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Increasing Deterrence of International Cartels through Reliance on Foreign Decisions

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INTRODUCTION

Motivation: International hard-core cartels are a primary evil of global trade. Such cartels often create considerable harm to numerous jurisdictions and should be vigorously deterred. Yet one of the main obstacles to fighting international cartels is low deterrence levels. Low deterrence results, inter alia, from the fact that generally only a handful of jurisdictions prosecute international cartels. In particular, small and developing jurisdictions rarely bring such cases.[1] This is due, in part, to these jurisdictions' limited financial and human resources and the high costs of proving the existence of an international cartel. Coupled with the fact that many cartels are never detected at all, the result is that deterrence is far from optimal.

Basic idea: This article proposes a novel solution to this problem. It introduces a legal mechanism for enhancing the enforcement of competition laws against international cartels, which, in turn, would increase domestic as well as global deterrence and welfare. The basic idea is simple: allowing domestic courts and competition authorities to recognize and apply foreign courts' factual findings of international hard-core cartels in their own jurisdictions, provided that such reliance meets certain criteria to ensure that it is reasonable and fair (hereinafter "the Recognition-of-Judgments Mechanism").

Example: The United States found a cartel in the international air cargo market, which had substantial effects on many jurisdictions. Using the Recognition-of-Judgments Mechanism, other jurisdictions harmed by this cartel could use the U.S. factual findings of the existence, scope, duration and harm created by the international cartel as a basis for bringing suits against it in their own jurisdictions. Plaintiffs would only have to prove harm to their domestic markets and that the foreign decision meets the pre-specified criteria that ensure reasonable and fair legal reliance. This would enable many jurisdictions to overcome their largest obstacle to efficient enforcement against an international cartel: the lack of human and financial resources needed to prosecute it. As a result, deterrence of international cartels would increase dramatically.

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1. *See, e.g.*, Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 FORDHAM INT'L L.J. 1, 24–25 (2009)(an empirical analysis of such cases worldwide); Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801 (2004).

The Recognition-of-Judgments Mechanism extends the doctrine of issue estoppel to apply among different jurisdictions. By so doing, it significantly reduces the resource constraint problem — both financial and human — by skipping over the costliest, most human-resource-intensive, and most difficult stage in the trial: proving the existence of an international cartel. The plaintiff need only prove the local elements of the offense (generally damage to local markets) and that the foreign decision meets some pre-specified standards to ensure reasonable and fair reliance. Such proof is generally much less complicated and resource-intensive. Resources could thus be saved, and cases that ordinarily would not have been brought could be heard. Moreover, the Mechanism can also speed up enforcement.

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

The proposed Mechanism takes advantage of four related facts: (a) international cartels affect more than one jurisdiction and therefore a finding of such a cartel by one jurisdiction has relevance beyond its borders; (b) parallel prosecution of international cartels in different jurisdictions benefits all by increasing overall deterrence levels; (c) the Mechanism does not require collective action, as each jurisdiction unilaterally decides whether to apply it, regardless of the decisions of other jurisdictions; and (d) on a political level, the proposed Mechanism guarantees that an important part of the decision-making process remains in the hands of the domestic jurisdiction, by allowing it to determine the conditions under which the Recognition-of-Judgments Mechanism can be applied, if at all. Thus, the Mechanism can be viewed as a means for efficient and effective self-help by enabling jurisdictions to overcome the technical capacity and resource constraints that currently plague their enforcement efforts. It thus holds potential to increase deterrence of international cartels without harming the interests of any other jurisdiction.

The potential benefits in the adoption of the Mechanism are exemplified by the Brazilian experience. The Brazilian competition authority adopted a version of this solution. In the Vitamins Cartel decision, the authorities relied on the findings concerning the worldwide cartel by U.S. and EU antitrust authorities. These findings were treated as facts, or factual documents. The Brazilian authority then corroborated these findings with import data of the various types of vitamins imported by the alleged cartelists into Brazil.[2] As a result, the authorities fined the vitamin producers involved, as well as some of their executives.

2. Ministério da Justiça Conselho Administrativo de Defesa Econômica [CADE], Processo Administrativo no. 08012.004599/1999-18, Cartel das Vitaminas, Relator: Villas Bôas Cueva, 5.12.2006, ¶ V1 (Braz.), *available at* http://tinyurl.com/296jnla. ¶ V2.3(3) ("The conclusion that the Brazilian market was, although potentially, affected by the actions of the cartel derives . . . from the condemnation of the Represented in the U.S. and Europe with respect to the vitamins' world market segmentation, through their combined elaboration of annual budgets, in which there was evidence that Latin America was part of that division.").

This document proceeds to show how the Recognition-of-Judgments Mechanism can be used to increase domestic and international welfare. Part I analyzes the conditions for the application of the Mechanism in practice. It suggests the criteria that a foreign decision must meet before it can be adopted. Part II addresses the Mechanism's possible costs and limitations and attempts to provide solutions to overcome them. It also submits that the Mechanism does not constitute a significant leap from existing legal tools. This discussion of its overall desirability suggests that implementation can have substantial positive welfare effects on both domestic and international levels. Based on this conclusion, the document concludes by suggesting a blueprint for the legislative change required to adopt the Mechanism.

I. CONDITIONS FOR ENFORCEMENT

This Part examines how the Recognition-of-Judgments Mechanism can be implemented in practice. The Mechanism is a novel legal tool with powerful implications. Thus, it is crucial to ensure that it would be fundamentally fair to adopt it.

Conditions must ensure that the decision meets both substantive and procedural fairness standards. There is no need to create such conditions anew. Rather, we can learn by way of analogy from the conditions set in international treaties and domestic laws with regard to the application and enforcement of foreign decisions.[3] In addition, we can learn from the doctrine of collateral estoppel. In accordance with these legal principles, the foreign decision must meet the following criteria, elaborated below: (a) the decision was made in accordance with foreign law; (b) the decision clearly and specifically included a factual finding of an international cartel; (c) resolution of the issue was essential to the foreign judgment; (d) the foreign authority met judicial competence requirements; (e) the defendant had a full and fair opportunity to litigate the issue before the foreign decision maker. At the end of this document a blue-print for the changes required in domestic law based on such conditions is included.

A. Decision Made in Accordance with Foreign Law

The first condition postulates that the foreign decision was made in accordance with foreign law, so that it is enforceable in the country of origin. This condition is necessary to ensure that the foreign decision is based on sound legal principles within that foreign jurisdiction.

The decision should also be final in the foreign jurisdiction, to increase its correctness. The downside is, of course, that it lengthens the time before the decision can be applied elsewhere. This requires a minor adjustment to domestic laws: The period for bringing suit based on the foreign decision must be extended because the appeal might take a long time. Otherwise, the Recognition-of-Judgments Mechanism might have no relevance in practice. To increase certainty and fairness, however, the plaintiff should be required to start formal proceedings within the regular time frame in order to indicate to the cartel members the possibility that the foreign decision will be adopted. Such proceedings will then be postponed until the foreign decision is final.

3. *See*, *e.g.*, EU Council Regulation 44/2001 at 10; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987).

B. Decision Clearly and Specifically Included a Factual Finding

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

C. Resolution Essential to the Foreign Judgment

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

D. Judicial Competence

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

The decision-making body should not be required to be a court. Rather, the Mechanism could also be applied to decisions of competition authorities that have quasi-judicial characteristics and responsibilities. This is of high importance because decisions regarding the existence of international cartels are often made by competition authorities, such as by the EU Commission, and are then subject to potential review in court.

E. Full and Fair Opportunity to Litigate

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

We can learn by analogy from domestic decisions with regard to the applicability of foreign judgments. For example, enforcement of a foreign judgment by a U.S. court requires

proof of the following:[4] (1) a full and fair trial took place in a competent foreign court, while the question is whether there was an actual opportunity for a party to be heard; (2) the trial took place under regular proceedings; (3) the defendant appeared voluntarily or received due notice of the proceeding; (4) the foreign country's judicial system is likely to have secured impartiality between foreign parties and its own domestic parties; and (5) no fraud took place in the decision-making process.[5] These conditions mostly ensure procedural fairness and should be required when applying the Recognition-of-Judgments Mechanism as well.

The burden of proof in the foreign jurisdiction also must be at least as high as in the adopting jurisdiction. Otherwise, it cannot be ensured that the same decision would have been reached if the case were tried in the adopting jurisdiction. This implies, for example, that a finding of a civil court cannot serve as a basis for a criminal offense. To ensure fairness, it is further suggested that the foreign judgment never serve as a basis for a criminal offense in the domestic jurisdiction.

In addition, it should be required that potential sanctions in the foreign jurisdiction not be much lower than in the adopting one. Since the production of evidence is costly, the height of the sanction affects the motivation of the defendants to bring evidence to counter the allegations against them. The lower the sanction, the lower their motivation to do so. Thus, unless the possible sanction is not much lower than in the adopting jurisdiction, it cannot be assumed that the defendant invested in bringing forward counter evidence as he would if his case were heard in the adopting jurisdiction.

Finally, a foreign decision should not be adopted if it would be manifestly incompatible with the public policy of the adopting jurisdiction. However, the possibility that this will occur in the case of international cartels is extremely low.

The fact that a non-negligible percentage of international cartel cases are settled by plea bargains raises an interesting question — should decisions based on plea bargains be treated as providing the defendant with "a full and fair" opportunity to litigate? The answer, in my view, is yes. The defendant had such an opportunity, but chose to forgo it. Obviously the plea bargain must include an admission of guilt.

This proposal would inevitably lead to a new category of litigation on the applicability of foreign cartel judgments in domestic law. One simple solution to limit litigation costs is for the adopting jurisdiction to list the countries that can be assumed to meet the above criteria, rather than require proof in each specific case. Such a list need not be complete, provided that it includes those jurisdictions that generally prosecute international cartels. Decisions of jurisdictions included in the list would then be assumed to meet all conditions. The party seeking recognition or applying for enforcement would only need to produce a complete and certified copy of the foreign decision. The defendant would only be allowed to rebut the assumption in exceptional cases in which strong evidence suggests that the conditions were not met.

4. Hilton v. Guyot, 159 U.S. 113, 163–64 (١٨٩٥).

5. The condition that the judgment not be obtained by fraud is required, for example, in the *Restatement (Third) of Foreign Relations Law of the United States*. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(c) (1987).

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

II. POSSIBLE OBJECTIONS TO THE MECHANISM

A. Political Objections: Reliance on Foreign Decisions

The Mechanism may encounter political objections because the adopted decision was reached by a foreign entity. This objection can be split into two main concerns: first, harm to sovereignty; and second, that the foreign decision maker will have skewed incentives once he acknowledges the fact that his decision might apply beyond his borders.

While the Mechanism allows for the incorporation of the decision of a foreign decision maker into domestic law, its harm to sovereignty is not prohibitive. First, it is a fully voluntary system in which each jurisdiction exercises its discretion and sovereign decision-making power in deciding whether and under what conditions to adopt foreign decisions, while furthering a domestic public policy of deterrence by overcoming its existing enforcement problems. Nonetheless, to minimize the imposition on sovereignty, the Mechanism should only be used in civil and administrative cases; it should not serve as a basis for criminal liability. Plaintiffs should also have the option not to rely on a foreign finding and to prove the existence of the cartel independently in their courts.

Furthermore, compared to the legal tools that currently exist, the Mechanism is not unique in its delegation of decision making to foreign bodies. It is comparable, to some extent, to the system adopted in the Patent Cooperation Treaty (PCT), which applies to patent applications made through the International Patent Office (IPO) and was ratified by 142 countries.[6] The PCT creates a system for reliance on foreign decisions regarding the innovative aspect of a patent application, which is a necessary condition for the grant of a patent in all jurisdictions. Under the PCT, the patent offices of several pre-specified jurisdictions are designated as international searching authorities (ISA) that search for prior art that might preempt the patent application. Domestic patent offices often base their factual findings on those of the ISA after the applicant requests a domestic patent.[7] Thus, the factual findings of an ISA, which are decisions of foreign patent institutions, may be binding in other jurisdictions. Like the Recognition-of-Judgments Mechanism, the foreign body performs a fact-finding function and answers a factual question that is similar for all jurisdictions.

Additional examples of recognition of foreign judgments also involve cases in which the mutual interest of all jurisdictions is generally aligned. Within Europe, an EU Council Regulation provides for judicial reliance in civil matters. Under this regulation, a court in one Member state, when asked to recognize a judgment of another Member state, is bound by the

6. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.

7. *Id.* art. 15. Similar adoption of factual decisions can also be found in other areas. For example, some laws allow stock exchanges to rely on the decisions of some foreign stock exchanges which regard to the registration of firms for trade. For such an example see the Israeli Securities Act 1968, Sections 1 and 35(17-18).

foreign court's findings of fact.[8] The same is true among U.S. states.[9] Undeniably, jurisdictions are generally less accommodating to reliance on foreign judgments, yet such reliance is not rare. For example, jurisdictions which have agreements on mutual forfeiture assistance allow domestic courts to recognize and enforce foreign forfeiture decisions.[10] Furthermore, some jurisdictions, such as the U.S., recognize foreign judgments under international comity principles[11] and others, such as England, apply the common law principles of estoppel and res judicata to some foreign decisions.[12] It is noteworthy that in the 80's, in response to U.S. expansions of jurisdiction inter alia through the effects doctrine, some jurisdictions enacted specific statues that prevented the application of some foreign decisions on competition law issues.[13] Where such laws exist, and where they clash with the proposed Mechanism, they should be limited for the Mechanism to apply.

The second concern is that foreign decision makers will make decisions that are not based on fact once they realize they will be applied elsewhere. This concern is minimal. Generally all jurisdictions have aligned incentives to bring international cartelists to trial.

Yet, in some rare cases, there is a chance that the possible reliance on the decision by other jurisdictions might change the decisions of a foreign fact-finder. Assume that the three main cartelists are a U.S., an Indian, and a Malaysian firm. There is a theoretical possibility that a U.S. court, acknowledging that its findings will have effects beyond its borders, will downplay the role of the U.S. firm in the cartel. Alternatively, it might decide not to find a cartel. This concern is a minor one. Most judges will perform their fact-finding function in accordance with domestic law. Otherwise, they might be subject to judicial review. Furthermore, most judges are likely to understand that the adoption of their decision elsewhere will increase enforcement and deterrence levels significantly by ensuring that the cartelists have not profited from their wrongdoings. In the long run, this will profit their jurisdictions as well, even if, in the short run, the market would be more concentrated. The mutual interest of the jurisdictions should largely solve this problem.

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8. Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) 10.

9. U.S. CONST. art. IV, § 1; Uniform Enforcement of Foreign Judgments Act, 13 U.L.A. 149 (as applied by the different U.S. states).

10 28 U.S. Code § 2467 (Enforcement of Foreign Judgment)(enabling the enforcement of an order of a foreign nation for forfeiture or confiscation). See also Uniform Foreign Money-Judgments Recognition Act 13 U.L.A. 263 (enabling the enforcement of a judgment of a foreign state granting or denying recovery of a sum of money). See also German Code of Civil Procedure (Zivilprozessordnung), Bundesgesetzblatt § 328, 722 and 723 (recognition and enforcement of a foreign judgment).

11 The U.S. Supreme Court in *Hilton v. Guyot*, supra. For a recent application see, e.g., *United States v. Kashamu*, 656 F.3d 679 (7th Cir. 2011).

12 The U.K. Civil Jurisdiction and Judgments Act 1982, Section 34 (prohibiting re-litigation of "a cause of action in respect of which a judgment has been given...in proceedings between the same parties... in a court of an overseas country..."); Foreign Judgments (Reciprocal Enforcement) Act 1933 (enabling the enforcement of foreign judgments which accord reciprocal treatment to judgments given in the U.K.); Peter Barnett, *Res Judicata, Estoppel and Foreign Judgments* (2001), 9.01-9.15. It is noteworthy that such doctrines generally require that the same parties be part of the proceedings in both jurisdictions, a condition which does not apply with regard to the Mechanism.

13 See, e.g., U.K. Protection of Trading Interests Act 1980, Sections 5-6; Australian Foreign Proceedings (Excess Of Jurisdiction) Act 1984; Canadian Foreign Extraterritorial Measures Act 1985, Section 8 (The Attorney General may declare foreign antitrust judgments not to be recognized or enforceable where the recognition or enforcement of the judgment in Canada has adversely affected or is likely to adversely affect significant interests in Canada).

B. Over- and Under-Enforcement

Once we increase the number of jurisdictions that can realistically prosecute international cartels, do we not create over-enforcement? The answer is negative, as long as some conditions are met. Deterrence will be too high only if the severity of the sanction multiplied by the chance that it will be imposed is not proportional to profits from the anti-competitive conduct. Since the Mechanism serves to increase prosecution levels, states must ensure that sanctions are not prohibitively high.

Generally, sanctions in most jurisdictions are based on the harm to their economy or on the firms' local turnover rates — which often serve as a good proxy for the profits of the cartelists. Suppose, however, just for the sake of argument, that one jurisdiction decides to impose a sanction that is equal to domestic harm multiplied by one thousand in order to increase deterrence or even as a way to fill its treasury. If this jurisdiction brings cases based on foreign decisions, then the result might indeed be over-deterrence. In such situations, the case for making it easier for the jurisdiction to bring suits is much shakier. Two solutions are possible. First, international bodies have an important role to play in setting guidelines for sanctions. Second, the decision maker might purposefully declare that his factual findings do not apply to the unruly jurisdiction. That way, the Mechanism could not be applied. That would surely bring the jurisdiction in line with international norms.

Another concern is that the imposition of high monetary fines might lead to the bankruptcy of some firms and to negative changes in the competitive conditions of the international market, at least in the short run. While this is a serious concern in the short run, it is an integral and important part of the deterrence effects of anti-cartel prohibitions. Indeed, similar outcomes might be expected when a domestic cartel is fined. Nonetheless, when high fines are expected to have long-term and significant negative effects on competitive conditions in international markets and thus on consumer welfare, jurisdictions should be allowed to join forces to find a suitable solution.

A concern for under-enforcement can also be raised: Each jurisdiction will wait until the other brings suit in order to limit its enforcement costs. This concern is unlikely to have significant effects in practice, at least not where the cartel affects the large jurisdictions that currently bring international cartels to trial. Even with the Recognition-of-Judgments Mechanism, the main decision makers in international cartel cases are not likely to change. The United States and the European Union (and, most likely, several other large, established jurisdictions like the United Kingdom and Canada) are prone to remain the principal enforcers, and are unlikely to use the Mechanism, preferring to reach their own decisions. Moreover, each has a strong incentive to bring the international cartelists to trial as soon as possible, in order to stop the cartel's welfare-reducing effects on its own jurisdiction, which are often significant. Furthermore, such jurisdictions can determine which countries to specifically name in their factual findings as affected by the international cartel, in order to induce other jurisdictions to share information or even share the costs of enforcement. Thus, the proposal is unlikely to have negative under-enforcement effects on large jurisdictions.

A related concern is that the Mechanism will increase the reliance of smaller or developing agencies on decisions of larger and more mature agencies, especially as cartels are increasingly more global. This, in turn, that might affect their ability to enforce cartel laws against mere domestic cartels, given the learning curve involved. Yet this concern is limited,

given, inter alia, the fact that in reality this situation already exists: international cartels are rarely brought to justice in such jurisdictions. Yet an important difference exists between the current situation and the one proposed: currently small and developing jurisdictions do not get compensated for their harms and the fruits of such harms are left in the hands of the international cartelists, thereby increasing incentives to engage in international cartels.

At the same time, the Mechanism might affect enforcement decisions in regional cartels that do not involve large, developed jurisdictions. There are several reasons, nonetheless, that reduce this concern. First, if the continuation of the cartel significantly affects domestic welfare and the jurisdiction has the tools to prosecute it on its own, it has a strong interest in ending the harmful conduct as soon as possible. Second, the jurisdiction will also weigh the prestige in bringing such a cartel to trial. Lastly, jurisdictions may cooperate and coordinate their enforcement efforts against cartels that affect their jurisdictions. Since decisions of whether to bring cartels to trial often form a repeated game, jurisdictions might agree to divide the enforcement efforts among themselves.

C. Fairness Considerations

Any legal norm must meet procedural and substantive fairness standards. The conditions for applying the Mechanism, elaborated above, serve to ensure that the decision was made by an able decision maker, is based on merit, meets public-policy standards in the adopting jurisdiction, and was the result of a legal procedure that fulfilled procedural fairness requirements.

Another concern is that the cartelists did not have their day in court in the adopting jurisdiction. Once again, the fact that an international cartel operates in more than one jurisdiction is of relevance in countering such a claim, since the cartelists did have their day before the foreign decision maker who dealt with similar factual issues. Moreover, the foreign decision maker, anticipating that his findings may apply beyond the borders of his jurisdiction, might be more careful in his analysis and his statements with regard to the scope of the cartel elsewhere. Furthermore, the cartelists, anticipating the possible application of the Mechanism, have a strong motivation to prove the geographical boundaries of the cartel and to bring any possible counter-argument. Finally, the cartelists will have the opportunity to prove that their cartel did not affect the adopting jurisdiction in the trial phase that dealt with harm.

The Mechanism might increase the costs of the foreign court and foreign prosecutors in hearing and deciding international cartel cases. Cartel members are likely to spend more resources in challenging the allegations against them. Yet, by incurring these extra costs, the jurisdiction gains a large benefit: The enforcement of antitrust laws by multiple jurisdictions significantly increases the deterrence of international cartels. Such increased deterrence, in turn, is likely to reduce the need for costly litigation in the future. Accordingly, the overall welfare effect of spending such extra resources upfront will easily be positive in the long run. Second, the jurisdiction can easily avoid such costs by deciding that its findings will apply only to its jurisdiction. Finally, it is not certain that the Mechanism would increase enforcement costs in those large jurisdictions that currently prosecute international cartels. This is because the potential sanctions that can be imposed on cartel members by such jurisdictions are often already sufficiently high to create a strong incentive of cartelists to defend themselves to the best of their ability (especially where imprisonment can be imposed). Yet the

Mechanism might reduce litigation costs as it increases incentives of defendants to enter into plea bargains in order to avoid follow-on litigation.

D. Negative Political Externalities

A possible problem with the Mechanism might arise if a domestic court or legislator decides that a particular foreign decision maker is not sufficiently competent or that its procedure is not fair enough for the foreign decision to be adopted. The problem can largely be overcome if jurisdictions create a list of other jurisdictions upon whose decisions they can rely. To minimize political problems, such a list can be comprised only of the few jurisdictions that currently bring international cartels to trial on a regular basis and that are all generally characterized by judicial competence and fair procedures.

E. Reduced Incentives for Leniency Programs

The most significant objection to the Recognition-of-Judgments Mechanism is that it might reduce incentives for international cartel members to report their cartels through leniency programs. The fact that a judgment based on evidence obtained through a leniency application could then serve as a basis for sanctions in third countries in which a leniency agreement was not reached might significantly reduce such reporting. The costs to the reporting party resulting from sanctions imposed by other jurisdictions might well exceed its relief from sanctions in the jurisdiction in which it enjoyed leniency. The result of these effects is that international cartels might be stronger relative to domestic ones, as cheating on them by way of self-reporting generates lower rewards. Put even more strongly, absent a solution to this problem, the Mechanism might act as an internal enforcement tool among cartelists.

Given that leniency programs have been the main driving force behind many current cartel investigations and convictions in both the United States and the European Union, this concern cannot be overlooked. Should their evidentiary channels be limited due to reduced incentives of cartel members to take advantage of leniency programs, even the limited deterrence that currently exists might be further reduced.

What can be done? The problem is that each country decides for itself how to enforce its laws and whether or not to adopt a leniency program. Coordination among jurisdictions is voluntary. Nonetheless, all jurisdictions have a joint incentive to ensure that as many international cartels are deterred as possible. Accordingly, one way to solve this problem is to decide, when structuring the Recognition-of-Judgments Mechanism, that those firms enjoying leniency in the origin country would enjoy similar leniency in the adopting country. By doing so, the adopting country recognizes the important role that the reporting firm played in bringing the cartel to trial. This would amount, in fact, to a global coordinated policy on leniency that would also serve to overcome some of leniency programs' current shortcomings. Yet to ensure that the domestic jurisdiction is provided with all relevant information, it is suggested that the parallel grant of leniency be conditioned on the leniency applicant's provision to the domestic competition authority of any information it has with regard to the application of the cartel and its harm in the domestic jurisdiction.

Should certain jurisdictions not limit the application of the decision to those firms that did not enjoy leniency, the foreign decision maker can specifically limit the breadth of his decision, so it would be difficult to apply in other jurisdictions. The incentives of the decision

maker with regard to the scope of his factual findings will thus depend on what he views as possible harmful effects on his jurisdiction's enforcement options.

CONCLUSION

The territoriality of competition law fundamentally clashes with the increasingly global nature of the most harmful cartels. This is because a sufficiently high number of jurisdictions must pursue duplicative parallel prosecutions in order to create effective deterrence to an international cartel. The majority of jurisdictions affected by such cartels, however, never take any legal action against them, and those that do generally base the sanctions only on harm to their own jurisdictions. As a result, domestic cartels are, paradoxically, better deterred than international ones, despite the fact that the latter often create much more harm. Recent attempts to solve this deterrence problem have largely failed. This situation calls for placing a high priority on the development of effective mechanisms to increase deterrence of international cartels.

On this background, this document suggests the adoption of an original tool that can potentially increase deterrence of international cartels significantly. The Recognition-of-Judgments Mechanism enables domestic plaintiffs to rely on foreign decisions with regard to the existence of an international cartel and its scope of operation. Plaintiffs would then only need to prove the harm to their jurisdiction that was created by the international cartel and that the foreign decision meets several pre-specified criteria that are designed to ensure that reliance on the foreign decision is reasonable and fair. As the analysis indicated, the costs of the Mechanism are generally not high and solutions can be devised to minimize its shortcomings. Its potential benefits, on the other hand, to both domestic and international welfare are enormous. Hopefully, these benefits will assist jurisdictions in overcoming the key political issue: applying a legal decision of another jurisdiction in their own legal system. Yet, as elaborated, the proposed Mechanism is not drastically different from other legal tools which allow jurisdictions to rely upon and give legal weight to certain types of foreign decisions.

The discussion focused on the fight against international cartels. However, the application of the Mechanism can easily be extended to abuses of market dominance that affect multiple jurisdictions and, to some extent, to merger decisions. However, the case for such adoption is more difficult: Theories of harm from abuse are oftentimes not settled and mergers often have different welfare effects on different jurisdictions. Additional conditions would thus have to be applied to ensure that foreign decisions are in line with domestic interests. In contrast, the case for the Mechanism in international cartel cases is a strong one.

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

APPENDIX: A SUGGESTION FOR A LEGISLATIVE PROPOSAL

To be potentially included in the Competition Act

Title: Recognition of a Foreign Judgment on the Existence of an International Cartel

Explanatory note

International cartels often create significant harm to domestic consumers. Yet prosecuting such cartels is often difficult, given, inter alia, the costs and evidentiary difficulties involved in proving their existence. Furthermore, such proof in parallel jurisdictions involves duplicative costs. Limited enforcement, in turn, increases the incentives of firms to engage in such cartels and enables them to keep the fruits of their anti-competitive conduct. This legislative proposal seeks to enhance agency effectiveness in dealing with sophisticated international cartels by overcoming one of the main obstacles to enforcement: proof of the existence of an international cartel. It does so by allowing the competition agency and courts to rely on the factual findings of international cartels of other jurisdictions, provided that they meet required standards for fairness and reasonableness.

Proposed Provision

Section 1. [*Definition*] In this Act "foreign judgment" means any judgment, decision, decree, or order of a foreign [Competition Authority or] court with regard to the existence, scope and duration, and possibly also to the harmful effects, of an international cartel, which affected both the foreign as well as the domestic market. It is not required that the domestic market be specifically mentioned in the foreign decision, so long as it is clear from the foreign judgment that the international cartel affected the domestic market.

[Jurisdictions may choose to include in the list also plea bargains that include an admission of guilt]

Section 2. [*Recognition of a Foreign Judgment*]
(a) The competition Authority and the courts shall be allowed to base their decisions with regard to the existence, scope, duration and harmful effects of an international cartel on the factual findings of a foreign judgment made by a Competition Authority or a court in a jurisdiction listed in List A below; This requirement shall be satisfied by a certified copy of the foreign judgment.

(b) A domestic decision based on foreign judgment shall be enforced or satisfied in a like manner to any other domestic decision.

Section 3. [*Grounds for Non-recognition*]
(a) A foreign judgment should not be recognized should one of the following be proven:
(1) The foreign judgment was not made in accordance with foreign law;
(2) The foreign decision-maker did not have personal jurisdiction over the defendant;
(3) The foreign decision-maker did not have jurisdiction over the subject matter;
(4) The foreign judgment was obtained by fraud;
(5) The trial was not fair or took place in an incompetent foreign court;
(6) The defendant did not receive due notice of the proceeding;
(7) The foreign country's judicial system is not likely to have secured impartiality between the parties;

(8) The [claim for relief] on which the foreign judgment is based is contrary to the public policy of the domestic jurisdiction;
(9) The judgment conflicts with another final judgment which meets all the conditions for recognition;
(10) The existence of the cartel was not essential to the foreign judgment. Yet it is not required that the cartel's existence outside the foreign jurisdiction be essential to the foreign judgment;
(11) The foreign judgment is not final where it was rendered.

(b) It shall be assumed that a foreign judgment which meets the conditions set in Section 2 shall also meet conditions 1-10 above, unless the dependant brings strong evidence to the contrary.

Section 3. [*No Basis for Criminal Sanctions*] The foreign judgment shall not serve as a basis for criminal sanctions in the domestic jurisdiction.

Section 4. [*Leniency Application*] In case the foreign judgment is based on a successful leniency application, and such a decision is applied in the domestic jurisdiction in accordance with Section 2 above, the entities granted leniency in the foreign jurisdiction will be granted equal leniency treatment in the domestic jurisdiction, so long as that the leniency applicant has also provided to the domestic competition authority any information it has with regard to the application of the cartel and its harm in the domestic jurisdiction.

Section 5. [*Extension*] Should the Competition Authority [or a plaintiff] wish to base their case on a foreign judgment in accordance with Section 2 above, and the decision is not final within the time limits for bringing such cases, the Competition Authority or the relevant court shall be allowed to stay the proceedings until the foreign judgment becomes final. The potential defendants shall be notified of this extension by the decision maker.

Section 6. [*Optional Procedure.*] Nothing in this provision shall prevent the Competition Authority [or domestic plaintiffs] from bringing another action against the international cartel in accordance with domestic law.

[optional: **Section 7.** [*Strength of Foreign Factual Finding*]
A foreign judgment which meets all the criteria set above shall create a non-rebuttable presumption with regard to the correctness of its facts.

[only where required: **Section 8.** [*cancellation of conflicting laws*]]

List A:
Should include a list of jurisdictions which meet the following criteria:
(a) Decisions are assumed to be fair and reasonable for the purposes of finding an international cartel; inter alia, the judgment was rendered under a system which provides impartial tribunals or procedures compatible with the requirements of due process of law and provide the defendant with full and fair opportunity to litigate the issues;
(b) The potential sanction for the cartel offense in the foreign jurisdiction is similar or lower (in relative terms once the size of the market is taken into account) to the potential sanction in the domestic jurisdiction.

(c) The burden of proof in the foreign jurisdiction must be at least as high as in the domestic jurisdiction;
(d) The foreign cartel offense is similar in nature to the domestic one;
(e)(optional: jurisdictions which generally make decisions regarding international cartels).

[Should such a list not be included, the conditions (a)-(c) should be added to Section 3 above.]