fixing conduct;\(^{102}\) global conspiracy,\(^{103}\) the defendants’ worldwide conspiracy to fix prices and exercise global market power over vitamin products;\(^{104}\) the defendants’ conspiracy to fix vitamin prices globally.\(^{105}\) All these statements show that the private plaintiffs in *Empagran* who had purchased vitamins from the defendants at inflated prices were injured by conduct that violated the Sherman Act - a global price-fixing conspiracy.\(^{106}\)

Particular consideration has to be given to the question whether the private plaintiffs in *Empagran* might have satisfied the antitrust standing requirement. A comparison of pre-*Empagran* case law on antitrust standing\(^ {107}\) and an analysis of standing by U.S. adjudicating courts in the *Empagran* litigation\(^ {108}\) reveals that the requirement of antitrust standing should not be an obstacle to private plaintiffs succeeding with their private antitrust claim.

In order to provide an explanation of the application of the transborder standard to the *Empagran* litigation on the issue of antitrust standing, it may be useful to present the extent to which the transborder standard may have altered the decisions of the *Empagran* courts on the issue of antitrust standing for private plaintiffs.

As far as the antitrust standing requirement is concerned, private plaintiffs have to prove that the injury was suffered in the relevant market.\(^ {109}\) The private plaintiffs in *Empagran* argued that their alleged injuries occurred in a global market, which necessarily includes U.S. commerce.\(^ {110}\) This explanation is

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\(^{101}\) For the valid case law on antitrust causation see Chapter 6, subsection 4.2.5.

\(^{102}\) N.14.

\(^{103}\) *Empagran S.A. v. F. Hoffman–La Roche, Ltd.*, 315 F.3d 338,343 (D.C.Cir.2003).


\(^{105}\) N.99.

\(^{106}\) N.98.

\(^{107}\) See Chapter 6, subsection 4.2.4.

\(^{108}\) See Chapter 2, subsection 3.1.4.


\(^{110}\) Ibid.
perfectly in conformity with the above analysis\textsuperscript{111} that the relevant market in the \textit{Empagran} litigation was of a transborder character.

In relation to other elements that are required to exist before private plaintiffs have standing, additional analysis is not required, as the application of the transborder standard does not alter the findings of the \textit{Empagran} courts that there was no risk of duplicative recovery;\textsuperscript{112} private plaintiffs suffered direct injury so the injury they claimed was not speculative;\textsuperscript{113} there were no more direct plaintiffs other than the private plaintiffs in the \textit{Empagran} litigation;\textsuperscript{114} courts would not face the risk of dealing with complex damage apportionment.\textsuperscript{115}

Not only did the private plaintiffs in the \textit{Empagran} litigation prove the existence of all the relevant elements necessary to benefit from the U.S. private antitrust law enforcement system, but they also went further. They did not invoke this protection merely because they had suffered injury recognized by U.S. antitrust law, but they built their private antitrust claims on another U.S. private antitrust law enforcement goal, i.e. deterrence of anticompetitive conduct.\textsuperscript{116} The private plaintiffs pleaded the risk that the global conspiracy would be under-deterred, and the members of the conspiracy would continue with their conspiracy as the gains obtained outside the U.S. make the conspiracy profitable.\textsuperscript{117} They also contended that their private antitrust action would contribute to the welfare of U.S. consumers,\textsuperscript{118} and that they could take action more effectively than private plaintiffs in the U.S.\textsuperscript{119} The last two statements may be correct, but the available data from the \textit{Empagran} judgments does not provide sufficient evidence to support such a conclusion.

\textsuperscript{111} See subsection 1.1.3.
\textsuperscript{113} N.98.
\textsuperscript{114} \textit{Empagran S.A. v. F. Hoffman–La Roche, Ltd.}, 315 F.3d 338,358,359 (D.C.Cir.2003).
\textsuperscript{115} N.98.
\textsuperscript{116} See Chapter 4, subsection 3.1.
\textsuperscript{117} \textit{Empagran S.A. v. F. Hoffman–La Roche, Ltd.}, 315 F.3d 338,356 (D.C.Cir.2003).
\textsuperscript{118} \textit{Empagran S.A. v. F. Hoffman–La Roche, Ltd.}, 315 F.3d 338,356,357 (D.C.Cir.2003).
\textsuperscript{119} \textit{Empagran S.A. v. F. Hoffman–La Roche, Ltd.}, 315 F.3d 338,359 (D.C.Cir.2003).
The above analysis shows that the private plaintiffs in the *Empagran* litigation presented their private antitrust claim in a way that they satisfied every single element of U.S. private antitrust law enforcement. No other factor is relevant to altering this conclusion. Therefore, the application of the transborder standard to the *Empagran* litigation would not have required much from the adjudicating courts. All they would have had to do was to accept that the private plaintiffs had suffered the type of antitrust injury for which the U.S. antitrust law provides an antitrust remedy. This conclusion cannot be altered by the fact that the factual situation in the *Empagran* litigation is of transborder character, or the fact that the litigated private antitrust injury was suffered by non-U.S. plaintiffs out of transactions concluded outside the U.S. to obtain goods outside the U.S., and these goods were never intended to enter the U.S. market.

1.3 Step 3: The Private Plaintiffs Have to Show that Obtaining Antitrust Remedies before the U.S. Courts would be Appropriate

The final step in the application of the transborder standard is to assess whether granting antitrust damages to private plaintiffs who suffer foreign private antitrust injuries would be correct, fair and just for both the litigants and the non-U.S. countries.\textsuperscript{120}

The application of this requirement to the *Empagran* litigation can be formulated with the following question. What is the reason that motivated private plaintiffs to seek protection for their private antitrust injuries they had suffered outside the U.S. before the U.S. courts and under U.S. antitrust law?

Some of the defendants had pleaded guilty to price fixing activities in violation of U.S. antitrust laws before the *Empagran* litigation started.\textsuperscript{121} Therefore, the private plaintiffs did not bring a private antitrust action before the U.S. courts with the purpose of identifying the existence of a U.S. antitrust law violation.

\textsuperscript{120} See Chapter 5, subsection 2.5.

The existence of this violation was established before the *Empagran* litigation started.

In general, a court’s decision that the defendants have violated U.S. antitrust law is not an obstacle to private parties who have suffered private antitrust injury bringing a private antitrust suit before the U.S. courts. The U.S. private antitrust law enforcement system provides for a follow-on action,\(^{122}\) and there does not exist any particular reason why this type of action would not be available to the private plaintiffs in the *Empagran* litigation.

A challenging aspect of the *Empagran* litigation is the fact that the private plaintiffs brought the private antitrust suit before the U.S. courts after\(^ {123}\) they had already brought private antitrust actions for the same type of injury before non-U.S. courts.

Why did the private plaintiffs in *Empagran* consider it necessary to start an additional private antitrust litigation before the U.S. courts? There is no obstacle to filing two or more private antitrust litigations between the same litigants in courts of different countries.\(^ {124}\) In addition, the application of the U.S. private antitrust law enforcement system and the award of antitrust remedies under the U.S. antitrust law is not conditioned by the fact that the private plaintiffs did not obtain antitrust remedies for the injuries suffered under non-U.S. antitrust law. Nevertheless, allowing private plaintiffs to litigate the same antitrust injury before the courts of different countries (the U.S. and non-U.S.), and in this way obtain multiple damage awards for the same suffered injury under the antitrust laws of different countries, would be unfair and unjust. Where the total amount of antitrust awarded damages obtained is three times the suffered damage,\(^ {125}\) this is not necessarily problematic.\(^ {126}\) The problem with the private plaintiffs in the *Empagran* litigation is that they did not exclude the possibility of there being an abuse\(^ {127}\) of the U.S. private antitrust law enforcement system and

\(^{122}\) See Chapter 4, section 4.


\(^{124}\) See Chapter 7, subsection 3.5.6.

\(^{125}\) Considering that private plaintiffs can claim treble damages under U.S. antitrust law.

\(^{126}\) Considering that under the antitrust laws of some countries, compensation that is higher than the antitrust injury actually suffered may be against public policy.
consequently, of benefitting from accumulating additional antitrust damages out of same antitrust injury caused by the same anticompetitive conduct.

The only explanation that the private plaintiffs in Empagran provided for bringing the additional private antitrust suit before the U.S. courts was fairness\textsuperscript{128} and deterrence.\textsuperscript{129} The private plaintiffs never elaborated on the substance of fairness in relation to the litigants and in relation to non-U.S. countries, but they used fairness as an abstract and vague argument in support of expanding the subject matter jurisdiction of U.S. antitrust law that this thesis does not support.\textsuperscript{130} In relation to the deterrence argument,\textsuperscript{131} the private plaintiffs in the Empagran litigation did not provide any specific explanation why it was not be possible to stop the anticompetitive conduct (i.e. global price fixing conspiracy) without bringing a private antitrust suit before the U.S. courts against non-U.S. defendants. Without this explanation, it is not possible to determine whether without the Empagran litigation the global price fixing conspiracy would still be able to operate and, consequently, whether the private plaintiffs would continue to suffer similar private antitrust injury in the future.

This analysis shows that the application of the third step of the transborder standard (i.e. appropriate adjustments) to the Empagran litigation requires a refusal by the U.S. courts to grant antitrust damages to plaintiffs who suffered foreign private antitrust injury because such decision would be incorrect, unfair and unjust.

\textsuperscript{127} See Chapter 4, section 4.
\textsuperscript{128} N.121.
\textsuperscript{130} See analysis in Chapter 2, subsection 3.1.3.
\textsuperscript{131} See subsection 1.2. and Chapter 2, subsection 3.1.9.
List of Cases

1 The Supreme Court of the U.S. Cases


Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311, Argued April 1, 2, 1940, Decided May 27, 1940, Supreme Court of the United States.


Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, Reargued October 9, 1961, Decided March 26, 1962, Supreme Court of the United States.


Benson v. Henkel, 198 U.S. 1, 25 S.Ct. 569, 49 L.Ed. 919, Argued February 20, 21, 1905, Decided April 17, 1905, Supreme Court of the United States.


Cole v. Cunningham, 133 U.S. 107, 10 Sup. Ct. 269, January 20, 1890, Supreme Court of the United States.


Comcast Corp. v. Behrend, 133 S.Ct. 142, 185 L.Ed.2d 515, Argued November 5, 2012, Decided March 27, 2013, Supreme Court of the United States.


Copperweld v. Independence Tube, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628, Argued December 5, 1983, Decided June 19, 1984, Supreme Court of the United States.


Ex parte Republic of Peru, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014, Argued March 1, 1943, Decided April 5, 1943, Supreme Court of the United States.


Fletcher v. Peck, 6 Cranch 87, 3 L.Ed. 162, February Term, 1810, Supreme Court of the United States.


Hilton v. Guyot, 159 U.S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, June 3, 1895, Supreme Court of the United States.


In re Baiz, 135 U.S. 403, 10 S.Ct. 854, 34 L.Ed. 222, May 5, 1890, Supreme Court of the United States.

In re Trade-Mark Cases, 100 U.S. 82, 25 L.Ed. 550, October Term, 1879, Supreme Court of the United States.


Jones v. Montague, 194 U.S. 147, 24 S. Ct. 611, 48 L. Ed. 913, Argued April 4, 5, 1904, Decided April 25, 1904, Supreme Court of the United States.


Little v. Bowers, 134 U.S. 547, 10 S.Ct. 620, 33 L.Ed. 1016, April 7, 1890, Supreme Court of the United States.


Lord v. Veazie, 49 U.S. 251, 12 L.Ed. 1067, January Term, 1850, Supreme Court of the United States.


Massie v. Watts, 6 Cranch 148, 3 L.Ed. 181, February Term, 1810, Supreme Court of the United States.


Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293, November 25, 1895, Supreme Court of the United States.


Murray v. The Charming Betsey, 6 U.S. (2 Cranch) 64, February Term 1804, Supreme Court of the United States.


Old Dominion S.S. Co. v. Gilmore, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264, Argued December 13, 1907, Decided December 23, 1907, Supreme Court of the United States.


Phelps v. McDonald, 99 U.S. 298, October Term, 1878, Supreme Court of the United States.


Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148, Argued February 27, 1957, Decided June 10, 1957, Supreme Court of the United States.


Sebelius v. Auburn Regional Medical Center, 133 S.Ct. 817, 184 L.Ed.2d 627, Decided January 22, 2013, Supreme Court of the United States.


Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310, Argued December 9, 1910, Decided February 20, 1911, Supreme Court of the United States.


Strassheim v. Daily, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed. 735, Argued April 3 and 4, 1911, Decided May 15, 1911, Supreme Court of the United States.


Texaco Inc. v. Dagher, 547 U.S. 1, 126 S.Ct. 1276, 164 L.Ed.2d 1, Argued January 10, 2006, Decided February 28, 2006, Supreme Court of the United States.

The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320, Argued November 7, 8, 1899, Decided January 8, 1900, Supreme Court of the United States.

The Sapphire, 78 U.S. 164, December Term, 1870, Supreme Court of the United States.

The Schooner Exchange v. McFaddon, 7 Cranch 116, 11 U.S. 116, 3 L.Ed. 287, February 24, 1812, Supreme Court of the United States.


U.S. v. A. Schrader’s Son, 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471, Argued January 22 and 23, 1920, Decided March 1, 1920, Supreme Court of the United States.


U.S. v. Frankfort Distilleries, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951, Argued February 8, 1945, Decided March 5, 1945, Supreme Court of the United States.


U.S. v. Lapene, 84 U.S. 601, October Term, 1873, Supreme Court of the United States.


U.S. v. Pacific & A R & Nav Co., 228 U.S. 87, 33 S.Ct. 443, 57 L.Ed. 742, Argued February 26, 1913, Decided April 7, 1913, Supreme Court of the United States.


U.S. v. Patten, 226 U.S. 525, 33 S.Ct. 141, 57 L.Ed. 333, Argued November 9 and 10, 1911, Ordered for reargument before full bench April 29, 1912, Reargued October 23 and 24, 1912, Decided January 6, 1913, Supreme Court of the United States.


U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L ed 1129, 60 S Ct 811, Argued February 5, 6, 1940, Decided May 6, 1940, Rehearing Denied June 3, 1940, Supreme Court of the United States.
U.S. v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, Argued January 11, 1944, Decided June 5, 1944, Rehearing Denied October 9, 1944, Supreme Court of the United States.


U.S. v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 17 Sup.Ct. 540, 41 L.Ed. 1007, March 22, 1897, Supreme Court of the United States.


U.S. v. U.S. Steel Corp., 251 U.S. 417, 40 S.Ct. 293, 64 L.Ed. 343, Argued March 9, 12, 13, and 14, 1917, Restored to docket May 21, 1917, Reargued October 7, 8, 9, and 10, 1919, Decided March 1, 1920, Supreme Court of the United States.


2 The U.S. Court of Appeals Cases


Alliance For Environmental Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, Argued September 1, 2005, Decided January 24, 2006, United States Court of Appeals, Second Circuit.


American Tobacco Co. v. U.S., 147 F.2d 93, December 8, 1944, Writ of Certiorari Granted March 26, 1945, Circuit Court of Appeals, Sixth Circuit.


Austin v. McNamara, 979 F.2d 728, Argued and Submitted December 6, 1991, Decided November 6, 1992, United States Court of Appeals, Ninth Circuit.


Bhan v. NME Hospitals, Inc., 772 F.2d 1467, Argued and Submitted June 12, 1985, Decided October 2, 1985, United States Court of Appeals, Ninth Circuit.


Black v. Payne, 591 F.2d 83, Rehearing Denied April 16, 1979, United States Court of Appeals, Ninth Circuit.


Branch v. F.T.C., 141 F.2d 31, Rehearing Denied March 25, 1944, Circuit Court of Appeals, Seventh Circuit.


Bulova Watch Co. v. Steele, 194 F.2d 567, Rehearing Denied March 13, 1952, United States Court of Appeals, Fifth Circuit.


Chatham Condominium Associations v. Century Village, Inc., 597 F.2d 1002, July 2, 1979, United States Court of Appeals, Fifth Circuit.


Coniglio v. Highwood Services, Inc., 495 F.2d 1286, Argued March 27, 1974, Decided April 17, 1974, United States Court of Appeals, Second Circuit.


Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, March 30, 1995, United States Court of Appeals, Tenth Circuit.


Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc., 123 F.3d 301, September 25, 1997, United States Court of Appeals, Fifth Circuit.


E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, Argued July 8, 1975, Decided November 11, 1975, Certiorari Denied March 29, 1976, United States Court of Appeals, Tenth Circuit.

Eagle Oil Co. of New York v. Vacuum Oil Co., 162 F. 671, June 18, 1908, Circuit Court of Appeals, Third Circuit.


Frankfort Distilleries v. U.S., 144 F.2d 824, August 26, 1944, November 13, 1944, Circuit Court of Appeals, Tenth Circuit.

Freeman v. Lester Coggins Trucking, Inc., 771 F.2d 860, September 23, 1985, United States Court of Appeals, Fifth Circuit.

G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, Argued December 5, 1994, Decided June 1, 1995, United States Court of Appeals, Second Circuit.

GAF Corp. v. Circle Floor Co., 463 F.2d 752, Argued April 19, 1972, Decided July 5, 1972, United States Court of Appeals, Second Circuit.


George W. Luft Co. v. Zande Cosmetic Co., 142 F.2d 536, May 9, 1944, Circuit Court of Appeals, Second Circuit.


Green v. Ferrell, 664 F.2d 1292, January 6, 1982, United States Court of Appeals, Fifth Circuit.


In re ATM Fee Antitrust Litigation, 686 F.3d 741, Argued and Submitted December 6, 2011, Filed July 12, 2012, United States Court of Appeals, Ninth Circuit.


In re Eastern Shore Shipbuilding Corp., 274 F. 893, June 15, 1921, Circuit Court of Appeals, Second Circuit.


In re Maxwell Communication Corp. plc by Homan, 93 F.3d 1036, Argued May 10, 1996, Decided August 21, 1996, United States Court of Appeals, Second Circuit.


In re Uranium Antitrust Litigation, 617 F.2d 1248, Argued September 20 and November 9, 1979, Decided February 15, 1980, United States Court of Appeals, Seventh Circuit.


Industrial Inv. Development Corp. v. Mitsui & Co., Ltd., 671 F.2d 876, March 31, 1982, United States Court of Appeals, Fifth Circuit.


Long Island Lighting Co. v. Standard Oil Co. of California, 521 F.2d 1269, Argued June 18, 1975, Decided August 22, 1975, United States Court of Appeals, Second Circuit.


Menchaca v. Chrysler Credit Corp., 613 F.2d 507, March 7, 1980, United States Court of Appeals, Fifth Circuit.


Miranda v. Reno, 238 F.3d 1156, Argued and Submitted October 12, 200, Filed February. 7, 2001, United States Court of Appeals, Ninth Circuit.


Oaxaca v. Roscoe, 641 F.2d 386, April 3, 1981, United States Court of Appeals, Fifth Circuit, Unit A.

Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 461 F.2d 1261, June 23, 1972, United States Court of Appeals, Ninth Circuit.


Overseas Motors, Inc. v. Import Motors Ltd., Inc., 519 F.2d 119, June 2, 1975, United States Court of Appeals, Sixth Circuit.


Pfizer, Inc. v. Lord, 522 F.2d 612, Submitted March 31, 1975, Decided August 27, 1975, United States Court of Appeals, Eighth Circuit.


Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, August 20, 1997, United States Court of Appeals, Eleventh Circuit.


Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416, November 8, 1972, United States Court of Appeals, Fifth Circuit.


Smith v. Gross, 604 F.2d 639, September 17, 1979, United States Court of Appeals, Ninth Circuit.


Southern Concrete Co. v. U.S. Steel Corp., 535 F.2d 313, July 19, 1976, United States Court of Appeals, Fifth Circuit.


The Adriatic, 258 F. 902, June 7, 1919, Circuit Court of Appeals, Third Circuit.

The Salton Sea Cases, 172 F. 792, August 2, 1909, Rehearing denied October 4, 1909, Circuit Court of Appeals, Ninth Circuit.


Thomsen v. Union Castle Mail S.S. Co., 166 F. 251, October 1, 1908, Circuit Court of Appeals, Second Circuit.


Transamerica Leasing, Inc. v. La Republica de Venezuela, 200 F.3d 843, Argued September 13, 1999, Decided January 21, 2000, Rehearing and Rehearing En Banc Denied March 8, 2000, United States Court of Appeals, District of Columbia Circuit.


U.S. v. Addyston Pipe & Steel Co., 46 L.R.A. 122, February 8, 1898, Circuit Court of Appeals, Sixth Circuit.

U.S. v. Aluminum Co. of America, 148 F.2d 416, March 12, 1945, Circuit Court of Appeals, Second Circuit.


U.S. v. Sabella, 272 F.2d 206, Decided November 13, 1959, United States Court of Appeals, Second Circuit.


U.S. v. Trans-Missouri Freight Ass'n., 24 L.R.A. 73, October 2, 1893, Circuit Court of Appeals, Eighth Circuit.


Union Castle Mail S.S. Co. v. Thomsen, 190 F. 536, July 26, 1911, Circuit Court of Appeals, Second Circuit.


Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, September 12, 1962, United States Court of Appeals, Sixth Circuit.


White v. Lee, 227 F.3d 1214, Argued and Submitted July 10, 2000, Filed September 27, 2000, United States Court of Appeals, Ninth Circuit.


3 The U.S. District Court Cases


Donlan v. Carvel, 193 F.Supp. 246, April 17, 1961, United States District Court, D. Maryland.


eMag Solutions, LLC v. Toda Kogyo Corp., 426 F.Supp.2d 1050, April 12, 2006, United States District Court, N.D. California.


Empagran S.A. v. F. Hoffman-La Roche Ltd., 453 F.Supp.2d 1, August 1, 2006, United States District Court, District of Columbia.


In re California Title Ins. Antitrust Litigation, 2009 WL 1458025 (N.D.Cal.), May 21, 2009, United States District Court, N.D. California.

In re Cathode Ray Tube (CRT) Antitrust Litigation, 2010 WL 9543295 (N.D.Cal.),Filed February 5, 2010, United States District Court, N.D. California.


In re Copper Antitrust Litigation, 117 F.Supp.2d 875, October 2, 2000, United States District Court, W.D. Wisconsin.

In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, 2006 WL 515629 (N.D.Cal.), March 1, 2006, United States District Court, N.D. California.

In re eBay Seller Antitrust Litigation, 2008 WL 3925350 (N.D.Cal.), August 22, 2008, United States District Court, N.D. California.


In re Flash Memory Antitrust Litigation, 643 F.Supp.2d 1133, March 31, 2009, United States District Court, N.D. California, Oakland Division.


In re Greene, 52 F. 104, 7 Ohio F.Dec. 245, August 4, 1892, Circuit Court, S.D. Ohio, Western Division.


In re Intel Corp. Microprocessor Antitrust Litigation, 452 F.Supp.2d 555, September 26, 2006, United States District Court, D. Delaware.


In re Monosodium Glutamate Antitrust Litigation, 2005 WL 1080790 (D.Minn.), May 2, 2005, United States District Court, D. Minnesota.

In re Monosodium Glutamate, 2005 WL 2810682 (D.Minn.), October 26, 2005, United States District Court, D. Minnesota.


In re Optical Disk Drive Antitrust Litigation, 2011 WL 3894376, August 3, 2011, United States District Court, N.D. California, San Francisco Division.


In re Rubber Chemicals Antitrust Litigation, 486 F.Supp.2d 1078, May 9, 2007, United States District Court, N.D. California.


In re TFT-LCD (Flat Panel) Antitrust Litigation, 2010 WL 2610641 (N.D.Cal.), June 28, 2010, United States District Court, N.D. California.

In re TFT-LCD (Flat Panel) Antitrust Litigation, 2010 WL 2629728 (N.D.Cal.), June 29, 2010, United States District Court, N.D. California.

In re TFT-LCD (Flat Panel) Antitrust Litigation, 2011 WL 5444261, November 9, 2011, United States District Court, N.D. California.

In re TFT-LCD (Flat Panel) Antitrust Litigation, 2012 WL 3763616, August, 29, 2012, United States District Court, N.D. California.


In re TFT-LCD (Flat Panel) Antitrust Litigation, 2013 WL 6174683, November 20, 2013, United States District Court, N.D. California.


In re TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 583, March 28, 2010, United States District Court, N.D. California.

In re TFT-LCD (Flat Panel) Antitrust Litigation, 599 F.Supp.2d 1179, March 3, 2009, United States District Court, N.D. California.

In re TFT-LCD (Flat Panel) Antitrust Litigation, 781 F.Supp.2d 955, March 16, 2011, United States District Court, N.D. California.

In re TFT-LCD (Flat Panel) Antitrust Litigation, 822 F.Supp.2d 953, October 5, 2011, United States District Court, N.D. California.


In re Urethane Antitrust Litigation, 261 F.R.D. 570, August 11, 2009, United States District Court, D. Kansas.


International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 477 F.Supp. 553, September 18, 1979, United States District Court, C. D. California.


Ramirez & Feraud Chili Co. v. Las Palmas Food Co., 146 F.Supp. 594, November 8, 1956, United States District Court S.D. California, Central Division.


The Roseric, 254 F. 154, November 22, 1918, District Court, D. New Jersey.


Vacuum Oil Co. v. Eagle Oil Co. of New York, 154 F. 867, June 18, 1907, Circuit Court, D. New Jersey.


4 The U.S. State Court Cases

Com. v. Macloon, 101 Mass. 1, January Term, 1869, Supreme Judicial Court of Massachusetts.

Com. v. Smith, 11 Allen 243, November Session, 1865, Supreme Judicial Court of Massachusetts.


Commonwealth v. Peaslee, 177 Mass. 267, January 1, 1901, Supreme Judicial Court of Massachusetts, Essex.

Dempsey v. Chambers, 13 L.R.A. 219, September 3, 1891, Supreme Judicial Court of Massachusetts, Essex.

Elmer v. Fessenden, 5 L.R.A. 724, November 26, 1889, Supreme Judicial Court of Massachusetts, Franklin.

Hunt v. Coastal States Gas Producing Co., 570 S.W.2d 503, August 23, 1978, Rehearings Denied September 13, 1978, Court of Civil Appeals of Texas, Houston (14th Dist.).

Hunt v. Coastal States Gas Producing Co., 583 S.W.2d 322, June 13, 1979, Rehearing Denied July 18, 1979, Supreme Court of Texas.

Milliken v. Pratt, 125 Mass. 374, October 4, 1877, September 12, 1878, Supreme Judicial Court of Massachusetts.

Moran v. Dunphy, 52 L.R.A. 115, January 4, 1901, Supreme Judicial Court of Massachusetts, Suffolk.


State v. Carter, 27 N.J.L. 499, June Term, 1859, Supreme Court of New Jersey.


State v. Piver, 74 Wash. 96, June 13, 1913, Supreme Court of Washington.

Weil v. Black, 76 W.Va. 685, October 5, 1915, Supreme Court of Appeals of West Virginia.
Bibliography

1.1 Books


1.2 Articles


### 1.3 Other Consulted Relevant Literature

#### 1.3.1 Books


### 1.3.2 Journal Articles


Comment. (1971). Fifth Circuit Rules That FTC May not Find a Section 5 Unfair Practice Absent some Violation of the Letter or Spirit of an Antitrust Statute. 71, 476-487.


Epstein, D. (1960). Trade Regulation - The Knowing Inducement or Receipt of Discriminatory Advertising Allowances Prohibiting by Section 2(d) of the Amended Clayton Act Constitutes


Hondius, E. (2002). Good Faith in European Contract Law - A First Publication of the Trento Common Core Project; Good Faith in European Contract


Huffman, M. (2013). A Global Collection; The Global Limits of Competition Law, by


Note. (1964). Standing to Sue for Treble Damages under Section 4 of the Clayton Act. 64, 570-588.


