FOREIGN PRICE-FIXING CONSPIRACIES

CHRISTOPHER R. LESLIE†

ABSTRACT

Although price-fixing agreements remain per se illegal in the United States, courts have undermined the per se rule against price fixing by making it harder for plaintiffs to prove that such an agreement exists. For example, most courts that have considered the issue have held that defendants' price-fixing conduct in a foreign market is not probative of price fixing in the United States. This Article examines the relationship between foreign and domestic price-fixing activity and shows how expanding a price-fixing cartel from foreign markets into the United States benefits the cartel by reducing the risk of arbitrage, stabilizing the cartel, and concealing the conspiracy from global antitrust authorities. The Article then takes the insights from the empirical and theoretical cartel literature and applies them to antitrust doctrine in order to demonstrate why defendants' overseas price-fixing arrangements are relevant to proving the existence of an agreement in litigation claiming that the same defendants fixed prices in the American market. Finally, the Article encourages courts to better understand how international price-fixing cartels operate.

TABLE OF CONTENTS

Copyright © 2017 Christopher R. Leslie.

† Chancellor's Professor of Law, University of California Irvine School of Law. The author thanks Herb Hovenkamp, Mark Lemley, and Tony Reese for their comments.

INTRODUCTION

For most of the first half of the twentieth century, price-fixing cartels controlled international trade in important commodities, from steel and aluminum to coffee and sugar. European countries did not have antitrust laws and European governments largely supported the efforts of their national companies to participate in international cartels. These cartels, after all, generated large profits for their nations' firms and transferred enormous wealth from consumers abroad to producers at home. Because the Sherman Antitrust Act of 1890 condemned price fixing, American firms could not legally join these international cartels.

Yet international cartels insinuated themselves into the American marketplace, often with the involvement of U.S. firms. Despite the risk of antitrust liability, many American firms participated in international cartels during the interwar period.[1] During this era, American firms played important roles in European-based international cartels in several ways: illegally, directly or through European parent companies; through export cartels; and "informally, through an 'understanding'

1. GEORGE W. STOCKING & MYRON W. WATKINS, CARTELS OR COMPETITION?: THE ECONOMICS OF INTERNATIONAL CONTROLS BY BUSINESS AND GOVERNMENT 135 (1948) ("Under American public policy the legal risks of cartel engagements are formidable, yet American companies have become associated with international cartel ventures directly or indirectly in a large number of industries.").

with a formal cartel."[2] The Sherman Act made it harder to bring American firms into the fold, but many international cartels, such as the international steel cartel, persevered and convinced their American counterparts to join them.[3] European companies with U.S. subsidiaries often instructed their American divisions to follow the cartel policies of their European-based parents.[4] Even when cartel managers initially excluded the American market from their cartel agreements, as did the international nitrogen cartel, the cartel arrangements soon expanded to include the United States.[5]

In addition to conspiring in unambiguously illegal cartel activity, American firms sometimes participated in international cartels through so-called export cartels. Under the Webb-Pomerene Act, American firms could legally create export cartels, which (subject to registration and certain conditions) allowed American firms to fix prices for exports, but not in the domestic market.[6] Though contrary to the purpose of the Webb-Pomerene Act, these export cartels sometimes participated in larger international cartels and reduced competition in the American market.[7] For example, in the sulphur industry, "[o]nce [the American firms] had joined hands to exploit foreign markets, effective price competition at home disappeared."[8]

---

2. Valerie Y. Suslow, *Cartel Contract Duration: Empirical Evidence from Inter-War International Cartels*, 14 INDUS. & CORP. CHANGE 705, 708 (2005).

3. CLEMENS WURM, BUSINESS, POLITICS AND INTERNATIONAL RELATIONS: STEEL, COTTON AND INTERNATIONAL CARTELS IN BRITISH POLITICS, 1924–1939, at 164 (Patrick Salmon trans., 1993); *see id.* at 184 ("The countries which belonged to the international steel cartel controlled around 80 per cent of world steel exports after Britain's inclusion, and around 90 per cent after the agreement with the United States.").

Even when American producers are not involved in a particular market, the Sherman Act plays a role in how international cartels interact with the American market. American antitrust law deterred the international diamond cartel from operating out of New York, but did not dissuade the cartel from targeting American consumers. ERVIN HEXNER, INTERNATIONAL CARTELS 253 (1946).

4. HEXNER, *supra* note 3, at 312–13 (discussing hormone cartel).

5. *Id.* at 329 (discussing nitrogen cartel).

6. STOCKING & WATKINS, *supra* note 1, at 435 ("One of the greatest risks the United States incurs from the Webb-Pomerene law is the spread of monopolistic practices from export trade to the domestic economy. Practices that are lawful under this Act when used in export business are illegal in domestic business.").

7. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 662–64 (2004); *see also* Andrew R. Dick, *Identifying Contracts, Combinations and Conspiracies in Restraint of Trade*, 17 MANAGERIAL & DECISION ECON. 203, 210 (1996) ("It is possible also that firms might have used legal Webb-Pomerene agreements to help enforce illegal collusion domestically. . . . [D]uring most of the Act's history, the FTC and the courts failed to scrutinize possible spillovers between export cartelization and the domestic market.").

8. STOCKING & WATKINS, *supra* note 1, at 261.

Many American firms treated their Webb-Pomerene status as permission to participate with foreign firms in an international cartel.[9]

Finally, many American firms had informal relationships with international cartels, which enabled the U.S. firms to partake in the cartel's activities without actually belonging to the cartel, and consequently brought the U.S. market within the control of the cartel's decisionmakers. For example, American plate glass producers used licensing and marketing agreements to coordinate with members of the European-based plate glass cartel.[10] In some major industries, such as potash, when European cartels reduced worldwide output, it led to American firms developing their own U.S.-based production; yet the American firms often eventually followed the cartel's policies.[11] In many commodity markets, American firms with European subsidiaries often worked with price-fixing cartels in European countries in which cartel activity was legal.[12] This cartel participation in foreign markets facilitated price fixing in the American market.[13] Even when it seemed that the United States was not included in an international cartel, some American firms found ways to participate in international cartels while not technically belonging to them; for example, the Aluminum Company of America (Alcoa) participated in the international aluminum cartel through its Canadian subsidiary.[14]

Through all of these various mechanisms, international cartels engulfed the American marketplace and colluded to fix prices in the United States. During this era, the Department of Justice's Antitrust Division played a critical role in challenging these anticompetitive price-fixing agreements that injured American consumers.[15] Cartel

---

9. HEXNER, *supra* note 3, at 66.

10. *Id.* at 367.

11. STOCKING & WATKINS, *supra* note 1, at 95 (discussing example of potash cartel).

12. *Id.* at 256 ("Even where they are not coerced into doing do, American firms may find it expedient to join cartels. In Europe cartels regulated most lines of manufacture and wholesale distribution before the war. American firms with subsidiaries in European countries generally found it advantageous to conform to local practices.").

13. *Id.* at 259 ("[American] producers who have learned to co-operate in regulating their foreign sales, and have found means of making their joint program effective, are not likely to forget what they have learned, when doing business in the home market.").

14. MARCO BERTILORENZI, THE INTERNATIONAL ALUMINUM CARTEL, 1886–1978, at 55 (2016); HEXNER, *supra* note 3, at 221 ("[M]any writers have felt that Canadian membership in the international cartel indirectly also bound Alcoa."); STOCKING & WATKINS, *supra* note 1, at 206; *see also* HEXNER, *supra* note 3, at 217 (explaining corporate relationships in the aluminum market).

15. In addition to price fixing, American firms would sometimes agree with their European counterparts to divide international markets, such as when General Electric (GE) entered a cartel

activity in steel, aluminum, nitrogen, and potash, for example, were successfully challenged.[16] Although most cartel activity is now illegal in Europe, international cartels continue to dominate many worldwide markets for necessary commodities and services.[17] Despite the well-documented history of legal foreign cartel activity transforming into illegal activity in the American market, federal judges of late have shown little appreciation for this history. They also seem to ignore how international cartels grow and expand into the United States to replace competitive markets that favor consumer interests with cartelized ones that artificially reduce output and raise prices. Today's courts seem less concerned with the dangers posed by international price fixing, even though the harms inflicted by international cartels have grown.[18]

Although price-fixing agreements remain per se illegal in the United States, courts have undermined the per se rule against price fixing by making it harder for plaintiffs to prove that an agreement to fix prices exists. In particular, American courts have a difficult time interpreting the significance of foreign price-fixing activity and its relevance to alleged domestic conspiracies to fix price. Judges too often discount or disregard the probative value of defendants fixing price in foreign markets in determining whether the same defendants have fixed price in the American market. This Article examines the legal significance of foreign price-fixing conduct in deciding claims of domestic price fixing and explains how most American courts have

---

agreement with the Krupp Steel Works of Germany in 1928, pursuant to which GE "obtained exclusive control over the United States market" for tungsten. STOCKING & WATKINS, *supra* note 1, at 132. This tungsten cartel was eventually disrupted, in part, because the Department of Justice brought an antitrust indictment in 1941.

16. *See, e.g.*, HEXNER, *supra* note 3, at 269 (noting consent decree against potash suppliers); *id*. at 329 (noting indictment against nitrogen cartel).

17. *See* Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance*, 51 VA. J. INT'L L. 57, 59 (2010) (noting that international cartels had a large enough share of the market to make more than $260 billion in profits between 1990 and 2005 by overcharging for necessary commodities).

18. John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies*, 51 ANTITRUST BULL. 983, 983 (2006). In 2013, for example, the federal government filed fifty new criminal antitrust cases and levied over one billion dollars in criminal fines. Margaret C. Levenstein & Valerie Y. Suslow, *Price Fixing Hits Home: An Empirical Study of US Price-Fixing Conspiracies*, 48 REV. INDUS. ORG. 361, 361 (2016); *see also* Scott D. Hammond, Acting Deputy Assistant Att'y Gen. for Criminal Enf't, U.S. Dep't of Justice, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program 2 (Jan. 10, 2005), https://www.justice.gov/atr/file/517886/download [https://perma.cc/7TPP-YSTU] ("Our investigations have uncovered meetings of international cartels in well over 100 cities in more than 35 countries, including most of the Far East and nearly every country in Western Europe.").

mishandled the issue.

By “foreign price fixing” and “foreign cartels,” this Article refers to fixing prices in markets outside of the United States. The price-fixing firms may be based in the United States or abroad, but their activity is directed at fixing prices in foreign markets, not the American market. When using the phrases “domestic price fixing” and “domestic cartels,” this Article means that the defendants are fixing price in the American market, regardless of where the defendants are based. An international cartel refers to a price-fixing conspiracy that is operating in multiple countries, which may or may not yet include fixing price in the American market.

Part I lays out the basics of American antitrust law. Agreements among competitors to fix price in the American marketplace are per se illegal. Plaintiffs alleging an illegal price-fixing agreement can use either direct evidence or circumstantial evidence to demonstrate that the defendants agreed to fix prices. Because direct evidence of price fixing is rarely available, most plaintiffs rely on circumstantial evidence. To establish a circumstantial case, the plaintiffs must show both that the defendants engaged in parallel pricing and that there are so-called plus factors that suggest this parallel pricing was the result of collusion. This requires courts to determine what constitutes a plus factor.

Part II discusses whether the fact that the defendant corporations have engaged in price fixing in foreign markets is a plus factor for showing that the defendants also fixed price in the American market. Although some courts have held defendants’ fixing price in foreign markets to be relevant, most courts have not. These latter courts have advanced two main reasons for not treating the defendants’ price fixing in a foreign market as a plus factor. First, some courts have held that price fixing in a foreign market is not a plus factor unless the plaintiffs can prove that the defendants’ specific activities violated applicable foreign law. Second, most courts assert that there is no connection between defendants’ proven foreign price fixing and alleged price fixing in the American market.

Part III examines the relationship between foreign and domestic price-fixing activity. After explaining the inherent difficulties in establishing a stable cartel, it shows how firms that have fixed prices in foreign markets are in a much better position to fix prices in the American marketplace. Cartels that fix prices outside of the United States facilitate cartels that fix prices in the United States because competitors who have already established a sufficient level of trust to engage in price fixing abroad can leverage that trust they have developed in foreign jurisdictions and utilize it in their collusive activity in the United States. Next, this Part describes why cartels that fix prices in a foreign market would want to expand their price-fixing operations into the American market, despite the penalties associated with violating the Sherman Act. Among other advantages, expanding a cartel from foreign markets into the United States reduces the risk of arbitrage, stabilizes the cartel, and also helps conceal the conspiracy from global antitrust authorities.

Part IV takes the insights from Part III and applies them to antitrust doctrine in order to demonstrate why defendants' overseas price-fixing arrangements constitute a plus factor in litigation about price fixing in the American market. The discussion explains not only why the defendants' foreign price fixing is a plus factor unto itself, but also why it satisfies other well-established plus factors, including the defendants' motive and opportunity to conspire and the fact that the product market at issue is conducive to cartelization. Ultimately, if defendants have colluded in foreign markets, then their parallel pricing in the American market is more likely to be the product of collusion.

Part IV then exposes the mistakes that courts make when concluding that defendants' foreign price fixing is legally irrelevant. First, courts are incorrect to assert that foreign price fixing can only be a plus factor if it violates foreign law. Legality is not part of the plus-factor analysis and inquiries into foreign law unnecessarily complicate the analysis. Second, when courts hold that there is no connection between foreign and domestic price fixing, their opinions display an unfamiliarity with how cartels—especially international cartels—actually operate. This unawareness might be tolerable but for the fact that courts are making a more fundamental error by essentially requiring plaintiffs to supply direct evidence of domestic price fixing in order to present evidence of the defendants' foreign activities as a plus factor. In so doing, courts seem not to understand how plus factors are used to construct a circumstantial case for inferring an agreement to fix prices.

The Article concludes by encouraging courts to better understand how international price-fixing cartels operate. Defendants' price fixing in foreign markets is relevant to claims that parallel pricing in the American market by these same defendants results from collusion. The foreign activity is not proof positive, but it is probative. And courts should treat it as so.

I. PRICE-FIXING AGREEMENTS AND U.S. ANTITRUST LAW

Price-fixing cartels inflict significant injuries on the national economy. By reducing output and increasing prices, cartels misappropriate billions of dollars from consumers and prevent millions of consumers from acquiring necessary products and services that these consumers could afford to purchase in a competitive market.[19] In addition to these allocative inefficiencies, cartels create productive inefficiencies by insulating inefficient manufacturers from the pressures of competition, which increases the average production costs in an industry.[20]

In recognition of these harms, Section 1 of the Sherman Act condemns agreements that unreasonably restrain trade.[21] Although the Supreme Court has not articulated a single legal test for Section 1 liability, most courts require an antitrust plaintiff to prove three elements: (1) An agreement; (2) that unreasonably restrains trade; and (3) has an effect on interstate commerce.[22] Discussing these elements in reverse order, the third element is almost inherently present because courts are lenient in finding that an agreement affects interstate commerce.[23] For the second element, courts have developed a deep body of common law for determining whether a challenged agreement constitutes an unreasonable restraint of trade. Plaintiffs can prove the second element through one of three different legal tests: the per se rule, the quick look rule, or rule of reason.[24] The per se rule is categorical and applies to agreements "that would always or almost always tend to restrict competition and decrease output."[25] If an

19. Economists refer to this form of inefficiency as deadweight loss. *See generally* Christopher R. Leslie, *Antitrust Damages and Deadweight Loss*, 51 ANTITRUST BULL. 521 (2006) (explaining deadweight loss and how antitrust law should address the problem).

20. GEORGE W. STOCKING & MYRON W. WATKINS, CARTELS IN ACTION: CASE STUDIES IN INTERNATIONAL BUSINESS DIPLOMACY 352 (1946) ("Cartel penalties and subsidies protected weaker producers and tended to raise average costs.").

21. 15 U.S.C. § 1 (2012). Section 1 of the Sherman Act litigation can be brought by either government officials or private plaintiffs. This Article focuses on private litigation because the judicial opinions discussing whether foreign price-fixing activity constitutes a plus factor are from private enforcement cases.

22. *See, e.g.*, T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 632–33 (9th Cir. 1987); White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983).

23. *See* Christopher R. Leslie, *The Commerce Requirement in Tying Law*, 100 IOWA L. REV. 2135, 2143 (2015).

24. *See* CHRISTOPHER R. LESLIE, ANTITRUST LAW AND INTELLECTUAL PROPERTY RIGHTS: CASES AND MATERIALS 26–27 (2011) (explaining differences among the three modes of antitrust analysis).

25. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289–90

agreement falls in a per se category, it is deemed unreasonably anticompetitive—and, thus, illegal—as a matter of law, and the defendants are not entitled to proffer a defense that their agreement is justified by legitimate business reasons.[26] Agreements among competitors to fix price are the quintessential case of per se illegality.[27] Because such horizontal price-fixing agreements are per se illegal, defendants who have made such an agreement cannot present a defense to justify their conduct.[28]

With the second and third elements almost perfunctory in price-fixing cases, liability usually turns on the first element: agreement. If the plaintiff can prove that the defendants agreed to fix price, antitrust liability is established.[29] Thus, most price-fixing litigation focuses on the agreement element.[30]

Antitrust plaintiffs can prove an agreement with either direct or circumstantial evidence.[31] Direct evidence may take the form of testimony from cartel participants, such as confessions obtained through the Department of Justice Antitrust Division's Amnesty

(1985) (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979)).

26. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (stating agreements that fall in a per se category are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"); *see also* Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988) ("[C]ertain anticompetitive practices, such as price fixing, so typically lack justification as to be per se unreasonable."); United States v. Nu-Phonics, Inc., 433 F. Supp. 1006, 1012 (E.D. Mich. 1977) ("Once it has been determined that a particular course of action was a price-fixing conspiracy which affected interstate commerce—a *per se* violation of section 1—there is virtually no defense. The reasonableness of the price fixed is immaterial, as is any benevolent or constructive motivation for the scheme."); Colo. Springs Bd. of Realtors, Inc. v. State, 780 P.2d 494, 497 (Colo. 1989) ("If a defendant's acts constitute a *per se* antitrust violation, no justification based on a rule of reason analysis can alter that fact.").

27. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984) (describing horizontal price fixing as "perhaps the paradigm of an unreasonable restraint of trade").

28. The Supreme Court, however, has chipped away at the edges of the per se rule against horizontal price fixing. For example, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), the Court held that fixing prices does not necessarily constitute price fixing—as the latter term is used in antitrust jurisprudence—if the defendants' agreement is necessary to create a new beneficial product that would not otherwise exist. *Broad. Music, Inc.*, 441 U.S. at 23–24.

29. Private plaintiffs must still prove antitrust injury and antitrust damages. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990).

30. Illegal price fixing includes agreements to reduce or stabilize price, as well. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). Traditional price-fixing cases, however, involve conspiracies to raise price and this Article will focus on this form of conspiracy.

31. *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010).

Program, in which firms or individuals exchange confessions for leniency.[32] Direct evidence of an agreement to fix prices is, however, generally not available because price fixers work to conceal their conspiracies.[33] Recognizing this fact, courts do not require direct evidence that the defendants conspired to raise price.[34]

Most antitrust plaintiffs rely on circumstantial evidence to establish the agreement element of a price-fixing claim. In antitrust jurisprudence, proving an agreement through circumstantial evidence involves two components. Plaintiffs must first prove conscious parallelism, which exists when competitors in a concentrated market price their products similarly because they recognize that the firms are interdependent and that their pricing decisions will influence their rivals' pricing decisions.[35] Conscious parallelism—generally in the form of the defendants' parallel pricing of their products—is not enough to show an agreement.[36] Plaintiffs must then also present plus factors, which are factors that tend to show that the defendants' parallel conduct is the result of collusion, rather than of independent decisions.[37] Plus factors are the critical linchpins in proving a price-fixing agreement in antitrust litigation through circumstantial

---

32. *See* Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1665–67 (2008).

33. *See, e.g.*, *In re* Vitamins Antitrust Litig., No. MISC 99-197, 2000 WL 1475705, at *3 (D.D.C. May 9, 2000) (alleged price fixers' acts of concealment included holding "secret meetings, confining the conspiracy plan to a small group of key officials at each company, avoiding references in documents or the creation of documents which would reveal these antitrust violations, destroying documents, using codes to conceal the identity of co-conspirators, and providing false information to law enforcement authorities"); JOHN G. FULLER, THE GENTLEMAN CONSPIRATORS: THE STORY OF THE PRICE-FIXERS IN THE ELECTRICAL INDUSTRY 13 (1962) (discussing concealment methods of electrical equipment cartels).

34. *In re Text Messaging*, 630 F.3d at 629 ("Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy.").

35. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) (describing conscious parallelism as "the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions").

36. *In re* Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir. 1999).

37. *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004) ("[E]xistence of these plus factors tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors.'" (quoting *In re Baby Food*, 166 F.3d at 122)); Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co., 998 F.2d 1224, 1232 (3d Cir. 1993) ("[A] plaintiff also must demonstrate the existence of certain 'plus' factors, for only when these additional factors are present does the evidence tend to exclude the possibility that the defendants acted independently.").

evidence.[38] In the absence of direct evidence of an agreement, antitrust plaintiffs need to plead plus factors in order to survive a motion to dismiss.[39] Thus, whether a court treats a particular circumstance as a plus factor can be dispositive of a plaintiff's price-fixing claim.

No single exhaustive, definitive catalog of plus factors exists.[40] The most commonly listed plus factors include: "a motive to conspire," "evidence that the defendants acted contrary to their economic self-interest," and "evidence of a traditional conspiracy, such as a high level of interfirm communications that would suggest that the defendants consciously agreed not to compete."[41] Other plus factors include that the defendants operate in a concentrated market with a structure conducive to collusion, that the defendants have proffered pretextual explanations for their conduct, and that the defendants have shared price information with each other.[42] Courts have not precisely defined any number or set of plus factors that must be present to infer an agreement to fix prices. No particular plus factor is required, and a single plus factor may be sufficient.[43] Fact finders are supposed to evaluate the bundle of plus factors proffered by the plaintiff and then determine whether these factors—when collectively considered—demonstrate that the defendants did, in fact, agree to fix prices.[44]

II. JUDICIAL TREATMENT OF CONSPIRACIES TO FIX PRICE IN FOREIGN MARKETS AS A PLUS FACTOR

The plus-factor approach to proving an agreement requires courts to determine what constitutes a plus factor. This Article addresses whether defendants' price-fixing activity in foreign markets can be a

38. *In re Baby Food*, 166 F.3d at 122 (describing plus factors as "necessary conditions for the conspiracy inference").

39. Mayor & City Council of Balt. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013).

40. *In re Flat Glass*, 385 F.3d at 360 ("The question then becomes, what are 'plus factors' that suffice to defeat summary judgment? There is no finite set of such criteria; no exhaustive list exists."); *In re* Pool Prods. Distribution Mkt. Antitrust Litig., 988 F. Supp. 2d 696, 711 (E.D. La. 2013) ("There is no finite or exhaustive list of plus factors, and different courts articulate the relevant factors in different ways.").

41. *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F. Supp. 2d 141, 166–67 (D. Conn. 2009).

42. *In re Pool Prods. Distribution*, 988 F. Supp. 2d at 711–12; *see also* RICHARD A. POSNER, ANTITRUST LAW 55–93 (2d ed. 2001) (listing plus factors).

43. Baker v. Jewel Food Stores, Inc., 823 N.E.2d 93, 106 (Ill. App. Ct. 2005) ("[E]vidence of a single plus factor can suffice to support an inference of conspiracy . . . .").

44. *In re* Domestic Airline Travel Antitrust Litig., 221 F. Supp. 3d 46, 58 (D.D.C. 2016) ("'Plus factors' must be evaluated holistically.").

plus factor for proving an agreement to fix prices in the American market. This Article does not address foreign-based conspiracies to fix prices in the U.S. market. These are clearly illegal. The Supreme Court has long held that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[45] This Article instead focuses on whether conspiracies to fix prices in foreign jurisdictions provide evidence of the existence of an additional price-fixing conspiracy by the same companies in the American marketplace.

Courts have not sung from the same hymnbook on this issue. Many courts have recognized that participation in a price-fixing conspiracy in one market is a plus factor in determining whether those participants also agreed to fix price in another market.[46] Some courts have applied this reasoning to foreign price-fixing activity, holding that "[e]vidence of cooperation between Defendants in foreign price-fixing, through a trade association or otherwise, would certainly be relevant to establish the existence of an illegal combination or conspiracy in restraint of trade, which is a required element of a § 1 Sherman Act claim."[47] Most courts to consider the issue, however, have failed to appreciate the significance of the defendants' price fixing outside the United States. This Part examines how courts considering allegations of domestic price fixing have generally discounted or disregarded the probative value of the defendants' participation in conspiracies to fix prices abroad.

A. *Foreign Price Fixing Considered Irrelevant Unless Illegal*

Several courts have held that antitrust defendants' alleged participation in a price-fixing cartel outside the United States cannot constitute a plus factor unless that alleged foreign activity would have

45. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

46. United States v. Andreas, 216 F.3d 645, 666 (7th Cir. 2000) (stating defendants' participation in a citric-acid price-fixing conspiracy was relevant in a criminal case against participants in a lysine price-fixing conspiracy); *In re* Packaged Ice Antitrust Litig., 723 F. Supp. 2d 987, 1011 (E.D. Mich. 2010) ("[G]uilty pleas in one market are suggestive of the plausibility of a conspiracy to commit the same illegal acts in another market."); *In re* Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) (stating guilty pleas of price fixing in the Dynamic Random Access Memory (DRAM) market "support an inference of a conspiracy in the SRAM industry"); Eddins v. Redstone, 35 Cal. Rptr. 3d 863, 877 n.11 (Cal. Ct. App. 2005) (recognizing "proved conspiracy or competition in other markets or times" as a plus factor).

47. *In re* Auto. Refinishing Paint Antitrust Litig., No. 1426, 2004 WL 7200711, at *3 (E.D. Pa. Oct. 29, 2004).

violated the foreign jurisdiction's competition law.[48] Most notably, in *Williamson Oil Co., Inc. v. Philip Morris USA*,[49] plaintiff retailers claimed that the defendant tobacco manufacturers had conspired to fix prices in the American market. Plaintiffs sought to prove an agreement through circumstantial evidence. Among other plus factors,[50] the plaintiffs asserted that the defendants' agreements to fix prices in foreign markets constituted a plus factor for proving a conspiracy to fix prices in the United States.[51] In particular, the plaintiffs argued that the defendants had been fixing tobacco prices in Argentina, Canada, Costa Rica, El Salvador, France, Guatemala, Hungary, Saudi Arabia, and Venezuela.[52]

The Eleventh Circuit rejected the argument that the defendants' alleged foreign price fixing constituted a plus factor. This holding flowed naturally from the appellate court's decision to affirm a ruling that the plaintiffs' evidence of foreign price fixing was inadmissible because they "had failed to show that *any* of the actions allegedly undertaken by [the defendants] overseas were illegal under the applicable foreign law."[53] The Eleventh Circuit both affirmed the district court's ruling and criticized the plaintiffs for "fail[ing] to establish that the foreign conduct was a crime or wrong under the laws of the foreign sovereigns."[54] Because of this failure to prove foreign illegality, the Eleventh Circuit held that the "alleged evidence of foreign agreements to collude does not rise to the level of a plus factor."[55]

The appellate panel also faulted the plaintiffs for not showing "some palpable tie between these overseas activities and appellees' pricing actions in the United States."[56] The absence of a tangible link between the domestic and foreign conspiracies is hardly surprising given that the district court forbade the antitrust plaintiffs from serving

48. What the United States calls "antitrust law," many foreign jurisdictions refer to as "competition law." This Article uses the terms interchangeably.

49. Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003).

50. The plaintiffs also alleged other plus factors, including price signaling, actions against individual interest, collective monitoring of sales, participation in other non-price conspiracies, a market structure conducive to collusion, the history of price fixing in the tobacco industry, opportunities to conspire, and others. *Id.* at 1305–19.

51. *Id.* at 1316–17.

52. *Id.*

53. *Id.* at 1316.

54. *Id.* at 1317.

55. *Id.*

56. *Id.*

discovery requests "relating to price-fixing episodes in foreign countries" unless they first proved that the foreign price-fixing agreements were illegal "under clearly-established statutes of the foreign jurisdiction, or, if the country is a common law jurisdiction, under the common law of the jurisdiction."[57] Furthermore, the district judge held that the plaintiffs could receive no discovery absent "direct evidence [of] one or more price fixing episodes in that country during the operative discovery period," which coincided roughly with the period of the defendants' alleged price fixing in the United States.[58] How the plaintiffs could acquire this direct evidence absent discovery, the district court did not address.

The Eleventh Circuit approach to evidence of foreign price-fixing activity proved persuasive in subsequent state court cases considering antitrust claims brought against the *Williamson* defendants.[59] For example, the Kansas appellate court in *Smith v. Philip Morris Companies, Inc.*,[60] granted summary judgment to the defendants after holding that the defendants' alleged foreign price fixing did not constitute a plus factor. As in *Williamson*, the plaintiffs in *Smith* argued that the defendants' foreign price-fixing activity constituted a plus factor that showed that the defendants' parallel pricing was "not merely the natural and wholly legal interdependent but independent pricing practices that occur in an oligopoly, but rather it was the product of an illegal agreement to fix the domestic wholesale price of cigarettes."[61] Invoking *Williamson*, the Kansas court held that the "Plaintiffs have not established that any alleged price-fixing activities by Defendants that underlie their allegations here were, in fact, unlawful under foreign law."[62] Thus, the court deprived the defendants' foreign price fixing of any probative value unless the plaintiffs could prove that it violated foreign law.

B. Foreign Price Fixing Discounted as Disconnected

Even when plaintiffs prove that defendants' price fixing abroad is illegal, courts discount the significance of foreign price fixing by failing

57. Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253, 1312 (N.D. Ga. 2002), *aff'd sub nom.*, *Williamson Oil Co.*, 346 F.3d 1287.

58. *Id.*

59. *See, e.g.*, Romero v. Philip Morris Inc., 242 P.3d 280, 297 (N.M. 2010).

60. Smith v. Philip Morris Cos., Inc., 335 P.3d 644 (Kan. Ct. App. 2014).

61. *Id.* at 673.

62. *Id.* at 674.

to see—in the words of the *Williamson* court—a "palpable link" between foreign price-fixing activity and the alleged price fixing in the American marketplace. For example, in *In re Chocolate Confectionary Antitrust Litigation*,[63] the plaintiffs sued Hershey's, Nestle, and Mars for fixing the prices of chocolate products in the American market. Lacking direct evidence of price fixing, the plaintiffs relied on circumstantial evidence.[64] They established conscious parallelism by showing that "on three separate occasions between December of 2002 and April of 2007, when one defendant initiated a price increase on single and king size chocolate bars, the other two defendants followed immediately with similar price increases."[65] The price increases were identical, except once when the increase varied "only by two-tenths of a penny."[66] The district court noted that the defendants "do not—and cannot—contest the fact that their price increases were synchronized and parallel throughout the alleged conspiracy period."[67] The defendants essentially conceded that this parallelism was conscious, but argued that "each company's pricing action was reactive," not collusive.[68]

After establishing conscious parallelism, the plaintiffs alleged plus factors, including that the defendants had illegally conspired to fix the price of chocolate in the Canadian marketplace, pursuant to a series of secret meetings.[69] These agreements violated Canadian competition law; indeed, the court noted that "the Canadian Competition Bureau criminally charged the Canadian manufacturers—three of whom share parent corporations with the domestic defendants—with conspiring to restrict competition and fix prices for chocolate products."[70] At the time that the district judge was entertaining the defendants' motion for summary judgment, Hershey Canada had already pled guilty to one count of price fixing and the antitrust charges against Nestle's and Mars' Canadian operations remained active.[71] The plaintiffs relied heavily on the Canadian chocolate conspiracy to demonstrate that the

---

63. *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015).

64. *Id.* at 398.

65. *In re* Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 787 (M.D. Pa. 2014), *aff'd*, 801 F.3d 383 (3d Cir. 2015).

66. *Id.* at 788.

67. *Id.* at 787.

68. *Id.*

69. *Id.* at 784.

70. *Id.*

71. *Id.*

parallel price movements in the American chocolate market were also the product of a conspiracy.[72]

The district court expressed suspicion about the probative value of the defendants' foreign price-fixing conspiracies. The judge began by quoting Professors Areeda and Hovenkamp's *Antitrust Law* treatise for the proposition that "[a]nticompetitive conduct 'elsewhere in time or place does not generally allow the inference of an immediate conspiracy.'"[73] The court required a "reliable, factual link between foreign and domestic conduct" in order to consider "foreign conduct as a plus factor for liability purposes."[74] The district court ultimately rejected the defendants' price-fixing activities in Canada as a plus factor, finding the plaintiffs' allegations "entirely devoid of any facts establishing a plausible, much less a palpable, tie between the Canadian . . . conspiracy and domestic pricing decisions."[75]

The Third Circuit affirmed both the district court's approach and its conclusion. The appellate panel reasoned that the plaintiffs failed to "adequately link[] the Canadian conspiracy to the purported U.S. conspiracy"[76] because the alleged conspiracies involved different people, different legal entities, and different circumstances.[77] Absent a sufficient link between the two conspiracies, the Third Circuit held the foreign price fixing not to be a plus factor and it affirmed summary judgment for the defendants.[78] The court did not view the same companies engaging in the same parallel pricing in the same products as showing a link between the proven and the alleged conspiracies that straddled one border.[79]

The "no connection" reasoning for rejecting the defendants' foreign price fixing as a plus factor reached its nadir when the Second

72. *Id.* at 797 ("The foundation of plaintiffs' claims rests largely on their hypothesis that alleged and partially proven anticompetitive conduct in Canada somehow facilitated a price-fixing conspiracy in the United States.").

73. *Id.* at 798 (quoting 6 PHILIP E. AREEDA & HERBERT H. HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1421a (3d ed. 2012)).

74. *Id.*

75. *Id.*

76. *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 403–04 (3d Cir. 2015).

77. *Id.* at 404. With respect to the third dissimilarity, the court distinguished the Canadian conspiracy from the alleged American one because the former cartel had a distributor serve as its ringleader and because the Canadian cartel included an agreement to restrict discounting as well as to fix prices. *Id.*

78. *Id.* at 412.

79. For an explanation of why the court's failure to see a connection was in error, see *infra* Part IV.B.2.

Circuit applied this rationale to dismiss a price-fixing claim. In *In re Elevator Antitrust Litigation*,[80] the plaintiffs alleged price fixing in the American market for elevator sales and maintenance. The plaintiffs accused the defendants of engaging in "standardized practices," including "standard price lists and contracts for maintenance and repair of elevators, which include similar language and terms."[81] This constituted conscious parallelism. As for plus factors, the plaintiffs alleged that "the elevator industry is an oligopoly, dominated by a small number of manufacturers, with the four defendants controlling 75% of the market for elevator sales and maintenance," which are "economic conditions conducive to anticompetitive behavior."[82] In addition to these structural plus factors, the plaintiffs also alleged that behavioral aspects of the elevator industry facilitated collusion, describing the industry as "closely knit" and alleging "that defendants belong to many of the same trade groups and associations, the frequent meetings of which provide numerous opportunities for defendants to reach collusive agreements."[83] These represent accepted plus factors for proving an agreement.

As part of its circumstantial case to show an agreement among the defendants, the plaintiffs also cited the defendants' anticompetitive activities in European markets. Following raids on the defendants' European subsidiaries' offices, the European Commission issued a statement that it had "good reason to believe that the manufacturers [including defendants . . .] may have shared between themselves the tenders for sale & installation of elevators & escalators and may have colluded to restrict competition with regard to after-sales services."[84] Two of the defendants had admitted to illegally fixing prices with their competitors.[85] The plaintiffs presented this foreign activity as a plus factor.

The district court denied any probative value to the defendants' illegal activity in the European marketplace, asserting that "*[t]here are no facts* alleged to suggest that defendants did not compete against one another in regard to the sale of elevators and the pricing of such sales"

80. *In re* Elevator Antitrust Litig., 502 F.3d 47 (2d Cir. 2007).

81. *In re* Elevator Antitrust Litig., No. 04 CV 1178, 2006 WL 1470994, at *2 (S.D.N.Y. May 30, 2006), *aff'd*, 502 F.3d 47 (2d Cir. 2007).

82. *Id.*

83. *Id.*

84. *Id.* at *7 (alteration in original).

85. *Id.*

in the United States.[86] The district judge further held that the European Commission's "investigations of defendants' subsidiaries' business practices in Europe are patently insufficient" to permit the plaintiffs' antitrust claims to proceed.[87] The court first asserted that there had "not, in fact, been any finding of wrongdoing by any regulatory or judicial body of law in Europe."[88] This reasoning is odd given that two of the entities had admitted to illegal price fixing.[89] An uncoerced admission of guilt would seem to be even more persuasive than a "finding" of price fixing because the former is less likely to be in error. The court then asserted that "despite the admission by certain defendants of illegal conduct in certain European countries, there is no basis from which to infer that those localized investigations or proceedings implicate defendants in the far broader conspiracy plaintiffs allege with respect to the U.S. markets."[90] The district court dismissed the plaintiffs' complaint without leave to replead.[91]

The Second Circuit affirmed, speculating that the defendants' similar pricing and similar contract terms could have occurred in a competitive market.[92] The appellate court conceded that subsequent to the plaintiffs' initial complaint, "extraordinary fines have been levied

86. *Id.* at *10 (emphasis added).

87. *Id.*

88. *Id.*

89. *Id.* at *7 ("At oral argument, counsel for defendants conceded that Otis has admitted that some of its employees in certain local Markets in Europe have violated the law, but asserted that such violations were confined to four European countries."); *see also id.* ("The Complaint further alleges that, the following day, March 18, 2004, World Markets Analysis reported that Kone Corporation had admitted on March 17, 2004 that it had engaged in anti-competitive activities at its subsidiaries in Germany, Belgium and Luxembourg by fixing prices.").

90. *Id.* at *10.

91. The district court condemned the plaintiffs' allegations as lacking specification and being "nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatever." *Id.* at *3. The district court also condemned the complaint for failing to allege "what elevators a specific plaintiff purchased from any defendant or defendants" or that specific plaintiffs were overcharged. *Id.* If the court were holding that the plaintiffs' lack of specificity with respect to the purchases and pricing is itself fatal, then the European price fixing might not compensate for this omission in the pleading. But the court did not treat the plaintiffs' oversight as warranting dismissal in and of itself. Rather, the court condemned the deficiency of details and then branded the defendant's European price fixing as irrelevant and unrelated.

92. *In re* Elevator Antitrust Litig., 502 F.3d 47, 51 (2d Cir. 2007) ("Similar contract terms can reflect similar bargaining power and commercial goals (not to mention boilerplate); similar contract language can reflect the copying of documents that may not be secret; similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy."). The Second Circuit's treatment of the defendants' similar pricing and terms is perplexing because it seemed to treat—and reject—them as plus factors, but failed to appreciate that these similarities establish conscious parallelism, the step that precedes the plus-factor analysis.

by the European Commission against defendants and their affiliates for various antitrust violations."[93] This would seem to rebuff the district court's argument that there had been no finding of antitrust liability in Europe. Nevertheless, the Second Circuit reasoned that "[a]llegations of anticompetitive wrongdoing in Europe—absent any evidence of linkage between such foreign conduct and conduct here—is merely to suggest, in defendants' words, that 'if it happened there, it could have happened here.'"[94] The court held that the plaintiffs failed to adequately allege "facts linking transactions in Europe to transactions and effects here" in the United States and, thus, the conspiracy alleged in the plaintiffs' complaint was not plausible and could not survive the defendants' motion to dismiss.[95]

In addition to these opinions from the Second, Third, and Eleventh Circuits, many state courts have cited a lack of connection between an alleged domestic conspiracy and foreign price-fixing activities in order to prevent plaintiffs' price-fixing claims from advancing to trial.[96] None of these opinions have suggested what makes a link sufficiently "palpable" to treat the defendants' foreign price fixing as a plus factor in a domestic antitrust case. Nor have they hinted at the quantum of evidence necessary to demonstrate this link. Part III explains why this link is inherent given how price-fixing cartels operate.

III. THE ROLE OF AGREEMENTS TO FIX PRICES ABROAD IN AMERICAN PRICE-FIXING CONSPIRACIES

The federal and state court opinions rejecting defendants' foreign

93. *Id.* at 51 n.6 (citing Plaintiffs-Appellants' Supplemental Letter Brief at 3, *In re Elevator Antitrust Litig.*, 502 F.3d 47 (No. 06-3128-cv)).

94. *Id.* at 51–52.

95. *Id.* ("Without an adequate allegation of facts linking transactions in Europe to transactions and effects here, plaintiffs' conclusory allegations do not 'nudge [their] claims across the line from conceivable to plausible.'" (quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007))).

96. *See, e.g.*, Smith v. Philip Morris Cos., Inc., 335 P.3d 644, 674 (Kan. Ct. App. 2014) ("Nor have plaintiffs produced any evidence of any 'palpable tie' between the tobacco companies' overseas activities and the pricing actions in the United States that underlie the price-fixing claim in this case."); Romero v. Philip Morris, Inc., 242 P.3d 280, 297 (N.M. 2010) ("The alleged conspiratorial meetings in other markets cannot serve as tending to exclude independent conduct because Plaintiffs offered no support to connect the actions in foreign markets with the actions in the United States."); Ren v. Philip Morris Cos., Inc., No. 00–004035–CZ (Mich. Cir. Ct. Sept. 10, 2003) (on file with the *Duke Law Journal*) ("[G]enerally, the existence of conspiracies in another country, without more, does not support an inference of a conspiracy to fix prices in the United States. . . . [P]laintiffs have not shown evidence linking these foreign [price-fixing] activities to those undertaken by the defendants . . . in the United States.").

price-fixing activities as a plus factor share a significant similarity. They all omit any discussion of how price-fixing conspiracies actually operate. Plus-factor analysis is supposed to help determine whether the defendants' parallel pricing behavior is the product of independent decisionmaking or of collusion. But this determination is not possible without understanding how price-fixing cartels function. Price-fixing cartels are difficult to form because rival firms must agree on several details—including price, output, and relative market shares—often across a wide range of products. These firms that are naturally competitors must also learn to trust each other not to cheat on the cartel and not to expose the cartel to enforcement officials. Once cartel members learn how to manage a cartel in a limited geographic market, they can expand their conspiracy into other markets. Indeed, cartels have many strong incentives to have their price-fixing operations include the United States. By incorporating the American market into their cartel's sphere of control, the conspirators can increase their profits and reduce the risks of arbitrage and exposure of the cartel to antitrust enforcement agencies. This Part explains how cartels are formed and managed, as well as how and why they expand geographically, including into the United States.

A. The Difficulty of Price Fixing and the Fragility of Cartels

Price fixing involves much more than meeting once to set a price and then collecting cartel profits for the foreseeable future. Cartels often must set multiple prices on multiple products in multiple markets.[97] To prevent cheating, cartels may also try to set production limits, another term about which cartel partners may vociferously disagree.[98] Negotiations over quotas can impede initiation of a cartel agreement[99] and such negotiations can destabilize a cartel.[100] After the

97. *See* Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 827–28 (2011) (discussing examples).

98. *See* James M. Griffin, *Previous Cartel Experience: Any Lessons For OPEC?*, *in* ECONOMICS IN THEORY AND PRACTICE: AN ECLECTIC APPROACH 179, 185 (Lawrence R. Klein & Jaime Marquez eds., 1989) ("Due to cost differences, discount rates, reserve levels, and market shares, each firm may desire a different market price and output.").

99. JOHN E. STEALEY III, THE ANTEBELLUM KANAWHA SALT BUSINESS AND WESTERN MARKETS 84 (1993) (discussing the Kanawha salt cartel); Griffin, *supra* note 98, at 198; Harm G. Schröter, *The International Dyestuffs Cartel, 1927–1939, with Special Reference to the Developing Areas of Europe and Japan*, *in* INTERNATIONAL CARTELS IN BUSINESS HISTORY 33, 48 (Akira Kudō & Terushi Hara eds., 1992) (discussing the European Steel Cartel).

100. *See* Margaret C. Levenstein & Valerie Y. Suslow, *Studies of Cartel Stability: A Comparison of Methodological Approaches*, *in* HOW CARTELS ENDURE AND HOW THEY FAIL:

cartel is operating, the firms must continue to negotiate with each other about ongoing details.[101]

Even when competitors in a market can actually launch a cartel, success is not guaranteed because price-fixing cartels are inherently unstable. In the long run, firms in a cartel maximize their profits by fixing an above-market price and honoring their cartel commitments. The firms essentially operate as a jointly held monopoly—reducing output, raising price, and then distributing the monopoly profits (i.e., cartel profits) among the members of the price-fixing conspiracy.[102] Despite these long-run incentives, the short run is always a consideration. And in the short run, a firm in a cartel may maximize its own profits by cheating on the cartel. By charging a lower-than-cartel price and selling more than its cartel allotment, a firm can achieve higher profits than it could either by honoring its cartel commitments or by competing in a free market. In game-theory parlance, cheating on a cartel is a dominant strategy, meaning that regardless of whether one's cartel partners are honoring or cheating on the cartel agreement, each individual firm is probably better off cheating in the short term.[103] The urge to cheat may be overwhelming when a firm needs capital quickly[104] or in periods of slack demand.[105] This threat of cheating makes cartels intrinsically insecure.[106]

Cheating on a cartel agreement, however, does not necessarily lead to the cartel's permanent demise. When cartel arrangements fall apart, the price fixers generally regroup, assess their situation, and relaunch their cartel with new understandings and enforcement

STUDIES OF INDUSTRIAL COLLUSION 9, 36 (Peter Z. Grossman ed., 2004) ("Bargaining problems were much more likely to undermine collusion than was secret cheating.").

101. *See, e.g.*, STOCKING & WATKINS, *supra* note 20, at 420 (discussing the chemical cartels of the mid-twentieth century).

102. This, of course, assumes that the cartel is not caught, prosecuted, and held accountable to its victims. But even then—after paying criminal and civil fines, and private damages and settlements—price-fixing firms may still find cartelization to be net profitable. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 431–34 (2012).

103. *See* Leslie, *supra* note 7, at 524–27 (discussing how price fixing is a prisoner's dilemma in which cheating is the dominant strategy).

104. *See, e.g.*, STEALEY, *supra* note 99, at 162.

105. *See, e.g.*, STOCKING & WATKINS, *supra* note 20, at 207 (noting the experience of the steel cartel).

106. Peter Huber, *Competition, Conglomerates, and the Evolution of Cooperation*, 93 YALE L.J. 1147, 1149 (1984) ("Because firms can collect greater rewards by defecting from collusive agreements than by adhering to them, cooperation is fragile and unstable, competition robust and inevitable." (footnote omitted)).

mechanisms in place.[107] Each iteration of a cartel arrangement tends to be longer and more robust as the conspirators learn to cooperate.[108]

For many price-fixing cartels, the difference between long-term success and failure is a function of whether the cartel members sufficiently trust each other. Business relationships often require trust. Professor Carol Rose notes that "without trust, we could not undertake any cooperative ventures, from the most trivial to the most cosmic."[109] To the extent that a business venture entails risk, trust makes risk-taking rational.[110] Trust is even more important in illegal business ventures, like price fixing, because they involve greater dangers, including the risks of criminal fines, prison time, and substantial civil liability.[111] As in any business relationship, trust has significant value for firms in a cartel.[112]

Stable cartels require that firms resist their desire to maximize short-term profits by cheating on the cartel agreement. Trust is critical for price-fixing firms to be able to reap the long-term profits of participating in a durable cartel.[113] If a firm cannot trust its cartel partners to abide by the cartel agreement, then it is better off withdrawing from the cartel. If a firm's cartel partners are cheating on the price-fixing agreement, then the worst thing that a firm can do is to

107. Levenstein & Suslow, *supra* note 100, at 17 ("Some cartels re-formed several times within a very short span of years, while others went off and on over 50 years or more. In some cases, such as the copper cartel, each period of cartelization appears to endure for longer than the previous one.").

108. *Id.* at 27 ("[C]artels reappear in some industries, and cartel duration tends to increase with industry experience with collusion, although patterns in cartel duration can vary substantially . . . ."); *see also id.* at 33 ("[F]irms did learn to cooperate during the [National Industrial Recovery Act] period in ways that improved their ability to limit price competition even after explicit collusion was prohibited.").

109. Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 534 (1995).

110. *See* JAMES M. KOUZES & BARRY Z. POSNER, THE LEADERSHIP CHALLENGE: HOW TO GET EXTRAORDINARY THINGS DONE IN ORGANIZATIONS 21 (4th ed. 2007) ("Authentic leadership is founded on trust, and the more people trust their leader, and each other, the more they take risks, make changes, and keep organizations and movements alive.").

111. *See* Annette Baier, *Trust and Antitrust*, 96 ETHICS 231, 231–32 (1986) ("Exploitation and conspiracy, as much as justice and fellowship, thrive better in an atmosphere of trust."); Helen Nissenbaum, *Securing Trust Online: Wisdom or Oxymoron?*, 81 B.U. L. REV. 635, 642 (2001) ("Trust between partners in crime increases the chances of criminal success.").

112. *See* Peter C. Carstensen, *While Antitrust Was Out to Lunch: Lessons from the 1980s for the Next Century of Enforcement*, 48 SMU L. REV. 1881, 1888 (1995) ("If A and B can each trust each other, they will share the cartel profit.").

113. *See* Levenstein & Suslow, *supra* note 100, at 19 ("The expectations that participants have about competitors' propensity to cooperate can make all the difference in whether collusion is successful or not.").

honor the agreement by continuing to charge the cartel price, while losing one's customers to firms charging less than the cartel price.[114] Cartels can solve the instability problem by creating trust among the cartel members.[115] Such trust allows cartels to be more nimble, to adapt to changing market conditions.[116] As with legitimate business, trust can reduce the transactions costs of cartel negotiations and operations.[117] In contrast, distrust can prevent cartel formation and cause existing cartels to disintegrate into competition as perceived cheating precipitates actual cheating.[118]

Cartel ringleaders have to work to create and nurture mutual trust among coconspirators. Trust is not the natural state of affairs for rivals in a competitive market, even when these rivals are contemplating supplanting competition with cartelization. Each member of a cartel knows that its cartel partners' dominant strategy is to maximize their profits by cheating on the cartel agreement.[119] The following Sections explain how beginning price-fixing efforts in a foreign jurisdiction can facilitate the construction of a stable cartel in the American marketplace.

B. Foreign Conspiracies and Cartel Creep

Participating in a cartel that fixes prices in foreign markets makes it easier to create a cartel in the United States. Historically, small

---

114. Leslie, *supra* note 7, at 521.

115. Successful cartels have firms that trust each other. They trust each other not to cheat on the agreement by charging less than the agreed upon price, not to sell more than they allotted quota, and not to expose the cartel to antitrust authorities in exchange for leniency. Christopher R. Leslie, *Antitrust Amnesty, Game Theory and Cartel Stability*, 31 J. CORP. L. 453, 461–65 (2006).

116. Leslie, *supra* note 7, at 549–51 (discussing several examples); *see also* JOHN CONNOR, GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY 225 (2001) ("[R]elatively trustful relations are required for cartels to operate effectively." (emphasis omitted)).

117. Leslie, *supra* note 7, at 550–51; *see also* Edward H. Lorenz, *Neither Friends nor Strangers: Informal Networks of Subcontracting in French Industry*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 194, 198 (Diego Gambetta ed., 1988) ("If transaction costs are thought of as friction in the economy, then trust can be seen as an extremely effective lubricant."); Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 553 (2001) ("Trust is a kind of social glue that allows people to interact at low transaction costs."); Denise M. Rousseau, Sim B. Sitkin, Ronald S. Burt & Colin Camerer, *Not so Different After All: A Cross-Discipline View of Trust*, 23 ACAD. MGMT. REV. 393, 396 (1998) ("Similarly, transaction cost economists view trust as a cause of reduced opportunism among transacting parties, which results in lower transaction costs.").

118. Leslie, *supra* note 7, at 552–53 (discussing lysine, uranium, and rayon cartels).

119. John Shepard Wiley, Jr., *Reciprocal Altruism as a Felony: Antitrust and the Prisoner's Dilemma*, 86 MICH. L. REV. 1906, 1916–17 (1988) ("Both firms prefer the high price that a monopolist would select if a single firm controlled the entire soft drink market, yet each distrusts the other's willingness to cooperate by maintaining that high price.").

cartels grow into larger cartels as they expand geographically and into new product lines. For example, the American-based heavy equipment cartel of the 1950s began by rigging bids for a limited range of products and then eventually grew into a significantly larger conspiracy across twenty different major product lines.[120] The multibillion-dollar international vitamin cartel of the 1990s expanded both geographically and across product lines.[121] Starting with a few vitamin categories in the European market, the cartel eventually swelled to encompass over twenty product lines across the globe, including in the United States. This cartel creep—by which successful cartels extend their reach until they encircle the globe—is common.

This Section explores three related mechanisms by which foreign cartels facilitate price-fixing conspiracies in the American market.

1. *Foreign Conspiracies and the Creation of Trust.* Foreign cartel activity accelerates the creation and success of price-fixing conspiracies on American soil by allowing business rivals to develop mutual trust in other jurisdictions—many with relatively weak antitrust enforcement regimes or none at all—before bringing their conspiracy to the United States. As explained above, trust is often critical for cartel success.[122] This Section discusses several conditions that help establish trust and shows how foreign price fixing creates these conditions.

Several factors increase the trustworthiness of individuals and firms. Trust is often a learned behavior that develops gradually over time. When individuals cooperate with each other, it builds trust that can facilitate greater cooperation in the future.[123] As Nobel Prize-winning economist Thomas Schelling has noted: "Trust is often achieved simply by the continuity of the relation between parties and

---

120. Wayne E. Baker & Robert R. Faulkner, *The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry*, 58 AM. SOCIOLOGICAL REV. 837, 838 (1993).

121. Some historic cartels, including those in steel and electrical equipment, were umbrella cartels that controlled production quotas and pricing in several different product markets. *See* Daniel Barbezat, *A Price for Every Product, Every Place: The International Steel Export Cartel, 1933–39*, 33 BUS. HIST. 68, 69 (1991).

122. *See supra* notes 91–101 and accompanying text.

123. *See* ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER'S DILEMMA: A STUDY IN CONFLICT AND COOPERATION 201 (1965) ("Thus learning goes both ways in Prisoner's Dilemma. First the subjects learn not to trust each other; then they learn to trust each other."); ROBERT WRIGHT, NONZERO: THE LOGIC OF HUMAN DESTINY 342 (2000) ("[B]y observing what a given player had done on the last occasion, another player could, in effect, gather information about the player's likely future behavior.").

the recognition by each that what he might gain by cheating in a given instance is outweighed by the value of the tradition of trust that makes possible a long sequence of future agreement."[124] Mild trust can grow into strong trust.[125] Mutual trust can become a self-sustaining virtuous cycle.[126]

This pattern of trust developing through past cooperation and then leading to greater future cooperation is evidenced throughout the modern history of price fixing. Past price-fixing activity is an excellent predictor of future price fixing because "an industry with a history of price fixing is more likely to repeat that behavior again."[127] The first attempts at price fixing generally fail, but lessons are learned that make the second or third iteration of a cartel much more likely to succeed. In their study of cartel duration, Professors Levenstein and Suslow noted that "cartels reappear in some industries, and cartel duration tends to increase with industry experience with collusion."[128] Cartel experience makes each successive iteration of a price-fixing conspiracy more likely to succeed as the conspirators grow to trust their coconspirators and learn how best to structure and run a stable cartel.[129]

Not surprisingly, having a reputation for trustworthiness makes one more likely to be trusted, which increases the desire of others to enter cooperative ventures.[130] One's perceived trustworthiness is as important as one's actual trustworthiness.[131] As a result, "[t]he value of

124. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 134–35 (1960).

125. *See* Toshio Yamagishi, *The Structural Goal/Expectation Theory of Cooperation in Social Dilemmas*, *in* 3 ADVANCES IN GROUP PROCESSES 51, 70 (Edward J. Lawler ed., 1986) ("Given this conviction of reciprocity or trust in the partner, each actor voluntarily cooperates, and as a result each actor's conviction or trust is substantiated by the cooperation of the partner. This cycle leads the dyad to a higher level of mutual trust and mutual cooperation.").

126. James P. Gahagan & James T. Tedeschi, *Strategy and the Credibility of Promises in the Prisoner's Dilemma Game*, 12 J. CONFLICT RESOL. 224, 225 (1968).

127. CONNOR, *supra* note 116, at 526.

128. Levenstein & Suslow, *supra* note 100, at 27.

129. STOCKING & WATKINS, *supra* note 20, at 143 (discussing Germany's role in nitrogen cartel); *see also* Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43, 54–55 (2006) ("In some cases, such as the copper cartel, each period of cartelization appears to endure for longer than the previous one. This suggests a pattern of learning on the part of cartel members."); Fausto R. Pitigliani, *The Development of Italian Cartels Under Fascism*, 48 J. POL. ECON. 375, 380 (1940) (discussing cartelization of the artificial textiles market in fascist Italy).

130. Robyn M. Dawes & Richard H. Thaler, *Anomalies: Cooperation*, 2 J. ECON. PERSP. 187, 190 ("A cooperative act itself—or a reputation for being a cooperative person—may with high probability be reciprocated with cooperation, to the ultimate benefit of the cooperator.").

131. *See* Avner Ben-Ner & Louis Putterman, *Trusting and Trustworthiness*, 81 B.U. L. REV. 523, 530 (2001) ("The simplest way in which information impacts trusting is through A's

a trustworthy reputation may be so high that it becomes rational to resist temptations to seize short-run advantages."[132] In the context of price fixing, a firm may rationally forgo the short-term profits that could be earned through cheating in order to essentially purchase a reputation for being a trustworthy coconspirator.[133] Firms can hone their reputations for being trustworthy in foreign price-fixing schemes and use that reputation to establish their dependability as a cartel partner in a conspiracy in the U.S. market.

Companies can use their foreign cartel experience as a calling card to convince potential cartel partners in new product and geographic markets that they are trustworthy.[134] For example, because pre-World War II Germany did not condemn cartelization, German companies had developed strong reputations as effective price fixers, which made them "natural leaders for international cartels."[135] Germany's IG Farben, in particular, was a cartel-generating machine, participating in cartels that manipulated the markets in dyestuffs, film, drugs and pharmaceuticals, petroleum and chemical industries, acrylate plastics, urea formaldehyde plastics, cellulose plastics, chlorinated rubber, magnesium, cyanides, tetraethyl lead, iron carbonyl, alkalies, dyes, nitrogen and nitrogenous fertilizers, and sulphuric acid.[136] Farben eventually had "agreements with every major world chemical producer, covering together virtually every branch of chemical manufacturing."[137] In short, "IG [Farben] created cartels everywhere it went."[138] Even though such price fixing was illegal in the United States, Farben harnessed its reputation as a cartel ringleader to convince several American chemical companies to enter collusive agreements.[139] Having a successful cartel in a foreign jurisdiction helps rivals establish trust and expand their cartel to the United States.

Finally, the cultivation of a group identity can create trust.

---

knowledge of B's reputation."); *see also id.* at 531 ("The most important sources of information about the trustworthiness of potential trading partners are direct experience and word-of-mouth in social networks.").

132. Bernd Lahno, *Trust, Reputation, and Exit in Exchange Relationships*, 39 J. CONFLICT RESOL. 495, 509 (1995).

133. Leslie, *supra* note 7, at 596–98.

134. *Id.*

135. *Id.* at 597 (citing STOCKING & WATKINS, *supra* note 1, at 30).

136. STOCKING & WATKINS, *supra* note 20, at 476–78.

137. *Id.* at 466 ("These agreements, meticulously drafted, have tended to 'stabilize' the chemical markets.").

138. *Id.* at 480.

139. Leslie, *supra* note 19, at 597 (citing STOCKING & WATKINS, *supra* note 20, at 474).

Members of a perceived group show a sense of loyalty and may sacrifice their short-term interests in order to advance the group's long-term interests.[140] When individuals share a sense of group identity, they are more likely to cooperate with each other, as group members perceive each other as being relatively trustworthy.[141]

Cartel members often form a group identity that helps stabilize the cartel relationship.[142] They can originate and refine this group identity in foreign jurisdictions and then use the trust it creates to expand their price fixing into the United States. By agreeing to violate competition laws, price-fixing firms create a mutual dependence and shared secret among the group members.[143] The discussions among the competitors to create the cartel and negotiate its terms can lead to the formation of a group identity.[144] The back and forth of negotiations can lead individuals to feel a group dynamic that leads to a shared collective identity.[145] Over time, successful cartels form social norms, which can help reinforce many necessary aspects of the cartel arrangement and allow it to expand geographically.[146] Cartels have developed many insidious norms. For example, the electrical equipment cartel of the 1950s and 1960s developed a social norm of members concealing their price fixing,[147] and the magnesium cartel "cultivat[ed] a philosophy of restrictionism."[148] Ultimately, these social norms can convince cartel

140. *Id.* at 584–90.

141. David Sally, *Conversation and Cooperation in Social Dilemmas*, 7 RATIONALITY & SOC'Y 58, 68 (1995).

142. Leslie, *supra* note 19, at 584–90.

143. Even in nations with relatively weak competition laws or enforcement regimes, firms generally try to conceal their price-fixing activities from competition authorities.

144. *See* Robyn M. Dawes, Alphons J. C. van de Kragt & John M. Orbell, *Cooperation for the Benefit of Us—Not Me, or My Conscience*, *in* BEYOND SELF INTEREST 97, 99 (Jane J. Mansbridge ed., 1990) ("Our experiments have led us to conclude that cooperation rates can be radically affected by one factor in particular, which is independent of the consequences for the choosing individual. That factor is group identity.").

145. Jane J. Mansbridge, *The Rise and Fall of Self-Interest in the Explanation of Political Life, in* BEYOND SELF INTEREST, *supra* note 144, at 3, 17 ("Experimenters can raise the level of cooperative behavior to 85 percent by allowing discussion and other procedures that increase feelings of group identity.").

146. Leslie, *supra* note 19, at 586–87.

147. JOHN HERLING, THE GREAT PRICE CONSPIRACY: THE STORY OF THE ANTITRUST VIOLATIONS IN THE ELECTRICAL INDUSTRY 50 (1962) ("Under questioning by Senator Hart, Paxton admitted that he would have promptly reported the stealing of company property or embezzlement of company funds by anybody, even if he were not in his direct line of command. But to report the violation of the antitrust law would have broken his own code, and what is more, would have exposed him to the danger of acquiring a reputation as a 'troublemaker.'").

148. STOCKING & WATKINS, *supra* note 20, at 303.

participants that price fixing is perfectly acceptable.[149] Indeed, abiding by one's cartel commitments can be seen by participants to rise to the level of an "ethical" obligation.[150] Once these norms of trust and collusive cooperation are established in one geographic market, they can be exploited to expand the cartel to new geographic markets. In the world of business, a price-fixing cartel may be the ultimate group with a shared identity.

In sum, successful cartelization in another market may mean that the competing firms have used their experience to create the necessary relationships to solve the trust juggernaut. Trust is an asset that cartel members can produce and expand. They can produce trust in foreign jurisdictions and use that trust to expand the cartel into the United States.

2. *Foreign Conspiracies and Coordination Problems*. In an international industry, the presence of a cartel outside the United States also demonstrates that the industry leaders have overcome the coordination problems that may otherwise hinder a price-fixing conspiracy in the United States. Launching an international cartel requires significant coordination among rival firms that come from different corporate cultures, often speak different languages, and may be generally reluctant to cooperate with their competitors. Yet to form a successful cartel, the coconspirators must coordinate the level and the timing of price increases, as well as in some cases, the volume of production, market allocation, and the announcement of price increases. Disputes during the initial and ongoing negotiations about these cartel terms and operating procedures can destabilize the arrangement, especially when cartel members perceive that their partners are bargaining in bad faith.[151] When disagreements lead to misunderstandings about the precise cartel terms, distrust may ensue; this can cause a cartel to unravel into competition.[152]

Beginning a cartel by fixing price in a relatively small market affords the cartel members an opportunity to address and solve these

---

149. Leslie, *supra* note 19, at 588–90.

150. STOCKING & WATKINS, *supra* note 20, at 395 (discussing historical chemical cartels); *see also* FULLER, *supra* note 33, at 58 (explaining that firms fixing prices in the electrical equipment markets "had rationalized their machinations to the point where they now believed that their actions were not wrong, that they were above the laws which applied to everyone else. . . . The individuals themselves faced a slow corrosion of values.").

151. KURT EICHENWALD, THE INFORMANT 201 (2000) (discussing lysine cartel).

152. *See id.* at 200.

coordination problems on a manageable scale. After the cartel partners develop a stable working relationship in running a small-market cartel, they can expand their price fixing into new product and geographic markets. For example, the aluminum cartel gave birth to the magnesium cartel.[153] Similarly, the member firms of the international cyanide cartel first constrained trade in sodium cyanide, hydrogen cyanide, and hydrocyanic acid, among others, before moving to expand their cartel activities to other chemicals.[154] In the 1950s and 1960s, major American electrical equipment manufacturers grew to cartelize dozens of individual product markets as "[t]he experience of one conspiracy was often transferred to another."[155] The multibillion dollar international vitamins cartel began by fixing the prices of relatively few vitamins and then expanding to other vitamins as the manufacturers gained experience in price fixing.[156] The experience of the international vitamin cartel led some members to expand their price fixing activities to include the international markets for other products, including citric acid,[157] lysine,[158] and MSG.[159] This dynamic is common throughout the history of price fixing.[160]

Price-fixing conspiracies often involve fits and starts. Professors Levenstein and Suslow note that "one of the most clearly established patterns is that cartels form, endure for a period, appear to break down, and then re-form again."[161] This pattern can be witnessed in numerous historical international cartels, including those in steel,[162] sugar,[163] and explosives,[164] among others. American history shows this same pattern

---

153. STOCKING & WATKINS, *supra* note 20, at 274.

154. *See id.* at 489–90.

155. HERLING, *supra* note 147, at 89; *see also* Leslie, *supra* note 7, at 591–96 (discussing other examples of cartel creep).

156. CONNOR, *supra* note 116, at 310.

157. *Id.* at 277 ("Memoranda have come to light that show the citric acid cartel was joined in 1991 by Hoffman-La Roche explicitly because of its profitable prior experience in vitamins.").

158. *Id.* at 426.

159. EICHENWALD, *supra* note 151, at 164.

160. STOCKING & WATKINS, *supra* note 20, at 199 ("Before 1938, collaboration between the Export Association and the [international] steel cartel was limited to price and quota agreements with three of the cartel's selling syndicates. These agreements covered exports of tin plate, rails, and tubular products. Experience in these fields proving mutually satisfactory, the cartel . . . [broadened] collaboration.").

161. Levenstein & Suslow, *supra* note 100, at 14.

162. STOCKING & WATKINS, *supra* note 20, at 186.

163. William Notz, *International Private Agreements in the Form of Cartels, Syndicates, and Other Combinations*, 28 J. POL. ECON. 658, 676 (1920).

164. STOCKING & WATKINS, *supra* note 20, at 442–43.

in domestic cartels, such as the early railroad cartel, the 1880s whiskey cartel,[165] and the 1980s school milk cartel.[166] For multinational corporations with designs on creating a stable international cartel, it makes more sense to address and resolve the inevitable problems of cartel creation in a foreign jurisdiction with less severe antitrust penalties. After the growing pains have dissipated, the cartel can expand into the more lucrative American market.

3. *Foreign Conspiracies and Cartel Enforcement.* Cartel activity outside the United States also allows for creating, refining, and perfecting cartel enforcement mechanisms that can then be employed in a price-fixing conspiracy in the United States. Cartel enforcement schemes generally serve two functions: detect cheating and punish defectors.[167] Traditional monitoring devices to detect cartel cheating include the reporting of sales figures by cartel members, as well as employing auditors, independent administrators, and spies.[168] Common punishment mechanisms include imposing fines and requiring firms that sell more than their quota to purchase products from their cartel partners who sold less than their cartel allotment.[169] Developing an effective cartel enforcement regime takes significant time and effort.

Foreign price-fixing activity can signify that the firms in the industry have developed an efficient enforcement mechanism that combines the necessary functions of detecting and punishing cheating on the cartel. Once a cartel has sufficient experience in one or more geographic markets, it can more easily expand into new regions. After the cartel has mastered its operations in a weak-antitrust jurisdiction, it can expand into more risky territories, like the United States.

4. *Summary.* In short, successful cartels beget more cartels. A first cartel can be difficult to form. A second cartel can be significantly easier to establish. Trust has already been established. The parties are aware that cooperation is possible and can significantly increase their profits. The parties have developed reliable enforcement mechanisms. If the major firms in an industry are fixing prices in one market, this

165. JEREMIAH JENKS, THE TRUST PROBLEM 147 (1917).

166. Robert F. Lanzillotti, *The Great School Milk Conspiracies of the 1980s*, 11 REV. INDUS. ORG. 413, 444 (1996).

167. Leslie, *supra* note 19, at 610–22.

168. *Id.* at 612–15.

169. *Id.* at 612–21.

increases the likelihood that the same firms are engaging in price fixing in another market. This heightened probability makes the fact of foreign price fixing a probative plus factor in litigation alleging a domestic conspiracy.

C. Foreign Conspiracies and the Motive To Fix Prices in the United States

The primary reason for a cartel operating in a foreign market to expand its price fixing into the American market is the same motivation for fixing prices anywhere: profits. Price fixing is lucrative. As the largest economy in the world, the American marketplace is an attractive target for price fixers. Being relatively wealthy, American consumers may be more willing and better able to pay supracompetitive prices. The lure of cartel profits will always make price fixing seem tempting.[170] This motivation is not unique to firms that are already fixing prices in foreign jurisdictions.

Beyond the general temptation of cartel profits, the participation of defendant firms, or their parent or sister corporations, in a price-fixing cartel outside of the United States provides several additional motives for the firms to fix prices in the American market as well. If a cartel has successfully raised prices in foreign markets, it may need to raise price similarly in the American market in order to prevent significant price disparities across markets. Such price differences can cause several problems for the cartel. First, price disparities create the risk of arbitrage. If the prices are lower in the American marketplace than in other markets, interlopers may engage in arbitrage, by purchasing products at competitive prices in the United States and reselling them in cartelized markets at supracompetitive prices that are nonetheless below the cartel price.[171] This arbitrage can dramatically

170. Despite the penalties associated with violating American antitrust law, we know that hundreds of firms accept the attendant risks and engage in criminal price fixing.

171. Grant Butler, *The Supreme Court's Destruction of Incentive to Participate in the Justice Department's Cartel Leniency Program*, 15 B.U. PUB. INT. L.J. 169, 180 (2005) ("If a cartel chose to fix prices only in foreign countries, arbitrageurs can purchase the goods in the United States at the competitive market price and take them to a foreign country where the goods could be sold at a price higher than the competitive price but lower than the fixed price of the cartel.").

reduce the cartel's profits[172] and could destabilize the entire cartel.[173]

To reduce the risk of arbitrage, regional cartels will often expand their operations internationally, for example to include the United States.[174] In international cartels, cartel managers set regional prices in relation to each other in order to prevent arbitrage across foreign and American markets.[175] Once a cartel has significantly elevated prices in the Canadian, European, or other foreign markets, the cartel leadership has a strong incentive to ensure that the price in the American market is similarly high.[176] Expanding a foreign cartel to American soil not only generates new illegal profits from the U.S. sales, it also protects the cartel's price margins in foreign markets.

---

172. *Id.* ("Arbitrage can therefore ruin the market power gained by the cartel's price fixing behavior."). The cartel may respond to this threat by engaging in limit pricing, which entails the cartel leadership trying to set a price that is higher than the competitive price but not so high as to induce new entry into the market. Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95, 101 (5th Cir. 1988) (explaining limit pricing means setting "price at a level just below that which a prospective entrant to the market would need to charge in order to sustain a successful entry"). While limit pricing can reduce new entrants and arbitrage activity, limit pricing necessarily reduces the cartel's profit below what would be secured in the absence of arbitrage threats.

173. 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, 835 (2008) ("Arbitrage undermines the ability of international cartels to set prices at the most profitable level in each currency zone and could even destroy collusive arrangements.").

174. *See* Butler, *supra* note 171, at 180 ("Price fixing cartels selling global goods must operate in all markets to avoid arbitrage."); Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. CHI. L. REV. 265, 275 (2005) ("Accordingly, the vitamin conspirators were obliged to cartelize globally: that is, to bring into the cartel enough of the worldwide supply that the supracompetitive price is defensible against arbitrage.").

175. Connor & Bush, *supra* note 173, at 835 ("But the only way cartelists can effectively prevent geographic arbitrage is to make it unprofitable by frequently resetting domestic cartel prices in all regions of the world using current exchange rates to ensure that prices remain close together."); *see also In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F. Supp. 2d 141, 160 (D. Conn. 2009) ("[T]he plaintiffs contend that conduct in Europe is important for understanding the U.S. price-fixing scheme because EPDM manufacturers set U.S. prices in consideration of European prices to avoid the potential for arbitrage and the defendants' North American and European counterparts met to discuss EPDM pricing and customers in both markets.").

176. Jonathan T. Schmidt, Note, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 220 (2006) ("If the cartel's product is sold in the United States, the cartel must raise its price in the United States sufficiently so that it is not profitable to buy the product in the United States, ship it to another market, and sell it at or below the cartel price."); *see also In re* Monosodium Glutamate, No. CIV.00MDL1328, 2005 WL 2810682, at *1 (D. Minn. Oct. 26, 2005) ("Defendants allegedly included the United States in the cartel precisely to extract cartel profits from purchasers around the world without risk of arbitrage."), *aff'd sub nom., In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535 (8th Cir. 2007) (affirming the lower court's dismissal of the complaint).

Second, even without arbitrage, if foreign markets have cartel-inflated prices while the American market reflects a lower competitive price, buyers in the non-American market may switch to American suppliers that are charging lower prices. American sellers can price discipline a non-American cartel.[177] In order to reduce or prevent this possibility, the cartel has every incentive to raise the price in the United States. The most straightforward mechanism for doing so may be to expand their price-fixing operations into the American market. In his deposition testimony, one coconspirator in an alleged graphite products cartel testified "that a conspiracy to fix prices in Europe must necessarily involve the fixing of prices in other markets, including the United States."[178] Otherwise consumers would evade the fixed price by purchasing in the cheaper market.[179]

Third, if a foreign cartel does not expand into the American market, this increases the risk of exposure to foreign competition authorities. Foreign price fixing may be more obvious if there is a huge price disparity between U.S. and foreign prices. Lockstep price increases among rival companies are often strong circumstantial evidence of an underlying agreement to raise prices. Antitrust defendants often attempt to explain their uniform price increases as a product of increases in input costs.[180] This common explanation may lose its persuasive power if the American market is not experiencing a similar increase in price. Thus, the fear of cartel exposure may

177. The ability of consumers to switch to American suppliers will be a function of several factors, including tariffs, transportation costs, and the nature of the product. For example, if tariffs or transportation costs are particularly high, this provides a price umbrella for foreign cartels.

If the competitive price for a product in the United States and the European common market is $10 per unit, but tariffs and transportation costs make the real price of an American-sourced version of the product for European consumers rise to $14 per unit, then a European cartel could raise the price of the product forty percent, from $10 to $14 per unit, without losing any sales to American suppliers.

178. *In re* Bulk (Extruded) Graphite Prods., No. CIV. 02-6030, 2007 WL 2212713, at *9 (D.N.J. July 30, 2007).

179. *Id.* at *8 (explaining the need for extending a European-based cartel into the American market, a coconspirator in an alleged graphite products cartel stated that "[t]he issue of graphite electrodes is if you sold them one place for one price and another place for another price, somebody would go to the other place that was a cheaper price").

180. *See, e.g.*, Suwannee Am. Cement LLC v. Zurich Ins. Co., 885 F. Supp. 2d 611, 613 (S.D.N.Y. 2012) (noting plaintiffs' allegation that "[d]efendants repeatedly attributed dramatic price increases to rising fuel and input costs, when in fact these costs did not justify the price increases"); *In re* Refrigerant Compressors Antitrust Litig., 795 F. Supp. 2d 647, 663 (E.D. Mich. 2011) ("Defendants represented that their pricing activities were unilateral, rather than collusive, and were based on market conditions and legitimate business purposes, such as increased input costs . . . .").

encourage a non-American cartel to fix prices in the U.S. marketplace in order to reduce price disparities across markets that foreign antitrust officials may see as a telltale sign of price fixing.

Beyond the myriad problems that price disparities across geographic markets can create for a cartel, the members of a foreign cartel may wish to expand their price-fixing operations into the U.S. market in order to stabilize the cartel. If the members of a price-fixing conspiracy collude in some major markets but compete in others, it increases the risk of miscommunication or misunderstandings, both of which can disrupt cartels.[181] Competition in the free market could spill over into the cartelized one. For example, a firm's nonproscribed aggression in the competitive market, which is not covered by the cartel agreement, could be misinterpreted as cheating on the cartel. This could induce a defensive price reduction, which starts a more generalized price war. Cartels can minimize this risk by having their cartel agreement cover all of the geographic markets in which they operate, including the United States.

Finally, expanding a foreign price-fixing conspiracy into the United States may strengthen the overall cartel by increasing the value of the cartel to all of its members. An international cartel generates significantly more ill-gotten gains than a more localized cartel. Cheating in just one geographic market in which an international cartel operates, though, risks destabilizing the entire cartel worldwide. This substantially increases the expected costs of cheating on the cartel in any region and, thereby creates a stronger incentive to abide by the cartel agreement globally. As cartel expert Corwin Edwards explained over half a century ago, firms that compete in multiple geographic markets, "may hesitate to fight local wars vigorously because the prospects of local gain are not worth the risk of general warfare."[182] Thus, increasing the geographic breadth of a cartel reduces each firm's incentive to cheat in any individual geographic market. An international cartel makes a domestic cartel more stable and effective.[183] Because an American cartel may be used to stabilize foreign price-fixing agreements, the existence of the latter may be

181. *See, e.g.*, Joel M. Podolny & Fiona M. Scott Morton, *Social Status, Entry and Predation: The Case of British Shipping Cartels 1879-1929*, 47 J. INDUS. ECON. 41, 45 n.4 (1999).

182. F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 340 (1980) (2d ed 1980) (alteration in original) (quoting Corwin Edwards).

183. *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 403 (2d Cir. 2002) (noting argument that "the success of an anticompetitive scheme in foreign markets may enhance the effectiveness of an anticompetitive scheme in the domestic market").

evidence of motive to establish the former.

For all of the above reasons, foreign price fixing is often correlated with domestic price fixing. Because cartels are often international in scope, covering the entire world market, the existence of a foreign cartel often indicates a larger global cartel that includes the U.S. market.[184]

IV. The Legal Significance of Foreign Price Fixing

Whereas Part III presented the practical significance of foreign price-fixing operations and their relationship to price fixing in the American marketplace, this Part considers the legal significance. First, it examines why price-fixing activity abroad satisfies the standard criteria for being a plus factor. Second, it analyzes those federal and state court opinions that have held that defendants' foreign price-fixing conduct is not a plus factor and explains why those opinions are flawed. Finally, it explores the consequences of those incorrect decisions.

A. Price Fixing Outside the United States as a Plus Factor

Although some courts have recognized the probative value of foreign price-fixing conspiracies to the determination of whether defendants agreed to fix prices in the United States,[185] most courts have not.[186] The judicial opinions that have minimized the significance of foreign price-fixing conspiracies have not held merely that such conspiracies are neither proof nor direct evidence of such an agreement. Rather, these courts have held that the existence of a

---

184. Regardless of where an international cartel *began* its operations, foreign price fixing is indicative of domestic price fixing. The fact that these defendant multinational corporations solved the operational problems of running a cartel in a foreign jurisdiction means that they are more likely to have solved these problems for an American-targeted cartel. The alleged cartel in the United States can be a follow-on cartel from a foreign price-fixing cartel. Alternatively, in theory, the presence of foreign price fixing can be evidence that the defendants started their price fixing in the United States and expanded it into foreign jurisdictions. Either way, the presence of the foreign cartel is consistent with—and evidence of—a price-fixing conspiracy in the United States. It makes more sense, however, that a price-fixing conspiracy would begin abroad and migrate into the U.S. market. Jurisdictions with relatively weak competition laws are more likely to be incubators for nascent cartels.

185. *In re* Auto. Refinishing Paint Antitrust Litig., No. 1426, 2004 WL 7200711, at *3 (E.D. Pa. Oct. 29, 2004) ("Evidence of cooperation between Defendants in foreign price-fixing, through a trade association or otherwise, would certainly be relevant to establish the existence of an illegal combination or conspiracy in restraint of trade, which is a required element of a § 1 Sherman Act claim.").

186. *See supra* Part II.

foreign price-fixing conspiracy is not a plus factor—that is, not relevant circumstantial evidence—as a matter of law.[187] The fact that the defendant firms are fixing prices in a foreign jurisdiction, or have done so recently, is a plus factor. When coupled with other plus factors, foreign price-fixing conspiracies can provide an important part of the circumstantial evidence that proves the defendants have agreed to fix prices in the United States in violation of Section 1 of the Sherman Act.

Evidence of the defendants' participation in foreign price fixing bears the hallmarks of a strong plus factor. Plus factors are simply circumstances "that increase the likelihood that the parallel prices resulted from conspiracy."[188] If the defendants are colluding in other markets, this demonstrates that they have solved the trust juggernaut that prevents many price-fixing cartels from forming or surviving. It also shows that they have surmounted the operational problems that generally plague cartels. Despite these insights, the Eleventh Circuit in *Williamson* was not persuaded by the plaintiffs' expert testimony that "the foreign agreements provided a mechanism to 'establish and revise, and to monitor and enforce agreements to coordinate.'"[189] This shows a judicial failure to appreciate how cartels operate.

When the defendants have fixed prices in foreign markets, the alleged U.S. cartel is but one part of a larger international cartel. Although such global cartels are common, international cartels rarely start off as international cartels; they usually start as national or regional cartels and then grow as the price fixers learn to trust each other. When experimenting with a "starter cartel," it makes little sense to start in the United States. American antitrust law treats price fixers more harshly than the competition laws of other jurisdictions. Price fixing is a criminal offense in the United States, and price fixers can be imprisoned for up to ten years.[190] Criminal fines can be double the cartel's gain with the result exceeding $1 billion.[191] Civil damages are also greater in the United States, as successful plaintiffs are entitled to

187. Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253, 1312 n.46 (N.D. Ga. 2002) ("Plaintiffs' allegations of foreign market conspiracies are not probative of collusion as a matter of law."), *aff'd sub nom.*, Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003).

188. Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1043 (8th Cir. 2000) (Gibson, J., dissenting).

189. *Williamson Oil Co.*, 346 F.3d at 1317.

190. 15 U.S.C. § 1 (2012).

191. 18 U.S.C. § 3571(d) (2012).

mandatory treble damages.[192] Furthermore, class action litigation allows victims of price-fixing schemes to aggregate their claims.[193] Although the size of the American marketplace means that cartels can generate significant ill-gotten gains by fixing the prices charged to American consumers, the risk and consequences of antitrust liability mean that smart price fixers will perfect their price-fixing conspiracy in other jurisdictions before moving into the U.S. market.[194] Using a foreign market to perfect the cartel's methods of enforcement and concealment before fixing price in the United States makes sense. Evidence of foreign price fixing is thus inherently probative when the plaintiff's theory of the case involves allegations that the alleged price-fixing activity in the United States is part of a larger international cartel.[195]

Not only is the existence of a foreign price-fixing conspiracy a relevant plus factor unto itself, it is also a combination of several well-established plus factors. First, for example, motive to conspire is a plus factor.[196] The fact that the defendants' foreign units have fixed prices indicates a motive for defendants to fix prices in the American market.[197] As discussed above, a foreign cartel's failure to elevate prices across regional markets, including the United States, can create

192. 15 U.S.C. § 15.

193. Changes in American arbitration jurisprudence, however, may make antitrust class actions considerably harder in the future. *See* Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 37–38 (2015); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 275–77 (2015).

194. Cartel expansion into the United States is not inevitable, however. Foreign cartels may decide against carrying their activities across the U.S. border because the penalties for price fixing are relatively high in the United States. These penalties include the risk of imprisonment, which is a strong deterrent. Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enf't, Antitrust Div., U.S. Dep't of Justice, Charting New Waters in International Cartel Prosecution (Mar. 2, 2006), https://www.justice.gov/atr/file/518446/download [https://perma.cc/P3EV-DGR6] ("We have uncovered international cartels that operated profitably and illegally in Europe, Asia, and elsewhere around the world, but did not expand their collusion to the United States solely because the executives decided it was not worth the risk of going to jail."). As foreign jurisdictions provide for imprisonment for price fixing, this dynamic may change and foreign price fixers may be more willing to expand into the U.S. market as the relative severity of American antitrust law decreases.

195. *In re* Auto. Refinishing Paint Antitrust Litig., No. 1426, 2004 WL 7200711, at *4 (E.D. Pa. Oct. 29, 2004) ("[E]vidence of foreign price-fixing activities is relevant in determining the nature and scope of an alleged international conspiracy.").

196. *See* LESLIE, *supra* note 24, at 26.

197. The motive to fix prices with one's competitors should be self-evident. Participation in a cartel allows a firm to reduce output and increase price in order to maximize each firm's profits. But the presence of foreign price fixing greatly magnifies the defendants' incentives to fix prices in the American market. *See supra* Part III.C.

price disparities. These disparities create the risk of arbitrage, of losing sales to American sellers, and of exposure to foreign competition law authorities. Furthermore, expanding the cartel's price-fixing activities into the U.S. market helps conceal their foreign price-fixing activities and can help stabilize an international cartel. These are powerful incentives for foreign price fixers to extend their conspiracy onto American soil.

Courts, however, often fail to comprehend these motives. For example, federal courts do not seem to recognize the risk of arbitrage as a strong incentive for foreign cartels to manipulate prices in the American market.[198] Similarly, as noted above, when a cartel covers several regions, cheating in any one market could destabilize the entire cartel and cause the cheater to sacrifice its cartel profits across the globe.[199] Courts emphatically do not understand this dynamic. For example, in *Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*,[200] the district judge rejected the plaintiffs' expert testimony "that 'multi-market contact facilitates a conspiracy in the United States because it decreases the likelihood that competitors will, for example, violate the agreement in the United States for fear of endangering anticompetitive agreements in other countries.'"[201] The court held that the "Plaintiffs' allegations of foreign market conspiracies are not probative of collusion as a matter of law,"[202] but the evidence is probative for precisely the reason provided by the plaintiffs' economist.[203]

---

198. *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 784 (M.D. Pa. 2014).

199. *See* Smith v. Philip Morris Cos., 335 P.3d 644, 673 (Kan. Ct. App. 2015) (noting, although the court ultimately rejected this argument, plaintiffs' contention "that when competitors collude in several foreign markets, if one conspirator 'jumps ship' in one particular market, that conspirator's position in another market where the conspirators' enjoy inflated prices may be placed in jeopardy").

200. Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253 (N.D. Ga. 2002), *aff'd sub nom.*, Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003).

201. *Id.* at 1312 n.46 (quoting Plaintiffs' Response at 58, *Holiday Wholesale Grocery Co.*, 231 F. Supp. 2d 1253 (No. 1:00-CV-0447-JOF)).

202. *Id.*

203. Yet some courts unequivocally deny this chain of logic. For example, in one of many tobacco cartel cases in which courts rejected foreign price fixing as a plus factor for showing similar price fixing in the American market, the Kansas appellate court held "[d]omestic conduct that is alleged to have furthered a conspiracy to fix prices in some foreign market is not relevant in this case." *Smith*, 335 P.3d at 673–74; *see also id.* at 673 ("This theory, of course, provides no support for the notion that the claimed foreign price-fixing conspiracy provides evidence from which one can infer an agreement to fix prices in Kansas.").

Second, communications among the defendants is a plus factor.[204] Because the defendants in an alleged horizontal price-fixing conspiracy are competitors in the market, communications among them are suspicious. Foreign price-fixing activities will often reveal actual communications involving sellers in the American market. These communications to and from members of the foreign cartel may be consistent with, or evidence of, price fixing in the United States.

Third, showing that the defendants had the opportunity to conspire is an important plus factor.[205] Foreign price-fixing activity can establish that the defendants had occasions to discuss not only their foreign pricing but also the profitability and prospects of including the American market in their price-fixing operations. Some courts have recognized the relevance of the defendants' foreign price fixing to an alleged American conspiracy.[206] But too many courts miss the significance.[207]

Fourth, evidence that the market structure in which the defendant firms operate is conducive to collusion is an important plus factor.[208] For example, the Seventh Circuit has explained that "an industry structure that facilitates collusion constitutes supporting evidence of collusion."[209] If the defendants have engaged in price fixing in foreign markets, then this suggests the market structure for the product at issue fosters collusion because it shows, among other things, that the product involved is subject to cartelization, that the product has few economic substitutes, and that there are likely to be barriers to entry. All of these

---

204. *See* LESLIE, *supra* note 24, at 26; *see also* William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 408 (2011) ("Perhaps the most probative proof of the mechanism for achieving consensus would consist of evidence demonstrating that a pattern of extensive communication among the defendants preceded a complex, parallel adjustment in behavior that could not readily be explained as the product of the defendants' independent efforts . . . .").

205. Weit v. Cont'l Ill. Nat'l Bank & Tr. Co., 641 F.2d 457, 462 (7th Cir. 1980) (concluding that "opportunity to conspire" is relevant "circumstantial evidence . . . to support a finding of a price-fixing conspiracy").

206. *See In re* Auto. Refinishing Paint Antitrust Litig., No. 1426, 2004 WL 7200711, at *3 (E.D. Pa. Oct. 29, 2004) ("Evidence of foreign price-fixing among Defendants would also be material to prove that they had the opportunity . . . to engage in domestic price-fixing . . . .").

207. *See infra* Part IV.B.

208. Stanislaus Food Prod. Co. v. USS-POSCO Indus., No. 1:09-CV-00560, 2013 WL 595122, at *11 (E.D. Cal. Feb. 15, 2013) ("Examples of plus factors include evidence of a market structure that is conducive to collusion. . . ."), *aff'd*, 803 F.3d 1084 (9th Cir. 2015); *see also In re* Flat Glass Antitrust Litig., 385 F.3d 350, 361 (3d Cir. 2004) (noting plus factor that "the flat glass industry is in many respects a text book example of an industry susceptible to efforts to maintain supracompetitive prices").

209. *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 627–28 (7th Cir. 2010).

variables help satisfy the market structure plus factor.[210] Not surprisingly then, some courts have recognized that foreign price fixing demonstrates that the product market at issue is susceptible to cartelization.[211] Of course, it is possible that the American market for that product may be structurally distinguishable from foreign markets.[212] If so, defendants should bear the burden to explain how the foreign markets differ from the American market and why any differences are legally significant.[213] As a prima facie matter, however, unrebutted evidence of foreign price fixing is a plus factor because it shows that the industry structure promotes collusion.[214]

In sum, not only is foreign price fixing itself a plus factor, it may also be proof of several recognized plus factors. To suggest that the defendants' foreign price-fixing activities have no probative value to the determination of whether the defendants agreed to fix prices in the American market entails a misunderstanding of plus-factor analysis and of how cartels operate.

B. How Courts Mishandle Evidence of Foreign Conspiracies

In their evaluation of whether defendants' foreign price fixing is a plus factor, courts have made fundamental mistakes, some factual and some legal. Factually, courts fail to understand how cartels operate and

---

210. *In re* Publ'n Paper Antitrust Litig., No. 3:04MD1631, 2010 WL 5253364, at *11 (D. Conn. Dec. 14, 2010), *aff'd in part, vacated in part* 690 F.3d 51 (2d Cir. 2012). The U.S. District Court for the District of Connecticut identified the following relevant variables:

> A market is more susceptible to illegal collusion where the market: (1) involves a commodity-like product; (2) for which there are few economic substitutes; (3) has a limited number of sellers; (4) has barriers to market entry; (5) reflects a lack of concentration on the buying side; (6) has sellers that set a 'national price'; and (7) exhibits excess capacity.

Id. (citing *In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 656–58 (7th Cir. 2002)).

211. *See In re* Auto. Refinishing Paint Antitrust Litig., No. 1426, 2004 WL 7200711, at *3 (E.D. Pa. Oct. 29, 2004) ("Evidence of foreign price-fixing among Defendants would also be material to prove that they had the . . . ability to engage in domestic price-fixing for automotive refinishing paint.").

212. It is possible that foreign markets may have unique barriers to entry that facilitate cartelization.

213. 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 146 (2d ed. 2003) ("Contemporaneous conspiracies in adjacent geographic markets could reasonably be deemed sufficient to transfer to the defendants at least the burden of going forward with evidence of an explanation that performance is different in the second market . . . .").

214. *Cf. In re* Plasma-Derivative Protein Therapies Antitrust Litig., 764 F. Supp. 2d 991, 1001 (N.D. Ill. 2011) ("But the structure of an industry can suggest whether observed parallel behavior is likely to be the result of agreement or mere interdependence.").

expand. In applying the law, courts have failed to appreciate the process by which plus factors are used to create a circumstantial case for inferring an agreement to fix prices. This Section discusses these errors.

1. *Legality as Irrelevant.* Several courts have held that foreign price-fixing conspiracies cannot be a plus factor unless those conspiracies violated foreign law.[215] The *Williamson* court created this rule from whole cloth, and other courts have followed.[216] These holdings are fatally flawed for several reasons. First, illegality is not a characteristic of plus factors. Plus factors are not about impropriety; they are simply pieces of circumstantial evidence that, when aggregated, allow a reasonable inference of the fact of an agreement. None of the major plus factors that courts have developed consider illicitness. For example, traditional plus factors include motive, opportunity, and market structure. None of these classic plus factors involves illegality. It is not illegal to have a motive to conspire with one's competitors; it is not illegal to have an opportunity to conspire; nor is it illegal to participate in a market whose structure is conducive to cartelization. In short, antitrust law has no prerequisite that plus factors represent independently illegal conduct.

Second, illegality is irrelevant to the reasons why foreign price-fixing activity should be considered an important plus factor. As explained above, foreign price fixing may signal domestic antitrust violations because it shows motive, opportunity, and a product market that is susceptible to cartelization, which are established plus factors. In the context of *Williamson*, regardless of the illegality of foreign price fixing, "that the cigarette companies were fixing prices outside the United States tends to exclude the possibility that they were acting independently in setting prices within the United States."[217] That gives foreign price fixing the quintessential characteristic of a plus factor, regardless of whether the foreign activity was illegal or not in the jurisdiction where it occurred.

Third, proving the illegality of foreign price fixing unnecessarily complicates the antitrust analysis. Under the Eleventh Circuit's

215. *See supra* Part II.A.

216. Daniel R. Shulman, Williamson Oil v. Philip Morris: *Whatever Happened to Jury Trials?*, 5 SEDONA CONF. J. 81, 89 (2004) ("The [*Williamson*] Court cited no authority to support this result.").

217. *Id.*

approach in *Williamson*, antitrust plaintiffs would have to prove that defendants' price-fixing activities were illegal in one or more foreign jurisdictions. In *Williamson* itself, this would have required the plaintiffs to hire experts to testify that the defendants' price-fixing activities in Saudi Arabia violated Saudi law, that the activities in Hungary violated Hungarian law, and so on for ten countries. These actions would require the defendants to hire their own cadre of experts in foreign antitrust law. American judges, in turn, would have to determine which of the dueling experts is more correctly explaining a body of law that is literally foreign to American jurists. It can be hard to determine with confidence whether and when particular activity constitutes illegal price fixing in foreign jurisdictions because some foreign countries apply a rule of reason to price fixing, not a per se rule.[218] Determining the contours of American antitrust law is hard enough. Ascertaining the intricacies of non-U.S. competition law is problematic, to put it mildly.[219]

Some courts bemoan the cost of antitrust litigation and use high costs as a justification for pro-defendant rulings.[220] Most notably, the Supreme Court in *Bell Atlantic Corp. v. Twombly*[221] justified increasing the plaintiffs' burden to survive a motion to dismiss by pointing to the high expense of antitrust litigation.[222] But pro-defendant rulings like *Williamson* unnecessarily drive up the cost further by increasing the

218. Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253, 1312 (N.D. Ga. 2002) ("[T]he jurisdictions in question generally analyzed price-fixing agreements under a 'rule of reason' approach that considered various factors in determining whether such agreements were illegal."), *aff'd sub nom.*, Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003).

219. When a foreign country's competition law applies the rule of reason to price-fixing agreements, then neither an American nor foreign court can determine whether the activity was illegal without knowing the specific facts of the case. While a per se rule against price fixing is formalistic and categorical, *see* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1214 (2008), the rule of reason cannot be applied in the abstract. An antitrust plaintiff cannot prove that an agreement violates the rule of reason without discovery into the nature and effects of the defendants' arrangement.

220. *See, e.g.*, Mayor & City Council of Balt. v. Citigroup, Inc., 709 F.3d 129, 137 (2d Cir. 2013) ("If we permit antitrust plaintiffs to overcome a motion to dismiss simply by alleging parallel conduct, we risk propelling defendants into expensive antitrust discovery . . . ."); S. Austin Coal. Cmty. Council v. SBC Commc'ns Inc., 274 F.3d 1168, 1171 (7th Cir. 2001) ("District courts may mitigate the expense of [antitrust] litigation by resolving motions for summary judgment early in the case—in advance of discovery, if appropriate, for summary judgment may be sought at any time.").

221. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

222. *Id.* at 558 (raising pleading burdens and noting that "antitrust discovery can be expensive").

complexity and duration of discovery. In order to prove one plus factor, foreign price-fixing activities, the plaintiffs would need to prove the illegality of ten different price-fixing conspiracies under ten different bodies of foreign law. The district judge in the *Williamson* litigation lamented that "the court would need to conduct mini-trials on Defendants' conduct in each of the countries at issue" and yet failed to recognize that this inefficiency would be a direct result of the court's own (incorrect) ruling that foreign conspiracies must violate foreign law in order to be admissible as a plus factor.[223]

Ultimately, the Eleventh Circuit approach creates a roadmap for firms that are intent on creating an international cartel, including the U.S. market, to avoid antitrust liability. The first step is to start a cartel in some country or countries with lax or no competition laws. Historically, during the interwar period in which European governments embraced cartels, cartel decisionmakers negotiated their agreements in these cartel-lenient countries, and stowed their records there in order to keep them out of the hands of American antitrust enforcers.[224] More recently, the tobacco cartel's selection of Saudi Arabia and Venezuela is particularly telling given that these two countries "are generally regarded as the founding fathers" of the worldwide petroleum cartel OPEC.[225] Perfecting one's price fixing in a relatively safe jurisdiction gives the conspirators an opportunity to work out the mechanics of cartel operations and their trust issues.[226] The cartel members can then implement their price-fixing agenda in the United States. Under the *Williamson* rule, not only is the evidence of foreign price-fixing activity inadmissible, but the federal court will deny discovery into it.[227] After the defendants have perfected their conspiracy in a foreign jurisdiction, they can expand their price-fixing

223. *Holiday Wholesale Grocery Co.*, 231 F. Supp. 2d at 1312.

224. STOCKING & WATKINS, *supra* note 1, at 270 ("Cartel members generally negotiate their agreements in tolerant countries and keep the cartel records there. Hence, even when American firms take part in cartels, American public officials charged with antitrust enforcement have access to little primary information on cartel structure or operations.").

225. Gary D. Libecap & James L. Smith, *Political Constraints on Government Cartelization: The Case of Oil Production Regulation in Texas and Saudi Arabia*, *in* HOW CARTELS ENDURE AND HOW THEY FAIL: STUDIES OF INDUSTRIAL COLLUSION, *supra* note 100, at 196, 207.

226. Indeed, the ideal jurisdictions to begin price fixing are those that either do not condemn it or have sufficiently weak enforcement regimes that antitrust liability is not a serious risk. In these locations, price fixers can focus on the mechanics of negotiating the cartel price—and market or customers allocations, if any—without the fear of imprisonment.

227. *Holiday Wholesale Grocery Co.*, 231 F. Supp. 2d at 1312 ("Accordingly, the court denied Plaintiffs' motion to conduct foreign discovery.").

campaign into the United States, knowing that their early price-fixing efforts cannot be used as evidence against them in American courts.

2. *Connecting the Disconnect*. Several courts have held that foreign price fixing cannot be a plus factor unless the plaintiffs can prove a sufficiently strong connection between the foreign price-fixing activities and the alleged price fixing in the American market. Conceptually, the need to show a link sounds reasonable. As applied, however, courts often fail to recognize the significance of the connections that are present. This Section shows the built-in connections between foreign and domestic price-fixing activities.

a. *The Logical and Corporate Connections*. Defendants' foreign price fixing is a plus factor because the intrinsic nature of cross-market cartelization provides an inherent connection between foreign and domestic price-fixing activities. If defendants have fixed prices in foreign markets, they necessarily possess potent reasons to fix price in the American markets—to increase their cartel profits, to prevent arbitrage and the evasion of the cartel price abroad, to stabilize their cartel, and to better conceal their price-fixing in foreign markets.[228] That's a "palpable link." If the defendants had managed to create and operate a price-fixing cartel outside of the United States, then that too is evidence that they are better equipped to do so in the American market as well. They have solved the organizational and operational problems of launching and maintaining a price-fixing cartel.

Courts seem to belittle plaintiffs' evidence of foreign price fixing as arguing merely that "if it happened there, it could have happened here."[229] This mischaracterizes the context in which plaintiffs proffer evidence of defendants' participation in foreign price fixing. In every case discussed in Part II, the plaintiffs had already shown that the defendants had engaged in conscious parallel pricing decisions in the American market. This context is critical. The inquiry into the defendants' foreign price fixing occurs *after* parallel pricing is established; each side is trying to explain why that identical conduct happened. The plaintiffs proffer collusion as the cause of the parallel pricing, while the defendants assert independent decisionmaking resulted in identical prices.

The plaintiffs' theory of collusion is supported by the fact that the

228. *See supra* Part III.C.

229. *See, e.g.*, *In re* Elevator Antitrust Litig., 502 F.3d 47, 51–52 (2d Cir. 2007).

defendants have already fixed prices in another market. Foreign price fixing explains why and how the defendants could have expanded the reach of their foreign cartel into the U.S. market.[230] If the defendants have a benign explanation for the parallel price movements, such as a market-wide increase in input costs, defendants can present this evidence to rebut the plaintiffs' circumstantial case. In none of the cases in which courts rejected the defendants' foreign price fixing as a plus factor did the courts address *why* the defendants had increased price in lockstep fashion. Of course, the defendant does not bear the burden on this issue but given the plaintiffs' explanation that the American price fixing is an extension of a foreign cartel, the courts' failure to credit the plaintiffs' evidence of collusion is troubling.

When the defendant corporations, or their parent companies or sister subsidiaries, have engaged in price fixing abroad, the corporate affiliation necessarily provides a connection between the proven foreign cartel and the alleged domestic cartel.[231] Multinational

---

230. The leading antitrust treatise explains:

> *The logical proposition.* Imagine that a conspiracy is proved in one of two identical markets inhabited by the very same firms. Suppose also that prices, profits, or other challenged economic results or business behavior are identical in the two markets. If the proved conspiracy is actually necessary to effect the results present in the first market—and the defendants must have thought it was, else they would not have conspired—then similar results in the second market could not have been achieved without a conspiracy there as well. Identity of markets, identity of results, and the necessity of conspiracy to these results in one market necessarily prove conspiracy in the other market. Furthermore, this proof does not depend upon the two markets in question being adjacent in time, geography, or product. A conspiracy in Asia proves a conspiracy in Boston when the three stated conditions are satisfied.

AREEDA & HOVENKAMP, *supra* note 213, at 152; *see also id.* (noting "the difficulties of establishing the three conditions").

231. Some courts try to downplay this corporate connection by asserting that two wholly owned subsidiaries of the same parent company are "different legal entities." *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 403–04 (3d Cir. 2015). While true, this detail is irrelevant. The issue is not whether the American defendants are legally responsible for their sister subsidiaries' foreign price-fixing activity, but rather whether the companies are connected. Antitrust law explicitly recognizes these connections in other contexts. For example, the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), held that a parent and its wholly owned subsidiary are one entity for the purposes of § 1 of the Sherman Act. *Copperweld Corp.*, 467 U.S. at 777. Lower courts have extended the *Copperweld* doctrine to hold that sister corporations—that are each wholly owned subsidiaries of the same parent company—should similarly be treated as one entity. Century Oil Tool, Inc. v. Prod. Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984) (observing "no relevant difference between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation or two corporations wholly owned by three persons who together manage all affairs of the two corporations"); Ass'n of Taxicab Operators, USA v. Yellow Checker Cab Co. of Dallas/Fort Worth, 910 F. Supp. 2d 971, 977–78 (N.D. Tex. 2012) (considering sister corporations one entity for antitrust purposes and, therefore, unable to illegally conspire with each other); *see also* Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp., 257 F. Supp. 2d 819, 834 (M.D.

corporations have corporate cultures, which oftentimes include tolerance or encouragement of illegal activity.[232] The culture can be international in scope[233] and specifically embrace price fixing as an acceptable norm.[234] For example, the rayon cartel created a "culture of collusion" that flowed from the fact that many American rayon producers started off as subsidiaries of European companies that openly cartelized the rayon market.[235] Some cartel members feel

---

La. 2002) ("Two corporations that are wholly owned by the same group of individuals cannot conspire with each other.").

Ironically, the federal court in *In re Chocolate Confectionary Antitrust Litigation* held the American and Canadian chocolate companies at issue to be unconnected despite the fact that "Mars U.S. and Mars Canada both report to the same parent company." *In re* Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 782 (M.D. Pa. 2014). Moreover, "Hershey, the parent company, approve[d] all domestic and international pricing decisions" of its American and Canadian subsidiaries. *Id.* It is odd that wholly subsidiaries are considered the same entity for *Copperweld* purposes, but are considered unrelated for plus-factor purposes.

232. Sally S. Simpson & Nicole Leeper Piquero, *Low Self–Control, Organizational Theory, and Corporate Crime,* 36 LAW & SOC'Y REV. 509, 535 (2002) (observing phenomenon in which "illegal acts become so commonplace or normalized within the corporate culture that insiders come to view them as acceptable"); D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 807 (2013) ("Illegal activity may become embedded in an organization over time and become a part of organizational culture."); *see also* Robert C. Bird, Daniel R. Cahoy & Lucien J. Dhooge, *Corporate Voluntarism and Liability for Human Rights in A Post-*Kiobel *World*, 102 KY. L.J. 601, 638 (2014) ("Corporate culture has emerged as a clear source of risk in corporate activity. Human rights policies become vitally important as nations begin to consider corporate culture when determining corporate criminal accountability.").

233. Sokol, *supra* note 232, at 824 (discussing "a corporate culture that permitted, and indeed encouraged, criminal behavior across different international business units").

234. *Id.* at 803 (discussing "culture of corruption that allows for [price-fixing] cartels to flourish"); *see also* Arthur Austin, *Adam Smith on the Inevitability of Price Fixing*, 55 CASE W. RES. L. REV. 501, 508 (2005) ("Price stabilization . . . was DNA at General Electric. As employees 'moved up through the corporation ranks, they found that they were inheriting a certain corporate "way of life" which had to be accepted, or they were no longer in line for promotion.'" (quoting JOHN G. FULLER, THE GENTLEMEN CONSPIRATORS 58 (1962))); John M. Conley & William M. O'Barr, *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 5, 13 (discussing Archer Daniels Midland and noting "[o]rganizing a price-fixing conspiracy seems to have been an almost natural development in an autocratic, top-down corporate culture that prized influence and control above all else"); Christopher Harding & Alun Gibbs, *Why Go to Court in Europe? An Analysis of Cartel Appeals 1995–2004*, 30 EUR. L. REV. 349, 369 (2005) ("[T]he awesome level of recidivism on the part of major companies who appear as usual suspects in the world of business cartels . . . suggests a confirmed culture of business delinquency.").

235. JESSE W. MARKHAM, COMPETITION IN THE RAYON INDUSTRY 97 (1952) ("Many of the [rayon] firms that operate in the United States have been loosely associated with each other through the European cartel. . . . [They] had worked in harmony with each other in Europe several years before American subsidiaries were established."); *id.* at 138 (noting "spirit of cooperation" in rayon industry as described in a textile trade journal); *id.* at 78 ("[A]ll [rayon] producers appear to have followed a uniform policy on term discounts, shipping terms, booking periods, and price guarantees."); Craig A. Gallet & John R. Schroeter, *The Effects of the Business Cycle on*

greater commitments to their coconspirators than to their customers or competition law. Archer Daniels Midland (ADM)—which led international cartels in several commodities, including lysine and citric acid—memorialized this attitude in its internal corporate slogan: "The competitors are our friends, and the customers are our enemies."[236] A multinational corporation that fixes prices in one national market is more likely to engage in price fixing in another national market.[237] The tobacco cartel in the *Williamson* case proves this point. The plaintiff alleged that the defendants were already fixing prices in ten other national markets, none of which are geographically connected. The Hungarian tobacco market and the Costa Rican tobacco market, for example, are not connected under the Eleventh Circuit's reasoning even though they were, in fact, all cogs in the same international tobacco cartel machine.

It is perplexing that some courts suggest that there is no connection between foreign and domestic price fixing when the same multinational corporations that are fixing prices in non-U.S. markets are also engaging in suspicious parallel pricing behavior in the U.S. market. These courts overly focus on individuals when the connection is corporate. The fact that the individuals in the U.S. subsidiary are not actively discussing price fixing with their foreign counterparts in a non-U.S. subsidiary (that is engaging in price fixing) does not mean that there is no connection.[238] In this scenario, the proven foreign cartel and the alleged domestic cartel are by definition connected because the same multinational corporations are involved.

Empirically, foreign price-fixing activity is connected to price fixing by the same corporate defendants in the United States. This is the nature of international cartels. Price-fixing conspiracies often start abroad and, once perfected, wind their way to the U.S. market. For example, the price-fixing conspiracy in electrical and mechanical carbon products began in the United Kingdom and expanded to the United States.[239] The multibillion dollar international cartel in vitamins

---

Oligopoly Coordination: Evidence from the U.S. Rayon Industry, 10 REV. INDUS. ORG. 181, 189 (1995).

236. EICHENWALD, *supra* note 151, at 51.

237. *See, e.g.*, CONNOR, *supra* note 116, at 225.

238. Chief executives of foreign corporations often play a role in directing their U.S. subsidiaries to engage in price fixing with competitors. *See, e.g.*, United States v. Norris, 753 F. Supp. 2d 492, 515 (E.D. Pa. 2010), *aff'd*, 419 F. App'x 190 (3d Cir. 2011).

239. United States v. Norris, 419 F. App'x 190, 191 (3d Cir. 2011) (affirming conviction of Chief Executive Officer, Ian Norris, pursuant to "indictment [that] alleged that Norris met with

began with meetings between officials from two European vitamin manufacturers about a limited range of products and expanded into dozens of vitamin products and regions, including the United States.[240] Courts suggesting that defendants' foreign price fixing is probably unconnected to lockstep parallel price increases in the American market ignore a century of historical research showing how international cartels function.

b. *Overlooked Connections*. American courts have gone out of their way to obfuscate the inherent connection between foreign and domestic price fixing when the same corporate owners are involved. Judges have discounted corporate affiliation and ignored the importance of corporate culture. More importantly, they discount the connections right in front of them. The chocolate cartel is a good case in point. In *In re Chocolate Confectionary Antitrust*, the Third Circuit held that there was no "necessary link" shown between the proven Canadian conspiracy and the alleged American conspiracy despite the plaintiffs' evidence that Bob Leonidas, CEO of Nestlé Canada, "played a key role in the Canadian conspiracy and regularly interacted with U.S. executives, including with Nestlé USA's team when Nestlé considered buying Hershey."[241] The court reasoned that Leonidas "did not have pricing authority for the U.S. market" and that his "documented communications with U.S. executives" did not show "illegal conduct in Canada."[242]

The court's approach sets an almost impossible standard for plaintiffs to show a connection between interrelated foreign and American price-fixing conspiracies. First, contrary to the Third Circuit's approach, the actual pricing authority of individuals is irrelevant because a foreign executive engaged in price fixing can show his or her American counterpart in the same corporation how to start and operate a cartel in the United States. If the corporation's head

various competitors in a price-fixing scheme that eventually expanded into the United States market"); *see also* United States v. Norris, 719 F. Supp. 2d 557, 560 (E.D. Pa. 2010) (giving more background).

240. Sam Foster Halabi, Note, *The "Comity" of* Empagran*: The Supreme Court Decides That Foreign Competition Regulation Limits American Antitrust Jurisdiction over International Cartels*, 46 HARV. INT'L L.J. 279, 281 (2005) ("Beginning in January 1988, officials from two European vitamin manufacturers—F. Hoffmann-La Roche and BASF—embarked on a price-fixing enterprise for bulk vitamins that expanded to involve every major world vitamin producer and affected every major world market.").

241. *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 406 (3d Cir. 2015).

242. *Id.*

office tolerates or endorses the non-American subsidiary's price fixing, it is more likely to encourage and enable price fixing by its American subsidiary as well. Moreover, no CEO of a foreign subsidiary would ever have true pricing authority over the CEO of the same company's American subsidiary. If the Third Circuit's opinion were mistakenly interpreted as requiring proof that one or more specific individuals had pricing authority in two separate countries, then there could almost never be a sufficient link between sister subsidiaries that were actually operating an international cartel.

Second, the evidence regarding Leonidas shows a potential connection between the two cartels. Under a plausible reading of the plaintiffs' allegations, Leonidas served as a mentor to the American cartel. He had every incentive to do so because price disparities between the Canadian and American markets could expose the Canadian conspiracy.[243] Pricing authority is irrelevant in his role as cartel tutor. By way of comparison, in the international lysine cartel, Terry Wilson of ADM attended cartel meetings and played a key role even though he had no pricing authority over lysine and indeed seemed to know little about the product. Wilson's value to the lysine cartel was his experience in running the international citric acid cartel. The Seventh Circuit held that evidence of the citric acid cartel was relevant and admissible in the government's prosecution of Wilson and other ADM participants in the lysine cartel because it explained Wilson's role in connecting the two—seemingly unrelated—conspiracies.[244]

Third, the fact that Leonidas's communications did not document illegal price fixing in Canada seems irrelevant given that we know that the Canadian chocolate manufacturers fixed price. In addition to the evidence of the price-fixing CEO of Nestlé Canada being involved in the American market, the plaintiffs also presented emails from Hershey Canada executives to Hershey's American executives that revealed that price discussions had occurred among the rival Canadian chocolate manufacturers.[245] The Third Circuit dismissed these as showing, at most, that "some Hershey executives in the United States were aware of the Canadian conspiracy" but not whether Mars and Nestlé USA knew.[246] The connection between conspiracies was

243. *See supra* note 176 and accompanying text.

244. United States v. Andreas, 216 F.3d 645, 666 (7th Cir. 2000) ("Wilson's entire reason for getting involved in lysine was to share his criminal experience.").

245. *In re Chocolate Confectionary*, 801 F.3d at 406.

246. *Id.* at 406–07.

stronger than the court admitted given that the court also noted that the Hershey parent company "approves all domestic and international pricing decisions."[247] Yet even after Hershey Canada pled guilty to price fixing in 2007 and paid a fine of $4 million (in Canadian dollars),[248] the court rejected any probative value, suggesting that the pricing decisions of Hershey's Canada and Hershey's USA were unconnected, despite the fact that they are subdivisions of the same company that controls the pricing of both entities. The Third Circuit minimized or disregarded all of the connections and then rejected the plaintiffs' claims for lack of connection.[249]

Similarly, the court in *In re Elevators* asserted that the defendants' foreign price fixing provided "no basis from which to infer" similar activity in the U.S. market because there was no connection between the proven European cartel and the alleged American one.[250] Yet the

---

247. *In re* Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 782 (M.D. Pa. 2014).

248. *In re Chocolate Confectionary*, 801 F.3d at 393.

249. The Third Circuit also invoked Areeda and Hovenkamp's influential antitrust treatise for the proposition that "[i]llegal behavior elsewhere in time or place does not generally allow the inference of an immediate conspiracy." *Id.* at 402 (quoting AREEDA & HOVENKAMP, *supra* note 213*,* at 146).

The court is, however, misinterpreting the treatise. The Antitrust Law treatise argues that the existence of foreign price-fixing does not *prove* additional price-fixing in other markets. This is true, but that does not mean that foreign price-fixing is not relevant. After all, rarely will a single plus factor, in and of itself, be proof of agreement. Moreover, Professors Areeda and Hovenkamp also note:

> Economic performance in comparable markets might also be probative: proof of conspiracy elsewhere may suggest that similar prices or actions here are also attributable to a conspiracy; or proof of competition elsewhere may suggest that less competitive performance here results from a conspiracy. Finally, the agreement elsewhere may be ancillary to the agreement locally.

AREEDA & HOVENKAMP, *supra* note 213, at 145. While the authors acknowledge the potential difficulty of establishing the comparability of markets, *id.* at 145–46, they also advocate shifting the burden to price-fixing defendants who have engaged in price-fixing in "adjacent geographic markets." *Id.* at 146. Specifically, such price-fixing defendants should bear

> the burden of going forward with evidence of an explanation that performance is different in the second market, that any motivation for conspiracy in one market does not extend to the other, or that the personnel or other circumstances make it unreasonable to interpret the proved conspiracy as extending to the adjacent market.

Id. Under this approach, the burden should be on the defendant chocolatiers to explain why they conspired in Canada but not in the adjacent American market. *Cf. id.* at 151 (noting that "[c]lose geographical proximity is probably sufficient to support a conspiracy finding in the absence of probative rebuttal evidence" since defendants who consciously enter a conspiracy "are in the best position to explain why they chose to enter a conspiracy in one place and not next door"). Although the treatise is discussing neighboring states, not countries, the rational for burden shifting is similar.

250. *In re* Elevator Antitrust Litig., No. 04 CV 1178, 2006 WL 1470994, at *10 (S.D.N.Y. May 30, 2006), *aff'd*, 502 F.3d 47 (2d Cir. 2007).

plaintiffs' complaint alleged that the same corporate defendants were involved in both geographic markets, that the elevators sold in the American market were manufactured and exported to the United States by the known European price fixers, and that "invoicing to customers in the United States and Europe [was] handled through the same inter-company accounting system."[251] The complaint further explained that because the market for elevator sales and service is global, the prices in the European and American markets affect each other.[252] The court denied that these allegations represented a sufficient connection, reasoning that the complaint "lacks the anomalous behavior, which the court in *Twombly* found to be a strong indicia of conspiracy."[253] But the court failed to realize that the defendants' proven illegal collusion in Europe is the "anomalous behavior" that makes the same parallel pricing in the American market more likely to be the product of collusion. Ultimately, the court did not recognize that the link between the two conspiracies—the one alleged in the United States and the one admitted to in Europe—is that they involve *the same* corporate defendants, engaging in *the same* illegal conduct involving *the same* product billed through "the same inter-company accounting system."[254] That's a connection.[255]

3. *Confusing Plus Factors with Direct Proof.* In declining to treat the defendants' foreign price fixing as a plus factor, some courts seem to misapprehend how plus-factor analysis works. The combination of conscious parallelism and plus factors allows antitrust plaintiffs to present a circumstantial case from which a jury can reasonably infer an agreement among the defendants. If plaintiffs have direct evidence of an agreement, they do not need to use this circumstantial approach.

Despite the fact that that the circumstantial plus-factor test is intended for those antitrust plaintiffs who do not have direct evidence of an agreement, some courts have essentially held that the defendants' foreign price-fixing activity cannot be a plus factor unless the plaintiff presents some direct evidence of an agreement. For example, the

251. *Id.* at *7.

252. *Id.*

253. *Id.* at *10.

254. *Id.* at *7.

255. Similarly, in the tobacco cartel, if the decisionmakers of the major tobacco companies are meeting to fix prices in Argentina, Canada, Costa Rica, El Salvador, France, Guatemala, Hungary, Saudi Arabia and Venezuela, how likely is it that they never mention the U.S. market but nonetheless have lockstep price increases over several years?

Kansas appellate court rejected foreign price-fixing behavior as a plus factor by quoting the Eleventh Circuit's *Williamson* opinion for the proposition that "the opportunity to fix prices without any showing that [the defendant tobacco companies] *actually* conspired does not tend to exclude the possibility that they did not avail themselves of such opportunity or, conversely, that they actually did conspire."[256] This confuses plus factors with direct proof. If the plaintiffs have to show that the defendants "actually conspired," that constitutes a direct-evidence requirement, which is completely inconsistent with the circumstantial approach of plus-factor analysis.

Similarly, the district court in the chocolate cartel case rejected the notion that communications related to the proven Canadian cartel and the alleged American cartel could be a plus factor because "'[c]ommunications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise.'"[257] On appeal, the Third Circuit in *In re Chocolate Confectionary Antitrust* faulted the plaintiffs' evidence of communications between Nestlé's Canadian and American subsidiaries for failing to show illegal conduct.[258] Intercompetitor communications are a plus factor for proving an agreement among defendants through circumstantial evidence. If the plaintiffs must prove that these communications definitely included an illegal agreement, the court is essentially requiring direct evidence of a price-fixing agreement.

These opinions seem to suggest that because foreign price fixing is not dispositive proof of domestic price fixing that it is not a plus factor. But this line of thinking misapprehends plus factors and how they operate in antitrust law. Plus factors are for proving an agreement through indirect evidence. To hold that something cannot constitute a plus factor unless it constitutes direct evidence destroys the entire framework for proving an agreement through circumstantial evidence. The presence of a non-U.S. price-fixing conspiracy is a plus factor. It is not itself proof, and it is not direct evidence of an antitrust violation in the United States. Requiring some connection between the foreign cartel and the alleged American cartel is reasonable, but when that

---

256. Smith v. Philip Morris Cos., Inc., 335 P.3d 644, 669 (Kan. Ct. App. 2015) (quoting Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1319 (11th Cir. 2013)).

257. *In re* Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 800 (M.D. Pa. 2014) (quoting *In re* Baby Food Antitrust Litig., 166 F.3d 112, 126 (3d Cir. 1999)).

258. *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 405–06 (3d Cir. 2015).

requirement of a connection rises to the level of direct evidence of price fixing in the American market, courts are effectively dismantling the plus-factor framework. After all, the entire purpose of the plus factor process is to demonstrate the presence of an agreement in the absence of direct evidence.

4. *The Discovery and Admissibility of Evidence of Defendants' Foreign Price Fixing*. The failure of courts to appreciate the significance of foreign price-fixing activity affects many aspects of antitrust litigation. In addition to discounting the import of foreign conspiracies as a matter of substantive antitrust law, courts also sometimes commit procedural errors. For example, some courts have prevented plaintiffs from discovering evidence that defendants have fixed prices in foreign markets.[259] It seems problematic for the court simultaneously to deny the plaintiffs any discovery into the defendants' foreign price-fixing activity and to condemn the plaintiffs for not linking that foreign activity with the alleged domestic cartel. For example, the Third Circuit in *In re Chocolate Confectionary Antitrust* condemned the plaintiffs for not showing that the same people were involved in the alleged foreign and domestic cartels.[260] Yet it is practically impossible for plaintiffs to show common personnel between the foreign and domestic cartels when the plaintiffs are denied meaningful discovery into the operations of the foreign cartel.

Plaintiffs are entitled to discovery of the defendants' foreign price-fixing activities because, in the context of international cartels, the foreign conduct is relevant to the alleged domestic conduct.[261] When the alleged conspiracy is global, evidence of activities in foreign markets "would be relevant to show the breadth of the conspiracy, the role that each defendants' executives played in implementing, expanding, enforcing and concealing the conspiracy, and how the conspiracy was maintained for the length of time alleged."[262] Plaintiffs need discovery to show the connection between the foreign and domestic price-fixing activities.

In general, discovery in antitrust litigation is not confined to the

259. Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253, 1312 (N.D. Ga. 2002) ("Accordingly, the court denied Plaintiffs' motion to conduct foreign discovery.").

260. *In re Chocolate Confectionary*, 801 F.3d at 403.

261. *See In re* Auto. Refinishing Paint Antitrust Litig., No. 1426, 2004 WL 7200711 at *3–4 (E.D. Pa. Oct. 29, 2004), *aff'd sub nom.*, *Williamson Oil Co.*, 346 F.3d 1287.

262. *In re* Vitamins Antitrust Litig., No. 99-197TFH, 2001 WL 1049433, at *11 (D.D.C. June 20, 2001).

defendants' activities in the geographic market at issue in the case.[263] Even if the plaintiffs were not trying to use the defendant's foreign price fixing as a plus factor, liberal discovery of price-fixing defendants' "purely foreign activities" makes sense for several reasons. Evidence related to foreign transactions "could also lead to the discovery of other admissible information by allowing plaintiffs to discover 'the identity and location of persons having knowledge of any discoverable matter,' which is explicitly authorized by Revised Fed. R. Civ. P. 26(b)(1)."[264] Discovery related to price-fixing defendants' behavior in foreign markets may likely lead to admissible evidence showing the defendants' motives and opportunities for fixing price in the United States, as well as evidence relating to such potentially important issues as "the manner by which defendants fraudulently concealed the conspiracy from plaintiffs."[265] Evidence of defendants' foreign conduct may help explain how a price-fixing cartel operated in the United States. For example, in *In re Aspartame Antitrust Litigation*, the district court explained that

> information and documents that relate, to among other things, the non-U.S. manufacture, sale and distribution of aspartame may prove relevant to establishing the existence of a global conspiracy to allocate the market for aspartame, the ability of market participants to engage in domestic price fixing and the mechanisms employed by market participants in price fixing.[266]

Including discovery of price-fixing activity outside the geographic market at issue is customary. It should remain so when the plaintiff is seeking to use evidence of the defendants' foreign price fixing as a plus

263. *See e.g.*, Kellam Energy, Inc. v. Duncan, 616 F. Supp. 215, 219 (D. Del.1985) ("[R]egardless of how [the] geographic market is eventually defined in [an antitrust] action, the boundaries of that market do not set the geographic limits of discovery. . . .").

264. *In re Vitamins*, 2001 WL 1049433, at *11; *see also In re* Urethane Antitrust Litig., 261 F.R.D. 570, 574 (D. Kan. 2009); *Kellam Energy, Inc.*, 616 F. Supp. at 219 ("Where allegations of conspiracy to restrain trade and intent to monopolize are at issue, as in the instant case, a broad scope for discovery is appropriate, because the conspiracy may involve actors outside of the plaintiff's geographic market and the scheme of monopolization may involve an area larger than the plaintiff's own limited sphere of operations.").

265. *In re* Plastics Additives Antitrust Litig., No. CIV.A. 03-2038, 2004 WL 2743591, at *14 (E.D. Pa. Nov. 29, 2004) ("[D]ocuments produced to foreign investigative bodies are relevant" because "these documents may lead to evidence that illuminates defendants' motive and opportunity for the alleged conspiracy within the United States, the breadth of the conspiracy, and the manner by which defendants fraudulently concealed the conspiracy from plaintiffs.").

266. *In re* Aspartame Antitrust Litig., No. 2:06-CV-1732-LDD, 2008 WL 2275531, at *2 (E.D. Pa. May 13, 2008).

factor.

Finally, the illegality of foreign price fixing should not be a prerequisite for discovery. In *Williamson*, the Eleventh Circuit affirmed the district court's denial of discovery into the defendants' foreign price-fixing activities unless the plaintiffs could first prove their illegality under foreign law. The court's approach is flawed because foreign price fixing is a plus factor regardless of its illegality.[267] Moreover, as the district court in *In re Automotive Refinishing Paint Antitrust Litigation*[268] explained when explicitly disagreeing with *Williamson*, evidence of illegality cannot be a prerequisite to the discovery of anticompetitive conduct in foreign countries because "[t]he Sherman Act encompasses conduct occurring outside our borders when that conduct has an effect on American commerce, even if the activities are not illegal in the countries where they are committed."[269] Antitrust discovery has never been limited to anticompetitive conduct already proven to be illegal. Courts should not restrict discovery in this manner when plaintiffs seek evidence of the defendants' price fixing in foreign markets.

Finally, to the extent that courts are worried about unfairly burdening defendants with excessively expansive discovery requests, that does not warrant a complete ban on discovery of foreign price fixing. Courts can manage and monitor these discovery requests as they do with other discovery disputes. At a minimum, it makes particular sense to require domestic defendants to produce documents that they have already submitted to foreign competition authorities that are investigating—or have investigated—the defendants' pricing behavior, because such requests are not unreasonably burdensome.[270]

Judicial errors about evidence of defendants' foreign price fixing are not limited to discovery disputes. Courts have also mishandled evidentiary rulings. In the federal tobacco conspiracy case, the district court held that any evidence of the defendants' participation in price fixing in other countries was inadmissible because Federal Rule of Evidence "Rule 404(b) allows jury inferences only where the compared conduct is closely analogous to the conduct at issue in the instant

267. *See supra* Part IV.B.1.

268. *In re* Auto. Refinishing Paint Antitrust Litig., No. 1426, 2004 WL 7200711 (E.D. Pa. Oct. 29, 2004).

269. *Id.* at *4.

270. *In re* Plastics Additives Antitrust Litig., No. CIV.A. 03-2038, 2004 WL 2743591, at *13 (E.D. Pa. Nov. 29, 2004) (discussing the recent order from *In re Auto. Refinishing Paint*).

suit."[271] The Eleventh Circuit affirmed the district court's ruling because the plaintiffs' evidence did not "readily establish a prior crime, wrong or act where appellants ultimately have failed to establish that the foreign conduct was a crime or wrong under the laws of the foreign sovereigns."[272] Both courts seemed to think that foreign price fixing is not "closely analogous" unless it is also illegal. That is wrong. The defendants' foreign conduct is "closely analogous" because it is price fixing, not because it is unlawful.

Evidence that the defendants have engaged in price fixing in foreign markets is admissible because it is probative of whether these same defendants have fixed prices in the American marketplace. Under Federal Rule of Evidence 404(b), evidence of the defendant's prior misdeeds is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[273] This is precisely the role that evidence of foreign price fixing is playing in antitrust litigation. Courts have explained that "evidence concerning a prior conspiracy may be relevant and admissible to show the background and development of a current conspiracy."[274] Evidence of the defendant's participation in a separate price-fixing conspiracy is admissible to show how that separate conspiracy "provided the blueprint for and motivating force behind" the price-fixing conspiracy being alleged in the case at hand.[275] Similarly, evidence of foreign price fixing should be admissible because it helps establish the plus factors of opportunity and ability to fix prices in the American domestic market.[276] Indeed, the evidence is admissible because foreign price fixing is a plus factor and also satisfies many individual plus factors.[277]

---

271. Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253, 1313 (N.D. Ga. 2002) ("Thus, Plaintiffs cannot show that 'conspiracies in foreign markets' is a 'plus factor.'"), *aff'd sub nom.*, Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003).

272. *Williamson Oil Co.*, 346 F.3d at 1317.

273. FED. R. EVID. 404(b).

274. *In re* Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1149 (N.D. Cal. 2009) (discussing United States v. Andreas, 216 F.3d 645 (7th Cir. 2000)).

275. *Andreas*, 216 F.3d at 665 ("The citric-acid conspiracy, of which [the defendant] was aware, provided the blueprint for and motivating force behind the nascent lysine scheme. Many of the lysine cartel's meetings revolved around the need to allocate sales volume, a lesson dictated by the experience in the citric-acid conspiracy.").

276. *In re* Auto. Refinishing Paint Antitrust Litig., No. MDL 1426, 2004 WL 7200711, at *3 (E.D. Pa. Oct. 29, 2004) ("Evidence of foreign price-fixing among Defendants would also be material to prove that they had the opportunity and ability to engage in domestic price-fixing for automotive refinishing paint.").

277. *See supra* Part IV.A.

The arguments for admissibility are even stronger in the context of international cartels. Evidence of price fixing in other markets is particularly probative if the plaintiff's theory of the case entails a geographically broad conspiracy that includes and extends beyond the American marketplace.[278] When the domestic price-fixing conspiracy is part of a geographically larger price-fixing conspiracy, Rule 404(b) should not exclude evidence of that larger conspiracy.[279]

These misguided judicial decisions regarding discovery and admissibility flow from courts failing to appreciate that the defendants' foreign price fixing constitutes a plus factor for proving the existence of an agreement that violates the Sherman Act. Because the absence of direct evidence ordinarily makes the use of plus factors necessary to prove an agreement, plaintiffs are entitled to discovery on plus factors and to present them to a jury. Courts cannot simultaneously require plus factors and deny plaintiffs discovery into relevant plus factors or hold that evidence of plus factors is inadmissible.[280] If courts better appreciated that defendants' foreign price-fixing activities are plus factors, judges would be less likely to err when making discovery and evidentiary rulings.[281]

---

278. *See* Charley's Tour & Transp., Inc. v. InterIsland Resorts, Ltd., No. 80-0060, 1985 WL 6268, at *2 (D. Haw. Oct. 10, 1985) ("[E]vidence of conspiracy in other markets and prior to the statute of limitations for this action is relevant and admissible as proof of a single overall conspiracy . . . .").

279. *Andreas*, 216 F.3d at 665 (admitting evidence of defendant's participation in another price-fixing conspiracy because "[w]hile not an express exception to Rule 404(b), this type of evidence is permitted by virtue of not being included within the province of the rule. 'Other crimes or acts' does not include those acts that are part and parcel of the charged crime itself; they simply are not 'other.'").

280. Courts have created a series of no-win situations when plaintiffs seek discovery to show that the defendants' foreign price fixing should constitute a plus factor:

- Plaintiffs cannot have discovery into the defendants' foreign price-fixing activity unless they can prove that that price fixing violated foreign law but plaintiffs cannot prove that the defendants' arrangements violate the rule of reason without discovery.
- Plaintiffs cannot survive a motion to dismiss—and thus, cannot have discovery into the defendants' foreign price-fixing activity—unless the plaintiffs can prove a specific connection between that foreign cartel and the alleged American cartel but plaintiffs cannot prove a sufficient connection to satisfy courts without the discovery that courts deny them.

These court-constructed Catch-22s make it harder for valid price-fixing claims to reach a jury. Yet most judges do not seem aware of the bind in which they have put antitrust plaintiffs.

281. Courts have recognized that "a broad scope of discovery is particularly appropriate in antitrust litigation because, for example, relevant business documents pertaining to the antitrust conspiracy may not exist and covert behavior may have to be proven through less direct means." *In re* Microcrystalline Cellulose Antitrust Litig., 221 F.R.D. 428, 429–30 (E.D. Pa. 2004); *see also* Callahan v. A.E.V., Inc., 947 F. Supp. 175, 179 (W.D. Pa. 1996) ("Discovery in an antitrust case is necessarily broad because allegations involve improper business conduct. . . . Such conduct is

V. Conclusion

By failing to appreciate the significance of foreign cartels, courts have drawn a roadmap for would be price fixers: Start the price-fixing conspiracy in a cartel-friendly jurisdiction. This "legal" cartel will help the price fixers build trust, which will allow the conspirators to rely on trust instead of cartel enforcement mechanisms, the use of which may expose the cartel to antitrust authorities. After the price-fixing firms have mastered how to run a cartel efficiently in these jurisdictions, they can expand their operations to the American market.

Although the mechanics of cartel operations and the doctrines of antitrust law can be complicated, the issues here are not. After antitrust plaintiffs have shown that the defendants accused of price fixing have engaged in conscious parallel pricing, is it more likely these same firms have fixed prices in the United States if they are engaging in—or have recently engaged in—price fixing in another jurisdiction? The answer is simple: yes. Although the defendants' foreign price-fixing activity does not *prove* domestic price fixing, it is probative.

generally covert and must be gleaned from records, conduct, and business relationships."). The better reasoned judicial decisions recognize that "[p]ermitting discovery of alleged conspirators' foreign activities in cases asserting antitrust violations in the United States is well supported by caselaw." *In re* Urethane Antitrust Litig., 261 F.R.D. 570, 573–74 (D. Kan. 2009).