Private Enforcement Against International Cartels in Latin America: A US Perspective

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Private Enforcement Against International Cartels in Latin America: A US Perspective

DANIEL A CRANE

A recent empirical study estimates that from 1990 to the end of 2005, 283 private international cartels were discovered and that the overcharges from these cartels totaled $500 billion. Estimates of the percentage of all detected cartels range from one in six or seven to one in 10. If the one in 10 number is correct, that would mean that overcharges from international cartels in the last 15 years were $5 trillion, or about $330 billion per year. Even assuming that the detection rate is higher today due to the success of the US Justice Department's leniency program and stepped up anti-cartel enforcement around the world, it is clear that international cartels exact hundreds of millions of dollars in illegal overcharges from consumers around the world every year. Indeed, as John Connor shows in his chapter in this volume, international cartels impose overcharges that exceed those of purely domestic cartels.

The United States historically has been the leader in private anti-cartel enforcement. Features that make cartel enforcement in US courts attractive include class actions, broad discovery rights, a judiciary receptive to antitrust claims, a well-developed body of cartel law, liberality in proof of damages, and the treble damages remedy. As long as the US played a dominant role in private anti-international cartel

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1 Professor, Benjamin N Cardozo School of Law.
4 John M Connor, 'Latin America and the Control of International Cartels', ch XIV in this book.
enforcement, there seemed to be little need to encourage the development of private cartel enforcement in other countries.

However, a recent development in US law makes US courts inhospitable to claims by consumers who made their purchases in a foreign country from an international cartel that also operated in the United States. In *F Hoffmann-La Roche Ltd v Empagran SA*, the United States Supreme Court held that plaintiffs who bought the price-fixed goods in a foreign country cannot sue in the United States unless they can show that their particular claim arises from the cartel's anti-competitive effect in the United States. Although it remains to be seen how the lower courts will interpret *Empagran*'s new test, it seems unlikely that US courts will continue to be friendly to claims by foreign purchasers.

This paper explores the need for enhanced private anti-cartel enforcement in Latin America in light of *Empagran* and what we have learned about international cartels from contemporaneous economic scholarship. *Empagran* creates both a need and an opportunity for private anti-cartel enforcement in Latin America. Contrary to the fears of many opponents of private enforcement, however, such enhancement of private antitrust enforcement need not extend beyond cartels or open a 'Pandora's box' of private antitrust litigation abuses.

Part I of the chapter surveys the *Empagran* decision, paying particular attention to the role of *amicus curiae* briefs by foreign governments. Seven foreign governments (Germany, Belgium, Canada, Japan, Great Britain and Northern Ireland, Ireland, and The Netherlands) submitted four *amicus curiae* briefs, all of them urging the Court to adopt a rule restrictive on the rights of foreigners to sue in US courts. Several of the briefs argued that allowing foreign purchasers to sue in the US could stifle the development of private anti-cartel enforcement in other countries. For example, the brief submitted on behalf of Great Britain, Northern Ireland, Ireland, and The Netherlands argued that the institutional distinctiveness of the private anti-cartel enforcement apparatuses emerging in those jurisdictions could be destroyed if foreign plaintiffs were constantly abandoning their home courts to sue in the US. The success of these appeals for space to create a culture of indigenous private enforcement provides motivation for institutional reforms that would enable such a culture to emerge in Latin America.

Part II considers the challenges facing private cartel enforcement in Latin America—which range from the lack of private rights of action to enforce anti-cartel laws, to various administrative, procedural, evidentiary and cultural hurdles. It singles out three issues as particularly important for private anti-cartel enforcement: claim aggregation, access to information, and judicial or administrative competence.

Part III makes the case for at least a limited regime of private anti-cartel enforcement. Although I have written critically about private antitrust enforcement

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in the US and its dulling effects on public enforcement,\(^5\) it is important to separate anti-cartel enforcement from antitrust enforcement more generally. If there is ever an appropriate place for private antitrust enforcement, it is against cartels. To be clear, I do not claim that consumers are the *best* anti-cartel enforcers. The most socially costly effect of a cartel’s supracompetitive pricing is not that consumers pay more but that some consumers substitute to other products (which creates a deadweight loss); yet would-be consumers of the cartelized products usually will not have standing to assert a claim. So government enforcement should always remain the centerpiece of any anti-cartel program, and it is critical that private enforcement not be allowed to detract from the government’s anti-cartel mission. Nonetheless, private enforcement provides a valuable complement to government enforcement and, if properly structured, could redound to the benefit of Latin American consumers.

Private anti-cartel enforcement is not a silver bullet that will instantly and without cost slay the cartels. Private litigation can be distracting and expensive, and foreign observers often rightly react to the excesses of US litigation culture. Creating a system of private antitrust litigation must be part of a larger package of properly balanced institutional choices.

I. The Challenges of Empagran

A. The Vitamins Cartel and the Jurisdictional Reach of US Antitrust Law

Beginning in the 1990s, a gigantic and complex international vitamins cartel took shape.\(^6\) It included multinational corporations located in Belgium, France, Germany, Japan, The Netherlands, Switzerland, and the United States. The victims of the cartel, however, did not correspond neatly with the countries in which the co-conspirators were located. One economic study estimated that the ‘Vitamins, Inc’ cartel (as its own members called it) affected over $34 billion of commerce, that the cartel members earned between $9 and $13 billion of profits, and that 58 per cent of these profits were taken from consumers outside the US, the EU and Canada.\(^7\) In the private litigation that followed, the plaintiffs included vitamin wholesalers from Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia, Ukraine and the United States.

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\(^7\) Klevorick and Sykes, above n 6, at 363, citing estimates by John M Connor.
The cartel seems to have been cracked by the US Justice Department, in cooperation with many other antitrust authorities. The Department credited its leniency program, which grants amnesty from criminal prosecution to cooperating defendants in certain circumstances. In particular, the Department cited the cooperation of Rhône-Poulenc, which was the first member of the cartel to cooperate.

Competition authorities in the US, Australia, Canada, the European Union, Japan and South Korea levied substantial fines against the cartel. For present purposes, the interesting aspect of the case concerns the private lawsuit brought under US antitrust law in the US District Court in Washington, DC. The Washington litigation included as plaintiffs both companies that had bought vitamins in the US and companies that had bought vitamins outside the US. The claims of the foreign purchasers raised an interesting and unresolved issue of US antitrust law: can plaintiffs who pay too much money for products outside of the US because of a global price-fixing conspiracy that also harms US consumers sue under the Sherman Act?

Prior to the Empagran case, the lower federal courts had resolved this issue in conflicting ways. For example, the federal appeals court in New York had held that people who bought and sold art in the Christie's and Sotheby's auction houses in London could bring claims under federal antitrust law when Christie's and Sotheby's fixed buyer and seller commissions in both London and New York. The New York court interpreted the relevant federal statute, the Foreign Trade Antitrust Improvements Act (FTAIA), to permit the claims by the foreign purchasers and sellers since the same price-fixing conspiracy also harmed US purchasers and sellers. On the other hand, the federal court of appeals in Texas rejected that position and held that foreign purchasers who did not make their purchases in the US market could not sue under the Sherman Act.

The Supreme Court of the United States accepted the vitamins case for review and sided with the interpretation of the Texas court. The Court's reasoning in interpreting the FTAIA is somewhat technical and dense, and need not detain us here. The upshot is that the Court held that a foreign plaintiff cannot establish that the Sherman Act applies to his claims unless he can show that his injury arose from anti-competitive effects in the US market. In other words, the only way that a foreign purchaser of a price-fixed product could sue under the Sherman Act would be if he established not only that the same cartel that fixed his prices also fixed the prices of US consumers, but additionally that the cartel was only able to

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8 Empagran SA v F Hoffman-La Roche, Ltd, No Civ 001686 (TFH) (DOC, 2006).
9 Kruman v Christie's Intern PLC, 284 F 3d 384 (2d Cir 2002).
10 15 USC § 6a.
11 Christopher Mason, The Art of the Steal: Inside the Sotheby's–Christie's Auction House Scandal (Putnam, 2004) tells an engaging story of the history of the Christie's and Sotheby's price-fixing conspiracy. As with the vitamins cartel, the Justice Department's leniency program played an important role in the detection and prosecution of the cartel's leaders.
12 Den Norske Oljeselkap As v HeereMac Vof, 241 F 3d 420 (5th Cir 2001).
fix the prices in the foreign market because of its success in fixing the prices in the US market.

It remains to be seen whether this test will effectively curtail any suits in the US by foreign purchasers from international cartels. In *Empagran*, the Supreme Court left open the possibility that the plaintiffs could establish US jurisdiction by establishing that their injury was not caused independently of the harm to the US market. On remand, however, the federal appeals court in Washington, DC, construed this potential loophole very narrowly, holding that a plaintiff would have to show 'a direct causal relationship' between the US injury and the foreign injury. 15

There remains also the possibility that a foreign purchaser could sue in US courts under the law of a foreign country, and hence get the benefit of liberal US discovery rules and the general receptiveness of US courts to private litigation. A few plaintiffs have tried this strategy, 16 thus far without any success.

So it is a good bet to assume that, for all intents and purposes, the US courts are now closed to claims by foreign purchasers who bought from international cartels. Whether this is a good or a bad thing is not the focus of this paper. As we shall see, however, the decision was applauded by a number of non-US governments.

**B. The Enforcement Gaps Created by *Empagran***

As noted earlier, the *Empagran* plaintiffs included Mexican, Panamanian and Ecuadorian companies that imported vitamins into Latin America. There is no doubt that the vitamins cartel had a serious negative impact on consumers in Latin America. However, the Court prohibited the Mexican, Panamanian and Ecuadorian plaintiffs from having their claims heard in the United States.

One reaction is 'who cares?' After all, the cartel was discovered, punished by competition officials in the US, Australia, Canada, the European Union, Japan and South Korea, and cartel members paid over $900 million in fines in the US and approximately the same amount in fines in other jurisdictions. Additionally, cartel members paid $2 billion to settle the civil cases. Further, at least 11 individuals received jail sentences. 17

It is not as if the Mexican, Panamanian and Ecuadorian plaintiffs would have turned around and issued refund checks to their customers if they had received damages. As I will discuss momentarily, anti-cartel enforcement is more important for its deterrent rather than for its compensatory effects. So why is it important

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14 *Ibid*, at 175.
15 *Empagran SA v F Hoffman-La Roche, Ltd*, 417 F 3d 1267, 1271 (DC Cir 2005).
for Latin America to allow private rights of action when the rest of the world seems to be doing such a good job at deterring international cartels?

Part of the answer is that Latin America should not assume that the US, EU and other large antitrust enforcers have the interests of Latin American consumers at heart. As Al Klevorick and Alan Sykes have written, 'the United States is largely free to shape its policy toward international cartels to promote the national interest'.

And it often does so. For example, the US has a statute called the Webb-Pomerane Act that exempts export cartels from US antitrust law. So long as they do not raise prices in the US, a cartel of US vitamin producers would be free under US law to fix prices for vitamins exported into Latin America.

Why would the US allow such a thing to happen? United States antitrust enforcement officials routinely refer to cartels as a form of theft. Why would the US permit US companies to steal from Latin American consumers? The answer is that what is bad for Latin American consumers may be good for US companies, and indirectly for the US economy.

It is a well-known fact that cartels simultaneously harm consumers and help producers. Cartels benefit producers in two different ways. For one, price fixing allows producers to raise prices above a competitive level and hence transform consumer surplus into producer surplus. But beyond these wealth transfers, there may also be some efficiencies from price fixing. Price fixing may allow producers to engage in better planning, eliminate waste and coordinate activities in a way that helps them to save production costs. It may also allow smaller firms that could not otherwise compete enter the market.

Such efficiency arguments for price fixing are never admissible in US antitrust cases. In Latin America, however, the story is much more nuanced. Some Latin American countries, including, for example, Peru, Colombia and Mexico, follow a rule of per se illegality for price-fixing arrangements. Other countries, like

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18 Klevorick and Sykes, above n 6, at 378.
21 The WTO Secretariat has recognized that export cartels may have some associated efficiencies, although it has expressed doubt that this is very often the case. Report by Secretariat, WTO Doc WT/WGTCP/M/21 (2003), at 44.
22 See generally, D Daniel Sokol, 'What Do We Really Know About Export Cartels and What is the Appropriate Solution?' 4 Journal of Competition Law & Economics 967–82 (2008) (arguing that the effects of export cartels are not well understood).
23 Examples of cases where US courts held that the defendants were not allowed even to argue that their cartel behavior was efficiency justified include United States v Socony-Vacuum Oil Co, 310 US 150 (1940) and Addystone Pipe & Steel Co v United States, 175 US 211 (1899), aff'd 85 F 271 (6th Cir 1898).
Venezuela, follow a general rule of per se illegality for price fixing, subject to the possibility of block exemptions for price-fixing behavior. Some jurisdictions, like Argentina and Brazil, reject per se treatment and require proof of economic harm—or at least market power from which economic harm can be presumed—in every case. In some jurisdictions, like Chile, it is unclear whether or not the per se rule applies to cartel behavior.

So, there is far from consensus on whether cartel behavior can ever be justified. But even where the inclination is not to permit cartelists to attempt to justify their conduct in the ordinary case, the justification for per se treatment lies not in the impossibility that a cartel would ever have efficiency benefits. Rather, it lies in the near certainty that cartels will harm consumers and the extremely high probability that whatever efficiencies a cartel may produce will be insufficient to offset the harm. The per se rule is a rule of judicial administrability, not a statement of absolute confidence that cartel arrangements never create efficiencies.

Now suppose that the producer benefits from cartelization are felt only in the domestic market and the consumer harms are felt only in the foreign markets. In that case, from the perspective of the domestic economy, price fixing looks like a good deal. The domestic producers will make more money, and hence create more jobs and pay more taxes in the domestic market. The cartel will affect terms of trade. Moreover, the domestic jurisdiction will not have to internalize the harms of the anti-competitive conduct. Export cartels are just like aiming a giant smokestack across a country’s border so that all of the pollution is absorbed by another country. They are a highly effective way to internalize benefits and externalize costs.

The problem with relying on the US and the EU to police international cartels does not stop at export cartels. Suppose that the G7 countries perfect anti-cartel enforcement to the point that they reach a ‘Beckerian equilibrium’ in G7 markets—that is to say, a point where everyone knows that the expected cost of price fixing (the probability of detection times the penalty) exceeds the profits to be made from price fixing. Now suppose that you are the vitamins cartel and you know that it is economically irrational to fix prices in G7 countries because the expected penalty outweighs the expected benefit. There is still a great deal of money to be made by price fixing in other jurisdictions, including those in Latin America, that do not have nearly as aggressive anti-cartel enforcement. Even if you are caught in one or two of the jurisdictions, the fines that you will pay are far less than the profits you are going to make by price fixing across the region.
The famous US Supreme Court Justice Oliver Wendell Holmes had an interesting approach to legal analysis. He said that we should look at the law from the perspective of the 'bad man', the man who cares only for the legal consequences of his behavior. So think about anti-cartel enforcement from the perspective of the 'bad men' in the cartels. To them, anti-cartel enforcement is just a cost of doing business. As anti-cartel enforcement gets 'better' from the perspective of consumers, the cost of doing business goes up from the perspective of the cartelists. And what happens when the cost of doing business goes up in one place? Economic theory predicts that, over time, business will tend to shift to lower-cost places of doing business. So if anti-cartel enforcement gets progressively better in G7 countries then one prediction is that more and more international cartel behavior will be directed at countries—including those in Latin America—where the ‘costs of doing business’ are comparatively lower. This may not be true of industries that are inherently local because of high transportation costs or local market peculiarities, but it is true of many fungible and portable products that have been the subject of international cartels. In other words, the success of international anti-cartel enforcement in the US, EU and Japan may be a magnet for more cartel behavior in Latin America.

Thus far, I have only made the case that the Empagran carve-out of non-US purchaser claims combined with improved anti-cartel enforcement in G7 countries creates the possibility for worse cartel conditions in Latin America. This suggests that there is an imperative to step up anti-cartel enforcement in Latin America. It does not yet establish the case for private enforcement. For a perspective on that issue, we now turn to the amicus briefs of the foreign governments.

C. The Foreign Government Amicus Curiae Briefs

It is customary in US courts—particularly in the Supreme Court—for people, corporations, governments, etc, who are not parties to the case but have an interest in its outcome to file amicus curiae briefs urging their view of the case on the Court. When the Empagran case reached the Supreme Court, seven foreign governments (Germany, Belgium, Canada, Japan, Great Britain and Northern Ireland, Ireland and The Netherlands) submitted four amicus curiae briefs, all of them urging the Court to adopt a rule disallowing suits by foreign purchasers in US courts.

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The briefs articulated a number of common themes. All assured the Supreme Court that their native jurisdictions were vigorously engaged in anti-cartel measures and that they did not require supplementary enforcement by private plaintiffs in US courts. All worried that a decision allowing suits by foreign plaintiffs would impede vigorous anti-cartel enforcement in their domestic jurisdictions, for example by discouraging cartelists to seek leniency in exchange for cooperation. The governments all argued that a rule allowing foreign purchaser claims in US courts would violate the sovereignty of the foreign governments, that it would contradict principles of international law, and that it would fail to comport with universally recognized principles of comity.

All of the governments but Japan emphasized an additional point of particular importance here: each jurisdiction allowed private rights of action to recover damages for price fixing. Analytically, this argument was presented with two different emphases.

First, the briefs stressed that allowing foreign purchaser suits in the US would seriously undermine the development of indigenous private enforcement in the amici countries because certain features of the US civil litigation and antitrust system—particularly treble damages, contingency fee arrangements, one-way attorney fee shifting, class actions, and liberal discovery rules—would inevitably drive all of the foreign purchaser plaintiffs to the United States. For instance, the UK Brief argued strenuously that allowing foreign purchaser claims would harm the private antitrust enforcement in the governments’ own jurisdictions:

Expanding the jurisdiction of this generous United States claim system could skew enforcement and increase international business risks. It makes the United States courts the forum of choice without regard to whose laws applies, where the injuries occurred or even if there is any connection to the court except the ability to get in personam jurisdiction over the defendants. Lord Denning best captured these anomalies when he observed: ‘As a moth is drawn to the light, so a litigant is drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.' Smith Kline & French Labs Ltd v Bloch, [1983] 1 WLR 730 (CA 1982). Enlarging the prescriptive jurisdiction of the United States to provide a US antitrust remedy to foreign buyers with no cognizable US nexus will attract even more litigants and will increase the number of private antitrust claims filed in United States courts.

The governments also made a second point: in their own national deliberations, they had rejected many of the aspects of US civil litigation that made litigation in US courts so attractive to plaintiffs. For example, the Irish Government pointedly

32 Although there is a theoretical possibility of private antitrust enforcement in Japan, there appear to be few if any successful private cases. See Wolfgang Wurmnest, ‘Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of US Antitrust Law’ 28 Hastings International & Comparative Law Review 205, 213 (2005), n 40 (collecting sources).

33 UK Brief, above n 31, at *13–14. See also Canada Brief, above n 31, at *14 (noting that the ‘policy of the United States permitting recovery of treble damages in civil antitrust actions likely would prove powerfully attractive to most Canadian plaintiffs injured by anti-competitive behavior in Canada’).
noted that class actions are not allowed in Ireland. The Canadian Government noted that Canada deliberately rejected the treble damages model because 'punitive sanctions for illegal cartel behavior [may] be imposed only through prosecutions initiated by the Government'. The UK and Northern Ireland, Ireland and The Netherlands also pointed out that none of them would dream of giving cartel cases to juries which are 'swayed by emotional appeals', a comment more notable for its accuracy than its tact. (As a side note, Ireland does in fact give criminal cartel cases to juries. In March 2006, two years after the Empagran brief, the Competition Authority secured its first criminal conviction, by a jury, against Michael Flanagan (trading as Flanagan Oil), who was fined €3,500 for his participation in a domestic heating oil cartel.)

Belgium and Germany made this point about rejecting the US private litigation system even more aggressively. Not only did their governments reject many of the remedial aspects of US private litigation, but they did so in part because of a conscious policy decision to prefer public anti-cartel enforcement to private anti-cartel enforcement. Thus Germany stated that '[w]hile in Germany private parties can also claim damages, see GWB § 33, Germany's focus in obtaining the desired deterrent effect of illegal restraints of trade is on prosecution through its competition authorities.' Similarly, Belgium noted that '[i]n Belgium, although private claims for damages are available in civil courts, the Belgian competition regime primarily utilizes a number of administrative and enforcement bodies to investigate and prosecute violations of the Belgian Act.

The consensus of the government amici briefs on these points should be of interest to Latin American governments. Although the foreign amici briefs nominally spoke only for themselves, they clearly intended to convey a unified message about how antitrust enforcers from around the world viewed the importance of private anti-cartel enforcement in their own jurisdictions. We now turn to the relevance of these arguments for anti-cartel enforcement in Latin America.

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34 UK Brief, above n 31, at *5.
35 Canada Brief, above n 31, at *2.
36 UK Brief, above n 31, at *15.
37 I have been similarly critical of the role of juries in antitrust cases, although cartel cases are, of all antitrust cases, the ones in which juries probably perform the best. See Daniel A Crane, 'Technocracy and Antitrust' 86 Texas Law Review 1159 (2008). In any event, this point is largely moot in the context of this article, since very few other jurisdictions use juries for antitrust cases.
39 Germany Brief, above n 31, at *11–12. Despite this disclaimer, in 2005 Germany adopted an amendment to its Competition Act that has led to significant enhancement in private party damages claims following on public findings of competition law infringements. ICN, Interaction of Public and Private Enforcement in Cartel Cases, Report of Cartels Working Group to International Competition Network Annual Conference (Moscow, May 2007), at 2.
40 Germany Brief, above n 31, at *13.
II. The Status of Anti-Cartel Enforcement in Latin America

Generalizing about competition institutions in a region as vast and diverse as ‘Latin America’ is a dangerous undertaking, particularly for an outsider such as myself. The suitability, practicability and relative importance of private anti-cartel enforcement may differ on a country-by-country basis. Nonetheless, there are some general points that can be made. In this section, I make two: first, public anti-cartel enforcement in Latin America is progressing, but only cautiously and sometimes unevenly; and, secondly, there are a number of general obstacles to the success of private anti-cartel enforcement that need to be addressed if private enforcement is to become an effective tool.

A. Anti-Cartel Enforcement and Private Rights of Action—Country Summaries

What is the status of anti-cartel enforcement in Latin America, both public and private? To give what I understand to be a representative taste, I summarize some key findings from a recent OECD Peer Review Report on competition policy in five leading Latin American jurisdictions.

1. Argentina

The OECD Report commends Argentina for giving its National Commission for the Defense of Competition (CNDC) ‘sufficient investigative tools for anti-cartel work’. Recent enforcement actions in the cement industry resulted in record fines of US $106 million, and another US $24 million was imposed for price fixing in the liquid oxygen industry. But despite the existence of adequate procedural tools, such as dawn raids, and the success of some high-profile enforcement actions, the OECD reports that it is suspected that ‘cartel activity is rife in Argentina’ and that the CNDC may not have the political will to move aggressively against cartel behavior. Private parties can initiate proceedings by lodging a complaint with the Commission, and there is theoretically a private right of action for damages.
2. Brazil

Brazil’s Conselho Administrativo de Defesa Econômica (CADE) has stepped up anti-cartel enforcement in the last decade, particularly since 2003.\(^{46}\) For example, a 2004 price-fixing decision fined the distributors of liquid petroleum 15 per cent of their annual revenues and imposed an additional fine of 10 per cent of the company’s fine on each company’s owner.\(^{47}\) Brazil has adopted an effective leniency program.\(^{48}\) Under Article 29 of Law 8884, private parties may file damages actions for antitrust violations under the Consumer Defense Code.\(^{49}\) However, there are no available records of how many such private cases have been filed, and Brazilian authorities believe that the number is small.\(^{50}\)

3. Chile

As noted earlier, there is some uncertainty as to whether cartel behavior is per se illegal in Chile. There have been a few anti-cartel prosecutions, including a 1995 pharmacy case where three incumbent pharmacies were fined about US $80,000 and a fourth new entrant about half that amount.\(^{51}\) In general, the OECD Report describes the Chilean approach to competition law enforcement as ‘cautious’. Chile has a theoretical private right of action for damages for violation of competition law, but such an action cannot proceed until a Commission has found that the defendant violated the law, because a civil court would not be independently competent to make such a decision.\(^{52}\) Competition authorities do not track the number of private cases filed, and the frequency of such cases is unknown.\(^{53}\)

4. Mexico

Following ratification of the North America Free Trade Agreement (NAFTA), Mexico adopted a Federal Law of Economic Competition (LFCE), which was intended to move Mexico toward more robust market competition.\(^{54}\) Until the mid-1980s, prices for most goods and services were fixed by law, usually as the result of agreements by ‘business chambers’ subject to the control of the Ministry of the Economy.\(^{55}\) In the early years of the LFCE, the competition authorities devoted much of their time to rooting out the old ‘business chamber’ cartel culture.\(^{56}\) Since 1998, the pace of such enforcement has slowed considerably. There has been only one criminal enforcement—a 2000 price-fixing case involving tortilla

\(^{46}\) OECD Peer Review Report, above n 24, at 105.
\(^{47}\) Ibid, at 76.
\(^{48}\) Ibid, at 108.
\(^{49}\) Ibid, at 125.
\(^{50}\) Ibid.
\(^{51}\) Ibid, at 218.
\(^{52}\) Ibid, at 210.
\(^{53}\) Ibid.
\(^{54}\) Ibid, at 261.
\(^{55}\) Ibid, at 268.
\(^{56}\) Ibid.
manufacturers. Similarly, anti-cartel enforcement outside the business chamber arena has slowed to a trickle in recent years. The Federal Competition Commission (CFC) feels that it needs enhanced tools, including dawn raid and leniency powers, better to combat cartels. Under Article 39 of the LFCE, when the CFC has found an antitrust violation, private parties that can prove in a Commission proceeding that they suffered damage may sue the responsible party in court for damages. Through 2002, at least, no such actions had been initiated.

5. Peru

Competition enforcement in Peru is conducted by the Institute for the Defense of Competition and Intellectual Property (INDECOPI), an autonomous government agency that generally receives good marks for its independence and vigor. In the 1997 landmark 'chicken case', INDECOPI fined a poultry cartel over US $2 million for price-fixing activities. Private parties may initiate INDECOPI proceedings, but the Commission is not authorized to award damages. If the Commission finds a competition law violation, that finding is conclusive proof in any subsequent private action for damages in court, but it is unknown whether any such actions have been filed.

6. Summary

The general tenor of the OECD's Report is to praise the enforcement institutions for meaning well and taking some positive steps toward establishing anti-cartel precedents and raising the visibility of the prohibition on price fixing and other cartel behavior. However, an equally important theme is that the victories so far have been largely symbolic, and that many Latin American economies remain rife with unchallenged cartel behavior. As to private enforcement, one can perhaps draw on an analogy that a US court once drew to the Louvre's statue of the Venus de Milo: she is 'much admired and often discussed, but rarely embraced'. While theoretically available everywhere, it seems that private anti-cartel enforcement is a rare occurrence. The next section considers why this may be.

B. Hurdles to Private Enforcement

From a chauvinistic US perspective, it is tempting to say that private anti-cartel enforcement does not succeed in Latin America (as it does not in much of the

57 Ibid, at 269.
58 Ibid.
59 Ibid, at 270.
61 Ibid.
63 Ibid, at 340.
64 Ibid, at 371.
65 McGahee v Northern Propane Gas Co, 858 F2d 1487, 1495 (11th Cir 1988).
world) precisely because of the absence of most of the characteristics of US civil litigation that drew the ire of the foreign government *amici in Empagran*—treble damages, discovery, class actions, juries, joint and several liability, no right of contribution among defendants, contingency fees, attorney fee-shifting, etc. And indeed, the EU’s 2005 Green Paper and 2008 White Paper on private antitrust enforcement recognized many of these features as being *possibly* necessary to achieve effective private enforcement.66

But other jurisdictions need not mimic the entire US system in order to have effective private antitrust enforcement. Rather, in keeping with the overall perspective of the foreign government *amici*, private enforcement needs to grow indigenously—to appropriate existing institutions and apparatuses rather than to attempt to transplant US features wholesale. With this in mind, I consider three of the most significant obstacles to effective private anti-cartel enforcement that need to be addressed, but which need not necessarily be addressed as they are in the US.

1. **Aggregation of Claims**

As noted earlier, in its *Empagran amicus* brief the Irish Government pointedly noted that class action treatment was foreign to Irish law. Is the availability of class actions necessary to any effective antitrust enforcement? The answer is no, although with some exceptions.

Class actions—or any claim-aggregation procedure—need not be available for private antitrust enforcement to succeed when there is concentrated harm from the anti-competitive conduct. This is particularly true as to monopolization or abuse of dominance, for example, where the most likely plaintiff is an injured competitor. Class actions are not necessary for private enforcement to succeed against Microsoft when firms like Novell and AOL stand ready to jump into the breach.

On the other hand, some form of claim-aggregation procedure is necessary when the harm of the conduct is almost entirely dispersed on thousands or millions of consumers, none of whom has a sufficient individual incentive or resources to sue. Unlike in the Microsoft case, where consumers were injured but so were competitors, cartel behavior often does not injure competitors at all. Unless there is some mechanism for aggregation of the claims, the availability of the private right of action may remain a theoretical possibility only.

Paradoxically, even though the US has by far the most liberal class action rules in the world, the need for class actions in cartel cases may be *weaker* in the United States than in much of the rest of the world. This is because antitrust standing rules in the US tend to give standing to large corporate buyers like wholesalers

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or retailers rather than consumers—plaintiffs who suffer concentrated harm. The US generally follows a 'direct purchaser' rule, in which the direct purchasers of the price-fixed good have standing to sue even though they may have passed on the overcharge by reselling the good at a marked-up price and hence avoided economic injury. Conversely, injured consumers who pay a higher price but do not purchase directly from the cartelists are denied standing.

But this does not appear to be true in most other jurisdictions that are developing private anti-cartel enforcement. According to a 2007 study of a number of jurisdictions by the International Competition Network (ICN), while the vast majority of the jurisdictions surveyed had not explicitly considered either the direct purchaser rule or the 'passing on' defense, most would probably invoke unjust enrichment principles to deny recovery to a wholesaler or retailer who simply passed on the overcharge. Conversely, the ICN study concluded that the vast majority of surveyed jurisdictions would probably allow suits by indirect purchasers. In other words, in most jurisdictions the parties with standing to sue cartels are often going to be the end users who suffer widely dispersed harm and, hence, have relatively little incentive to sue.

So some form of claim aggregation is important, but it need not mirror the US model. The ICN reports that class actions are available in five of the jurisdictions it surveyed. It also notes that there is a variety of similar models for aggregating claims, including public interest litigation, representative actions, joinder of individual claims and parens patriae litigation.

One interesting example is Brazil's Consumer Defense Code (Law 8078), which creates a series of state and local consumer protection agencies called 'Procons' that are located in all 26 Brazilian states, in the Federal District (Brasilia), and in 670 municipalities. The Procons, either upon a consumer complaint or their own initiative, can initiate class action lawsuits for damages on behalf of injured consumers. Similarly, Brazilian law allows non-governmental

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68 *Hanover Shoe Inc v United Shoe Machinery Corp*, 392 US 481 (1968). It bears noting that the *Illinois Brick* and *Hanover Shoe* rules apply only in federal lawsuits. In *California v ARC America Corp*, 490 US 93 (1989), the Supreme Court held that federal antitrust law does not preempt state antitrust laws that allow indirect purchaser suits. A number of states have allowed such indirect purchaser suits. Further, the Congressionally appointed Antitrust Modernization Commission recently made a recommendation for legislative reforms that would overrule both *Hanover Shoe* and *Illinois Brick* and allow for removal of state cases to federal court and consolidation of all damages claims as to a particular violation. Report and Recommendation of the Antitrust Modernization Commission Chapter Two (Apr 2007), <http://www.amc.gov/report_recommendation/.chapter3.pdf>. The court would then make a determination of what the total monopoly overcharge was, treble the overcharge, and allocate the damages pot to the different plaintiffs based on the proportion of their individual injuries to the total.

69 ICN, above n 39, at 12.
70 Ibid.
71 Ibid., at 24.
72 Ibid., at 24–25.
73 *OECD Peer Review Report*, above n 24, at 97.
consumer organizations to file antitrust class actions seeking damages. As noted earlier, very few such cases have been filed, but at least there is an indigenous model of claim-aggregation that could be brought to bear on the collective action problems that cartels create.

2. Access to Information

A major impediment to private anti-cartel enforcement in many jurisdictions is that private plaintiffs often lack the procedural tools necessary to obtain information about the cartel. Since cartels are usually covert and secretive, amassing the documentary evidence necessary to make out a case often proves difficult.

The United States is often thought to be particularly plaintiff-friendly because of its liberal discovery rules—which essentially allow plaintiffs to demand that the defendants produce any documents that are relevant to the plaintiffs’ claims. While depositions of the defendants’ executives are also allowed, those may be less available in cartel cases since the individuals may choose to invoke their Fifth Amendment rights against self-incrimination. Nonetheless, US discovery rights tend to be very broad.

Recently, however, the availability of discovery in cartel cases may have been somewhat contracted. In *Bell Atlantic Corp v Twombly*, the United States Supreme Court held that plaintiffs in cartel cases must plead facts which, if true, would directly establish the existence of the conspiracy, and that they may not simply rely upon the existence of parallel behavior by the defendants in the marketplace. This pleading must occur—and be sufficient to satisfy the trial court—before the plaintiffs can get any discovery. In other words, plaintiffs must have some internal evidence of the conspiracy before they can use the process of discovery to search for additional evidence supporting their claim.

Pre-trial discovery is said to be virtually non-existent in many Latin American jurisdictions. As long as this remains true, it is doubtful that a regime of effective private anti-cartel enforcement can emerge. It is not helpful to respond that in many jurisdictions potential private plaintiffs are able to participate in the anti-cartel proceedings brought by the competition authorities and, hence, gather some information that may be useful in subsequent civil litigation. That makes private litigants’ access to court entirely dependent on a prior enforcement action by the competition authorities. As I will discuss momentarily, perhaps the chief benefit of private enforcement is to spur the competition authorities to action when they are otherwise disposed to do nothing.

When it comes to international cartels, it might be thought that the best solution for private litigants in jurisdictions without strong discovery rights

74 Ibid, at 125.
75 Fed R Civ P 26(b)(1).
is to free-ride on discovery efforts in more discovery-friendly jurisdictions, particularly by seeking documents or other information collected in US discovery. But that solution also turns out to be largely illusory. United States courts often impose strict protective orders on the litigants that prohibit them from sharing information learned in discovery, or using that information for any purpose other than the conduct of the case. Similarly, information collected by US antitrust enforcement authorities pursuant to civil investigative demands must be treated as confidential and cannot be disclosed to third parties.  

Some form of private discovery in Latin American jurisdictions is thus critical to the success of private anti-cartel enforcement. The obvious problem is that the absence of discovery rights is not peculiar to anti-cartel enforcement—it is a deeply-rooted aspect of Latin American civil litigation culture. Perhaps the Twombly decision suggests a plausible model for justifying creating some limited discovery rights in cartel cases: plaintiffs should not be able to get access to documents and other evidence from defendants unless they can assert facts—with a reasonable degree of particularity—evidencing the existence of the conspiracy. Such a threshold requirement for getting discovery would prevent the filing of speculative, harassing or unfounded claims. And what facts might count as sufficient to open the door to discovery? As to international cartels, the fact that the defendant has been indicted on charges of international cartel behavior in another jurisdiction, or that plaintiffs in another jurisdiction have unearthed facts sufficient to survive a motion to dismiss—as disclosed in a court decision—should perhaps count as sufficient (assuming, of course, that the defendant also does business in the relevant Latin American jurisdiction). In this way, facts unearthed in other jurisdictions could serve as an influential threshold showing in Latin American antitrust litigation—a showing sufficient to accord the private plaintiffs their own discovery rights.

3. Judicial Competence and Acceptance

The OECD Peer Review Report on Latin America notes as to Mexico that the competition authority’s (CFC) experience in the district courts before generalist judges does not augur well for private enforcement.  

78 15 USC § 1313.
79 OECD Peer Review Report, above n 24, at 296.
80 Ibid, at 296.
Fortunately, judicial competence is probably the least serious problem as to cartel cases. Certainly, it takes a judge very knowledgeable about economics and antitrust principles to try an abuse of dominance, rule of reason, merger or price discrimination case. But cartel cases often involve fewer questions of economic policy—after all, the per se rule (in those jurisdictions that follow it) is intended to simplify the plaintiff’s proof and avoid difficult balancing questions. Of course, cartel cases are not free from difficult economic questions. An important and complex issue will often be how to calculate and allocate the plaintiffs’ damages. But, in general, cartel cases are the easiest of private antitrust cases for generalist judges to handle. They are in many ways much more like traditional fraud or conspiracy cases with which commercially sophisticated judges will be familiar.

There is also the possibility of creating specialized antitrust courts, or allowing the existing competition courts to hear private cases. For example, Canada is cautiously experimenting with opening up its Competition Tribunal—which until recently has been reserved for Competition Bureau enforcement—to private litigants. Similarly, the Indian Competition Commission, which was created by a 2002 overhaul of India’s antitrust laws, has the power to award compensation to any person who makes application seeking compensation from any enterprise for any loss or damages caused by a violation of the competition law. Similar moves may be constitutionally barred in jurisdictions that employ a completely administrative—as opposed to judicial—process for competition enforcement. In that case, it may be wise to focus on seminars and other forms of training on private cartel litigation for commercial judges—if not the creation of specialized antitrust courts.

III. The Benefits and Limits of Private Anti-Cartel Enforcement

We come, finally, to the question ‘Why?’ Why should Latin America look favorably on private anti-cartel enforcement? In this last section, I first make the case for private anti-cartel enforcement (although not necessarily the conventional case). I then acknowledge and examine a key limitation of private anti-cartel enforcement—a limitation that justifies the position of the German and Belgian Governments that private anti-cartel enforcement will always remain secondary to public enforcement. Finally, I try to quell some of the most alarmist suspicions about allowing private anti-cartel enforcement—particularly the view that this

would be a Trojan Horse, leading to an unbounded, US-style system of private antitrust litigation.

A. The Benefits of Private Enforcement

There has been much talk in recent years about the benefits of private anti-cartel enforcement. In its Empagran amicus brief, the UK Government informed the Supreme Court that it recognized the need to enhance private antitrust enforcement in the UK.\(^83\) In 2008, the European Commission produced a White Paper on the need for a more efficient system for bringing damages claims for infringement of EC antitrust law.\(^84\) The ICN’s 2007 study on private anti-cartel enforcement noted that ‘there have been a number of substantial changes in the last few years in many national legal systems to improve the situation of private plaintiffs’.\(^85\)

But what is the value of private anti-cartel enforcement? In the literature, it is common to hear about two primary objectives: enhanced enforcement because of greater resource commitment, and compensation of injured parties.\(^86\) I will briefly argue that compensation is overrated as a justification for anti-cartel enforcement, that resource enhancement is a good justification, but that there is a third—and even more compelling—justification that has not received sufficient attention.

1. Compensation

There is no doubt that it would be socially desirable to use antitrust law to compensate the victims of cartels, just as it is good to use the law to compensate people who have been robbed.\(^87\) Unfortunately, antitrust law does a very poor job of this. This is not because courts, agencies and plaintiffs ignore compensation goals. Rather, it goes back to an earlier point in this chapter about the widely distributed nature of cartel harms. If 10 million people have each paid $20 too much for vitamins, the overcharge from the cartel is $200 million, a large sum to be sure. But the cost of identifying each of the 10 million people and issuing them a refund

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\(^{83}\) UK Brief, above n 31, at *15, citing UK Dept of Trade and Industry, ‘Real Redress for Harmed Parties’ in A World Class Competition Regime (Government White Paper, Cm 5233, July 2001), 47–48 (noting recommendation by the Department of Trade and Industry Report to create ‘a system in the UK where private actions are less inhibited than at present’).

\(^{84}\) White Paper, Commission of the European Communities, Damages for Breach of the EC Antitrust Rules, (SEC, Brussels, Apr 2, 2008).

\(^{85}\) ICN Report, above n 39, at 2.

\(^{86}\) See White Paper, above n 84 (arguing that compensation should be the primary goal of private antitrust enforcement and that added deterrence is a secondary goal).

\(^{87}\) I stress the word socially because it hard to justify compensation of injured consumers as an economic goal of anti-cartel enforcement. Economics is principally concerned with preventing deadweight losses caused by anti-competitive behavior, not with any particular distributive theory of market behavior.
check in proportion to their purchases, may well exceed the $20 each person paid in overcharges.

The US experience on this is illustrative. Realizing that the costs of issuing checks to the members of the injured class were often prohibitive, creative lawyers instead invented other ways in which the injured consumers could be compensated. For example, the settling lawyers would have the defendants agree to issue coupons to class members that could be used against future purchases from the defendants. Often, these coupons go unclaimed and unused. Further, they can simply encourage the defendants to raise the price of their products (thus wiping away any compensatory benefit), or can cause inefficient over-consumption by the compensated class. In 2005, the US Congress passed the Class Action Fairness Act, which was designed to rein in perceived abuses in coupon settlements.

I do not claim that the parties injured by cartel behavior are never fairly compensated in private litigation. If the injured party is a large business purchaser that buys the price-fixed item for incorporation into another product (say, for example, a hospital that buys medical supplies, or a car company that buys steel) and faces elastic demand for the downstream product it sells, it may actually absorb a large share of the overcharge and recoup meaningful sums of money through private litigation. Consumers, however, rarely get much valuable compensation from private anti-cartel litigation (which is not to say that they do not benefit from private anti-cartel enforcement). After lawyers' fees and administrative fees, each consumer's share of the recovery is often negligible, even though the harm across the class is great. Compensation is a much more attainable goal of private antitrust enforcement in cases where the harm is concentrated than in cases where it is widely dispersed.

2. Resources

If compensation is a noble but fairly unrealistic goal of private anti-cartel enforcement, adding further resources to the fight against global cartels is both a noble and realistic goal. In the United States, we often refer to the benefits of having 'private attorneys general,' private lawyers who perform a public function. One of the chief reasons for having private attorneys general is that the resources of the existing attorney general are often limited. Further, the budgets (not to mention aggressiveness) of public enforcers are usually dependent on the will of the legislature or other organs of government, and hence may ebb

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88 See A Mitchell Polinsky, 'A Damage-Revelation Model of Coupon Remedies' 23 Journal of Law, Economics & Organization 653, 653 (2007). Polinsky summarizes the literature critical of coupon settlements, but argues that coupons may be socially efficient if they are designed as an alternative to cash and make the defendant bear costs that better reflect the harms they have caused.

89 Class Action Fairness Act, Pub L 109-2 (Feb 18, 2005).

and flow with changes in overall budgetary priorities. Private antitrust enforcers are not dependent on budgetary allocations, and hence provide a steady stream of enforcement regardless of the resources (or politics) of the administration in office.

The amount of money invested in public antitrust enforcement in Latin America seems trivial compared with the challenges of anti-cartel enforcement (much less all competition law enforcement). Argentina's 2005 CNDC budget was less than US $750,000, with only 53 devoted person-years.\(^91\) Chile's National Economic Prosecutor's Office had a budget of US $2.25 million in 2001, but that office has responsibilities beyond antitrust enforcement.\(^92\) In 2003, Peru's INDECOPI had a budget of only US $183,000.\(^93\) Of the five countries surveyed by the OECD, Brazil with US $7 million in competition enforcement resources in 2004\(^94\) and Mexico with a competition law enforcement budget of almost US $16 million in 2002\(^95\) had the most well-funded antitrust enforcers. But even those numbers seem trivial compared with the challenges of anti-cartel enforcement.

To put the Latin American budgetary numbers in perspective, consider the fact that the attorney's fees award made to the primary law firm representing the class of domestic purchasers in the Christie's/Sotheby's commission-fixing case was over $27 million.\(^96\) And, mind you, the auction house attorney's fees award was not some unusually high fluke. If anything, it was lower than many comparable attorney's fees awards, because the federal district judge, Louis Kaplan, submitted the lead attorney role to competitive bidding.\(^97\) In other words, the attorney's fees awarded in a single US cartel case where the judge reined in the attorney's fees exceeded the entire annual competition enforcement budgets of the first, second, third, fifth, and seventh largest Latin American economies combined.

Of course, such comparisons are not entirely fair. A dollar buys you much more enforcement in Latin America, where labor costs are lower, than it does in the US—although, of course, the quality of the services may vary by country. And the attorney's fees awarded to the Boies, Schiller law firm in the auction house cases represented a share of the settlement, not their actual expenses. But still, there is no doubt that the level of resources devoted to public anti-cartel enforcement in Latin America is far too low to do the job adequately. Adding a meaningful system of private enforcement would quickly multiply the resources devoted to protecting Latin American consumers.

\(^91\) OECD Peer Review Report, above n 24, at 32.
\(^92\) Ibid, at 244.
\(^93\) Ibid, at 369.
\(^94\) Ibid, at 130.
\(^95\) Ibid, at 300.
\(^96\) In re Auction Houses Antitrust Litigation, 2001 WL 170792, at *18 (SDNY Feb 22, 2001).
\(^97\) In re Auction Houses Antitrust Litigation, 197 FRD 71 (SDNY 2000).
3. *Competition for Enforcement*

One benefit of private anti-cartel enforcement that has not received much attention should be obvious to antitrust lawyers: *competition*. Of course, we all hope that better anti-cartel enforcement will produce more competition in commercial markets, but enhancing private enforcement can produce a different kind of competition—competition among antitrust enforcers for more rigorous enforcement.

Part of the problem with relying solely on public enforcement is that public enforcement becomes an institutional monopoly. As with any monopoly, public enforcement monopolies will tend toward lethargy, conservatism (in its worst sense), risk aversion and inaction. Indeed, the prospect of enhanced private enforcement may sometimes draw the opposition of the incumbent antitrust enforcers precisely for the same reasons that State-owned enterprises resist the introduction of private competition. As already mentioned, the *OECD Peer Review Report* noted (with some exceptions) cautious and often inadequate anti-cartel enforcement in Latin America. The introduction of private enforcement would provide incentives for more vigorous public enforcement.  

Take, for example, the often-made claim that private enforcement can interfere with public enforcement by altering the balance of incentives that cartelists have to participate in leniency programs or to plead guilty to criminal charges. There is a simple solution to this problem: allow competition authorities to grant immunity—partial or full—from civil liability to cooperating defendants.  

In order to take advantage of this primacy over cartel enforcement, however, the enforcement agencies would actually need to investigate the case, crack the cartel using leniency programs or other enforcement tools, and reach a resolution with the cartelists. The presence of a vibrant culture of private litigation would give public enforcers greater incentives to pursue cartels vigorously in order to avoid being shown up by private enforcers. From a public choice perspective, governmental enforcers are assumed to maximize advancement of their own careers. It would not look good politically for private enforcers to win case after case that the public authorities had not even investigated.

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98 There are ways in which private litigation could lead to backlash against cartel enforcement. For example, injudicious private enforcers might bring actions against politically powerful interests that the government had avoided prosecuting. However, the net effect of increased private enforcement is likely to be greater transparency and more vigor in anti-cartel measures.

99 The US has a limited version of this. Under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub L No 108-237 (2004), defendants that qualify for the requirements of the leniency program receive a reprieve from the harsher aspects of US antitrust civil liability. Plaintiffs are limited to single (as opposed to treble) damages against them, and the cooperating defendant is not subject to joint and several liability.

As noted earlier, the Governments of Belgium and Germany cautioned that private enforcement should always be secondary to public enforcement. Even if that view prevails, it is quite sensible to keep private enforcement as a residual option to give the public enforcers the necessary incentives to do their jobs well.

B. The Limits of Private Enforcement

Having lauded the benefits of private anti-cartel enforcement, I must now take a step back and acknowledge a limit of private enforcement. Indeed, there is an oddity about placing emphasis on the importance of private anti-cartel enforcement. Even if private enforcement were encouraged, the consumers whose injury corresponds mostly closely to the greatest social harm of the cartel behavior would not typically be the parties bringing suit. To understand this, it is necessary to take a quick trip back to the economic foundations of antitrust policy.

When a cartel raises prices above competitive level, it causes at least two distinct kinds of harm. First, some consumers who would otherwise have purchased the product are no longer willing to purchase it at the higher price. Hence, they substitute to a second-best preference—which probably is not sold by the cartelists. We refer to the losses of these consumers as ‘deadweight’ losses, because they represent a class of forgone transactions that should have, in a competitive market, taken place. Economists identify these deadweight losses as the primary (or, to some, only) social costs of cartel behavior. They are a social cost because they result in misallocation of social resources—of customers buying their second-best rather than first-best preferences.

The second class of harm accrues to consumers who continue to purchase the product at the higher price. Their injury is a wealth transfer from consumers to producers. This is not necessarily inefficient in an economic sense, since it merely transfers money from one person to another (as opposed to affecting the deployment of scarce resources directly). There is nothing that can tell us a priori that the money is better off in the hands of consumers than in the hands of the producers—for example, if the price-fixed product is a luxury good, the price fixing may work as a progressive tax on rich consumers for the benefit of poor artisans.

For present purposes, it is unnecessary to make a detailed analysis of whether wealth transfers are an important subject of antitrust enforcement. The important point is that deadweight losses are clearly harmful and part of the core—if not the core—of antitrust enforcement. But private parties who sue cartels typically will not be suing to vindicate the interests of the consumers who stopped buying the price-fixed good because it was too expensive. For example, imagine the difficulty of representing a class of purchasers who stopped buying vitamins because of the vitamins cartel, or, even worse, who never started buying vitamins because of the excessive prices. How would you prove who they were, or quantify their injury? It is much easier to recover damages on behalf of purchasers who made the purchase but paid too much. There, the formula is simply to posit a but-for price and take the difference between the actual price and the but-for price as damages.
Private anti-cartel enforcement tends to focus on a set of purchasers and injuries that are, in my view, secondary in the hierarchy of antitrust concerns. Private enforcement does not seek compensation for or meaningfully analyze the key concern over deadweight losses. On the other hand, public enforcers typically seek penalties, not damages, and do not have to establish standing to sue or make the case on behalf of any particular class of purchasers. Rather, they can focus on the overall social harm of the conduct, and pursue remedies designed to deter and prevent such conduct in the future.

Hence, I am inclined to agree with the German and Belgian Governments that private anti-cartel enforcement is conceptually secondary to public enforcement. This is not a reason to deny private enforcement. Rather, it buttresses my earlier point that perhaps the most important function of private enforcement is to spur the government to action.

C. Private Anti-Cartel Enforcement Need Not Open Pandora’s Box

There is a good deal of skepticism in Latin America and around the world about creating US-style mechanisms for private enforcement of antitrust law. One often hears that private litigation in the US is out of control. The example of the woman who recovered $2.9 million from McDonald’ s after spilling hot coffee on herself is legendary the world over.\footnote{Andrea Gerlin, ‘A Matter of Degree: How a Jury Decided That a Coffee Spill is Worth $2.9 Million’ \textit{Wall Street Journal} (Sept 1, 1994), at A1.} I have been told by an individual involved in framing a new antitrust law in an Asian jurisdiction that this story is invoked whenever the possibility of private enforcement is mentioned. In its \textit{Empagran amicus curiae} brief, the UK cited a report of the UK Department of Trade and Industry finding that

many US commentators ‘view the number of private antitrust cases in the US as too high’ particularly because of ‘unscrupulous lawyers . . . quick to file vexatious actions—attracted by the prospect of treble damages.’\footnote{UK Brief, above n 31, at *15, citing UK Dept of Trade and Industry, above n 83. Despite stressing the need to ‘guard against the risks of the US system’, the Dept of Trade and Industry Report did recommend changes that would create ‘a system in the UK where private actions are less inhibited than at present’.}

Interestingly, even the OECD, which is generally supportive of enhanced competition enforcement, has expressed concern over the availability of a private right of action in the few Latin American jurisdictions where such a right exists. Consider, for example, the following statement from the \textit{OECD’s Peer Review Report} on Brazil:

Private plaintiffs in Brazil may file suit against seeking [sic] antitrust damages under Law 8884 and other laws. Just as exposure to prosecution under the Economic Crimes Law
can deter pro-competitive behaviour, exposure to private suits for antitrust damages can do likewise. Private damage suits may be commenced in any of Brazil's first instance courts, and there is no information available to determine how frequently such suits are undertaken or how often they result in awards against conduct not properly characterised as anti-competitive. One method for confining private suits to legitimate claims is to amend the law so that such suits may be filed only against parties and conduct that have been subject to a specific finding of illegality by CADE. Such an amendment could include a sunset clause under which the restriction would lapse after a certain number of years unless renewed. Such a clause would provide an opportunity to collect information about and assess the record of private antitrust enforcement in Brazil. If such legislation is not considered appropriate, efforts should nevertheless be undertaken to collect information going forward about the volume, nature, and outcome of private antitrust litigation.¹⁰³

This paragraph strikingly reveals the depths of the antipathy toward private rights of action in antitrust. Despite concluding earlier in the same Report that there have probably been very few private antitrust cases filed in Brazil, the authors of the Report were prepared to recommend at least a temporary moratorium on all independently initiated private antitrust actions so that a study could be done to ensure that the few private cases filed (if any) were not chilling pro-competitive behavior.

I am not unsympathetic to the claim that meritless private antitrust actions can chill pro-competitive behavior. One of the chief criticisms of private antitrust enforcement is that private rights of action lead to abusive suits by competitors.¹⁰⁴ In the United States, about two-thirds of private enforcers of antitrust are aggrieved competitors or other businesses vertically related to the defendant; fewer than 20 per cent are consumers.¹⁰⁵ There is ample evidence that businesses sometimes (and I believe often) abuse the private right of action by filing lawsuits that are primarily designed to harass their competitors and prevent vigorous competition and other efficient practices.

This concern, however, should not deter the creation of a private right of action directed against hard-core cartel behavior. Competitors typically will not have standing to sue the members of a cartel because they are not usually injured by

¹⁰³ OECD Peer Review Report, above n 24, at 164. Later in the Report, the authors again stress the need for study of private antitrust litigation in Brazil, repeating the concern that private litigation could be 'detracting from effective competition law enforcement'. Ibid, at 169.


¹⁰⁵ Lawrence J White, 'The Georgetown Study of Private Antitrust Litigation' (1985) 54 Antitrust Law Journal 59, 62. White reports that the Georgetown Study conducted on a sample of 2,500 antitrust cases from 1973–83 found that a third of private plaintiffs were defendant's competitors, another 30% were dealers or distributors, and less than 20% were customers or otherwise consumers.
cartel behavior. To the contrary, if the cartel succeeds in raising prices in the market, this will usually redound to the benefit of any firms that do not join the cartel. Indeed, returning for a moment to Oliver Wendell Holmes's 'bad man' perspective, the ideal position of a seller is for his competitors to form a cartel, raise prices artificially high, and implement strict production quotas. The non-participating seller can then make a fortune by 'cheating' slightly on the cartel price and vastly expanding his market share at a lucrative price.

Of course, some cartels can have exclusionary effects—for example, if they not only agree to fix prices, rig bids or divide territories, but also agree to boycott or otherwise impose economic sanctions on non-participating rivals. For example, the 1997 chicken case in Peru noted earlier involved a cartel agreement by poultry producers to limit production, exclude new entry, and even knock some existing producers out of the market. But if abusive suits by competitors of this stripe are a concern, one could limit the reach of the private right of action by specifying that only plaintiffs who have been injured as purchasers from or sellers to a cartel can sue.

The specter of private litigation running amok—of greedy lawyers harassing innocent businesses—is a real concern. But, in this regard, there is a vast difference in incentives and opportunities for abuse between private abuse of dominance litigation and private anti-cartel litigation. Abusive litigation is a comparatively minimal concern if the proposal is to establish a well-tailored program of private anti-cartel enforcement.

**IV. Conclusion**

This chapter has offered a US perspective on opening up private anti-cartel enforcement in Latin America. Writing from a US perspective comes with both benefits and drawbacks. The benefit is that the US has far more experience with private anti-cartel enforcement than any other jurisdiction. The drawback is that much of the world deliberately rejects many of the features of US civil litigation that make private enforcement so prevalent. Nonetheless, the trend around the world, including in the jurisdictions that filed the Empagran amici briefs, is to open up private antitrust enforcement. If there is any place for such measures, it is with respect to cartels, particularly international cartels. Private anti-cartel enforcement in Latin America need not follow a US model. It would be advisable, however, to move in the direction of building indigenous models that are sustainable and effective in bringing the benefits of private enforcement to Latin American consumers.

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