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The "Comity" of Empagran: The Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction over International Cartels

Sam F. Halabi
University of Missouri School of Law, halabis@missouri.edu

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Recent Development
Sam Foster Halabi [a1]

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I. INTRODUCTION

The equivocal language of the 1982 Foreign Trade Antitrust Improvements Act (“FTAIA”) [1] has led to several disputes concerning when victims of international price-fixing can bring suit under U.S. antitrust law. The FTAIA vests federal district courts with subject matter jurisdiction over conduct that “has a direct, substantial and reasonably foreseeable effect” on U.S. commerce that “gives rise to a claim” under the Sherman Act. [2] The FTAIA's unique statutory language offers little guidance for district courts when an international cartel raises the price of a good or service in both domestic *and* foreign markets. In that case, does the FTAIA permit foreign plaintiffs injured in foreign markets access to U.S. federal district courts? Recently, the U.S. Supreme Court ruled in *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.* (“*Empagran*”) [3] that the doctrine of “comity among nations” limited the reach of U.S. antitrust law over foreign plaintiffs who claim injury in nations where other competition regulations exist. [4] This decision left unresolved the split between the Courts of Appeals for the Fifth Circuit and the Second Circuit over the FTAIA's language and history. Moreover, the Supreme Court's resort to the existence of foreign regulatory schemes to limit Sherman Act jurisdiction ignored Congress's intent to deter international cartels and protect American markets.

This Recent Development argues that *Empagran* misapplies the doctrine of comity. Part II traces the history of the FTAIA, which was passed to define the limits on participation by American businesses in anticompetitive conduct overseas. Part III narrates the factual and procedural history of *Empagran*. Part IV contrasts the Fifth and Second Circuits' interpretations of the FTAIA. In Part V, the Recent Development analyzes the Supreme Court's ruling in *Empagran*, and Part VI outlines the procedurally questionable application of the “comity among nations” doctrine. Finally, the Recent Development ***280** concludes that, by invoking comity, the Supreme Court added to the difficulties of interpreting the FTAIA.

II. A BRIEF HISTORY OF THE FTAIA

Since 1909, [5] the Supreme Court has wrestled with the appropriate extra-territorial application of the Sherman and Clayton Acts. [6] On the one hand, U.S. antitrust laws are the most robust in the world, preserving competition through

Department of Justice ("DOJ") actions [7] and awards of treble damages and attorneys' fees to injured private parties. [8] On the other hand, the disparity between foreign "competition" law and U.S. law frequently disadvantages U.S. businesses. [9]

The global economy's increased interdependence after World War II enhanced business's capability to organize sophisticated cartel arrangements. [10] This development, along with judicial confusion over the appropriate reach of the antitrust laws, exacerbated the tension. [11] Congress passed the FTAIA to clarify unsettled and conflicting federal court decisions concerning the extra-territorial reach of U.S. antitrust laws [12] and to "insulate United States business from its antitrust laws for certain business conducted outside the country ... to assist American business competing abroad." [13] The text of the FTAIA reads:

> ***281** Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States. [14]

The FTAIA gave rise to competing interpretations among U.S. courts about how "direct, substantial and reasonably foreseeable" an anticompetitive effect must be for resort to American antitrust law. [15] Most recently, a decade-long conspiracy to inflate the prices of vitamins used in everyday products finally gave the Supreme Court the opportunity to determine the reach of American antitrust laws under the FTAIA.

III. "VITAMINS, INC."

The "bulk vitamins industry" refers to those companies involved in the initial processing of "dry-powder" vitamins, an intermediate component used by independent "blenders" as ingredients in end-use products such as milk and animal feed. [16] 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. [17] Labeling their operation "Vitamins, Inc.," [18] the cartel members conspired to inflate prices at this first, ***282** "bulk," stage of the vitamin distribution process. Claiming that they were holding trade association meetings, they met quarterly and compared sales volumes on country, regional, and worldwide levels. [19] Generating additional revenues of hundreds of millions of dollars in a $20 billion industry, the conspiracy directly injured large American companies, including General Mills, Kellogg, Coca-Cola, Tyson Foods, and Procter & Gamble. [20] In 1999, executives from co-conspirator Rhône-Poulenc came forward under the DOJ's Corporate Leniency Policy, which provides amnesty for the first member of a cartel to testify, [21] and exposed the cartel in exchange for immunity from U.S. criminal penalties. [22] Because of Rhône-Poulenc's cooperation, twelve corporate defendants and thirteen individual defendants reached plea agreements with the DOJ and paid immense fines. [23]

Concurrently with DOJ investigations, domestic and foreign vitamin purchasers, including Empagran S.A., the named plaintiff, filed class action suits under the Sherman and Clayton Acts claiming that the international price-fixing arrangement directly raised prices in their respective markets, despite the fact that none of the foreign plaintiffs had been injured while engaged in U.S. commerce. [24] The District Court for the District of Columbia dismissed the claims for lack of subject matter jurisdiction, holding that "under [the] FTAIA, a plaintiff must establish that the injuries it seeks to remedy actually arose from the anticompetitive effects of the defendants' conduct on United States commerce." [25] The court applied a reading of the FTAIA issued by the Fifth Circuit in 2001, [26] holding that the Sherman Act applies only to anticompetitive behavior in U.S. territory. The Court of Appeals for the District of Columbia reversed, applying the Second Circuit's 2002 interpretation of the FTAIA, [27] which held that private foreign plaintiffs can bring actions under the Sherman Act as long as *any* domestic claim exists; the claim can be made ***283** by the U.S. government or by a party injured as part of domestic commerce. [28] The split provided the opportunity to review the "inelegantly phrased" [29] statute that Congress had passed in order to identify those plaintiffs eligible to resort to U.S. antitrust law.

IV. DISAGREEMENT AMONG THE CIRCUITS

A. The Fifth Circuit Approach

In 1998, Den Norske Stats Oljeselskap As ("Statoil"), a Norwegian petroleum corporation, filed suit in the Northern District of Texas for injuries sustained from a market and price-fixing conspiracy between the world's only three providers of heavy-lift barge services. [30] The providers divided the market for their services between the Gulf of Mexico and the North Sea. [31] The court held that the FTAIA limited the "space" for subject matter jurisdiction under the Sherman Act to injuries sustained in American territory. [32] The court found that it had jurisdiction over activities in American territorial waters in the Gulf of Mexico. [33] Statoil, however, operated only in the North Sea and had entered no contracts in the United States nor any that even applied U.S. law. Despite this fact, it claimed that the increased prices it faced resulted from the same conspiracy that gave rise to antitrust claims for affected American businesses. [34] Nonetheless, the court dismissed Statoil's complaint under the FTAIA.

On appeal, the Fifth Circuit affirmed the district court's ruling on the jurisdictional issue. [35] Statoil's injury, the court claimed, "must stem from the effect of higher prices for heavy-lift services *in the Gulf*." [36] The court asserted that although there was a link between the higher prices in the Gulf of Mexico and the North Sea—and thus a close relationship between the domestic injury ***284** and the plaintiff's claim—it did not “give rise” to the claim.[37] High prices in the Gulf of Mexico, the “effect,” were not the same as high prices in the North Sea.[38] Should the domestic conduct be allowed to form the jurisdictional nexus,

> any entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States.[39]

Thus, the Fifth Circuit concluded, the FTAIA does not grant U.S. courts subject matter jurisdiction over claims by foreign plaintiffs “where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.”[40]

B. The Second Circuit Approach

Between 1992 and 2000, the world's largest auction houses, Christie's and Sotheby's, coordinated their buyers' premiums and sellers' commissions, restricted sellers' ability to negotiate terms of loans before sale of their items, and exchanged client lists.[41] After an investigation in which Christie's cooperated under a conditional amnesty offered by the DOJ, a class action lawsuit was certified on behalf of non-U.S. customers who purchased and sold items outside the United States.[42] The District Court for the Southern District of New York framed the issue as “whether a transnational price fixing conspiracy that affects commerce both in the United States and in other countries inevitably gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws.”[43] The court dismissed the foreign plaintiffs' action for lack of subject matter jurisdiction under the FTAIA.

Reversing the district court, the Second Circuit argued that the FTAIA amended the Sherman Act, an act oriented toward defendants.[44] The FTAIA's plain language suggested that cartels aimed at foreign markets with sufficient effect upon U.S. commerce would give rise to subject matter jurisdiction.

The court maintained that reading the FTAIA's provision to limit plaintiffs' redress to injuries sustained in domestic commerce would “conflate [the] ***285** FTAIA with the Clayton Act.”[45] Since the Sherman Act “defines substantive standards that prohibit certain forms of anticompetitive conduct,”[46] the prohibited transaction regarding the auction houses was the agreement to fix prices, not the imposition of high prices. Since the Clayton Act and the Sherman Act “operate independently,” no injury needed to be proven for a company or companies to violate the antitrust laws, even where the conduct was directed at foreign markets.[47] Therefore, the court held that the FTAIA does not determine which plaintiffs can file suit under the Clayton Act and that “it would be inappropriate to import the element of injury from the Clayton Act and graft it onto the FTAIA.”[48]

The Second Circuit emphasized that the statutory text “gives rise to *a* claim,” but not specifically to “the plaintiff's claim.”[49] The court interpreted the statute broadly to allow litigants access to U.S. courts as long as any domestic claim existed. “The ‘effect’ on domestic commerce need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the Sherman Act.”[50] The Second Circuit further ruled that the success of the domestic price-fixing agreement depended on the foreign price-fixing agreement, thus giving rise to Sherman Act jurisdiction.[51]

The Second Circuit offered three responses to the Fifth Circuit's claim that such an interpretation of Sherman Act jurisdiction would "open the floodgates" to foreign litigants seeking the Clayton Act's generous damages terms. First, global price-fixing does not inherently rise to actionable conduct under the FTAIA. Interference in global markets must still satisfy the FTAIA's requirement that the conduct's effect be "direct, substantial and reasonably foreseeable." [52] Second, the evidentiary requirements of Sherman Act claims create "natural limits" to actionable claims. [53] Third, even in cases where price-fixing arrangements occur in foreign markets, but enhance the likelihood of price-fixing in domestic markets, American markets benefit from the additional deterrence against conduct affecting foreign markets. [54] In this way, the Second Circuit decision directly challenged the interpretive and policy holdings of the Fifth Circuit.

V. THE SUPREME COURT DECISION

In *Empagran*, the Supreme Court reversed the D.C. Circuit but did not specifically reject the Second Circuit reasoning imported by the D.C. Circuit. The ***286** Court framed the issue as whether the FTAIA's exemptions apply where international price-fixing activity "has the requisite domestic effect, and ... also has *independent* foreign effects giving rise to the plaintiff's claim." [55] Observing that the FTAIA had an essentially exclusionary purpose, the Court framed the FTAIA as "placing *all* (non-import) activity involving foreign commerce outside the Sherman Act's reach"; the statute only brings such conduct back within jurisdictional reach if it sufficiently affected American commerce. [56] The Court rejected a finding of subject matter jurisdiction on two bases: (1) that rules of comity should limit foreign plaintiffs' use of U.S. laws because of foreign nations' interests, and (2) that the doctrine of comity itself suggests that Congress meant the FTAIA to be restrictive rather than expansive. [57]

A. "Comity Among Nations" as an Instrument To Determine Jurisdiction

The Supreme Court has invoked the customary international legal principle of comity to limit the exercise of jurisdiction over individuals and corporations associated with a foreign country. [58] Under this rule of statutory interpretation, the Court assumes that legislators seek to avoid conflict with the laws of foreign sovereigns in the interest of harmonizing potentially conflicting laws, "a harmony particularly needed in today's highly interdependent commercial world." [59] Because the statute as interpreted by the Second and D.C. Circuits would raise the possibility of supplanting foreign law or having a significant impact on other countries' abilities to regulate commercial matters, the Court reasoned that Congress meant to exclude from U.S. jurisdiction antitrust claims lacking ties to the American market.

The international legal doctrine of comity underpinned and qualified the entire *Empagran* decision. Insofar as the Supreme Court's decision addressed the disputed interpretive issues from the Fifth and Second Circuits, it did so with the proviso that its decision was based on notions of comity. [60] For example, the Court ruled that the Second and D.C. Circuits' reading of "a claim" could "show that [Empagran's] reading is the more natural reading of the statutory language .... But ... considerations previously mentioned—those of comity and history—make clear that the respondents' reading is not consistent with the FTAIA's basic intent." [61] Justice Breyer's opinion focused on the ***287** interests of foreign sovereigns in regulating their own markets and the potential difficulties arising from resort by foreign plaintiffs to U.S. courts. Through frequent reference to the narrow question of a separate, foreign injury suffered in a foreign market, the Court evaded the threshold question of the conduct-effect nexus. The Court left the door open for the large-scale prosecution of expansive, international cartels in U.S. courts by acknowledging that it would be possible for plaintiffs to argue that “without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement.” [62]

B. Comity and Subject Matter Jurisdiction as Separate Questions: **Hartford Fire** *Revisited*

In *Empagran*, Justice Scalia filed a brief concurring opinion restating his dissent in *Hartford Fire Insurance Co. v. California*. [63] In *Hartford Fire*, American insurers conspired with major London reinsurers to limit the availability of commercial general litigation insurance policies that excluded various restrictions on claim availability. [64] Nineteen states as well as private plaintiffs brought Sherman Act claims against the London reinsurers. The London reinsurers argued that even though their acts may have been illegal under the Sherman Act, principles of international comity demanded that since British law did not forbid their conduct, jurisdiction by U.S. courts should “be restrained.” [65]

The *Hartford Fire* majority rejected the argument, determining that “the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only *after* a court has determined that the acts complained of are subject to Sherman Act jurisdiction.” [66] Even if a conflict with English law and policy existed, the Court maintained that considerations of deference were outweighed by the express purpose of the London reinsurers to affect U.S. commerce and the substantial effect their activities produced. [67] Moreover, since the London reinsurers were free to conduct business in compliance with the laws of both the United States and the United Kingdom, no conflict existed. [68] The decision spawned dramatic commentary by legal scholars who argued that it ***288** signaled the end of American courts' attempts to balance U.S. antitrust laws with those of foreign countries. [69]

In dissent, Justice Scalia asserted that two maxims of statutory interpretation should govern. First, acts of Congress, absent express contrary intent, are meant to apply only within the territorial United States. [70] Second, even if contrary intent is expressed, as in the case of the FTAIA, courts should not construe acts of Congress in a way that violates the law of nations unless no other construction is possible. [71] Scalia argued that the controlling analysis should therefore be choice-of-law between sovereign governments sharing jurisdiction. [72] Principles of comity demanded that the court dismiss the action against the London reinsurers because Britain had its own comprehensive regulations for the reinsurance market, as well as a significant interest in regulating that market. [73]

VI. *EMPAGRAN*: CHOOSING BETWEEN COMPETING SOVEREIGNS

The FTAIA grants U.S. courts broad oversight of increasingly sophisticated cartel behavior made possible by large multinational companies serving as the sole producers of various specialized goods. In essence, the FTAIA could be read as Congress's encouragement of American businesses to act as anti-competitively as they wish, as long as they respect the American economy and refrain from activity that would injure participants in the domestic market. [74] The FTAIA extends subject matter jurisdiction to federal district courts where anticompetitive conduct (1) “has a direct, substantial and reasonably foreseeable effect” on non-import foreign trade and (2) “gives rise to a claim.” Beyond this, the FTAIA is unclear as to how courts should approach antitrust litigation where price-fixing occurs at the supranational level and affects domestic and foreign markets. Did Congress intend the deterrent effect of the Sherman Act to reach global cartel behavior by allowing foreign plaintiffs access to generous American damages? Or did Congress only intend for those affected by raised prices *in the American market* to be able to obtain Clayton Act relief? This Recent Development asserts that the Supreme Court's decision to apply notions of comity to answer the question of subject matter jurisdiction under the FTAIA generally ignores Congress's intent and complicates courts' task in resolving transnational price fixing cases.

***289** Congress specifically considered comity concerns when passing the FTAIA. [75] The record reflects the view that courts should first determine subject matter jurisdiction under the statute, and then invoke principles of comity if necessary. The Supreme Court put the cart before the horse by ruling that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." [76] Under the Court's theory in *Empagran*, the initial inquiry into any statute would be the laws and interests of foreign nations, rather than statutory language or the authority of House Judiciary Committee Reports. In a legal system increasingly grappling with issues of foreign law, international law, and globalized regulation of international trade, such a theory would turn federal district courts into *ad hoc* tribunals of all three at the cost of Congressional efforts to protect American markets in an internationalized economy.

The Supreme Court might respond that by invoking comity considerations, it assumed that Sherman Act jurisdiction was proper and therefore held that American adjudication of Empagran's claims would be "unreasonable" given the defendants' "connections with another state." [77] That reasoning would represent a significant break with the traditional functioning of the comity doctrine. Here, when the Court invokes notions of comity, it does not determine subject matter jurisdiction; it "decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute." [78] However, the FTAIA is a *jurisdictional* statute. At issue is not a general law whose language happens to snare unanticipated plaintiffs, [79] but rather a specific Congressional directive to confer jurisdiction in order to protect American markets by punishing price-fixers who unlawfully raise prices in the United States. It therefore seems problematic that the Supreme Court would use comity principles to overrule "the more natural reading of the statutory language." [80]

Even if the Supreme Court had ruled on the relevant jurisdictional tests in the FTAIA statutory language, it is not axiomatic that the doctrine of comity demands dismissal of *Empagran*'s claims. The list from which to draw inferences of "unreasonable" jurisdiction is long and ambiguous. [81] The Supreme ***290** Court's decision is directly traceable to the catalogue of briefs submitted by foreign governments, all of which emphasized comity and international law as justifications to reverse. [82] Two arguments ran throughout those briefs. One was that American antitrust laws, especially their provisions for treble damages, were not consistent with foreign laws, although each brief emphasized that cartels were illegal and private parties had the right to compensation. [83] The other was that extending jurisdiction to private plaintiffs would undermine cooperation between governments on sharing information to discover and prosecute international cartels. [84]

The foreign briefs did not assert that adjudicating claims brought by foreign plaintiffs injured in foreign markets would violate national law. If one theme emerged from all of the briefs, it is that there is a general international norm against price fixing. [85] In other words, if a finding of liability is the same in both countries, it would be logical for conflict-of-laws principles to be invoked only on the issue of remedy. [86] The Supreme Court rejected that reasoning. ***291** [87] This rejection is puzzling, given that cartel formation is universally predatory and disruptive of commerce, and a broad, global *opinio juris* appears to have developed against the practice. [88] It also reinforces the idea that the decision to withhold application of American law demands greater scrutiny than the *Empagran* court, or the *Hartford Fire* dissent, suggest.

Determining whether a state has exercised "unreasonable" jurisdiction over a person or activity is inherently discretionary. Notwithstanding this point, the Supreme Court neglected elements of antitrust law that would limit foreign plaintiffs' Sherman and Clayton Act claims. American antitrust laws do not provide treble damages remedies for all injuries from a Sherman Act violation. Rather, foreign plaintiffs injured in foreign markets must still satisfy standing requirements under the Clayton Act. [89] The relevant language for purposes of determining jurisdiction under the FTAIA is the requirement for "direct, substantial, and reasonably foreseeable effect." [90] It is exactly that language that is shared by the Restatement (Third) of Foreign Relations Law of the United States, the FTAIA, and the accompanying House Judiciary Committee Report suggesting that an international cartel whose actions raised prices in the U.S. market would satisfy the FTAIA's jurisdictional requirements:

> Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country—by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices—the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at ***292** least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce. [91]

Moreover, considerations of venue and personal jurisdiction, respectively, would ensure that claims are adjudicated in the most appropriate forum and that the Sherman Act does not become the world's antitrust law. [92] Finally, the evidentiary standards for proving Sherman Act violations are difficult to satisfy. [93] The underlying presumption in the amici briefs was that private plaintiffs became free riders on the admissions of guilt made under the DOJ Amnesty Program; at least in the case of "Vitamins, Inc.," the process of private litigation produced evidence used by the DOJ in its investigation. [94] However, procedural requirements are not waived through a finding of subject matter jurisdiction, and each gives rise to an additional opportunity to invoke comity as a restrictive instrument.

Empagran's silence on the FTAIA's language virtually guarantees the continued cycle of inconsistent judgments about how American courts should approach global cartels, their organizers, and their victims. *Empagran* does not even clarify the point of initial inquiry for district courts. Should they first look to the existence of an alternative, national system of regulation, or must they focus on the relationship between prices in the United States and abroad? The issue of intended jurisdiction lay at the heart of the dispute between the Fifth and Second Circuits. While the Fifth Circuit argued that Congress intended to exclude wholly foreign transactions, [95] the Second Circuit concluded that large, transnational cartels produced exactly the domestic effect Congress had intended to deter. [96] As examined above, the *Empagran* decision appears neither to satisfy nor to resolve any of the principles advanced by the Fifth and Second Circuits. The Court subordinated the statute's meaning to the interests of foreign governments.

VII. CONCLUSION

The *Empagran* decision confused comity jurisprudence while lending little clarity to the difficult debate about the FTAIA's jurisdictional reach. The status of foreign plaintiffs injured abroad by international cartels remains in limbo. It is difficult to ignore the House Judiciary Committee Report describing ***293** an international cartel similar to "Vitamins, Inc." and the report's explicit conclusion that it was a justified target of American antitrust laws. The Supreme Court will undoubtedly confront the question of the relationship between domestic and foreign injury in the near future, perhaps from the same litigants. Absent from this Recent Development, as they were from the *Empagran* decision, are the empirical claims of both Empagran and F. Hoffmann-La Roche that expanding U.S. jurisdiction over antitrust claims would alternatively enhance deterrence of international cartels [97] or hinder international cooperation and evidence gathering.[98] Also left for another discussion is the claim that the doctrine of comity is becoming increasingly antiquated in the context of a globalized economy.[99] While such analyses are important, as an initial matter the Court should seize its next opportunity to address the language of the FTAIA. The Court should provide an interpretation that relies on Congress' intent regarding the reach of antitrust law, rather than on the goals of foreign legislatures.

Footnotes

a1 J.D. Candidate, Harvard Law School, 2005.

1 Foreign Trade Antitrust Improvements Act, Pub. L. No. 97-290, § 402, 96 Stat. 1248 (1982).

2 Deborah J. Buswell, *Foreign Trade Antitrust Improvements Act: A Three Ring Circus—Three Circuits. Three Interpretations*, 28 DEL. J. CORP. L. 979, 985 (2003) (quoting 15 U.S.C. § 6(a)(1)-(2) (2000)).

3 F. Hoffmann-La Roche, Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004). The spelling of “Hoffmann” and “La Roche” varies throughout the procedural history of the *Empagran* case and its associated secondary literature. Rather than impose a uniform spelling system, the author has chosen to spell these names according to the referenced authority.

4 *Id.* at 2367 (“Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?”).

5 *See* American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (holding that monopolistic practices, illegal in the United States, could not be struck down if they were allowed in the foreign jurisdiction in which they were implemented).

6 The two acts work in concert: “The Sherman Act primarily deals with defendants. It defines substantive standards that prohibit certain forms of anticompetitive conduct by defendants. The Clayton Act deals with plaintiffs. It sets forth the requirement that a plaintiff must suffer an injury or be threatened with an injury caused by a Sherman Act violation in order to bring suit.” Kruman v. Christie's Int'l PLC, 284 F.3d 384, 397 (2d Cir. 2002).

7 15 U.S.C. § 4 (2004).

8 15 U.S.C. § 15(a) (2004).

9 For instance, American firms have often complained that U.S. antitrust laws hinder their ability to “expand exports by means of aggressive competition or cooperation.” Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122, 2135 (2001). *See also* Kareen O'Brien, Note, *Giving Rise to a Claim: Is FTAIA's Section 6A(2) an Antitrust Plaintiff's Key to the Courthouse Door?*, 9 SW. J.L. & TRADE AM. 421, 425 (2003).

10 *See* Joel I. Klein, Address at Fordham Corporate Law Institute, 26th Annual Conference on International Antitrust Law & Policy (Oct. 14, 1999), *available at* http://www.usdoj.gov/atr/public/speeches/3747.pdf (last visited on Dec. 1, 2004).

11 *See* John Gibeaut, *Antitrust American Style: Prosecutors Fear Their Cartel-Busting Efforts Will Fizzle if U.S. Courts Are Opened to Global Price-Fixing Litigation*, A.B.A. J., Apr. 2004, at 54, 57-58.

12 *Compare* Nat'l Bank of Canada v. Interbank Card Assoc., 666 F.2d 6 (2d Cir. 1981) (finding Sherman Act jurisdiction lacking where one Canadian bank and one American bank allegedly concentrated the credit card service market to the disadvantage of second Canadian bank), *with* Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978) (holding that sovereign foreign governments could sue for treble damages in U.S. courts under the Sherman Act if they were damaged by a conspiracy to restrain and monopolize interstate trade for the manufacture, distribution, and sale of antibiotics).

13 Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420, 431 (5th Cir. 2001) (Higginbotham, J., dissenting).

14 15 U.S.C. § 6a (2004).

15 *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.23 (1993) ("Also unclear is whether [FTAIA's] 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it."); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997) ("The FTAIA is inelegantly phrased and the court in Hartford Fire declined to place any weight on it.").

16 *See* Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2001).

17 *See* Empagran S.A. v. F. Hoffman-La Roche, Ltd., 315 F.3d 338, 342 (D.C. Cir. 2003). *See also* JULIAN L. CLARKE & SIMON J. EVENETT, THE DETERRENT EFFECTS OF NATIONAL ANTI-CARTEL LAWS: EVIDENCE FROM THE INTERNATIONAL VITAMIN CARTEL 7 (AEI-Brookings Ctr. for Reg. Stud., Working Paper No. 02-13, 2002); Lily Henning, *Antitrust Goes Global*, PHARM. & MED. DEVICE L. BULL., Nov. 14, 2003, at 3.

18 *See* John R. Wilke & Susan Warren, *Vitamin Makers Plead Guilty, to Pay Record Fine of $725 Million*, WALL ST. J., May 21, 1999, at A3.

19 United States Department of Justice (DOJ) U.S.S.G. § 8C4.1 Mot. for Departure and Mem. in Supp. at 4, United States v. F. Hoffmann-LaRoche, Ltd., 1999 U.S. Dist. LEXIS 21963 (No. 03-724). *See also* First, *supra* note 16, at 715 n.12.

20 *See* Stephen Labaton, *The World Gess Tough on Fixing Prices*, N.Y. TIMES, June 3, 2001, at C1. This gave rise to the plausible conclusion that American consumers were harmed as well. In the dramatic words of DOJ Antitrust Division head, Joel Klein, the conspiracy "hurt the pocket book of virtually every American consumer, anyone who took a vitamin, drank a glass of milk, or had a bowl of cereal." Julie Wolf, *EC to Investigate Vitamin Price Fixing*, GUARDIAN, May 22, 1999, at 27.

21 For a corporation to receive this leniency, it "must, *inter alia*, be the first involved party to come forward, at a time when the government lacks evidence 'likely to result in a sustainable conviction,'" First, *supra* note 16, at 715 n.14.

22 *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 1-2, Empagran S.A. v. F. Hoffmann-La Roche Ltd., 315 F.2d 338 (D.C. Cir. 2003) (No. 03-724).

23 *Id.* at 2. One corporate defendant agreed to a $500 million fine, the largest fine ever levied by the DOJ, while another was fined $225 million. First, *supra* note 16, at 715.

24 *See* Andrew Stanger, Note, *Analyzing U.S. Antitrust Jurisdiction over Foreign Parties After* Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 2003 BYU L. REV. 1453, 1468-69 (2003). The plaintiffs were foreign vitamin distributors located in Ukraine, Australia, Ecuador, and Panama, who bought vitamins outside the United States for delivery outside the United States.

25 Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d at 340.

26 Den Norske Stats Oljeselskap As v. HeereMac V.o.f., 241 F.3d 420, 420-31 (5th Cir. 2001).

27 *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002).

28 *Empagran*, 315 F.3d at 350 (modifying the Second Circuit decision by ruling that the Circuit's separation of the Sherman and Clayton Acts was artificial; that "a claim" required a private plaintiff to have a claim arising out of U.S. domestic commerce; and that a claim by the U.S. government alone was insufficient).

29 United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997).

30 *Den Norske*, 241 F.3d at 422 (also noting that under "the alleged arrangement, the defendants agreed that HeereMac and McDermott would have exclusive access to heavy-lift projects in the Gulf of Mexico, while Saipem would receive a higher

allocation of North Sea projects in exchange for staying out of the Gulf. The defendants also allegedly agreed to submit embellished bids on heavy-lift projects.” *Id.*).

31 *Id.*

32 *Id.* at 423 (“‘Statoil's damages arise from its projects in the Norwegian sector of the North Sea’; thus, the FTAIA's requirement that the effect on domestic commerce ‘gives rise’ to the antitrust claim was not satisfied. *See* 15 U.S.C. § 6a(2). The court also held that the defendants' conspiracy ‘did not have a direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce’ under the FTAIA. *See* 15 U.S.C. § 6a(1).”).

33 *Id.*

34 *Id.* at 422.

35 *Id.* at 426 (“Therefore, we doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act.”).

36 *Id.* at 427 (emphasis added) (also noting that “the higher prices American companies allegedly paid for services provided by the McDermott defendants in the Gulf of Mexico does not give rise to Statoil's claim that it paid inflated prices for HeereMac and Saipem's services in the North Sea.”).

37 *Id.*

38 *Id.*

39 *Id.* at 427-28.

40 *Id.* at 428.

41 Kruman v. Christie's Int'l PLC, 284 F.3d 384, 390-91 (2d Cir. 2002).

42 *Id.* at 391.

43 *Id.* at 392 (quoting Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 623-24 (S.D.N.Y. 2001)).

44 *See id.* at 397.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* at 398.

49 *Id.* at 399 (emphasis added).

50 *Id.*

51 *See id.* at 401.

52 *Id.* at 402 (quoting 15 U.S.C. § 6a(1) (2004)).

53 *Id.* at 402-03.

54 *Id.* at 403.

55 F. Hoffmann-LaRoche, Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2365 (2004) (emphasis added).

56 *Id.*

57 *Id.* at 2369.

58 *Id.* at 2366 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403(1), 403(2) (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]).

59 *Empagran*, 124 S. Ct. at 2366. The Restatement is the traditional authority cited for invoking the "comity of nations": "Even when one of the bases for jurisdiction ... is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." RESTATEMENT OF FOREIGN RELATIONS, *supra* note 58, § 403(1).

60 *Empagran*, 124 S. Ct. at 2372.

61 *Id.* ("Linguistically speaking, a statute can apply and not apply to the same conduct, depending upon other circumstances; and those other circumstances may include the nature of the lawsuit .... It also makes linguistic sense to read the words 'a claim' as if they refer to the 'plaintiff's claim' or 'the claim at issue.'").

62 *Id.*

63 *Id.* at 2373 (Scalia, J., concurring).

64 Hartford Fire Ins. Co. v. California, 509 U.S. 764, 773-76 (1993).

65 *Id.* at 795-96.

66 *Id.* at 798 n.24 (emphasis added).

67 *See id.* at 798.

68 *See id.* at 799. *See also* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997) ("The conduct with which NPI is charged is illegal under both Japanese and American laws, thereby alleviating any founded concern about NPI being whipsawed between separate sovereigns.").

69 *See, e.g.*, Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L. L. 275 (2002); Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L. L. 562 (2000).

70 *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting).

71 *See id.* at 815.

72 *See id.* (citing Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 383 (1959) ("The controlling considerations in this choice-of-law analysis were the interacting interests of the United States and of foreign countries.")).

73 *See id.* at 819 (citing RESTATEMENT OF FOREIGN RELATIONS, *supra* note 58, § 403(2)(g)).

74 *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 395 (2d Cir. 2002).

75 *See* H.R. REP. NO. 97-686 at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498 ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the ... ability to employ notions of comity ... or otherwise to take account of the international character of the transaction.").

76 F. Hoffman-La Roche, Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2367 (2004).

77 RESTATEMENT OF FOREIGN RELATIONS, *supra* note 58, § 403(1).

78 Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

79 *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571 (1953). In *Lauritzen*, a Danish sailor, on a Danish-owned ship whose guiding articles stated disputes were to be governed under Danish law, brought a Jones Act claim after being injured in a Cuban port. The Supreme Court ruled that Danish law should apply.

80 *Empagran*, 124 S. Ct. at 2372.

81 *Id.* at 2367 (citing RESTATEMENT OF FOREIGN RELATIONS, which provides that unreasonable jurisdiction may be determined by considering: "(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state." RESTATEMENT OF FOREIGN RELATIONS, *supra* note 58, § 403(2).).

82 *See* Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 1, F. Hoffman-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724) ("[p]rinciples of international law and comity also come into play when U.S. courts consider whether they should exercise the broadest possible jurisdiction authorized by a statute ...."); Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 4, F. Hoffman-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724) ("The [D.C. Circuit's] holding thus directly conflicts with the well-established principle that United States statutes are to be construed to avoid conflict with other nations' laws and to avoid unreasonableness in the exercise of U.S. courts' jurisdiction"; Brief of the Government of Japan as Amicus Curiae in Support of Petitioners at 2, F. Hoffman-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724) ("Giving foreign purchasers the right to damages for purely foreign market transactions undermines the important principle of comity, respect due to a sovereign nation to regulate conduct within its national territory.").

83 *See, e.g.*, Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 11, F. Hoffman-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724), and Brief of the Government of Japan as Amicus Curiae in Support of Petitioners at 6-7, F. Hoffman-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724).

84 *See, e.g.*, Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 24, F. Hoffman-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724) and Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 17, F. Hoffman-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724).

85 Henning, *supra* note 16, at 3 ("More than 100 countries worldwide now have some form of anti-cartel laws.").

86 *See, e.g.*, Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 384 (1959) (invoking "comity" of nations because of foreign interests in regulating *remedies* to maritime injuries).

87 *Empagran*, 124 S. Ct. at 2368 ("Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, and various forms of joint venture, in respect to both primary conduct and to remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings—to the point where procedural

costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system.").

88 *See Romero*, 358 U.S. at 384 ("To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country.").

89 *See* Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 534-35 (1983) (citing Illinois Brick Co. v. Illinois, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting) ("An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.' It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.")).

90 15 U.S.C. § 6a(1) (2004).

91 Kruman v. Christie's Int'l PLC, 284 F.3d 384, 401 (2d Cir. 2002) (citing H.R. REP. NO. 97-686 at 26 (1982)).

92 *See* Joel A. Christie, *D.C. Circuit Authorizes Foreign Firms to Sue in Federal Court for Foreign Injuries*, METROPOLITAN CORP. COUNSEL, Mar. 2003, at 12.

93 *See, e.g.*, Marsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

94 *See, generally*, First, *supra* note 16, at 715.

95 Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420, 429 (5th Cir. 2001) (holding that a "transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws .... It is thus clear that wholly foreign transactions as well as export transactions are covered by the FTAIA, but that import transactions are not.").

96 *Kruman*, 284 F.3d at 401.

97 *See, e.g.*, Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents at 13, F. Hoffman-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724) ("The penalties embedded in U.S. antitrust laws are appropriate for domestic conspiracies because they presuppose an alignment of the scope of the cartelized market and the scope of enforcement. Allowing foreign claims in U.S. courts extends this principle to international conspiracies, establishing a level of deterrence comparable to what the current law achieves for domestic conspiracies."); Brief of Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents at 3, F. Hoffman-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724) ("A deterrence perspective thus suggests that it would substantially further the underlying goals of U.S. antitrust law to allow private civil suits by foreign plaintiffs in the United States, even when such suits seek recovery based on foreign transactions by the global cartel.").

98 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 20, F. Hoffmann-La Roche, Ltd., et al. v. Empagran, S.A., et al., 124 S. Ct. 2359 (2004) (No. 03-724) ("The court of appeals' interpretation of Section 6a would undermine the effectiveness of the government's amnesty program. Even those conspirators who come forward and receive amnesty from criminal prosecution still face exposure to private treble damage actions under 15 U.S.C. 15(a).").

99 *See* Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.—Oct. 1997, at 183, 183.

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