Free Movement of Judgments: Increasing Deterrence of International Cartels through Jurisdictional Reliance

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This Article challenges the conventional wisdom that little can be done under the existing atomistic system of antitrust enforcement to solve the problem of sub-optimal deterrence of international cartels. Low deterrence results from two main facts: First, international cartels are generally prosecuted by only a fraction of the jurisdictions harmed by them; second, monetary sanctions imposed by those jurisdictions are generally based only on the harm incurred to their domestic markets. To solve this problem, this Article proposes a novel legal tool that would enable countries to adopt and rely upon foreign decisions finding international hard-core cartels, provided that the foreign decisions meet criteria that are designed to ensure that such reliance is reasonable and fair. As elaborated in this Article, this free movement of judgments holds potential to overcome the main obstacles to efficient deterrence and to significantly increase both domestic and global welfare. The proposed mechanism's costs can be overcome to a great extent by designing appropriate solutions. The political implications are also not prohibitive. As shown here, jurisdictions already rely on foreign judgments that do not significantly differ from the decisions at hand.

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INTRODUCTION

International hard-core cartels are a primary evil of global trade.¹ Such cartels allow firms from different jurisdictions to join forces to exploit markets around the world. Such cartels often create considerable harm and they should be vigorously deterred. Yet one of the main obstacles to fighting international cartels is low deterrence levels. Low deterrence results because generally only a handful of jurisdictions prosecute international cartels. In particular, small and developing jurisdictions rarely bring such cases.² This is mainly due to these

¹ The Supreme Court of the United States described cartels as “the supreme evil of antitrust.” Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004). This observation, which referred to domestic cartels, is also applicable to international cartels.

² 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) (reviewing, empirically and theoretically, enforcement levels of different jurisdictions in international antitrust cases); Margaret Levenstein & Valerie Y. Suslow, Contemporary
jurisdictions’ limited financial and human resources and the high costs of proving the existence of an international cartel. Coupled with the fact that the jurisdictions that prosecute international cartels generally impose only monetary sanctions that are based on the harm to their own jurisdictions — and that many cartels are never detected at all — the result is that deterrence is far from optimal.3 The stakes are high: One study estimated that between 1990 and 2005, total overcharge by international cartels amounted to more than $260 billion.4 During this period, the aggregate real monetary sanctions against such cartels reached only $13.5 billion, which is less than 5% of their overcharges.5 Accordingly, devising more efficient ways to deter international cartels is of the utmost importance. Yet, to date, most attempts to increase deterrence levels have largely failed.6

This Article proposes a novel solution to this problem. It introduces a legal mechanism for enhancing the enforcement of antitrust laws against international cartels, which, in turn, would increase domestic as well as global deterrence and welfare. To this end, this Article contemplates the possibility of allowing domestic courts and antitrust authorities to recognize and apply foreign decisions finding 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”). The Recognition-of-Judgments Mechanism therefore extends the doctrine of collateral estoppel to apply among different jurisdictions. This would enable domestic plaintiffs to focus mainly on the cartel’s domestic effects and would significantly decrease the amount of resources needed to

International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy, 71 ANTITRUST L.J. 801, 801 (2004).


5. Connor & Helmers, supra note 4, at 38. Of course, some of these cartels were sanctioned after 2005, but if we assume a relatively constant flow of international cartel cases even before 1990, then the comparison between the harm and sanctions during this period is a crude, but nonetheless useful, indication of sub-optimal deterrence levels.

6. See infra Part I.B.
prosecute it. As a result, domestic enforcement may increase significantly. The Mechanism also solves the problem of duplicative enforcement costs, which is a direct outcome of the atomistic enforcement regime that currently dominates antitrust.

Consider the following example: The United States found a cartel in the international air cargo market, which had substantial effects on many jurisdictions.7 Using the Recognition-of-Judgments Mechanism, other jurisdictions harmed by this cartel could use the U.S. decision as a basis for bringing suits against the cartel 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.8 As a result, deterrence of international cartels would increase dramatically.

The proposed Mechanism takes advantage of four related facts: (a) international cartels affect more than one jurisdiction and therefore a decision finding 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 antitrust


8. A somewhat similar claim was recently made in Israel in a private damages suit against the members of an international cartel. There, however, the plaintiffs based their arguments on an Israeli law that gives evidentiary weight to foreign documents. DC (CT) 936/12/07 ABB Ltd. v. Kottler (filed December 2007) (Isr.); see Press Release, Siemens AG, Legal Proceedings – First Quarter of Fiscal 2008, at 2 (Jan. 24, 2008), available at http://tinyurl.com/2b7them. Their arguments did not go as far as this Article suggests.
authorities adopted a version of this solution, albeit not as refined as the one suggested in this Article. In the Vitamins Cartel decision, the authorities relied on the decisions concerning the worldwide cartel by U.S. and EU antitrust authorities. These decisions were treated as facts, or factual documents. The Brazilian antitrust authorities then corroborated these decisions with import data of the various types of vitamins imported by the alleged cartelists into Brazil. As a result, the authorities fined the vitamin producers involved, as well as some of their executives.

This Article begins by presenting the motivation and justifications for recognizing and adopting foreign judgments in domestic cases against international cartels. Accordingly, Part I elaborates the enforcement obstacles in international cartel cases, their causes, and the shortcomings of the existing tools to solve them. Part II proceeds to show how the Recognition-of-Judgments Mechanism can be used to overcome the major causes of under-deterrence by increasing domestic prosecution while reducing enforcement costs. Part III 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, Part IV analyzes the conditions for the application of the Mechanism in practice. It suggests a blueprint for the criteria that a foreign decision must meet before it can be adopted. The Article concludes by touching upon the possibility of applying the Mechanism to other types of anti-competitive conduct.

9. 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 (“[T]he Brazilian Secretariat for Economic Monitoring concludes that, because of American and European condemnation of the international cartel, and the import of vitamins whose prices were arbitrated in Europe, such imports would entail losses to Brazilian consumers and that the conduct of businesses are illegal . . . .

10. Id. ¶ 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.”).

11. For the fines imposed, see CADE, Voto, Cartel das Vitaminas, Conclusão (Feb. 5, 2007).
I. MOTIVATION: SUB-OPTIMAL DETERRENCE EFFECTS

A. The Problematic Deterrence Effects of the Current Regime

As Nobel laureate Gary Becker demonstrated, deterrence levels are determined by two main factors: the severity of the sanction and the probability that the conduct will be detected and punished.\(^\text{12}\) Even if we assume that sanctions against international cartels are sufficiently high,\(^\text{13}\) the current antitrust system suffers from two serious problems in enforcement levels. First, only a small percentage of cartels are detected. According to recent studies, the probability of detection is in the 13% to 17% range.\(^\text{14}\) Some jurisdictions remedy this problem, at least partially, by increasing sanctions to reflect low detection rates. For example, the United States imposes treble damages for harm caused by anti-competitive conduct.\(^\text{15}\) Second, even those cartels that have been detected are generally prosecuted by no more than a handful of jurisdictions. While there has been a significant and encouraging increase in the number of international cartel prosecutions by several jurisdictions — most notably the European Union, Korea, and Brazil — in the past decade, such prosecutions are generally not followed by most other jurisdictions, despite the fact that over a hundred jurisdictions have adopted antitrust laws that prohibit cartels.\(^\text{16}\) As a result, overall deterrence is sub-optimal. This Section elaborates on the latter problem and its causes.

Antitrust is currently characterized by an atomistic model in which each jurisdiction enforces its own laws and generally bases its sanctions on domestic harm.\(^\text{17}\) At most, countries share information and modes of


\(^{13}\) Under optimal deterrence the severity of the sanction should be equal to the gains of the cartel. Quantifying such gains is a difficult task. See, e.g., OECD 2002 Report, supra note 3, at 13. For the effects of personal criminal sanctions, see infra Part I.B.


\(^{17}\) The laws of several jurisdictions permit fines to be assessed on the basis of worldwide turnover. Thus, the cumulative effect of fines in these countries could theoretically account for
analysis. While this system might perform well when dealing with domestic cartels, it creates two main inefficiencies when it is applied to international cartels. First, parallel enforcement by several jurisdictions against the same international cartels results in duplicative enforcement costs. Second, and more importantly, optimal deterrence of international cartels requires aggregate enforcement actions by all or most jurisdictions that are affected by the cartel. Yet, the number of jurisdictions that pursue international cartels is quite small.\textsuperscript{18} Most jurisdictions do not prosecute international cartels, as they do not have the resources or incentives to engage in such extensive and costly prosecutions, for reasons that will be elaborated below.

This is problematic on both the domestic and the global level. On the domestic level, limited enforcement encourages firms to design cartels that would continue to operate in such jurisdictions, even if not elsewhere.\textsuperscript{19} In addition, the harm that such cartels inflict on the domestic market is never remedied.\textsuperscript{20} Indeed, the large proportion of imported products traded in small and developing countries means that the anti-competitive conduct of foreign importers will often have strong negative effects on those countries. Levenstein and Suslow have argued that the estimated harm to developing jurisdictions from international cartels is as high as 15\% of the financial aid they receive from industrialized countries.\textsuperscript{21} Such countries, however, rarely prosecute international cartels.

Of no less importance, the aggregation of under-enforcement at the domestic level has non-negligible global implications. Limited enforcement provides firms with incentives to engage in global anti-competitive conduct. This is because the sanctions imposed by a handful of jurisdictions on cartel members are significantly smaller than the worldwide profits to be gained.\textsuperscript{22} As the Organization for Economic non-prosecution in other countries. Yet as long as enforcement levels in those jurisdictions are low, the compensatory effect is not sufficiently high. In addition, many of these jurisdictions base their fines on only one year's turnover. OECD 2002 Report, \textit{supra} note 3, at 14. Other factors that are taken into account in determining the height of the fine, such as recidivism, might also allow the jurisdiction to increase deterrence levels.

\textsuperscript{19.} Id. at 692.
\textsuperscript{20.} See, e.g., John M. Connor, \textit{Latin America and the Control of International Cartels}, in \textit{COMPETITION LAW AND POLICY IN LATIN AMERICA} 291, 291 (Eleanor M. Fox & D. Daniel Sokol eds., 2009); Connor & Helmers, \textit{supra} note 4, at 38.
\textsuperscript{21.} Levenstein & Suslow, \textit{supra} note 2, at 816.
\textsuperscript{22.} Such arguments were recognized by the Supreme Court of the United States in 1978. \textit{See} Pfizer, Inc. v. India, 434 U.S 308, 315 (1978); \textit{see also} \textit{COMPETITION COMM., OECD, FIGHTING HARD CORE CARTELS: RECENT PROGRESS AND CHALLENGES AHEAD} 8–10 (2003); Dennis W. Carlton, Keynote Address at the Second Annual Conference of the International Competition
Cooperation and Development (OECD) observed, "[t]heoretically, unless a multinational cartel participant is prosecuted and fined in most or all of the countries in which the cartel had effects, the cartel still might have been profitable after paying fines in only some of the countries affected." Indeed, since the decision to join a cartel is primarily a financial one, if anti-cartel enforcement leaves significant profits in the hands of the cartelists, they have strong incentives to engage in such conduct. One study indicated that only about 40% of global cartel overcharges were disgorged from those cartels that were prosecuted. Moreover, if the probability of detection is indeed low, then ex ante deterrence is far from optimal. International cartel members may thus still find it highly profitable to engage in international anti-competitive activity.

Low deterrence levels have an added indirect negative effect: They reduce the effectiveness of existing leniency programs, designed to provide a "carrot" for cartel participants to defect from the secret agreement and provide information to the investigators. According to the OECD, "[t]he 'carrot and stick' approach to cartel investigation requires that the 'stick' — the possible sanction — be sufficiently severe to give effect to the 'carrot' — the opportunity to avoid the sanction by cooperating." The immediate result is that if overall sanctions are limited, so is the incentive for existing cartel participants to take advantage of leniency programs. As elaborated below, however, the effects on leniency programs from increased parallel prosecution are


24. Other factors might also affect the motivation of cartelists to enter into anti-competitive agreements, such as the perceived morality of such conduct. See generally Stucke, supra note 14.


26. A study conducted by Professor Connor has found that international cartels raise prices on average by 30–33%. Connor & Lande, How High, supra note 14, at 543. See generally Levenstein & Suslow, supra note 2. These studies imply that international cartels may be highly profitable and thus high fines are needed in order to deter such conduct.

more complicated than this simple analysis suggests. Unless leniency is coordinated, the incentive of cartelists to defect is reduced as more jurisdictions apply their laws.

Consider the following example, which involves the landmark international vitamins cartel. As Connor argues, the vitamins cartel effectively raised the price of vitamins all over the world. Its estimated profits exceeded $8 billion.\(^{28}\) The cartel, though, was brought to trial only in six jurisdictions.\(^{29}\) Its aggregate monetary sanctions in these jurisdictions represent merely 11% of worldwide affected sales.\(^{30}\) Still, most international cartels are prosecuted by an even smaller number of jurisdictions and deterrence effects are often even more limited.

The causes for the limited domestic enforcement of antitrust laws against international cartels have been elaborated elsewhere. The main causes are explained below in order to analyze the ability of the Recognition-of-Judgments Mechanism to remedy them.

Most importantly, limited enforcement results from limited financial resources for prosecution and the high costs of proving the existence of an international cartel. Bringing a suit against an international cartel is a complicated, costly, and lengthy endeavor.\(^{31}\) Information is often spread over several jurisdictions, and the investigation involves multinational firms that are often major players in world markets and that are armed with top lawyers. Add to this the fact that a jurisdiction’s size or level of development does not affect the “fixed” costs of conducting an antitrust inquiry: Such costs are comparable across jurisdictions, because the investigatory and analytical steps of the inquiry and prosecution are similar regardless of the level of development or size of the jurisdiction. Accordingly, a small financial endowment naturally makes it more difficult for a jurisdiction to bring cases against international cartels.\(^{32}\) It is thus no surprise that generally only the antitrust authorities of large,


\(^{29}\) These jurisdictions include the United States, EU, Canada, Brazil, Australia, and Korea. Connor, Vitamins, supra note 28, at 117, 125–26.

\(^{30}\) Id. at 149.

\(^{31}\) See generally Gal, supra note 2.

\(^{32}\) Antitrust authorities in developing jurisdictions often have very small financial endowments. Small economies have low endowments in absolute terms, although their endowments might be similar to those of large economies in relative terms, when such endowments are analyzed as a percentage of their total budget or per capita. See William E. Kovacic & DeCourcy Eversley, An Assessment of International Machinery: Methods Used in Competition Agencies and What Worked for Them, at 22 (2007), available at http://tinyurl.com/2bfbbmm; Michal S. Gal, When the Going Gets Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce, 41 LOY. U. CHI. L.J. 417, 423–25 (2010).
established jurisdictions investigate and prosecute international cartels. In addition, many developing and small jurisdictions suffer from technical constraints: They have a limited number of skilled individuals that can investigate the existence of cartels. Such jurisdictions usually choose not to spend their constrained resources on international cartels, but rather opt to prosecute domestic ones. This choice is rational: Large, international cartels are generally prosecuted elsewhere, and, as a result, they generally cease their anti-competitive operations. In contrast, domestic cartels will not cease to operate unless they are prosecuted domestically.

An additional factor that plays a role in developing countries’ low enforcement levels involves the lack of competition culture, which often leads to political influences of large foreign firms that cannot be countered by relatively weak antitrust authorities. Indeed, large, multinational firms regularly have strong ties with the political and business elite in small and developing jurisdictions, which sometimes translate into political pressure not to enforce antitrust laws. Furthermore, the high stakes involved in cartel enforcement can sometimes lead to blatant corruption in deciding whether to prosecute cartels.

Another factor is the limited ability of some jurisdictions to create a credible threat of enforcement. For example, consider a shipping cartel that operates worldwide. If trade in a certain jurisdiction is only a

33. In recent years, several large developing jurisdictions — notably Mexico, South Korea, and Brazil — have applied their laws against international cartels. Connor & Helmers, supra note 4, at 74.


35. This is the case especially if the cartel cannot operate without harming the prosecuting jurisdictions. For example, a shipping cartel between the United States and Puerto Rico cannot operate solely in the latter. See Press Release, U.S. Dep’t of Justice, Four Shipping Executives Agree to Plead Guilty to Conspiracy to Eliminate Competition and Raise Prices for Moving Freight to and from the Continental U.S. and Puerto Rico (Oct. 1, 2008), available at http://tinyurl.com/25u2jqm. As noted above, however, in some cases the cartel is designed to affect trade only in those jurisdictions that generally do not prosecute international cartels.


37. See, e.g., Gal, supra note 36, at 32–33.

38. See, e.g., CONSUMER UNITY & TRUST SOC’Y, supra note 34, at 68–69; Stephan, supra note 27, at 5–9. As noted elsewhere, competition law enforcement can only be as strong as all law enforcement. Gal, supra note 36, at 35–36. Indeed, the Recognition-of-Judgments Mechanism can increase this negative effect.

39. See generally MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES
small part of the foreign firm's total world operation and thus the gains from trade within it are limited, foreign firms would most likely choose to exit and trade only in other jurisdictions if the jurisdiction placed significant restrictions on the firms and if the costs of compliance were high. In practice, however, such an exit will rarely occur. This is because the negative welfare effects on the jurisdiction from the exit of the foreign firms may well be greater than the negative effects from its continued operation within its borders.

Accordingly, countries with small markets usually have reduced incentives to prevent the cartel from trading within its borders even if the firm engages in harmful conduct.\textsuperscript{40} Indeed, case studies have indicated that large foreign importers sometimes use an explicit or implicit threat of exit to dissuade the small or developing jurisdiction from imposing limitations that the importers may agree to if imposed by a large jurisdiction.\textsuperscript{41} Yet this restraint has limited effect once the cartel has ceased its operation as a result of its prosecution in another jurisdiction. In addition, the jurisdiction might lack the political clout necessary to enforce any fines or punishments.\textsuperscript{42}

A growing number of jurisdictions also recognize private rights of action against cartels. For example, Canadian steel producers sued in Canadian courts to recoup damages from the members of the graphite electrodes cartel.\textsuperscript{43} While private suits hold important potential for increasing deterrence, in many jurisdictions, such potential is, as of yet, quite limited.\textsuperscript{44} Most importantly, private parties must also incur the high costs of proving a cartel.\textsuperscript{45} In most jurisdictions (except the United States and Taiwan), the damages that can be recouped cover only actual damages incurred by the plaintiff.\textsuperscript{46} In some jurisdictions, class actions are not allowed.\textsuperscript{47} Private parties generally have limited investigatory

\textsuperscript{40} Id. at 242-43.
\textsuperscript{41} Gal, supra note 2, at 31.
\textsuperscript{42} Levenstein & Suslow, supra note 2, at 845.
\textsuperscript{43} Id.
\textsuperscript{44} According to a recent survey, private actions are generally used in only seven jurisdictions. International Competition Network [ICN], Setting of Fines for Cartels in ICN Jurisdictions — Report to the 7th ICN Annual Conference, at 10 (2008) [hereinafter ICN Cartel Fines Report], available at http://tinyurl.com/234kxtg.
\textsuperscript{45} As elaborated below, the Recognition-of-Judgments Mechanism can solve this problem by allowing follow-on suits. Some commentators suggest that remedies in private cases should be based on compensation rather than on deterrence. See Wouter P.J. Wils, The Relationship Between Public Antitrust Enforcement and Private Actions for Damages, 32 WORLD COMPETITION 3, 14-15 (2009).
\textsuperscript{47} OECD 2002 Report, supra note 3, at 15; THE INTERNATIONAL HANDBOOK ON PRIVATE
tools and often rely on the antitrust authorities to investigate cartels. As a result, private enforcement currently does not significantly increase deterrence levels in most jurisdictions.\textsuperscript{48}

B. Current Solutions

Given the inability of current antitrust tools to deter international cartels effectively, some scholars have made suggestions to solve this problem. Proposals span from a global solution in the form of an international enforcer to the lowering of some barriers to domestic enforcement.\textsuperscript{49} This Section sketches the main benefits and drawbacks of each to indicate the lack of an efficient solution using current approaches. Against this backdrop, the following Section analyzes the proposed Recognition-of-Judgments Mechanism.

One of the most interesting solutions, which was attempted in the famous Empagran case, was the use of competent foreign courts as "enforcers for the world" in private antitrust cases.\textsuperscript{50} This suggestion is based on the idea that, given the joint incentives of all jurisdictions involved, foreign plaintiffs could pursue a legal remedy for the harm caused to them by an international cartel by requesting a foreign court to apply its domestic antitrust laws to remedy such harm when the conduct also affected domestic markets.

In Empagran, foreign consumers requested that a U.S. court allow them to join a private damage suit brought by U.S. consumers in a case where an international cartel allegedly harmed them all.\textsuperscript{51} Similar to the Recognition-of-Judgments Mechanism, this suggestion attempted to build on the competence of the courts of some jurisdictions in deciding international cartel cases, but it went much further by extending the scope of U.S. law to apply to conduct that can be punishable under foreign law and by transferring the locus of enforcement to foreign courts. This suggestion generated negative reactions from several jurisdictions and was largely rejected by the U.S. Supreme Court.\textsuperscript{52}

\begin{footnotesize}
\textsuperscript{48} John M. Connor & Darren Bush, How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism, 112 Penn St. L. Rev. 813, 814 (2008) ("[O]nly two [jurisdictions], the United States and Canada, have traditions that allow private plaintiffs to bring antitrust suits for significant damages. The result is a tremendous incentive to cartelize, with few penalties for doing so.").
\textsuperscript{49} See infra notes 50–77.
\textsuperscript{51} A literal reading of the U.S. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2006), served as the legal basis for such a case.
\textsuperscript{52} The Court held that there is no jurisdiction to hear such a case where foreign injury is independent of any effect on U.S. commerce. Empagran, 542 U.S. at 159. Yet it left open the question of whether foreign plaintiffs could bring actions in the United States if the foreign injury is dependent on the effect of the injury to U.S. business. Empagran, 542 U.S. at 175. For analysis
\end{footnotesize}
Importantly for this Article, one of the major reasons for the rejection was that, as a matter of "prescriptive comity," the Supreme Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." As elaborated below, the Recognition-of-Judgments Mechanism avoids such interference.

Some scholars suggest the creation of an international or supranational competition enforcement agency that would hear international cartel cases in order to overcome the deficiencies of the current, atomistic system. Under such proposals, a global enforcement authority will have "powers to collect evidence, conduct interviews, and then compute the global gains from cartelization and levy the appropriate fines"—much like a global class action in which the class members are sovereign states. While these suggestions are theoretically possible, they have limited practical applicability, since jurisdictions are careful not to concede their decision-making power to an international body and give up sovereignty. It is noteworthy that regional antitrust agreements are based on a similar aggregation-of-powers rationale and hold some promise for increased enforcement and deterrence by aggregating the decision-making functions of their members on issues of mutual concern. Most existing regional agreements are, however, limited in scope and funding.

A less ambitious proposal involves the use of the World Trade Organization (WTO) framework to increase domestic enforcement against international cartels. The envisioned agreement would involve commitments to enact and enforce an anti-cartel law, and to cooperate

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53. Empagran, 542 U.S. at 164. For a criticism of this decision, see, for example, Connor & Bush, supra note 48, at 856.


55. See Evenett et al., supra note 54, at 1241.

56. Id.

57. See generally COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS (Philippe Brusick et al. eds., 2005), available at http://tinyurl.com/26bp6q. Nonetheless, some regional agreements, such as the EU, generally work very well.

58. Evenett et al., supra note 54, at 1243.
with investigations launched abroad. This suggestion is fraught with problems. Most importantly, it relies, once again, on domestic enforcement, but with the added stick of punishment if enforcement does not meet certain requirements. It thus does not address the main obstacles of small economies—lack of financial and technical resources, political pressures, and the limited leverage over international cartels. Rather, the effects of such obstacles might be worsened if jurisdictions use their limited resources to prosecute international cartels instead of domestic ones, in order to avoid WTO sanction. Moreover, as Evenett, Levenstein, and Suslow argue,

it is not obvious how a WTO dispute panel might assess whether a government used [its investigatory and prosecutorial] discretion in a manner entirely consistent with the agreement. The likely outcome is that only those anti-trust authorities that have not followed certain minimal procedural steps would be found in violation, an outcome that is unlikely to result in significant increases in the probability that cartel members will be punished. Finally, such a WTO agreement would still not ensure that the penalties for cartelization are based on the worldwide pecuniary gains.\(^{59}\)

Indeed, antitrust has been taken off the WTO negotiation table due to the objections of developing countries.\(^{60}\)

Another method for increasing deterrence involves raising domestic monetary penalties, especially in those jurisdictions that do enforce their laws against international cartels.\(^{61}\) Current sanction levels, however, are still far from ensuring that would-be cartel operators could not expect to profit from their anti-competitive conduct.\(^{62}\) The relatively limited monetary fines imposed by each individual jurisdiction can be explained on both political and legal grounds. Legally, as long as jurisdictions do not view themselves as global enforcers, sanctions are generally based on domestic harm or gains to the cartelists resulting from the anti-competitive harm to their jurisdictions.\(^{63}\) Politically, were

\(^{59}\) Id.

\(^{60}\) The issue was placed on the agenda in 2001. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶¶ 1, 3, 23–25, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). It was taken off the agenda in 2004. World Trade Organization, Decision Adopted by the General Council on 1 August 2004, ¶ I(g), WT/L/579/Annex D. For more on the difficulties associated with WTO negotiations, see generally Anu Bradford, When the WTO Works, and How It Fails, 51 Va. J. Int’l L. 1 (2010).

\(^{61}\) Information about the height of fines that can be imposed by different jurisdictions on international cartels can be found in ICN Anti-Cartel Templates at ICN Cartel Fines Report, supra note 44, at 35–38.


\(^{63}\) See ICN Cartel Fines Report, supra note 44, at 19. Indeed, several jurisdictions base their
jurisdictions to base their fines on global harm or profits, other jurisdictions might view this as an interference with their sovereignty since their own fines might seem duplicative.

Probably the most successful method of increasing deterrence in recent years is the spreading criminalization of cartel offenses and other limitations imposed on top officials. The United States, for example, increased maximum prison sentences for cartelization from three to ten years. Accordingly, average jail sentences imposed on cartel offenders in the United States have increased in recent years, and jail terms reached a new level in 2007 in response to a marine hose cartel. Likewise, in 2002, the United Kingdom adopted the Enterprise Act, under which an individual who dishonestly agrees to cartelistic conduct is subject to criminal liability and can be imprisoned up to five years and subjected to an unlimited fine. The Act also empowers courts to impose a Competition Disqualification Order under which a director can be disqualified and prevented from holding office for a period of up to fifteen years.

Undoubtedly, such sanctions increase deterrence, but they do not provide a complete solution. In a recent study, Connor suggested that, despite heavier penalties, more companies are participating in

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sanctions on the worldwide total turnover of the cartelists. However, the number of such jurisdictions is limited and their fines are generally based on the turnover of only one year, whereas international cartels generally last much longer.

64. The jurisdictions that impose such liability include the United States, the United Kingdom, Ireland, Canada, and Israel. In addition, Australia has recently adopted a draft law that criminalizes cartel offenses. See OECD, Cartels: Sanctions Against Individuals, at 51–52, 68–69, 93 (2005), available at http://tinyurl.com/2djxk3h; Andreas P. Reindl, How Strong Is the Case for Criminal Sanctions in Cartel Cases?, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT: ECONOMIC AND LEGAL IMPLICATIONS FOR THE EU MEMBER STATES 110, 113–25 (Katalin J. Cseres et al. eds., 2006).


67. Enterprise Act, 2002, c. 40, §§ 188(1), 190 (Gr. Brit.).

68. Id. § 204 (Gr. Brit.).

69. Indeed, while fines can sometimes be passed on to consumers, jail time cannot. Moreover, imprisonment serves to separate, at least to some degree, the interest of executives and those of the firm. See, e.g., OFFICE OF FAIR TRADING, THE DETERRENT EFFECT OF COMPETITION ENFORCEMENT BY THE OFT (2007), at 70–74, available at http://tinyurl.com/2etnle3. See generally Kirtikumar Mehta, Recent Developments in EU Anti-Cartel Enforcement, 4 COMP. POL'Y INT'L (2008). Yet one can observe that international cartels continue to operate, despite such sanctions, and that at least some of the executives have returned to their industries. Personal financial sanctions against individuals also do not create sufficient deterrence effects. See, e.g., OECD 2002 Report, supra note 3, at 17.
international cartels.\textsuperscript{70} In addition, Stephan argues that, in the United Kingdom, the obstacles to deterrence include the absence of a strong public stigma for the cartel offense and, in particular, limited willingness to impose custodial sentences on violators.\textsuperscript{71} Stephan also notes that those convicted of cartelistic conduct generally did not encounter much difficulty in finding employment as high-level executives upon their release from prison.\textsuperscript{72}

Scholars have also suggested information sharing as a method to increase deterrence.\textsuperscript{73} While improving access to evidence and witnesses located elsewhere and increasing cooperation by exchanging know-how and expertise hold some promise, they are generally limited in their effect. Even if information is transferable, the costs of proving the existence of an international cartel might still be prohibitively high, since one still has to go through the process of proving the existence of the cartel in domestic courts. Of no less importance, the leniency programs of some major enforcing jurisdictions, including the United States and Canada, promise firms that provide information that may lead to the prosecution of an international cartel that they will not make such information public.\textsuperscript{74} This promise of non-disclosure is critical to encourage companies to come forward, given the possibility that the information they provide might be used against them in other jurisdictions. The basis of these problems is that there is no harmonized or global leniency policy.\textsuperscript{75} Since leniency is one of the main ways in which international cartels are currently detected, information sharing is a limited tool for increasing worldwide enforcement and deterrence.

Another approach is to enhance the technical abilities of antitrust agencies in developing countries. Technical assistance and capacity-building programs, which are often sponsored by large, established jurisdictions or by international bodies, are designed to create a cadre of domestic enforcers. Those enforcers are capable of applying local antitrust laws, assisting domestic agencies in confronting and dealing with business practices and providing educational and public consulting to staff and officials making difficult decisions about competition policy

\begin{itemize}
\item \textsuperscript{70} Connor, supra note 16, at 11.
\item \textsuperscript{71} Stephan, supra note 66, at 4–5. The lengthy sentences in the recent marine hose cartel were induced, in part, by the fact that short terms would have resulted in the U.K. offenders being jailed in the United States.
\item \textsuperscript{72} Id. at 29–31.
\item \textsuperscript{73} Levenstein & Suslow, supra note 2, at 848–49.
\item \textsuperscript{74} See, e.g., Gary R. Spratling, Deputy Assistant Atty. Gen., Antitrust Division, United States Department of Justice, The Corporate Leniency Policy: Answers to Recurrent Questions, Address Before the ABA Antitrust Section, 1998 Spring Meeting (Apr. 1, 1998), available at http://tinyurl.com/284jnoq. In addition, there are legal limitations on the transfer of information.
\item \textsuperscript{75} Id. at 849.
\end{itemize}
such programs, while enhancing human capital, often do not lead the newly trained local authority to pursue international cartel cases. Often, such programs are limited in scale and scope. And, as elaborated above, it might still be more cost effective for the authority to use its resources to prosecute several domestic cartels instead. Thus, technical assistance programs also have limited effects on the prosecution of international cartels.

In sum, conventional wisdom dictates that little can currently be done to increase enforcement of domestic antitrust laws against international cartels. Current solutions are limited in their ability to solve international antitrust enforcement problems. The obstacles to optimal enforcement of small jurisdictions are unlikely to disappear with time, whereas those of developing jurisdictions will likely disappear only when their level of development changes significantly. Given the shortcomings of the current system, the next Part analyzes the ability of the Recognition-of-Judgments Mechanism to increase deterrence and welfare.

II. THE DETERRENCE AND WELFARE EFFECTS OF THE RECOGNITION-OF-JUDGMENTS MECHANISM

The Recognition-of-Judgments Mechanism allows domestic antitrust authorities to apply foreign decisions finding cartel violations in their own domestic courts. The Mechanism thus overcomes the major obstacles to domestic enforcement efforts by taking advantage of the international scope of the cartel. Accordingly, the Mechanism creates the potential to significantly increase both domestic and global welfare.

Most importantly, the Recognition-of-Judgments Mechanism 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

77. For some limitations, see, for example, Kenneth M. Davidson, Creating Effective Competition Institutions: Ideas for Transitional Economies, 6 ASIAN-PAC. L. & POL’Y J. 71, 123–24 (2005); Kovacic, supra note 76, at 416–17.
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 Recognition-of-Judgments Mechanism can also speed up enforcement by going almost straight to the damages stage.

The Recognition-of-Judgments Mechanism does not, however, solve all obstacles to domestic prosecution. It cannot solve the credible threat problem described in Section I.A. Fortunately, though, this problem is quite minimal in cartel cases, since, by assumption, a cartel is comprised of several potential competitors that can each operate in the market and, thus, a cartel’s threat that it will not serve the market is much less credible than that of a monopolist. The Recognition-of-Judgments Mechanism also cannot directly counter all political influences that currently impede enforcement against large, multinational firms. It can, however, indirectly reduce this obstacle in two important ways. First, successful prosecutions of international cartels serve to strengthen the competition culture by exemplifying to local consumers and suppliers the harm from cartels, and by signaling to domestic cartel members that even international ones are not immune from prosecution. Thus, it would become more difficult to exercise political influence because the competition culture would create a counter-force. Second, this problem can be largely overcome by allowing private plaintiffs to use the Recognition-of-Judgments Mechanism. Usually, such parties have limited investigatory tools and often rely on the decisions of the domestic competition authority with regard to the existence of a cartel. The Recognition-of-Judgments Mechanism broadens their options by allowing them to rely on the decisions of foreign courts, thus overcoming negative political influences that might plague the domestic authority.

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 decision 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

78. See GAL, supra note 39.
79. This observation is based on the assumption that courts are less susceptible to political influence than the antitrust authorities.
80. It also saves the cartel members duplicative costs of defense.
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.

What makes the Recognition-of-Judgments Mechanism work? The potential of the Mechanism to increase deterrence and welfare is based on the following four distinct facts. The first is that international cartels, unlike domestic ones, affect more than one jurisdiction, so a decision finding such a cartel extends beyond the borders of the prosecuting jurisdiction to all the countries in which the cartel operates. The Recognition-of-Judgments Mechanism takes advantage of this positive externality by allowing jurisdictions to rely on the factual findings of a reliable and fair foreign decision maker.

Second, parallel prosecution of international cartels in different jurisdictions benefits all by increasing overall deterrence levels. Put differently, no jurisdiction seeks to gain a comparative advantage by ensuring that others do not bring cartels to trial. In economic terms, it is not a zero-sum game. To the contrary, prosecution of an international cartel by any jurisdiction generally creates positive externalities for all others. Thus, there is a joint motivation for increased enforcement and deterrence worldwide. Indeed, the Mechanism might even increase the incentives of countries to cooperate and coordinate cartel investigations.

Third, the adoption of the Mechanism does not require collective action by all jurisdictions, although coordination might increase its effectiveness. Rather, each jurisdiction determines, on its own, whether to adopt it and under which conditions.

Lastly, as elaborated below, the Mechanism minimizes the harm to sovereignty, relative to other solutions. It is a self-enforced remedy, which is used to solve internal obstacles to efficient prosecution.

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

81. An exception exists in rare cases in which the jurisdiction benefits from the operation of an international cartel, since its domestic firms pay taxes on supra-competitive profits earned elsewhere (for example, an export cartel). In such cases, the jurisdiction will most likely not apply the Recognition-of-Judgments Mechanism.
III. POSSIBLE OBJECTIONS TO THE RECOGNITION-OF-JUDGMENTS MECHANISM

A. Political Objections: Reliance on Decisions of Foreign Jurisdictions

The preceding analysis focused only on deterrence effects. While clearly a central factor, the deterrence effect is not the only relevant consideration in determining whether or not to rely on a foreign decision. Rather, the Recognition-of-Judgments Mechanism may encounter sound political objections because the adopted decision was reached by a foreign entity. More specifically, 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 have applicability beyond his borders. I will contend with each in turn.

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. In this respect, the proposal differs from proposals to create a global enforcement authority, since under the latter the decision-making powers would be completely external to each jurisdiction. It also largely avoids the shortcomings of Empagran, which suggested that foreign consumers could bring suit in a foreign court based on a foreign law. Indeed, under the Recognition-of-Judgments Mechanism, the foreign decision maker acts as an enforcer for the world, but only in a very limited sense: His decision does not immediately and directly carry sanctions for harm elsewhere. He only performs a fact-finding function that he would carry out anyway. Moreover, recognition of foreign judgments is based on sovereign equality and respect for the public acts of another jurisdiction. Nonetheless, to minimize the imposition on sovereignty, I suggest that the Mechanism only be used in civil and administrative cases; it should not serve as a basis for criminal liability. Plaintiffs in each jurisdiction should also have the option not to rely on a foreign decision and to prove the existence of the cartel independently in their courts.

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83. 4 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 11.01 (2003).
Importantly, compared to the legal tools that currently exist, the Recognition-of-Judgments 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. 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 can be designated as international searching authorities (ISA) that search for prior art that might preempt the patent application. Domestically, patent offices often base their factual findings on those of the ISA after the applicant requests a domestic patent. 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. Moreover, the interests of all jurisdictions in the results of this search are aligned, although to a lesser degree than under the Recognition-of-Judgments Mechanism.

Additional examples of judicial reliance 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 completely bound by the foreign court’s findings of fact. The same is true among U.S. states. Indeed, international agreements are less accommodating to reliance on foreign judgments, but such reliance is sometimes allowed. For example, under The Hague Convention on International Child Abduction, states may “take notice” of a foreign judicial or administrative decision with regard to the question of “whether there has been a wrongful removal or retention.” Under the Hague Convention on Choice of Court Agreements, once a dispute between private parties has been heard in one jurisdiction in accordance with an
exclusive choice of court agreement between the parties, the courts in other jurisdictions must apply the decision and "[t]he court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction," provided that some conditions regarding procedural and substantive fairness are met.  

Admittedly, the Recognition-of-Judgments Mechanism goes one step further than the Hague Convention. The Mechanism applies to issues that affect the interests of the state more strongly and are largely between the state and private parties. Yet the interests furthered by the Recognition-of-Judgments Mechanism are generally more aligned among different jurisdictions than in a case for the recognition of private agreements for exclusive jurisdiction.

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. As noted above, cartel enforcement is not a zero-sum game. Rather, all jurisdictions generally have aligned incentives to bring international cartelists to trial, to ensure that deterrence is optimal.

Yet, in some rare cases, there is a chance that the possible reliance on the decision by other jurisdictions might change the decisions of 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. Such a decision does not necessarily have to be based on patriotic preferences. Rather, it might be based on short-term concerns regarding domestic markets. Suppose that a cartel is regularly brought to trial only in the United States and in Europe, although its harm is worldwide. The cartel members might still survive the blow financially. However, if all jurisdictions brought suits, the cumulative sanction might lead to bankruptcy and to some firms’ exit from the market. The judge might consider that the short-run harm to the U.S. economy might be larger than the benefit. He might then reach a different decision than if the Recognition-of-Judgments Mechanism were not available to foreign courts.

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91. The Convention specifically exempts antitrust and other matters that are largely matters between private parties and the states from its scope. Id. art. 2(2)(h).

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. Once again, the mutual interest of the jurisdictions should largely solve this problem.

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

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. Going back to Becker’s formula, deterrence levels 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 Recognition-of-Judgments 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

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

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. Indeed, both the International Competition Network (ICN) and the OECD have attempted to set guidelines, and they regularly monitor sanction levels. Of course, the ICN is a voluntary organization and the OECD has limited membership, but their guidelines still affect the conduct of other jurisdictions. Second, should the setting of international norms not be sufficient, the decision maker might purposefully declare that his decision's factual findings do not apply to the unruly jurisdiction. That way, the Recognition-of-Judgments Mechanism could not be applied. That would surely bring the jurisdiction in line with international norms.

Another concern, briefly noted above, 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. This might be the case if the firm has already spent or divided its profits from its past cartelistic activity, for which it must now pay fines. 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, especially if the fine triples the harm, as is commonplace in the United States. If firms were bailed out once the fine significantly affects their liquidity, without regard for the firms' conduct and profits in the past, they might engage in strategic conduct designed to ensure that profits do not remain in the firm, thereby significantly reducing deterrence effects and distorting normal investment decisions. 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.

Let me also briefly address a concern for under-enforcement based on a free-rider rationale: Each jurisdiction will wait until the other brings suit in order to limit its enforcement costs. This concern, while

97. See supra Part III.A.
98. For analysis of the effects of antitrust remedies on market structure, see Michal S. Gal, Harmful Remedies: Optimal Reformation of Anti-Competitive Contracts, 22 CARDOZO L. REV. 91, 94 (2000).
theoretically valid, 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 decisions’ 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 in cases that negatively affect such large, established jurisdictions.

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. Third, current enforcement efforts in small and developing jurisdictions against cartels that affect their own jurisdiction as well as others are extremely low. Thus, the Mechanism’s possible under-enforcement effects are very limited, whereas its potential to increase deterrence effects has a much wider range.

Lastly, but no less importantly, 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. Alternatively, this might serve as an impetus for the creation of a regional enforcement agreement.

C. Fairness Considerations

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

100. See generally Gal, supra note 2.
101. Another possible fairness consideration involves symmetry in the application of the Mechanism — allowing cartelists to use the Mechanism as a defense by recognizing judgments
Judgments Mechanism, elaborated in the next Part, 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 to prove that the international cartel did not exist, did not operate in the relevant jurisdiction, or were not party to it. Once again, the fact that an international cartel operates in more than one jurisdiction is of relevance in countering such a claim, since the cartelists did have their day before the foreign decision maker who dealt with similar factual issues. Moreover, the foreign decision maker, anticipating that his decision 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 Recognition-of-Judgments Mechanism, have a strong motivation to prove the geographical boundaries of the cartel and to bring any possible counter-argument. The Recognition-of-Judgments Mechanism can thus be regarded as based on logic that is relatively similar to that on which the doctrine of collateral estoppel is based: Preventing a party and its privies from re-litigating issues that were actually litigated and determined in a prior suit by an able and fair decision maker.\textsuperscript{102} Finally, the international 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 Recognition-of-Judgments Mechanism might increase the costs of the foreign court and foreign prosecutors in hearing and deciding international cartel cases.\textsuperscript{103} Cartel members are likely to spend more that find that no cartel existed. While such symmetry is appealing at first blush, further analysis suggests that it should be rejected. Most importantly, such a rule would create strategic litigation that might abuse the Mechanism. Cartelists might choose to concentrate their defense efforts on the jurisdiction with the least resources in order to achieve a judgment in their favor. Moreover, some jurisdictions, acknowledging this incentive effect, might choose not to bring cases against international cartels in the first place, thereby reducing deterrence even further. One way to limit this problem is by restricting the jurisdictions from which a judgment can be recognized to the few large, developed ones that currently bring such cases and have significant resources to do so. This, however, would limit the application of the Mechanism to cases in which a cartel did not significantly affect such jurisdictions but still affects several other jurisdictions. Finally, the Recognition-of-Judgments Mechanism was created in order to solve the enforcement problems of small and developing jurisdictions and to increase domestic and global welfare. Achieving this goal does not require symmetric recognition.


\textsuperscript{103} It might also increase the defense costs of the international cartel members. However, such costs are likely to be much lower than the costs they would likely incur if they had to defend
resources in challenging the allegations against them. Yet, by incurring these extra costs, the jurisdiction gains a large benefit. The enforcement of antitrust laws by multiple jurisdictions significantly increases the deterrence of international cartels. Such increased deterrence, in turn, positively affects the welfare of all countries and is also likely to reduce the need for costly litigation in the future. Accordingly, the overall welfare effect of spending such extra resources up front will easily be positive in the long run.

Second, the jurisdiction can easily avoid such costs by deciding that its decisions will apply only to its jurisdiction and refraining from naming other jurisdictions in which the cartel behavior had taken place. Then, however, it loses the ability to significantly increase the welfare of its jurisdiction in the long run.

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).

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

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. This problem, though, is not unique to antitrust, and arises whenever a jurisdiction gives weight (or does not give weight) to a decision rendered elsewhere. 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

\footnote{104. Creation of such a list can also reduce political objections. This is because the harm to sovereignty might be viewed as depending on the relationship between the adopting and the originating jurisdictions. Jurisdictions might thus wish to limit the applicability of the Mechanism to decisions originating only in jurisdictions with which they have good relationships. See infra Part IV.D.}
international cartels to trial on a regular basis and that are all generally characterized by judicial competence and fair procedures. This suggestion also minimizes possible political clashes by basing the list on considerations of enforcement, thereby avoiding the need to make politically challenging decisions regarding the judicial competence of other jurisdictions.

E. Avoiding Foreign "Moods, Fads, or Fashions"

Students of legal realism have long argued that legal decisions reflect the ideology of the decision maker and the culture in which he operates. A legitimate concern thus involves reliance on foreign judgments that apply an ideology that is not in line with the domestic one. This concern is reflected in the famous statement of the U.S. Supreme Court that "this Court... should not impose foreign moods, fads, or fashions on Americans." While these concerns have merit, they have little weight in international hard-core cartel cases. Antitrust prohibitions are largely uncontroversial when applied to hard-core cartels. The theory of harm on which such prohibitions are based is grounded in sound economic principles and is accepted worldwide. While some legal differences exist with regard to some elements of the offense, such as the definition of an agreement, such differences are largely minimal with regard to hard-core cartels. Thus, decisions

105. See, e.g., OLIVER W. HOLMES, JR., THE COMMON LAW 3 (G. Edward White ed., Harvard Univ. Press 2009) (1881) ("The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

106. Lawrence v. Texas, 539 U.S. 558, 598 (2003) (quoting Foster v. Florida, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in denial of certiorari)). The concern was raised in the context of the interpretation of the constitution. Indeed, this concern has spurred some congressmen to suggest the adoption of the "Constitution Restoration Act," which states that when applying the U.S. constitution "a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States." S. 520, 109th Cong. § 201 (2005). The bill was not passed. See Roger P. Alford, Symposium: "Outsourcing Authority?" Citation to Foreign Court Precedent in Domestic Jurisprudence, 69 ALB. L. REV. 653, 661 (2006) (discussing the ways in which the debate over this concern has spilled into the contemporary political arena).

107. Compare 15 U.S.C. § 1 (2006) (making "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" a felony), with Consolidated Version of the Treaty on the Functioning of the European Union art. 101, 2010 O.J. (C 83) 47 (prohibiting "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market").
about the existence of such cartels are likely to be based on a common legal culture and socioeconomic ideology and understanding.

F. Reduced Incentives for Leniency Programs

The most significant possible 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.108 Moreover, the reporting firm may be at a disadvantage relative to its competitors because the reporting firm is unlikely to appeal the decision; therefore, the decision with regard to it would be final and could be adopted elsewhere. Its rivals, on the other hand, might appeal and succeed. The result of these effects is that international cartels might be stronger relative to domestic ones, as cheating on them by way of self-reporting generates lower rewards.109 Put even more strongly, absent a solution to this problem, the Recognition-of-Judgments Mechanism might even act as an internal enforcement tool among international cartel members.

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. Moreover, this problem is exacerbated because both jurisdictions are the main prosecutors of international cartels.110 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.

108. For arguments along this line, see the brief filed by the U.S. government in Empagran, in which it was argued that its leniency program would be imperiled by the increased private antitrust liability that leniency applicants would face should foreign private enforcement through U.S. courts be allowed. See Brief for the United States as Amici Curiae Supporting Petitioners at 19–21, F. Hoffman-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03–724), 2004 WL 234125. To limit such problems at the domestic level, the U.S. Antitrust Criminal Penalty Enhancement and Reform Act of 2004 provides leniency to the cooperating firms and individuals not only as to the federal prosecution but also provides some protection from civil damage exposure by shielding such firms and individuals from liability for treble damages. Standards Development Organization Advancement Act of 2004 § 213, 15 U.S.C. § 1 (2006).

109. See Evenett et al., supra note 54, at 1237.

What can be done? The problem is that each country decides for itself how to enforce its laws and whether 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 important way to solve this reporting incentive 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.

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

The Recognition-of-Judgments Mechanism addresses the shortcomings of the current system and alternative solutions, while imposing very limited costs. Given the many ills of the existing system, an experiment with a different enforcement model may be worthwhile. As I have shown, the costs of applying the proposed Mechanism are not high, and many costs can be avoided by applying corrective solutions. The Mechanism’s potential benefits, on the other hand, are significant. Given this conclusion, the next Part focuses on the practical aspects of the proposal.

IV. FROM THEORY TO PRACTICE

This Part examines in detail 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. Accordingly, this Part suggests a blueprint for conditions to ensure its fair implementation, which should be adopted into domestic law as a basis for the application of the Mechanism.

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

Conditions must ensure that the decision meets both substantive and procedural fairness standards. There is no need to create such conditions anew. Rather, we can learn by way of analogy from the conditions set in international treaties and domestic laws with regard to the application and enforcement of foreign decisions. 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 in the following sections: (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.

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. Such a legal basis need not mirror that of the adopting jurisdiction. Rather, it should be based on the domestic laws of the origin country.

An important question in this respect is whether the decision should be final in the foreign jurisdiction. In my view, there is a strong case for requiring that the decision be final in the foreign jurisdiction before it

111. See, e.g., Council Regulation 44/2001, supra note 87, at 10; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987); NANDA & PANSIUS, supra note 83, §§ 11-12.

112. See, e.g., BARNETT, supra note 102, at 164–66; FREEDMAN, supra note 102, at 21–36.

113. For a similar requirement, see, for example, the Swiss Code on Private International Law. BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [FEDERAL LAW ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, art. 25 (Switz.).
can be adopted elsewhere.\textsuperscript{114} Since the Recognition-of-Judgments Mechanism allows for the application of a foreign decision, one must be careful to ensure that the decision is factually accurate. Allowing the defendant to go through appeal procedures increases the likelihood that the decision meets this criterion.\textsuperscript{115} The downside is, of course, that it lengthens the time before the decision can be applied elsewhere. Yet, the deterrence effects of this extended period are usually not significant. Generally, the cartel terminates its anti-competitive conduct once the original jurisdiction brings it to trial. The additional sanctions that are likely to be imposed on it would thus generally have a forward-looking deterrence effect. Therefore, deterrence levels would not be significantly reduced if domestic enforcement took place only after the foreign decision was final.

This requires a minor adjustment to domestic laws: The period for bringing suit based on the foreign decision must be extended 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.

\textbf{B. Decision Clearly and Specifically Included a Factual Finding}

The foreign decision must clearly include a factual finding of a cartel that specifically relates to its operation within the adopting jurisdiction. The jurisdiction does not need to be specifically named, as long as it is clear from the decision that the decision maker found 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.

\textbf{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

\begin{itemize}
\item \textsuperscript{115} For a similar requirement, see, for example, IPRG, art. 25 (Switz.).
\end{itemize}
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 should also 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.  

In my view, the decision-making body should not be required to be a court. Rather, the Recognition-of-Judgments Mechanism could also be applied to decisions of antitrust 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 antitrust authorities, such as by the EU Commission, and are then subject to review in court. If a jurisdiction does not allow such decisions to be used as a basis for the application of the Recognition-of-Judgments Mechanism, deterrence effects will be significantly reduced.

116. One example would be if it is proven that the decision maker in a specific case took a bribe.

117. Indeed, some jurisdictions, including Hungary, Switzerland, and Québec, allow for the possibility that decisions by quasi-judicial bodies will also be relied upon in their jurisdictions. See 1979. évi 13. számú törvénye jár u rendelete a nemzetközi magánjogról (Decree 13 of 1979 on the International Private Law) § 72(1)–(2) (Hung.), translated in Francis A. Gabor, A Socialist Approach to Codification of Private International Law in Hungary: Comment and Translation, 55 Tul. L. Rev. 63 (1980); Civil Code of Québec, S.Q. 1991, c. 64, art. 3155 (Can.); Bundesgesetz über das Internationale Privatrecht [IPRG] [Code of Private International Law] Dec. 18, 1987, SR 291, RS 291, art. 25(a) (Switz.).
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, while different, must afford the defendant a full and fair trial.

We can learn by analogy from domestic decisions with regard to the applicability of foreign judgments. For example, enforcement of a foreign judgment by a U.S. court requires proof of the following: \(^{118}\) (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. \(^{119}\) 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. Obviously, if the burden of proof in the foreign jurisdiction is lower than in the adopting jurisdiction, then it cannot be ensured that the same factual decision would have been reached if the case were tried in the adopting jurisdiction.

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

\(^{118}\) Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

\(^{119}\) 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).
Finally, a foreign decision should not be adopted if it would be manifestly incompatible with the public policy of the adopting jurisdiction. However, as noted above, the possibility that this will occur in 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.\textsuperscript{120} Obviously the plea bargain must include an admission of guilt, rather than an agreement to a penalty without admission of guilt. It is worth mentioning that the opportunity to enter into a plea bargain might be used by the defendant to limit the geographical scope of the decision. For example, if he only acknowledges the existence of a cartel in the prosecuting jurisdiction, the Recognition-of-Judgments Mechanism would not apply. The ability of the defendant to achieve this result will depend on, among other things, the balance between the short- and long-term interests of the plaintiff.\textsuperscript{121} Nonetheless, even if plea bargains reduce the ability to apply the Mechanism, its mere existence might still create some positive effects, at least in the litigating jurisdiction. This is because, as noted above, it increases the incentives of defendants to enter into plea bargains in order to avoid follow-on litigation, and thus it reduces the resources needed to prosecute such cartels.

This proposal would inevitably lead to a new category of litigation on the applicability of foreign cartel judgments in domestic law. This observation leads to several questions. Will it not be too difficult or costly to determine whether the conditions have been met? Is the risk of judicial error in disputes high? One simple solution to this problem is for the adopting jurisdiction to list the countries that can be assumed to meet the above criteria, rather than require proof in each specific case. Such a list 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. As noted above, such a list can also limit political problems, as long as it purposefully includes only those

\textsuperscript{120} This was conditioned on the fact that the court accepting the plea bargain ensured that the defendant voluntarily and knowingly entered into the plea bargain.

\textsuperscript{121} To ensure that the plaintiff can take into account long-term interests, the competition law should be amended explicitly to allow it to do so.
jurisdictions that currently apply their laws to fight international cartels, which are all industrialized countries with generally well-functioning and fair decision-making systems. But even if plaintiffs had to prove the above conditions, the task would not be a difficult one. Moreover, the costs of such proof are likely to be incomparably lower than those that plaintiffs would have to incur if they had to prove the existence of an international cartel.

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

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 international cartel in accordance with regular domestic rules and procedures. In the same vein, the Mechanism should not be applied if the foreign decision is inconsistent with a domestic judgment.

CONCLUSION

The territoriality of antitrust 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. The attempt to use U.S. courts directly as "enforcers for the world" has been rejected by the U.S. Supreme Court, and suggestions to create a global enforcer have not gone beyond a
basic theoretical level, due to their political implications. Technical assistance programs designed to increase the ability of developing jurisdictions to enforce their laws have also had limited success, partially due to limited financial and human resources for enforcement. Additional solutions also have a limited effect on overall deterrence levels. This situation calls for placing a high priority on the development of effective mechanisms to increase deterrence of international cartels.

On this background, this Article 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 Recognition-of-Judgments 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 in this Article, 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.

This Article focused on the fight against international cartels. However, the application of the Recognition-of-Judgments 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 much 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 Recognition-of-Judgments 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. It also has the potential to increase global awareness of the harms created by cartels and to increase convergence on the legal
standards for cartel prosecution, which might assist in reaching the next step of enforcement. 122

122. It is noteworthy that the Mechanism might also be useful in other areas of law, such as consumer protection. Exploring this proposition is, of course, beyond the scope of this paper.