

International Cartels: Who's Liable? Who's Not?

Tracking a Moving Target

Ronald W. Davis

For about half a century antitrust did not concern itself with international cartels—either they were not there, or the enforcers could not find them. Then, beginning in the latter part of the 1990s, a series of criminal actions under the Sherman Act against international cartels led ineluctably—as civil actions followed the criminal prosecutions—to the exposure of significant gaps and ambiguities in the legal treatment of international cartels.

Where anticompetitive behavior in foreign countries has no adverse effect on competition in the United States, foreign purchasers and other victims have no U.S. antitrust claim. That much is clear under the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (FTAIA).¹ But what about foreign victims of a true international cartel—one that reduces competition both in the United States *and* abroad? Are their Sherman Act claims barred by the FTAIA and/or principles of standing? Or do deterrence and other policy considerations require that foreign victims should be able to sue in the United States?

Two recent cases are of particular moment. In *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002), the Second Circuit may have created a conflict among the circuits as to whether foreign purchasers from an international cartel have a right of action under U.S. law—and brought to a screeching halt the hitherto strong trend against such claims. And in *Paper Systems Inc. v. Nippon Paper Industries Co.*, 281 F.3d 629 (7th Cir. 2002), decided February 6, the Seventh Circuit indicated that foreign participants in international cartels may be liable to U.S. purchasers to whom they did not sell, whether or not they are also liable to foreign purchasers, to whom they *did* sell.

It makes a difference who is liable in an international cartel context; it makes a difference who has a claim and who does not; and it makes a difference who gets left holding the bag. First, enormous sums of money may turn on the answers to still controversial questions—which makes these questions important to the parties involved, and to their counsel. Second, precisely *because* enormous sums of money are involved, the answers can make a big difference in deterring (or providing an incentive for) anticompetitive conduct. And third, getting the application of the Sherman Act to international cartels right is an important building block in the foundation of a multi-national antitrust enforcement system.

Thus . . .

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¹ *E.g.*, *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 922 (E.D.N.Y. 1985) (lack of anticompetitive effect in the United States doomed antitrust action against defendant, a consumer of services of destination tour operators in St. Kitts, who allegedly excluded plaintiff from that market by refusing to do further business).

Assume a Cartel

Assume an international cartel. Assume the members of the cartel include, among others, DM (a U.S. domestic manufacturer) and FM (a foreign manufacturer selling solely to foreign buyers, i.e., with no sales directly in or into the United States). Assume that without FM's participation in the cartel, the U.S. side of the conspiracy would have been ineffective (because U.S. buyers would have responded to an artificial price increase by purchasing in competitive foreign markets).

Assume a suit for damages under the Clayton Act, seeking damages for violation of the Sherman Act, as amended by the FTAIA, brought against all the members of the cartel including DM and FM. The plaintiffs include (1) FP (a foreign entity that does not do business in the United States, is not affiliated with any U.S. entity, and buys directly from FM, solely outside the United States) and (2) DP (a U.S. entity whose only direct purchases from members of the cartel were from DM, such sales having occurred solely in the United States).

This not-so-hypothetical hypothetical raises several interesting questions:

Question 1. Has FM—which does not sell in or into the United States—violated the Sherman Act, or, on the contrary, is its participation in the cartel exempt by reason of the provisions of the FTAIA? (Some courts imprecisely formulate this question by asking whether the FTAIA affords “subject matter jurisdiction” over FM.)

Question 2. If the answer to Question 1 is that FM did not violate the Sherman Act, the logical implication is not only that FM owes no Clayton Act damages to FP, the foreign direct purchaser, but *also* that

- *domestic* purchasers from the cartel, like DP, have no claim against FM under a theory of joint and several liability, and that
- no one may seek to enjoin FM, under Section 16 of the Clayton Act, from further cartel activity, and that
- FM has *no criminal liability* for violation of the Sherman Act.

Is each of these seemingly logical implications correct? (Note that a number of Sherman Act criminal cases have actually been brought against alleged foreign cartel participants; indeed, most of the civil cases discussed in this article have parallel criminal prosecutions.²)

Question 3. Now assume that FM's participation in the international cartel *is* a violation of the Sherman Act, as amended by the FTAIA. On that assumption, do entities such as FP, which purchased only outside the United States, have a claim for damages against FM under Clayton Act Section 4,³ 15 U.S.C. § 15, or, on the contrary, are such claims barred by principles of standing?

Question 4. Finally, continuing to assume that the foreign cartel participant, FM, *did* violate the Sherman Act, is FM jointly and severally liable (along with domestic defendants such as DM) for injuries caused by the cartel to *U.S.* direct purchasers from the cartel—regardless of whether the Clayton Act claims of foreign purchasers might be barred for want of standing?

² United States v. Nippon Paper Indus., 109 F.3d 1, 2 (1st Cir. 1997) (upholding government's right to prosecute international members of alleged thermal fax paper cartel); United States v. J. Alfred Taubman, Crim. No. 01 CR 429 (GBD) (S.D.N.Y. filed May 2, 2001) (auction house cartel); United States v. Lonza AG, Crim. No. 3-98-CR-338-R (N.D. Tex. filed Mar. 1, 1999) (vitamins); United States v. UCAR Int'l, Inc., Crim. No. 98-177 (E.D. Pa. filed Apr. 7, 1998) (graphite electrodes); United States v. HeereMac, v.o.f., Crim. No. 97 CR 0869 (N.D. Ill. filed Dec. 22, 1997) (heavy-lift barge services).

³ Assuming, of course, there is personal jurisdiction over FM, venue is proper, and the action is not barred by the doctrine of *forum non conveniens*. These same assumptions apply to Question 4 as well.

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One Year Ago

As of the summer of 2001, four recent cases had addressed Question 1⁴—whether a foreign participant in an international cartel, who sells only outside the United States, has engaged in conduct violative of the Sherman Act, as amended by FTAIA—and all had answered in the negative. In *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1059 (2002), over a vigorous dissent by Judge Patrick Higginbotham, the court held that heavy-lift barge service providers, alleged cartel participants, were not liable to a foreign purchaser. In *In re Microsoft Corp. Antitrust Litigation*, 127 F. Supp. 2d 702 (D. Md. 2001), the Sherman Act claims of foreign direct purchasers from an alleged worldwide monopolist were held to be barred by the FTAIA; the question was certified to the Fourth Circuit, which continues to ponder it. In *Kruman v. Christie's International*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001), *aff'd*, 284 F.3d 384 (2d Cir. 2002), the court held that buyers and sellers from London branches of Sotheby's and Christie's could not recover under the Sherman Act for alleged conspiratorial overcharges. (As noted above, the Second Circuit has recently reversed the district court. A petition for rehearing or hearing *en banc* is pending in the Second Circuit as of this writing.) Finally, the court in *In re Copper Antitrust Litigation*, 117 F. Supp. 2d 875 (W.D. Wis. 2000), held that buyers on the London Metals Exchange, who allegedly were illegally “squeezed” as part of an international scheme affecting prices in the United States, had no action against cartel participants.

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Each of these courts faced the challenge of construing the language of the FTAIA, which provides that the Sherman Act,

shall not apply to *conduct* involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such *conduct* has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) *such effect gives rise to a claim* under the provisions of [the Sherman Act], other than this section.

If [the Sherman Act] applies to such conduct only because of the operation of paragraph (1)(B), then [the Sherman Act] shall apply to such conduct only for injury to export business in the United States. (emphasis added)

The Supreme Court has called this language “unclear” in important respects, *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 n.23 (1993), and many would agree, yet these courts generally agreed, in the words of the Fifth Circuit, that “the *plain language* of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.” *Den Norske*, 241 F.3d at 428 (emphasis added).

In general, these courts reasoned that

- the word “conduct,” as used in the FTAIA, should not be read to mean the act of joining in a cartel but rather the act of selling to a foreign purchaser at a price that includes an anti-competitive overcharge, and that

⁴ See Ronald W. Davis, *Developments: International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 ANTITRUST, Summer 2001, at 53 (outlining the issues in greater detail and discussing the four cases cited in this paragraph). See also Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122 (2001).

- subsection (2) of the statute should be construed as if it read “such [direct, substantial, and reasonably foreseeable anticompetitive] effect gives rise to *the* claim” by the particular plaintiff in the lawsuit—instead of “a claim,” in other words, a claim by anyone entitled to sue for antitrust relief.⁵

Although these four cases focused on the FTAIA, two of them, *Copper* and *Microsoft*, particularly the latter, gave some attention to standing as well.⁶ To the extent they addressed the subject, not surprisingly, they found a lack of standing.

The Weight of Authority Grows Heavier

Several other cases continued the trend against allowing claims by foreign purchasers. In *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, No. Civ. 001686TFH, 2001 WL 761360 (D.D.C. June 7, 2001), Judge Hogan ruled that a purported class of purchasers of price-fixed vitamins, who took delivery outside the United States, were barred by FTAIA subsection (2) from pursuing Sherman Act claims because no anticompetitive effect in the United States resulted from their having paid an overcharge on foreign purchases. In the alternative, the court ruled that such claims were also barred for want of standing.⁷ An appeal is pending in the D.C. Circuit.

In *Ferromin International Trade Corp. v. UCAR International, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001), foreign purchasers from the alleged international graphite electrode cartel were permitted to pursue Sherman Act claims for sales invoiced from the United States, but not for purchases made outside the United States, even though the members of the cartel were U.S.-based companies. The Third Circuit is considering an appeal.

Finally, in *Sniado v. Bank Austria AG*, 174 F. Supp. 2d 159 (S.D.N.Y. 2001), the court addressed a U.S. antitrust claim arising from an alleged agreement among European banks to inflate fees for exchanging European currencies. Some of the allegedly inflated fees may have been charged on transactions occurring in the United States, but the salient point was that the plaintiff had suffered injury only on transactions in Europe. Judge Schwartz discussed the case law in some detail and dismissed the complaint based on the “majority view” that, to survive FTAIA scrutiny, the injury of which plaintiff complains must be one and the same as the injury that creates the requisite “direct, substantial, and reasonably foreseeable [anticompetitive] effect” in the United States. *Id.* at 163.

In sum, by early 2002, as the cases piled up, they showed a very strong trend away from permitting U.S. antitrust damages claims by foreigners purchasing abroad from participants in international cartels. In a brief opposing certiorari in *Den Norske*, the Antitrust Division and the Federal

⁵ In his *Den Norske* dissent, Judge Higginbotham was scathing in his criticism of what he saw as his colleagues’ disregard of the difference between the definite and the indefinite article. 241 F.3d at 432.

⁶ In *Microsoft* Judge Motz rejected the claims for lack of standing after citing with approval an earlier unreported case, *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C 97-3259FMS, 1997 WL 732498, at *1–*2 (N.D. Cal. Nov. 19 1997), which had found FTAIA “subject matter jurisdiction” over a claim by foreign citric acid purchasers buying abroad from foreign manufacturing facilities owned by U.S.-based alleged cartel participants.

⁷ In a companion ruling, however, the court distinguished *Empagran* and permitted Sherman Act claims by “American companies or subsidiaries of American companies that have purchased substantial volumes of vitamins for delivery both in the United States and abroad as part of a global procurement strategy formulated and directed by United States parent corporations whereby these plaintiffs suffered ultimate financial injury in the United States.” *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 755852, at *2 (D.D.C. June 7, 2001). The reasoning underlying this distinction is thin and difficult to follow, especially in view of abundant authority holding that derivative injury to shareholders does not afford antitrust standing. *See, e.g.*, *Information Resources, Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 417 (S.D.N.Y. 2000) (U.S. parent company had no antitrust derivative claim for injuries suffered by foreign subsidiaries, allegedly due to anticompetitive conduct by the defendant).

Trade Commission likewise opposed recovery by foreign purchasers suing in the United States.⁸ At the same time, the courts were backing away from the proposition that participation by foreigners in international cartels is not “conduct” forbidden by U.S. antitrust law and were instead hanging their hats on the alternative, and more limited, rationale that an antitrust plaintiff’s claim may not be heard unless that plaintiff has suffered antitrust injury in the United States.

By adopting that more limited justification—bypassing the question of whether a foreign cartel participant violates U.S. law in the abstract—the courts were able to avoid issues such as whether a foreign cartel participant could be criminally indicted in the United States, or whether it could be enjoined to cease its cartel activity. The no-U.S.-anticompetitive-injury rationale suffers, however, from certain embarrassments, which the case law noted above arguably has not explained away. These include

- the need to ignore that pesky indefinite article in FTAIA subsection (2), pretending that the statutes says “*the* claim” when it actually says “*a* claim,”
- the fact that Congress simply did not have international cartels in mind when it drafted the FTAIA in 1982, but was instead thinking about other issues altogether, and
- the consequent need to read the legislative history in a rather selective manner.⁹

Second Circuit Rejects the Weight of Authority; Seventh Circuit Just Ignores It

Unintimidated by the weight of authority prohibiting foreign claims against international cartel participants, on March 13 of this year, the Second Circuit reversed the district court’s decision in the auction house cartel litigation. *Kruman v. Christie’s International PLC*, 284 F.3d 384 (2d Cir. 2002). In doing so, the court harkened back to its pre-FTAIA decision in *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981), and reaffirmed that the Sherman Act applies to foreign conduct that “injures domestic commerce by either (1) reducing the competitiveness of a domestic market; or (2) making possible anticompetitive conduct directed at domestic commerce.” *Kruman*, 284 F.3d at 394. The Second Circuit said that the alleged agreement “could be an agreement to fix prices in both foreign and domestic auction markets,” *id.* at 401, in which case the first leg of the test would apply, that is, the defendants’ conduct had reduced the competitiveness of a U.S. domestic market. Alternatively, said the court, the complaint might be read as alleging “an agreement to fix prices in a foreign auction market that made possible an agreement to fix prices in the domestic auction market.” *Id.* In other words, even if there were “separate” foreign and domestic conspiracies, the complaint alleged that the foreign conspiracy was essential to make the domestic conspiracy work. Thus the second prong of *National Bank* would be satisfied.

Essentially embracing Judge Higginbotham’s dissent in *Den Norske*, the Second Circuit firmly rejected the two theories on which prior courts had held foreign plaintiffs’ claims barred by the FTAIA. First, the court held that “the word ‘conduct’ [in FTAIA] refers to any conduct that would violate . . . the Sherman Act absent the FTAIA. Such conduct necessarily focuses on the acts of the defendant, not the injury to the plaintiff needed to bring a Clayton Act case.” *Id.* at 398.

⁸ The government argued that the Fifth Circuit’s decision does not prejudice U.S. criminal enforcement against international cartels, that taking *cert* would be premature in view of the fact that several circuits are considering the FTAIA’s impact on suits by foreign purchasers, and that, in any event, the Fifth Circuit’s decision was correct. Brief for the United States and the Federal Trade Commission as Amici Curiae, *Statoil ASA v. HeereMac V.O.F.*, No. 00-1842 (U.S. Sup. Ct. filed Jan. 3 2002), available at <http://www.usdoj.gov/atr/cases/f9800/9844.htm>.

⁹ For a somewhat more detailed treatment of these matters, see Davis, *supra* note 4.

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Second, the court disagreed with the assertion that “subsection 2 of the FTAIA changed the *National Bank of Canada* test to require that the ‘effect’ on domestic commerce be the basis for the alleged injury suffered by the plaintiff.” *Id.* at 399. That way of looking at things, said the court, (1) confuses the Sherman Act (which specifies the acts that violate the law) with the Clayton Act (which specifies who has a claim for damages), (2) ignores the favorable citation to *National Bank of Canada* found in the FTAIA’s legislative history, and (3), perhaps most egregiously, rewrites the statute to replace the indefinite with the definite article—most definitely a no-no. *See id.* at 399–400.

One hopes, however, that before breaking out the champagne the plaintiffs in *Kruman* continued reading to the end of the opinion. Rather than simply permitting the foreign purchasers to proceed with their damages claim, the appellate court remanded for consideration of the defendants’ argument on venue as well as their contention that, even if the defendants’ alleged London activities violated U.S. law in the abstract, the plaintiffs nevertheless lacked standing to seek damages for that violation.

Addressing standing, the court briefly, but cogently, identified the relevant issues for consideration in the standing inquiry: balancing the additional deterrence effect of permitting U.S. suits by foreign plaintiffs against the burden on the U.S. judicial system of permitting foreign antitrust plaintiffs to litigate in the United States. *Id.* at 403.

The court harkened back to a significant pre-FTAIA precedent, *Pfizer, Inc. v. India*, 434 U.S. 308 (1978), which held that a foreign government purchaser from U.S. based producers that had cartelized a world market was a “person” within the meaning of the Clayton Act and could pursue an antitrust claim. Although the *Pfizer* Court did not analyze the issue in terms of “standing,” it did discuss at some length the need to decide the case in such a way as to deter future antitrust violations, a concern we recognize today as vital to the “standing” inquiry.¹⁰

Pfizer involved a U.S.-based cartel operating in many countries, not a true international cartel involving foreign participants, and hence the Supreme Court had no occasion to focus on the question of how U.S. antitrust would apply to true international cartels. Similarly, there is no real evidence that Congress had international cartels in mind when it enacted the FTAIA in 1982.

The decision of the *Kruman* panel may be reversed as a result of the petition for rehearing or hearing *en banc*. If, however, the decision stands, on remand the district court will be forced to grapple with a hitherto unresolved mystery; it must decide whether, even if a foreign cartel participant “violates the Sherman Act” in the abstract, a foreign purchaser nevertheless lacks standing to seek damages. The factors that the court will presumably consider in making this decision are not precisely the standing factors laid out in *Associated General Contractors*¹¹ (AGC), for a conventional domestic context, but there is a certain similarity.

(a) For example, one AGC factor is the nature of the injury and the relation between the injury and the purposes of the antitrust laws. In addressing whether foreign purchasers have standing, courts will no doubt emphasize that it is not a purpose of U.S. antitrust to preserve competitive conditions in foreign countries for the sake of foreign consumers and competitors (a point made in many of the cases discussed above).

¹⁰ For example, in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court ruled that direct purchasers may sue to recover their entire overcharge, even if they have passed it on to others, because awarding a windfall to direct purchasers makes antitrust private enforcement more efficient and thus serves to deter violations.

¹¹ *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534–45 (1983).

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(b) *AGC*, like *Illinois Brick*¹² and other standing authorities, is grounded in large part on concern for efficient antitrust enforcement, in order to deter conduct harmful to U.S. consumers and the U.S. economy. But, in this day and age, is U.S. enforcement the only effective deterrent against international cartels? On the one hand, foreign antitrust enforcement has come a very long way since *Pfizer* was decided in 1978. On the other hand, the U.S. treble damages civil action remains a more fearsome and potent enforcement tool than private antitrust remedies in non-U.S. jurisdictions. It follows that depriving foreign purchasers of a U.S. damages claim will, to some non-trivial extent, reduce the risk of participating in an international cartel, and thereby make joining a cartel a more profitable proposition than it otherwise might be.

(c) Another fundamental policy underlying classic cases like *Illinois Brick* and *AGC* is to keep U.S. private antitrust enforcement efficient by avoiding undue burdens on the courts. (That concern, for example, led the *Illinois Brick* Court to instruct the lower courts to eschew any damages pass-on determination.) Similarly, it is legitimate for a court addressing foreign purchaser standing to be concerned that allowing such claims might place a heavy burden on the U.S. judicial system, not only to the detriment of domestic antitrust plaintiffs but also to the prejudice of all involved in the administration of justice.

All this awaits resolution. And that is where the matter of foreign purchaser/international cartel damages now stands—in a word, unresolved.

Meanwhile, in Chicago, in February of this year, one month before the *Kruman* reversal, the Seventh Circuit, per Judge Easterbrook, issued its opinion in *Paper Systems Inc. v. Nippon Paper Industries Co.*, 281 F.3d 629 (7th Cir. 2002), and, in so doing, passed up a golden opportunity to address the issue of how to read the FTAIA. In that case, following Sherman Act criminal indictments, paper distributors sued thermal fax manufacturers, alleged participants in an international cartel, seeking damages. One of the manufacturers, Nippon Paper,

sold its output *in Japan* to Japan Pulp & Paper Co. and Mitsui & Co., which resold through subsidiaries around the world. Neither [of the two direct purchasers] is alleged to have participated in the conspiracy. . . . Neither of these firms joined the suit or expressed any interest in suing.

Id. at 632 (emphasis added). (The court gave no hint that the foreign purchasers' failure to pursue private antitrust actions might have been due to any legal inability to do so.)

The legal consequence of these facts, as the court explained, is that, under the rule of *Illinois Brick*, “no damages may be awarded to the three plaintiffs (or any class member) on account of Nippon Paper’s sales.” *Id.* at 632.

But, said Judge Easterbrook, the lower court missed the boat when it leapt from the correct premise that Nippon Paper’s sales are out of the case to the erroneous conclusion that “Nippon Paper cannot be liable” at all. *Id.* To the contrary, there is nothing in *Illinois Brick* that trumps the rule of joint and several liability for all who participate in a conspiracy that violates U.S. antitrust law. Hence, as long as Nippon Paper’s status as a member of the cartel remains to be determined, it is possible that that defendant might be found jointly and severally liable for all the sales that *are* in the case, even though that figure does not include any sales by Nippon Paper itself! Thus, ruled the Seventh Circuit, the district court erred in dismissing Nippon Paper from the lawsuit.

Judge Easterbrook failed to address the legal significance of the fact that all of Nippon’s sales were made “in Japan” (to quote the court) to non-U.S. direct purchasers. If the Fifth Circuit’s major-

¹⁰ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

ity holding in *Den Norske* were applied to those facts, then it should follow that Nippon Paper did not engage in “conduct” within the scope of the Sherman Act, as amended by the FTAIA. That, in turn, would mean that the district court’s decision to dismiss Nippon Paper from the case was actually correct, albeit for the wrong reason.

Did Judge Easterbrook just overlook the latent FTAIA issue? Did he think the Fifth Circuit’s view was so wrongheaded that it deserved the back of his hand (i.e., the silent treatment)? Or did he consciously, perhaps, decide to avoid creating a conflict among the circuits as to FTAIA?

Enquiring minds want to know.

And suppose—just for the sake of an interesting discussion—that foreign purchaser claims are held barred on standing grounds while *Nippon Paper* continues to be good law. In that case,

- most sales by foreign cartel participants would be excluded from the calculation of damages in a U.S. antitrust proceeding—which would make participation in a cartel vastly more enticing than it otherwise might be—
- *but*, if there ever is a lawsuit, the U.S. conspirators will have the foreign conspirators in the case with them, to help them pay damages to U.S. purchasers—which would *further* reduce the expected downside of joining a cartel, making conspiracy yet more attractive.

And that, some might think, would be a fine how do you do.

In Conclusion: So Much for “Plain Meaning”

Plain as the nose on your face, plainer than the plainest vanilla, is the plain meaning of the FTAIA, is the conclusion of court after court. According to the Second Circuit panel in *Kruman*, the FTAIA clearly and plainly condemns the conduct of foreign participants in anticompetitive activity that has an anticompetitive effect in the United States, even where the sales in question are made to foreign purchasers outside the United States. It was, however, equally clear to the Fifth Circuit majority in *Den Norske* that such conduct is plainly outside the scope of U.S. law, per the FTAIA. And to the Seventh Circuit in *Nippon Paper* the application of U.S. law to the conduct of a foreign cartel participant was evidently so plain that the question was not even worth raising.

In general, the lower court decisions discussed above exhibit an equal level of certainty about the meaning of the FTAIA. Viewed as a whole, these decisions give new meaning to the phrase, “Often in error, but never in doubt.”

One may reasonably conclude that trying to find the answer to this conundrum by staring long and hard at the language of the FTAIA is about as profitable as consulting a ouija board. The relevant question, it seems, is not how to construe the FTAIA, but rather how to apply principles of standing. The relevant policy concerns are foreshadowed in *Pfizer* and readily gleaned from a thoughtful reading of the leading cases on domestic standing.

Missing from these policy concerns are fairness and equity. Domestic standing law affords wind-fall damages to direct purchasing wholesalers and other intermediaries, who passed on the overcharge, while denying the claims of indirect purchasing consumers who wind up holding the bag. Applying the same rule to the claims of foreign direct and indirect purchasers would only add to the inequity.

But letting foreign direct purchasers sue in U.S. courts would add materially to the deterrent effect of American antitrust law. The relevant policy concerns, thus, are essentially twofold, and they point in opposite directions: deterrence of international cartel activity versus burden on the U.S. judicial system. In the final analysis, one may speculate, burden will trump deterrence, and foreign purchasers will ultimately return to their home courts. ●