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### The FTAIA and Subject Matter Jurisdiction over Foreign Transactions under the Antitrust Laws: The New Frontier in Antitrust Litigation

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# THE FTAIA AND SUBJECT MATTER JURISDICTION OVER FOREIGN TRANSACTIONS UNDER THE ANTITRUST LAWS: THE NEW FRONTIER IN ANTITRUST LITIGATION

*Edward D. Cavanagh\**

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|---|------|
| I. INTRODUCTION   |      |
| II. BACKGROUND: THE HISTORIC TREATMENT OF<br>FOREIGN-BASED CLAIMS   | 2153 |
| A. THE COURTS: ALCOA AND ITS PROGENY  | 2153 |
| B. CONGRESS: THE FTAIA  | 2156 |
| 1. <i>The Statute</i>   | 2156 |
| 2. <i>The Legislative History</i>   | 2158 |
| III. CONCRETE FACTUAL SCENARIOS IN WHICH<br>JURISDICTIONAL ISSUES ARISE   | 2159 |
| A. AMERICAN PURCHASERS AND FOREIGN CARTEL<br>PARTICIPANTS SELLING INTO THE UNITED STATES  | 2160 |
| B. FOREIGN PURCHASERS BUYING FROM CONSPIRATORS<br>BASED IN THE UNITED STATES  | 2164 |
| C. UNITED STATES CITIZENS INJURED ABROAD BY<br>FOREIGN CONSPIRACY   | 2166 |
| D. FOREIGN PURCHASER BUYING IN A FOREIGN MARKET<br>ALLEGING A WORLDWIDE CONSPIRACY AFFECTING<br>BOTH FOREIGN AND DOMESTIC MARKETS | 2167 |
| 1. <i>The Fifth Circuit</i>   | 2168 |
| 2. <i>The Second Circuit</i>  | 2171 |
| a. The District Court   | 2171 |
| b. The Court of Appeals   | 2172 |
| E. <i>EMPAGRAN</i>  | 2177 |
| 1. <i>Statutory Language</i>  | 2178 |
| 2. <i>Structure of the FTAIA</i>  | 2178 |
| 3. <i>Legislative History</i>   | 2179 |
| 4. <i>Deterrence</i>  | 2179 |

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|  |      |
|--|------|
| IV. A CRITIQUE .....   | 2180 |
| A. "GIVES RISE TO A CLAIM" .....                             | 2180 |
| 1. <i>Fifth Circuit</i> .....                                | 2180 |
| 2. <i>Second Circuit</i> .....                               | 2183 |
| 3. <i>D.C. Circuit</i> .....                                 | 2184 |
| B. "DIRECT, SUBSTANTIAL AND REASONABLY<br>FORESEEABLE" ..... | 2186 |
| V. SYNTHESIS .....   | 2188 |
| VI. CONCLUSION .....   | 2189 |

## I. INTRODUCTION

THE aggressive antitrust enforcement activities by the United States Department of Justice Antitrust Division against international cartels in the last decade, coupled with the increasingly global character of commercial markets, have spawned significant private antitrust treble damages litigation in American courts by foreign plaintiffs. Not surprisingly, the jurisdictional reach of the Sherman Act has been a threshold issue in these cases. While jurisdictional questions are not new to American courts, this latest round of antitrust cases has posed novel issues of subject matter jurisdiction,<sup>1</sup> including the extent to which foreign plaintiffs claiming antitrust damages based on foreign transactions may sue in American courts under the Sherman Act.

Historically, the federal courts have disagreed over the extraterritorial reach of the antitrust laws.<sup>2</sup> The courts have developed various tests to determine the precise scope of the Sherman Act, but these efforts have generated a body of case law that is both "confusing and unsettled."<sup>3</sup> In 1982, Congress sought to clarify matters by enacting the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA).<sup>4</sup> Designed explicitly to limit Sherman Act jurisdiction, the FTAIA exempted certain foreign conduct from antitrust scrutiny but also made clear that when foreign transactions were involved, it was incumbent on the plaintiff to show that this

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1. The majority of courts treat jurisdictional questions under the FTAIA as going to the issue of the court's subject matter jurisdiction. See *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003). Some judges, however, have questioned whether the issue is really a matter of legislative or prescriptive jurisdiction rather than subject matter jurisdiction. *Id.* at 953 (Wood, J., dissenting). Subject matter jurisdiction goes to the power to decide a case; legislative jurisdiction is the power to prescribe a rule of law. *Id.* Put another way, does the FTAIA purport to strip federal courts of jurisdiction in certain cases where its test is not met or does it instead describe an element of the plaintiff's claim?

The question is not merely of academic interest and may indeed have a significant practical effect on the progress of a case. If it is a question of subject matter jurisdiction, the matter can be dismissed on the pleadings. On the other hand, if the issue is a matter of legislative jurisdiction, the case will normally not be successfully dismissed on a threshold motion and must await summary judgment upon a full pretrial record.

2. *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 423-24 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

3. *Id.* at 424.

4. 15 U.S.C. § 6a (2000).

conduct had a “direct, substantial and reasonably foreseeable effect” on domestic commerce.<sup>5</sup> Unfortunately, the FTAIA, rather than clarifying the reach of the antitrust laws, has only heightened the confusion.

This article will (1) analyze the historic bases for exercise of subject matter jurisdiction over foreign transactions under the antitrust laws; (2) review the scope of the FTAIA and the varied judicial opinions purporting to construe it; and (3) propose an interpretative framework that is consistent with both legislative intent and long-recognized common-law limits on the power of American courts.

## II. BACKGROUND: THE HISTORIC TREATMENT OF FOREIGN-BASED CLAIMS

### A. THE COURTS: ALCOA AND ITS PROGENY

Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or, conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations.”<sup>6</sup> Notwithstanding the broad language of the Sherman Act and its specific reference to foreign commerce, the courts have long presumed that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial limits of the United States.”<sup>7</sup> Historically, courts of the United States have been circumspect in applying American antitrust laws to conduct occurring outside of the country. In *American Banana Co. v. United Fruit Co.*,<sup>8</sup> the Court, per Justice Holmes, held that the Sherman Act could have no application to conduct occurring outside the United States and that a statute must be “confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.” As American traders became increasingly involved in the international arena, the Supreme Court relaxed the hard-line position expressed in *American Banana* and held that federal courts could assert antitrust jurisdiction over foreign defendants if domestic commerce were affected and some conduct occurred in the United States.<sup>9</sup>

The Second Circuit sought further to refine the jurisdictional analysis in the *Alcoa* case.<sup>10</sup> Writing for the court, Judge Learned Hand articulated what has become known as the “effects test” and held that the Sherman Act does proscribe extraterritorial acts which are “intended to affect imports [into the United States] and did affect them.” In so holding, the court limited *American Banana* to cases where extraterritorial acts produced no anticompetitive effects in the United States.<sup>11</sup> At the same time, *Alcoa* made clear that “[w]e should not impute to Congress an in-

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5. *Id.*

6. *Id.* § 1.

7. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted).

8. 213 U.S. 347, 357 (1909).

9. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927).

10. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

11. *Id.* at 444.

tent to punish all whom its courts can catch, for conduct which has no consequences within the United States.”<sup>12</sup> The Second Circuit did not attempt to articulate the point at which foreign acts were qualitatively and quantitatively sufficient to affect domestic commerce and thus confer jurisdiction on American courts.

The effects test has been widely, but by no means universally, followed by other courts.<sup>13</sup> Concerned that the *Alcoa* test did not adequately account for the interests of foreign states, the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America Corp.*<sup>14</sup> added a gloss to *Alcoa* by creating a jurisdictional rule of reason. This rule required a comity-based balancing test as well as an analysis of domestic effects when assessing the reach of the antitrust laws over foreign defendants. The Fifth Circuit adopted a similar approach in *American Rice, Inc. v. Arkansas Rice Growers Cooperative Ass’n.*<sup>15</sup> While one cannot fault these courts for attempting to develop comprehensive jurisdictional standards, it is undeniable that infusing the issue of comity into the jurisdictional analysis has generated more confusion than certainty and has created significant unpredictability in the law.

Without specifically addressing the differing standards which had percolated up through the circuit courts, the Supreme Court, in *Hartford Fire Insurance Co. v. California*,<sup>16</sup> clearly embraced the effects test. Without so much as a nod to comity, the Court there ruled that a civil antitrust action could go forward, despite the fact that the alleged violations occurred entirely on British soil, where it could be shown that the foreign conduct “was meant to produce and did in fact produce some substantial effect in the United States.”<sup>17</sup>

The rationale from *Alcoa* and *Hartford Fire* was subsequently adopted in the criminal context in *United States v. Nippon Paper Industries Co.*<sup>18</sup> In *Nippon Paper*, the First Circuit held that a Japanese manufacturer of thermal fax paper could be held criminally liable for violating American

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12. *Id.*

13. In the years since the *Alcoa* decision, the courts and commentators have disagreed as to whether an assertion of antitrust jurisdiction over foreign activities requires both an actual effect on United States commerce and an intent to affect domestic commerce, or whether effect alone or an intent to affect the commerce of the United States by itself is sufficient. See *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 289 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2638 (2003); see also *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (foreign conduct must have an actual effect on American commerce); 1 WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, § 2.12, at 82 (4th ed. 1991) (suggesting both a direct and substantial effects test and an element of intent where “U.S. jurisdiction is based upon acts or agreements abroad which are not in the flow of foreign commerce”); 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 272a, at 350, ¶ 272f, at 354 (2d ed. 2000) (proposing a “significant effects” test).

14. 549 F.2d 597, 613 (9th Cir. 1976).

15. 701 F.2d 408, 413 (5th Cir. 1983).

16. 509 U.S. 764 (1993).

17. *Id.* at 796; *accord* *Filetech, S.A. v. Fr. Telecom, S.A.*, 157 F.3d 922, 931 (2d Cir. 1998); *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173 (D. Mass. 1999).

18. 109 F.3d 1 (1st Cir. 1997).

antitrust laws by agreeing with rivals to impose resale price maintenance on unaffiliated trading houses that resold the paper in the United States. Liability could be imposed even if it had no operations within the United States and all alleged price-fixing activities occurred completely outside the United States.<sup>19</sup> All of the co-conspirators were Japanese companies; all meetings at which price-fixing was discussed took place in Japan; all sales to distributors subject to the price-fixing agreement took place in Japan; and all monitoring took place in Japan.<sup>20</sup>

On these facts, the trial court dismissed the indictment for lack of subject matter jurisdiction.<sup>21</sup> The First Circuit reversed the trial court and held that jurisdiction existed using a two-step analysis. First, relying on *Hartford Fire*, the court found that “the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One’s jurisdictional reach.”<sup>22</sup> Second, the court concluded that since the same language in § 1 of the Sherman Act creates both criminal and civil liability, the *Hartford Fire* rationale applies equally in criminal cases. The court noted that “it would be disingenuous . . . to pretend that the words [of Section 1] had lost their clarity merely because this is a criminal proceeding.”<sup>23</sup> Accordingly, it is fair to say that the *Alcoa* effects test, notwithstanding its imprecision, is now widely accepted by courts.<sup>24</sup>

The *Alcoa* line of cases deals essentially with foreign conduct having anticompetitive effects in the domestic arena. A second line of cases deals with the mirror image of *Alcoa*—foreign purchasers who are victimized by anticompetitive conduct in the United States market. In *Pfizer Inc. v. India*,<sup>25</sup> the Supreme Court held that foreign purchasers victimized by antitrust violations committed by domestic sellers have a remedy under the United States antitrust laws. The Court reached this conclusion in two stages. First, it found that foreign governments, like foreign corporations, were “persons” within the meaning of section 4 of the Clayton Act<sup>26</sup> and that Congress did not intend to deny foreigners a remedy when they are injured by antitrust violations that would give American

19. *Id.* at 2.

20. *Id.*

21. *United States v. Nippon Paper Indus. Co.*, 944 F. Supp. 55, 64 (D. Mass. 1996).

22. *Nippon Paper*, 109 F.3d at 4.

23. *Id.*

24. *Id.*; see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (“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.”) (citing *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986)); *Laker Airways Ltd. v. Sabena Belgian Work Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984) (“It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory.”); see also 1A AREEDA & HOVENKAMP, *supra* note 13, ¶ 270b, at 336 (“The central point, now well established, is that conduct, whether at home or abroad, can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States.”).

25. 434 U.S. 308 (1978).

26. *Id.* at 313-14.

victims a right to sue.<sup>27</sup>

Second, the Court found that allowing foreign plaintiffs to sue would not only enhance the antitrust goals of compensation, deterrence, and disgorgement of ill-gotten gains, but also would enhance protection of domestic consumers.<sup>28</sup> The Court noted that where a case involved a conspiracy that operated both domestically and internationally, excluding foreign plaintiffs would undermine deterrence by encouraging wrongdoers to undertake worldwide conspiracies because wrongdoers would know that any losses in the United States through treble damages lawsuits might be more than offset by ill-gotten gains reaped in the foreign phase.<sup>29</sup> On the other hand, forcing conspirators to take into account the full cost of their conduct by permitting foreign buyers to sue would tend to optimize the deterrent effect of the treble damages remedy.<sup>30</sup>

*Pfizer* did not involve the issue of subject matter jurisdiction and indeed predates the FTAIA by four years.<sup>31</sup> Given that the plaintiffs in *Pfizer* had entered the domestic market and made purchases in the United States, jurisdiction under the Sherman Act was clear.<sup>32</sup> Indeed, the Court never discussed the issue of subject matter jurisdiction. Nevertheless, subsequent courts have seized on the deterrence rationale in *Pfizer*—albeit wrongly—to justify the exercise of subject matter jurisdiction over antitrust claims by certain foreign purchasers.<sup>33</sup>

## B. CONGRESS: THE FTAIA

### 1. *The Statute*

The FTAIA<sup>34</sup> was passed as part of the Export Trading Company Act of 1982. Enacted as an exception to the Sherman Act, the statute provides that:

Sections 1 to 7 of [title 15] 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 com-

27. *Id.*

28. *Id.* at 315.

29. *Id.*

30. *Id.*

31. *See, e.g.,* Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 304 n.10 (3d Cir. 2002); *Sniado v. Bank Aus., N.A.*, 174 F. Supp. 2d 159, 169 (S.D.N.Y. 2001).

32. *Pfizer*, 434 U.S. at 315; *Sniado*, 174 F. Supp. 2d at 169 (S.D.N.Y. 2002); *see also* Den Norske Oljeselskap AS v. Heeremac Vof, 241 F.3d 420, 435 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) (Higginbotham, J., dissenting) (“[I]n *Pfizer*, the sales were made in the United States.”).

33. *Empagran S.A. v. F. Hoffman La Roche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003), *reh’g denied*, 2003 U.S. App. LEXIS 19042 (D.C. Cir. Sept. 11, 2003).

34. 15 U.S.C. § 6a.

merce 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 sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.<sup>35</sup>

The FTAIA is very difficult to read. Its draftsmanship has been charitably described as “cumbersome and inelegant.”<sup>36</sup> The FTAIA is perhaps described as a drafting disaster, the worst nightmare of every legislation professor. Its obtuse language has provided a field day for critics.<sup>37</sup>

By its terms, the statute limits the subject matter jurisdiction of the antitrust laws by providing that the Sherman Act shall not apply to trade or commerce with foreign nations unless (1) the conduct has a “direct, substantial and reasonably foreseeable effect” on domestic or export commerce of the United States and (2) “such effect gives rise to a claim” under the Sherman Act.<sup>38</sup> The FTAIA also provides an exception to the exception by specifically asserting jurisdiction over matters involving import trade or commerce.<sup>39</sup> Put another way, the Sherman Act applies to conduct involving commerce with foreign nations if and only if:

- (1) that conduct has a direct, substantial and reasonably foreseeable effect –
  - (A) on domestic commerce or on import commerce or
  - (B) on export commerce with foreign nations of a person engaged in export commerce in USA; and
- (2) such effect gives rise to a claim under sections 1 to 7 of the Sherman Act.

Not only is the FTAIA difficult to read, it is difficult to comprehend. The text of the statute does not speak to the question of what kind of extraterritorial conduct is within the ambit of the antitrust laws. On its face, the FTAIA is neutral as between citizens of the United States and foreign citizens.<sup>40</sup> Similarly, the statute is neutral as to conduct occurring within or outside of the United States.<sup>41</sup> The focus of the statute is whether there is an anticompetitive effect in the United States.

35. *Id.*

36. 1A AREEDA & HOVENKAMP, *supra* note 13, ¶ 272; *United Phosphorus Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1024 (N.D. Ill. 2001), *aff'd*, 322 F.3d 942 (7th Cir. 2003); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 714 (D. Md. 2001).

37. *See, e.g.*, SPENCER WALLER, *ANTITRUST LAWS & INTERNATIONAL COMMERCE*, § 6.03 (1992) (“If Congress intended to clarify the jurisdictional reach of the Sherman Act over export activity and promote greater certainty it failed [in enacting the FTAIA.]”); *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 301 (3d Cir. 2002) (stating that the language of the FTAIA is “convoluted”).

38. 15 U.S.C. § 6a.

39. *Id.*

40. Salil Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 289 (2002).

41. *Id.*



The FTAIA carves out certain conduct—other than import commerce—involving trade or commerce with foreign nations.<sup>42</sup> It then “carves back in” that very conduct if (1) the conduct has a “direct, substantial and reasonably foreseeable effect on the domestic commerce of the United States and (2) that domestic effect “gives rise to a claim” under the Sherman Act.<sup>43</sup> Again, the FTAIA itself does not illuminate the meaning of either of the foregoing conditions; and, as discussed in detail below, courts have disagreed as to the proper interpretation of both.

## 2. *The Legislative History*

The legislative history of the FTAIA sheds some, but not much, light on this opaque statute.<sup>44</sup> The history reveals two distinct and potentially conflicting purposes. First, the FTAIA was intended to limit the antitrust exposure of American exporters.<sup>45</sup> The legislation was in part a response to “a perception [which] exists among businessmen, especially small businessmen, that antitrust law prohibits efficiency-enhancing joint export activities.”<sup>46</sup> Specifically, American sellers engaged in export commerce were concerned that the antitrust laws put them at a competitive disadvantage in the international arena. The FTAIA was designed “to encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services.”<sup>47</sup> The statute also “was intended to exempt from the Sherman Act export transactions that did not injure the United States economy.”<sup>48</sup> The fact that the FTAIA was enacted as a part of the Export Trading Company Act of 1982 leaves no doubt that Congress sought to limit the potential antitrust exposure of domestic exporters.

Second, Congress intended to clarify the jurisdictional reach of the Sherman Act to international transactions.<sup>49</sup> While most courts concurred in *Alcoa's* central proposition that subject matter jurisdiction is lacking where the requisite domestic effects cannot be shown, the precise parameters of the effects test remained uncharted. Accordingly, the legislature sought to enact a “single, objective test—the ‘direct, substantial and reasonably foreseeable effect’ test” that would “serve as a simple and straightforward clarification of existing American law.” in cases involving

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42. *Id.* at 290.

43. *Id.*

44. H.R. Rep. No. 97-686 (1982), reprinted in 1982 U.S.C.C.A.N. 2487.

45. *Id.* at 4.

46. *Id.*

47. *Id.*

48. *Id.*; see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 n.23 (1993).

49. *Den Norske Stats Oljeselskap v. Heeremac Vof*, 241 F.3d 420, 421 (5th Cir. 2001), cert. denied, 534 U.S. 1127 (2002); *Ferromin Int'l Trade Corp. v. UCAR Int'l Corp.*, 153 F. Supp. 2d 700, 703 (E.D. Pa. 2001); *United Phosphorus Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1024 (N.D. Ill. 2001) (“Congress enacted the FTAIA as an amendment to the Sherman Act to clarify the extra-territorial reach of the federal antitrust laws.”), *aff'd*, 322 F.3d 942 (7th Cir. 2003).

trade or commerce with foreign nations.<sup>50</sup>

Yet, there is nothing about the FTAIA itself that is “simple and straightforward.” Nor is there any consensus as to how the FTAIA itself clarifies the law. Noting that the legislative history cites Judge Hand’s *Alcoa* opinion with approval, some courts urge that the FTAIA merely codifies the *Alcoa* effects test.<sup>51</sup> At least one court has suggested that the FTAIA *expands* subject matter jurisdiction under the Sherman Act.<sup>52</sup> Still other courts maintain that any such expansive reading of the FTAIA would be unreasonable.<sup>53</sup>

In short, the legislative history is not definitive on the interplay between the statute and prior case law. In particular, the legislative history provides little guidance on two key aspects of the statute: (1) what constitutes “direct, substantial and reasonably foreseeable effect” on domestic commerce; and (2) what is meant by the anticompetitive effect that “gives rise to a claim” under the Sherman Act. It has therefore fallen to the courts to determine the precise meaning and scope of the FTAIA.

### III. CONCRETE FACTUAL SCENARIOS IN WHICH JURISDICTIONAL ISSUES ARISE

After a prolonged period of dormancy, the FTAIA has taken center stage in the antitrust sphere in light of the increasingly globalized economy and the aggressive prosecution of foreign-based cartels by the Antitrust Division.<sup>54</sup> These phenomena have combined to produce a new

50. H.R. Rep. No. 97-686, at 2.

51. *Empagran S.A. v. F. Hoffman La Roche Ltd.*, 315 F.3d 338, 345 (D.C. Cir. 2003), *reh'g denied*, 2003 U.S. App. LEXIS 19042 (D.C. Cir. Sept. 11, 2003); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002).

52. *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 714-15 (D. Md. 2001).

53. *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 887 (W.D. Wis. 2000), *rev'd sub nom.*, *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836 (7th Cir. 2003).

54. *E.g.*, *In re Vitamins Antitrust Class Actions*, 215 F.3d 26 (D.C. Cir. 2000). Combatting international cartels continues to be an enforcement priority at the Department of Justice. As the head of the Antitrust Division recently observed:

An effective anti-cartel enforcement program should be the top enforcement priority for every antitrust agency, and it will continue to be so for us. International cartels have become more common in recent decades as the economy has become more globalized. Cartels often involve massive volumes of commerce, which in turn means they inflict great harm on American businesses and consumers. We have continued our decade-long concentration of criminal resources on our international cartel program. This focus had led to increased detection and prosecution of major international cartels. At the same time, many other governments have strengthened their own anti-cartel enforcement programs and cooperated with the Division in prosecuting international cartels. Building on these successes is a key priority for the Division.

.....

Since late 1996, the Division has prosecuted international cartels affecting over \$10 billion in U.S. commerce. Well over 90 percent of the total criminal fines we have obtained in this time period were from international cartel cases. Many of you have spent much of your professional careers in an anti-trust world where \$1 million fines were extraordinary; we now have obtained 38 fines of \$10 million or more and six fines of \$100 million or more. The

class of private antitrust plaintiff in United States courts—foreign purchasers claiming damages based on transactions consummated outside the United States. The issue of whether the federal courts have jurisdiction in such cases has split the circuits.<sup>55</sup>

The recent cases raising jurisdictional issues fall into several distinct factual patterns, and a review of these cases will help clarify the nature and scope of the legal disputes on jurisdiction grounds: (1) American purchasers of price-fixed goods sold by foreign cartel participants into the United States; (2) foreign purchasers buying from American-based cartel participants; (3) American buyers injured abroad by a foreign conspiracy; and (4) foreign purchasers injured in foreign transactions by conspirators in a worldwide cartel affecting both American and foreign markets.

#### A. AMERICAN PURCHASERS AND FOREIGN CARTEL PARTICIPANTS SELLING INTO THE UNITED STATES

Under *Hartford Fire*, a conspiracy hatched entirely abroad is subject to antitrust scrutiny in the United States where the illegal foreign agreement “was meant to produce and did in fact produce some substantial effect in the United States.”<sup>56</sup> The key questions after *Hartford Fire* are (1) whether a conspiracy having both foreign and domestic elements is sufficiently “foreign” to activate the domestic “effects” test; and (2) what constitutes “some substantial effect” in the United States.

The Fourth Circuit’s decision in *Dee-K Enterprises, Inc. v. Heveafil, Sdn. Bhd*<sup>57</sup> is instructive on the first issue. *Dee-K* involved a price-fixing action by two American companies against Southeast Asian producers of rubber thread.<sup>58</sup> *Dee-K* alleged that the conspiracy was worldwide in scope and intended to affect United States commerce.<sup>59</sup> Following an eight day trial, the jury agreed with *Dee-K* but also found that “the conspiracy had no ‘substantial effect’ on [American] commerce.”<sup>60</sup> The trial court then entered judgment for the defendants.

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international cartels we have uncovered involved a wide range of industries, including the food and feed additives, graphite electrode, vitamins, construction, fine arts, and textile industries. These illegal cartels have cost U.S. victims many hundreds of millions of dollars annually. Victims have included individual consumers and some of the most well known names in American business—Coca-Cola, Proctor & Gamble, Tyson Foods, Kellogg, and Nestle, jut to name a few.

R. Hewitt Pate, The DOJ International Antitrust Program—Maintaining Momentum, Address Before the American Association Section of Antitrust Law (February 6, 2003), *available at* <http://www.usdoj.gov/atr/public/speeches/200736.htm>.

55. *Compare* *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 423-24 (5th Cir. 2001) (jurisdiction lacking), *cert. denied*, 534 U.S. 1127 (2002), *with* *Empagran*, 315 F.3d 338 (jurisdiction proper), *and* *Kruman*, 284 F.3d 384 (jurisdiction proper).

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

57. 299 F.3d 281 (4th Cir. 2002).

58. *Id.* at 283.

59. *Id.*

60. *Id.*

On appeal, Dee-K challenged the trial court's adherence to the legal standard expressed in *Hartford Fire*, which gave Dee-K the burden of proving that the defendant's acts had "some substantial effect in the United States."<sup>61</sup> Dee-K argued that: (1) *Hartford Fire* was inapposite because it applied only to cases involving "wholly foreign" commerce and (2) sales of price-fixed goods into the United States by definition involve domestic, not foreign commerce because they are "in" United States commerce.<sup>62</sup> Accordingly, Dee-K urged that it need not prove "substantial effect" in the United States. Rather, it need only meet the more lenient jurisdictional standard used in domestic antitrust cases: "that the defendant's activity is in itself in interstate commerce, or . . . that it has an effect on some other appreciable activity demonstrably in interstate commerce."<sup>63</sup>

The Fourth Circuit rejected the attempt to distinguish *Hartford Fire* as involving only wholly foreign commerce.<sup>64</sup> The court pointed out that *Hartford Fire* involved three counts of conspiracy; two counts dealt only with foreign actors, but the third count involved both foreign and domestic conspirators.<sup>65</sup> Notwithstanding the fact that other courts have characterized the *Hartford Fire* conspiracies as being wholly foreign, the facts of the case clearly show that the alleged misconduct had both domestic and foreign elements.<sup>66</sup> In so ruling, the court acknowledged that neither *Hartford Fire* nor other cases provided definitive guidance on what constitutes "foreign conduct."<sup>67</sup>

In addition, the Fourth Circuit rejected Dee-K's argument that the sale of price-fixed goods by foreign sellers to an American buyer in the United States by definition involves domestic commerce. The court characterized Dee-K's suggested test as "perilously close to clear conflict with *Hartford Fire*."<sup>68</sup> Furthermore, the court pointed out that the "single-factor test" proposed by Dee-K would open United States courts to a flood of claims involving "a great variety of foreign conduct."<sup>69</sup> The Fourth Circuit noted that in global conspiracies involving both domestic and foreign actors, courts have "consistently required" a showing of effect on United States commerce, even in cases involving price-fixing on imports.<sup>70</sup>

61. *Id.* at 286.

62. *Id.*

63. *Id.*

64. *Id.* at 290.

65. *Id.* at 289.

66. *Id.*

67. *Id.* *Hartford Fire* does not discuss the definition of foreign conduct but does "give us some guidance by characterizing certain conduct as foreign." *Id.*

68. *Id.* at 291.

69. *Id.* at 292.

70. *Id.* at 292-93. For example, in *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1254 (7th Cir. 1980), the court applied the *Alcoa* effects test in a case involving a worldwide conspiracy to fix the price of uranium. Defendants included nine foreign entities and twenty domestic companies. Even though (1) the domestic participants outnumbered the

At the same time, the Fourth Circuit rejected the defendants' argument that whether or not a conspiracy was foreign turned solely upon the situs of the illicit agreement.<sup>71</sup> The court found this approach unduly rigid. It noted that a standard focused on the situs of the conduct would be at odds with the *Alcoa* effects test.<sup>72</sup> In addition, the court observed that this standard would produce the anomalous result of (1) requiring a special showing of domestic effects where a conspiracy among domestic sellers doing business in the United States is hatched abroad but carried out entirely within the United States, and (2) imposing at the same time, no special requirements where the very same conspiracy among domestic sellers is hatched at home rather than abroad.<sup>73</sup>

The court instead opted for a middle course with a "flexible and [more] subtle inquiry" in determining whether foreign conduct is involved and a substantial effect in the United States is required.<sup>74</sup> The Fourth Circuit ruled that in determining whether the *Hartford Fire* test applies, a court should be "able to consider the full range of factors that may appropriately affect the exercise of [its] antitrust jurisdiction," including whether the participants, acts, targets and effects involved in an alleged antitrust violation are *primarily* foreign or *primarily* domestic.<sup>75</sup> Applying that test, the court found that: (1) the agreements were all formed outside the United States; (2) the agreements targeted a global market; (3) all conspirators except two held offices in foreign companies, and the two who held offices in the American companies also had important roles in Southeast Asian companies; and (4) all meetings took place outside the United States.<sup>76</sup> While there were sales in the United States to American consumers and American divisions of the foreign sellers cooperated in the conspiracy, such links to the United States "are mere drops in the sea of conduct that occurred in Southeast Asia."<sup>77</sup>

Accordingly, the price-fixing conspiracy at issue involved "primarily foreign conduct." *Dee-K* therefore had the burden of proving that there was a substantial effect on United States commerce, but ultimately failed to carry that burden.

On the second question left in the wake of *Hartford Fire*—what constitutes some substantial effect on domestic commerce—the post-*Hartford Fire* cases have been instructive. As a threshold matter, courts have emphasized that it is "the situs of the effect, not the conduct, which is crucial."<sup>78</sup> Thus, the requisite domestic effect may be lacking even if the

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foreign conspirators, (2) at least one conspiratorial meeting took place in the United States, and (3) the United States was a target market, the effects test still applied.

71. *Id.* at 293.

72. *Id.* at 294.

73. *Id.*

74. *Id.* at 294.

75. *Id.*

76. *Id.*

77. *Id.*

78. *United Phosphorus Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1009 (N.D. Ill. 2001), *aff'd*, 322 F.3d 942 (7th Cir. 2003).

conduct originates in the United States or involves American-owned entities operating overseas. The effect on domestic commerce must be “demonstrable”; the antitrust laws would not be “triggered . . . by any minor impact” on the domestic marketplace.<sup>79</sup>

In *Ferromin International Trade Corp. v. UCAR International Corp.*,<sup>80</sup> the court held that the substantial effect test was met where plaintiffs alleged the following effects on the domestic marketplace: “(1) artificial inflation of graphite electrode prices; (2) artificial limits on the volume of imported graphite electrodes; (3) an artificial increase in the price of imported steel; (4) an artificial reduction in the price of scrap; and (5) artificial limits on the volume of graphite electrodes exported from the United States.”<sup>81</sup>

In *Caribbean Broadcasting Systems, Ltd. v. Cable & Wireless PLC*,<sup>82</sup> the D.C. Circuit held that monopolistic overcharges imposed on advertisers in the Eastern Caribbean had the requisite domestic effect.<sup>83</sup> Courts have also found the requisite effect where competition has been eliminated or significantly reduced in a given market.<sup>84</sup> On the other hand, the requisite effects have been held missing where (1) the impact of the allegedly unlawful conduct is felt entirely outside the United States;<sup>85</sup> (2) the domestic effects are speculative, derivative or not demonstrable;<sup>86</sup> (3) the foreign seller did not transact business in the United States and had neither intent nor ability to do so;<sup>87</sup> and (4) it can be shown that the prospective domestic customers would not have dealt with foreign sellers.<sup>88</sup> Foreign sellers may not bootstrap claims onto the injury suffered by American exporters.<sup>89</sup> Injury to customers and potential customers abroad and to an American exporting firm was held insufficient to meet the effect requirement.<sup>90</sup>

Nevertheless, it should be pointed out that in cases involving worldwide conspiracies, notably the *Auction House Cases*<sup>91</sup> and the *Vitamins*

79. *Id.*

80. 153 F. Supp. 2d 700, 715 (E.D. Pa. 2001).

81. *Id.* at 705 (citations omitted).

82. 148 F.3d 1080 (D.C. Cir. 1998).

83. *Id.* at 1085-86.

84. Richard Becker & Matthew Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What is “Direct, Substantial and Reasonably Foreseeable Effect” Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT’L L.J. 11, 18-19 (2003).

85. *United Phosphorus Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1009 (N.D. Ill. 2001), *aff’d* 322 F. 3d 942 (7th Cir. 2003).

86. *Id.*; *McElderry v. Cathay Pac. Airways, Ltd.*, 678 F. Supp. 1071, 1078 (S.D.N.Y. 1988) (FTAIA requires more than speculative effects); *Info. Res., Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 417 (S.D.N.Y. 2000) (effect of foreign acts on domestic commerce must be more than derivative).

87. *United Phosphorus*, 131 F. Supp. 2d at 1010.

88. *Id.* at 1012.

89. *Id.* at 1013.

90. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 814-15 (9th Cir. 1988).

91. *See Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 401 (2d Cir. 2002).

Cases,<sup>92</sup> the issue of domestic effect is conceded or presumed.

#### B. FOREIGN PURCHASERS BUYING FROM CONSPIRATORS BASED IN THE UNITED STATES

The law is a bit clearer where the wrongdoers are American firms engaged in a worldwide price-fixing conspiracy and the victims are foreign purchasers participating in the United States market. The legislative history of the FTAIA suggests that foreign purchasers participating in the domestic marketplace and victimized by price-fixing in that marketplace enjoy the protection of the United States antitrust laws to the same extent as domestic purchasers:

The intent of the Sherman and FTCA Act amendments in H.R. 5235 is to exempt from the antitrust laws conduct that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—e.g., price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The conduct has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do. Indeed, to deny them this protection could violate the Friendship, Commerce, and Navigation Treaties this country has entered into with a number of foreign nations.<sup>93</sup>

Thus, Congress contemplated that the FTAIA effects test would encompass conduct committed outside the United States having effects within the United States as well as conduct committed within the United States having effects both within and outside the United States.<sup>94</sup> Accordingly, the “critical question is not the nationality of the plaintiff but the location of the marketplace in which he participated.”<sup>95</sup> While the above-quoted language indicates that, as a general proposition, foreign and domestic purchasers of price-fixed goods should be treated the same provided the effects test is met, the fourth sentence qualifies that language and states that “the conduct has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad,” as long as the plaintiff has some participation in the domestic marketplace.<sup>96</sup> On the other hand, as one court aptly noted, the legislative history does *not* provide “that jurisdiction exists if the plaintiff actually makes the purchase abroad and does not otherwise par-

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92. See *Empagran S.A. v. F. Hoffman La Roche, Ltd.*, 315 F.3d 338, 344 (D.C. Cir. 2003), *reh'g denied*, 2003 U.S. App. LEXIS 19842 (D.C. Cir. Sept. 11, 2003).

93. H.R. Rep. No. 97-686, at 10 (citations omitted).

94. *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D. Md. 2001).

95. *Id.*

96. *Id.*

ticipate in a U.S. market.”<sup>97</sup>

The court in *Ferromin* made this precise distinction.<sup>98</sup> *Ferromin* involved a worldwide conspiracy to fix the price of graphite electrodes. The plaintiffs were foreign entities that had purchased graphite electrodes from the alleged conspirators, which included some domestic sellers. The court concluded that purchases by foreigners that had been invoiced in the United States had the requisite substantial effect on domestic commerce.<sup>99</sup> On the other hand, those whose purchases had been invoiced outside the United States “could not have been injured by the anti-competitive prices in the United States marketplace.”<sup>100</sup> Any injuries suffered by these plaintiffs “were caused by anticompetitive effects in foreign countries and not in the United States.”<sup>101</sup> Accordingly, those claims based on foreign purchases were barred by the FTAIA.

Jurisdiction was upheld in *Caribbean Broadcasting System*, wherein the plaintiff, a foreign radio station, alleged that the defendant, a rival radio station in the Caribbean, had monopolized or attempted to monopolize the market for English language radio broadcasts in the Eastern Caribbean (including Puerto Rico and the Virgin Islands) by preventing the plaintiff from selling advertising time to United States advertisers.<sup>102</sup> The plaintiff claimed that the defendant falsely represented to advertisers that the defendant’s radio signal reached the entire Eastern Caribbean.<sup>103</sup> Upholding the complaint, the court concluded that the plaintiff had sufficiently alleged anticompetitive effect on American commerce and antitrust injury arising from that anticompetitive effect because United States advertisers were forced to pay higher rates, having been denied the benefit of competition.<sup>104</sup>

Similarly, subject matter jurisdiction was upheld in *Transnor (Bermuda), Ltd. v. BP North American Petroleum*.<sup>105</sup> There, a foreign plaintiff claimed to have been injured by a conspiracy among defendants to cause a decline in oil prices on the Brent Oil Market, which the court concluded was an American market.<sup>106</sup> The illegal conduct thus had an anticompetitive effect on the American oil market that gave rise to plaintiff’s claim.

In both *Transnor* and *Caribbean Broadcasting*, the anticompetitive conduct, while specifically targeted at foreign entities, had anticompetitive

97. *Id.*

98. *Ferromin Int’l Trade Corp. v. UCAR Int’l Corp.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001).

99. *Id.* at 706.

100. *Id.* at 705.

101. *Id.* at 705-06.

102. *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1082 (D.C. Cir. 1998).

103. *Id.*

104. *Id.* at 1083.

105. *Transnor (Bermuda), Ltd. v. BP N. Am. Petroleum*, 666 F. Supp. 581, 582-83 (S.D.N.Y. 1987).

106. *Id.*



effects in the domestic marketplace, which formed the basis of the plaintiffs' claims. On the other hand, courts have found subject matter jurisdiction lacking where foreign claimants can show no such "direct, substantial and reasonably foreseeable effect" on United States commerce.<sup>107</sup> For example, in *Turicentro v. American Airlines, Inc.*,<sup>108</sup> the plaintiffs, travel agents in Central America, alleged that five domestic air carriers and other foreign carriers conspired to lower commissions paid to them on travel to various Central American countries. The court held that the fact that some defendants were American and that some illegal activities pursuant to the conspiracy may have taken place in the United States is "irrelevant if the economic consequences are not felt in the United States economy."<sup>109</sup> The court acknowledged that fixing commission rates was illegal, but found that the conspiracy targeted foreign travel agents and involved work performed outside the United States.<sup>110</sup> Other courts have consistently dismissed foreign-based claims on this basis.<sup>111</sup>

### C. UNITED STATES CITIZENS INJURED ABROAD BY FOREIGN CONSPIRACY

*Bank Austria*<sup>112</sup> is the paradigm for a third category of cases involving American citizens injured abroad by a foreign antitrust conspiracy. The plaintiff, a domiciliary of New York, alleged the defendants, all European banks, had conspired to charge supra-competitive fees when exchanging certain currencies that make up the Euro.<sup>113</sup> The complaint failed to allege where the currency exchanges occurred, but counsel conceded that they had all taken place in Europe and not in the United States.<sup>114</sup> The complaint also failed to describe the scope of the conspiracy. Although the particular overt acts in question were confined to Europe, the trial court, facing a motion to dismiss, gave full scope to the complaint and assumed that the conspiracy was directed at the United States as well as Europe.<sup>115</sup>

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107. See, e.g., *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 304 (3d Cir. 2002); *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 924 (E.D.N.Y. 1985).

108. *Turicentro*, 303 F.3d 293.

109. *Id.* at 305.

110. *Id.*

111. See *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does not reach conduct outside our borders, but only when the conduct has an effect on American commerce."); *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 427-28 (5th Cir. 2001), cert. denied, 534 U.S. 1127 (2002); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 814-15 (9th Cir. 1988); *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071, 1078 (S.D.N.Y. 1988). But see *MM Global Servs., Inc. v. Dow Chem. Co.*, 2003 WL 22201083 (D. Conn. Sept. 12, 2003) (presuming anticompetitive effect in the United States in an action involving alleged price fixing by an American company and foreign sellers targeted at foreign consumers).

112. *Sniado v. Bank Aus., N.A.*, 174 F. Supp. 2d 159 (S.D.N.Y. 2001).

113. *Id.* at 160.

114. *Id.* at 163.

115. *Id.* at 164.

That assumption by itself, however, did not get the plaintiff out of the woods. The court noted that the term “conduct” may be viewed narrowly or broadly.<sup>116</sup> Under the narrow view, conduct refers to the specific acts that harmed the plaintiffs.<sup>117</sup> In *Bank Austria*, the plaintiff was injured by exchanges that took place in Europe; and the court concluded that charging supra-competitive rates for exchanges of European currency in Europe would fail to meet the “effect” requirements under the narrow view of the FTAIA.<sup>118</sup> The court further observed that a plaintiff would need to show more than American citizenship to establish jurisdiction.

Under the broader view of conduct, a court would look to the totality of defendants’ acts; here, that conduct “would consist of the entire alleged conspiracy to fix fees for exchange of European currencies in Europe and the United States.”<sup>119</sup> If the fee-fixing occurred in the United States, then a reasonably foreseeable effect on United States commerce would have been established. However, the court declined to choose between the two definitions of conduct, ruling that plaintiff had failed to bring itself within § 6a(2) of the FTAIA.<sup>120</sup>

#### D. FOREIGN PURCHASER BUYING IN A FOREIGN MARKET ALLEGING A WORLDWIDE CONSPIRACY AFFECTING BOTH FOREIGN AND DOMESTIC MARKETS

It is the fourth subset of cases that has generated the hottest debate and has created a split between the Second<sup>121</sup> and Fifth Circuits,<sup>122</sup> with the D.C. Circuit<sup>123</sup> somewhere in between. The focus of the debate has been the proper construction of § 6a(2) of the FTAIA. Specifically, the question is whether the statute requires that the direct, substantial and

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 165.

120. *Id.* Section 6a(2) of the FTAIA requires that the “effect [on United States commerce] give rise to a claim under the provisions of sections 1 to 7 of the Sherman Act.” *Id.* at 166. The court concluded that § 6a(2) requires that the alleged anticompetitive effect on American commerce must give rise to its claim. *Id.* The court ruled that a plaintiff injured abroad by an antitrust violation that causes an anticompetitive effect in the United States can sue under the Sherman Act if and only if the overseas injury is the result of anticompetitive effects in the American market. *Id.* At the same time, the antitrust laws do not apply to a claim by a plaintiff injured overseas by a price-fixing scheme in a foreign market, “even if the same defendants engage in price-fixing affecting an American market.” The plaintiff in *Bank Austria* did not and could not assert that its claim arose out of any anticompetitive effect on domestic commerce.

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

122. *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

123. *Empagran S.A. v. F. Hoffman La Roche, Ltd.*, 315 F.3d 338 (D.C. Cir.), *reh’g denied*, 2003 U.S. App. LEXIS 19042 (D.C. Cir. Sept. 11, 2003). In addition, the Seventh Circuit appears poised to join the Second and D.C. Circuits in their construction of § 6a(2). See *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836, 840 (7th Cir. 2003) (“Although we need not come to a definitive resolution of the issue in this case, the *United Phosphorus* result appears to point in the direction of the approach taken by the D.C. and Second Circuits.”).

reasonably foreseeable anticompetitive effect on United States commerce that creates the court's jurisdiction must be the same effect that gives rise to the claim by a particular plaintiff or whether, once the requisite domestic effect can be shown, the court has subject matter jurisdiction irrespective of whether that domestic effect itself gives rise to the claim of this particular plaintiff. Put another way, must the domestic effect give rise to "the" claim or simply "a" claim.

### 1. *The Fifth Circuit*

In *Den Norske Stats Oljeselskap As v. Heeremac Vof* ("*Statoil*") a Norwegian oil company, conducting business exclusively in the North Sea brought an antitrust claim against providers of heavy-lift barge services.<sup>124</sup> The plaintiff Statoil claimed that (1) the defendants agreed to fix bids and allocate customers for heavy-lift barge services in the Gulf of Mexico; and (2) the conspiracy not only led purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices, but also led American consumers to pay supra-competitive prices for oil.<sup>125</sup> Statoil contended that the market for heavy-lift services was global.<sup>126</sup> While acknowledging its injuries were suffered outside the United States, it contended the injury suffered in the North Sea was a "necessary prerequisite to" and was the *quid pro quo* for, the injury suffered in the domestic market.<sup>127</sup> The trial court concluded that Statoil had neither sufficiently alleged anticompetitive effect on the domestic market nor did any effect on domestic commerce give rise to its claims.<sup>128</sup>

The Fifth Circuit concluded that domestic effect had been sufficiently alleged, but dismissed Statoil's claim because the alleged effect on United States commerce—here, "higher prices paid by American companies for heavy-lift services in the Gulf of Mexico"—did not give rise to the claim asserted by Statoil against the defendants for alleged anticompetitive conduct in the North Sea.<sup>129</sup> Citing the language of § 2 of the FTAIA, the Fifth Circuit ruled that "the effect on United States commerce—in this case, the higher prices paid by United States companies for heavy-lift services in the Gulf of Mexico—must give rise to the claim that Statoil asserts."<sup>130</sup> Put another way, Statoil needed to show that its injury stemmed from the effect of higher prices for heavy-lift services in the Gulf of Mexico, but the higher prices paid by American companies for heavy-lift services in the Gulf did not give rise to Statoil's claim that it paid inflated prices for services in the North Sea. Accordingly, Statoil's claim was barred by the FTAIA. It was not enough that the plaintiff's

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124. 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

125. *Id.* at 426-29.

126. *Id.*

127. *Id.* at 427.

128. *Id.* at 426.

129. *Id.* at 427.

130. *Id.*

injury in the North Sea was closely related to the domestic harm caused by anticompetitive conduct in the Gulf of Mexico.

In so holding, the appellate court specifically rejected Statoil's argument that the requirement of § 2 of the FTAIA that the domestic effect must give rise to a claim under the antitrust laws is met where defendant's domestic *conduct*—e.g., bid rigging in the Gulf of Mexico—gives rise to a claim.<sup>131</sup> The majority concluded that Statoil's interpretation (1) was contrary to the plain language of the FTAIA; (2) would flood American courts with claims by foreign plaintiffs who have no commercial ties to the United States and whose injuries were not suffered in the United States; and (3) was an overly expansive reading of the extraterritorial reach of the antitrust laws that was never intended by Congress.<sup>132</sup>

The Fifth Circuit also found that the legislative history of the FTAIA shows that Congress intended to exclude wholly foreign transactions, such as the contract between Statoil and foreign defendants for services in the North Sea, from the reach of the antitrust laws: "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 are covered by the [FTAIA], but that import transactions are not."<sup>133</sup>

Finally, the majority pointed out that Statoil had failed to cite even one case supporting its position that a foreign plaintiff injured in a foreign market may sue in a United States court where the anticompetitive effect on domestic commerce did not give rise to the plaintiff's claim.<sup>134</sup>

Judge Higginbotham filed a vigorous dissent. Taking issue with the majority, he stated that § 6a(2) requires only that the anticompetitive effect of a defendant's conduct give rise to a claim; the statute does not say, as the majority suggests, that the anticompetitive effects of defendant's conduct give rise to the *plaintiff's* claim.<sup>135</sup> Thus, he found the majority's construction was contrary to the literal text of the statute.<sup>136</sup>

Having concluded that the text of the FTAIA does not compel the majority's construction of § 6a(2), Judge Higginbotham turned to other construction aids to determine the meaning of the FTAIA.<sup>137</sup> He found support for his view in the legislative history of the FTAIA. He noted that the FTAIA was enacted as part of the Export Trading Company Act of 1982 and served to exempt exporting from antitrust scrutiny, "not to limit the liability of participants in transnational conspiracies that affect United States commerce."<sup>138</sup> In short, the FTAIA was intended to provide a safe harbor for American exporters, not international price

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131. *Id.*

132. *Id.* at 427-30.

133. *Id.* at 428.

134. *Id.* at 429.

135. *Id.* at 431-33.

136. *Id.*

137. *Id.* at 431-37.

138. *Id.* at 433.

fixers.<sup>139</sup>

Judge Higginbotham further reasoned that under the majority view an American cartel that fixes prices worldwide would be subject to antitrust suits by plaintiffs around the world, but foreign cartels fixing prices worldwide would be subject to suit under the Clayton Act only by plaintiffs injured in American commerce.<sup>140</sup> In other words, the majority would transform a safe harbor for American exporters into a safe haven for foreign cartels restraining commerce in the United States.<sup>141</sup>

Judge Higginbotham also found that the majority position would impair the deterrent function of the treble damages remedy.

Conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States. A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.<sup>142</sup>

Judge Higginbotham noted that in *Pfizer*, the Supreme Court upheld the standing of foreign governments which had purchased price-fixed goods in the United States from an allegedly American-based cartel operating worldwide to sue for treble damages.<sup>143</sup> While he acknowledged that *Pfizer* was factually distinguishable from the instant case, he nonetheless found its logic compelling and concluded that the majority reading of section 6a(2) would undermine deterrence.<sup>144</sup> He reasoned that if foreign plaintiffs could not sue a cartel based in the United States, a cartel would not be deterred from operating in the United States because a worldwide price fixing scheme may be able to sustain supra-competitive prices in the United States, notwithstanding potential treble damage exposure, if the cartel could cross-subsidize American operations (and potential losses in treble damage actions) with foreign profits.<sup>145</sup> Thus, by excluding foreign buyers as plaintiffs, courts would permit cartels to remain both profitable and undeterred.<sup>146</sup>

Judge Higginbotham found support for this approach in the legislative history of the FTAIA, which states that:

the FTAIA does not exclude all persons injured abroad from recovering under the anti-trust laws of the United States. A course of conduct in the United States e.g., price fixing not limited to the ex-

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139. *Id.* at 431-37.

140. *Id.*

141. *Id.*

142. *Id.* at 434-35.

143. *Id.* at 435.

144. *Id.*

145. *Id.*

146. *Id.*

port market—would affect all purchases of the target domestic product or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects in the United States, even if some purchasers take title abroad or suffer economic injury abroad.<sup>147</sup>

Accordingly, the legislative history suggests that plaintiffs suffering injury abroad are not precluded by the FTAIA.

## 2. *The Second Circuit*

The Second Circuit, relying heavily on Judge Higginbotham's dissent in *Statoil*, reached the opposite result in *Kruman v. Christie's International PLC*.<sup>148</sup> *Kruman* was a treble damages action that arose out of the worldwide conspiracy between the world's two leading auction houses, Christie's and Sotheby's, to fix the amount of seller's commissions or buyer's premium paid by successful bidders at auction.<sup>149</sup> It was one of many private actions filed after word leaked that Christie's had confessed to price fixing and had sought leniency from the Antitrust Division. In *Kruman*, eight plaintiffs, four American and four foreign, sued in the Southern District of New York.<sup>150</sup> All transactions upon which damages were based took place outside the United States, although the plaintiffs alleged that part of the conspiracy had been hatched in the United States and that overt acts in furtherance of the conspiracy had been committed in the United States.<sup>151</sup>

### a. *The District Court*

Judge Kaplan granted the defendants' motion to dismiss on the grounds that subject matter jurisdiction was lacking under the FTAIA. He succinctly stated the issue as follows: "The fundamental question here is 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."

His answer was equally succinct: "Unless the Court is to impute to Congress an intention to establish an antitrust regimen to cover the world, the answer must be 'no.'"<sup>152</sup>

The court found that this case presented precisely the kind of situation that the FTAIA is intended to exempt.<sup>153</sup> Citing the legislative history of the FTAIA, the court concluded that subject matter jurisdiction would attach "only where the offending conduct had 'direct, substantial and reasonably foreseeable effects' in the United States;" and that "the effects

147. *Id.* at 436.

148. 284 F.3d 384 (2d Cir. 2002).

149. *Id.* at 389.

150. *Id.* at 390-91.

151. *Id.* at 391.

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

153. *Id.*

giving rise to jurisdiction also are the basis for the alleged injury.”<sup>154</sup>

In analyzing whether the defendants’ “conduct” had the requisite domestic “effects,” the court acknowledged that the term “conduct” is vague and conceded that the plaintiffs could properly contend that a substantial part of the defendants’ conduct took place in the United States. The court concluded, however, that proper usage of the term “conduct” was beside the point.<sup>155</sup> The key for the court was identifying the precise acts that caused injury in this case—imposition of supra-competitive charges for auction services.<sup>156</sup> Some of those acts occurred in the United States; others, and those which were specifically complained about, took place abroad.

The court reasoned that the United States could be bringing a *criminal* action to punish a conspiracy that took place in substantial part in the United States.<sup>157</sup> The United States could also provide civil remedies for injuries caused by conspiratorial acts that both occurred here and had effects here.<sup>158</sup> However, where overt acts occurred outside the United States, only those acts that have direct, substantial, and reasonably foreseeable effects in the United States that caused the injuries for which relief is sought would be within the jurisdiction of American courts. That did not occur in this case because (1) the alleged conspiratorial acts did not have the requisite effect in the United States; and (2) the domestic effects purporting to give rise to jurisdiction (here conspiratorial meetings and sales to others not now before the court) are not the basis of the injury claimed by the plaintiffs presently before the court. Instead, the plaintiffs brought a claim concerning overcharges on sales made outside of the United States.

#### b. The Court of Appeals

On appeal, the Second Circuit reversed Judge Kaplan and ruled that “the complaint describes conduct that has the requisite ‘effect’ on domestic commerce under the FTAIA to be regulated by the Sherman Act.”<sup>159</sup> The court held that (1) the FTAIA did not alter, but merely codified, its earlier decision in *National Bank of Canada v. Interbank Card Association*; and (2) the trial court erred in holding that, under the FTAIA, the plaintiff must show not only anticompetitive effects in the United States but also that the “effects giving rise to jurisdiction also are the basis for the alleged injury”; that is, only plaintiffs who suffer injury from that domestic effect may sue.<sup>160</sup> The appellate court categorically rejected the trial court’s position that plaintiffs injured abroad by anticompetitive conduct directed at foreign markets are barred from suit under the FTAIA,

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154. *Id.* at 625.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 625-26.

159. *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 390 (2d Cir. 2002).

160. *Id.* at 389-90.

even if that conduct has hurt the competitiveness of the domestic market.<sup>161</sup>

In reversing the district court, the Second Circuit ruled that the FTAIA did not alter but merely codified the decisional law of the Second Circuit<sup>162</sup> and that under its earlier ruling in *National Bank of Canada*, subject matter jurisdiction over claims of foreign plaintiffs was proper.<sup>163</sup> Plaintiff National Bank of Canada (National Bank) was a Canadian corporation that had been created from the amalgamation of two other Canadian banks, Provincial Bank and Banque Canadienne Nationale. Defendant Interbank Card Association (Interbank) was a licensor of Master Card credit cards.<sup>164</sup> Provincial Bank, National Bank's predecessor, had been an Interbank licensee. Provincial Bank attempted to transfer its Master Card license to National Bank.<sup>165</sup> Interbank and one of its licensees, Bank of Montreal, objected to the license transfer unless National Bank would agree to dispose of the Visa credit card business which it had inherited from Banque Canadienne Nationale.<sup>166</sup> National Bank was unable to sell the Visa business at an acceptable price. Interbank then terminated its Master Card license, and National Bank sued in the Southern District of New York, alleging that its termination by Interbank constituted an unlawful restraint of trade in violation of section 1 of the Sherman Act by excluding National Bank from competition for Canadian credit cardholders and merchant accounts.<sup>167</sup>

Affirming the trial court's dismissal of the complaint, the Second Circuit concluded that the plaintiff failed "to make clear the linkage, if any, between the behavior objected to and any anticompetitive consequences to United States commerce."<sup>168</sup> The court emphasized that subject matter jurisdiction "is not supported by every conceivable repercussion of the action objected to on United States commerce."<sup>169</sup> Rather "[o]nly those injuries to United States commerce which reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation constitute effects sufficient to confer jurisdiction."<sup>170</sup>

The court in *Kruman* restated this holding: "anticompetitive conduct directed at foreign markets is only regulated by the Sherman Act if it has the 'effect' of causing injury to domestic commerce by (1) reducing competitiveness of a domestic market; or (2) making possible anticompetitive

161. *Id.*

162. *Id.* at 389-90, 401 (noting that the legislative history of the FTAIA cites *Nat'l Bank of Can.* with approval).

163. *Id.* at 401 (citing *Nat'l Bank of Can. v. Interbank Card Assoc.*, 666 F.2d 6, 8 (2d Cir. 1981)).

164. *Nat'l Bank of Can.*, 666 F.2d at 7.

165. *Id.* at 8.

166. *Id.*

167. *Id.*

168. *Id.* at 9.

169. *Id.* at 8.

170. *Id.*



conduct directed at domestic commerce.”<sup>171</sup> The court concluded that the defendants’ alleged conduct would confer subject matter jurisdiction on the federal courts under either prong of *National Bank of Canada*:

Conduct meeting the first prong of the *National Bank of Canada* test would clearly have an effect on domestic commerce and give rise to a claim under the Sherman Act because a plaintiff would have to show that such conduct was directed at both domestic and foreign markets and actually reduced the competitiveness of domestic markets. Moreover, conduct meeting the second prong would satisfy the requirements of subsection 2 of the FTAIA because it would have the effect on domestic commerce of making possible anticompetitive conduct that “gives rise to a claim” under the Sherman Act.<sup>172</sup>

Having found that the FTAIA does not change existing case law in the Second Circuit, the appellate court further held that the court below had erred in ruling that the FTAIA permits suit, insofar as was relevant to the case before it, only where the conduct complained of had “direct substantial and reasonably foreseeable effects in the United States and the effects giving rise to jurisdiction also are the basis for the alleged injury.”<sup>173</sup> Specifically, the court ruled that Judge Kaplan had misconstrued three key terms in the FTAIA: (1) “injury”; (2) “conduct”; and (3) “effect . . . that gives rise to a claim.”<sup>174</sup>

The Second Circuit ruled that the trial court had erred by interpreting the FTAIA as imposing a broader plaintiff’s injury requirement than can be supported by the text of the statute.<sup>175</sup> The trial court had concluded that foreign plaintiffs must show not only anticompetitive effect on domestic commerce, but also that the same anticompetitive effect conferring jurisdiction gives rise to their claims.<sup>176</sup>

The appellate court rejected the corollary to the trial court’s holding that plaintiffs injured abroad by anticompetitive conduct targeted at foreign markets are barred from suing under the antitrust laws, even if that conduct had hurt the competitiveness of domestic markets. First, the court noted that the term “injury” is used in the FTAIA only once and then only in reference to conduct affecting export markets.<sup>177</sup> The Act provides that where conduct affects export trade with foreign nations, a plaintiff’s antitrust claim is limited “to such conduct only for injury to export business in the United States.”<sup>178</sup> Accordingly, the injury requirement does not apply across the board to the FTAIA, but rather only to a small subset involving export-related conduct. Such an interpretation

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171. *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 399 (2d Cir. 2002).

172. *Id.* at 401.

173. *Id.* at 389.

174. *Id.* at 396-401.

175. *Id.* at 396-98.

176. *Id.* at 396.

177. *Id.*

178. *Id.*

would, in the view of the appellate court, render the injury language in the FTAIA superfluous.

Second, and more fundamentally, the Second Circuit concluded the interpretation of the FTAIA below would “conflate the FTAIA with the Clayton Act.”<sup>179</sup> The court drew a sharp divide between the Clayton Act and the Sherman Act. The Clayton Act deals with the plaintiff’s right to sue, i.e., whether it has suffered injury. The Sherman Act, on the other hand, deals with defendants and substantive standards prohibiting certain conduct. Put another way, “The substantive provisions of the Sherman Act determine what conduct by the defendant is actionable. The Clayton Act determines what injury a plaintiff must suffer in order to bring suit.”<sup>180</sup>

According to the court, the conduct and injury requirements of the Sherman and Clayton Acts operate independently.<sup>181</sup> The court observed that it is possible that conduct may violate the Sherman Act and not be actionable under the Clayton Act because no one suffered injury.<sup>182</sup> At the same time, a plaintiff who has not yet suffered injury may enjoin a violation of the Sherman Act.<sup>183</sup> In other words, a private plaintiff’s inability to establish injury from a Sherman Act violation only confines the available remedy to injunctive relief; moreover, the Sherman Act itself empowers the government to enjoin antitrust violations even where no plaintiff has suffered injury.

The district court had held that conduct under the FTAIA refers to the “precise acts that caused injury,” in this case, the imposition of overcharges at auction.<sup>184</sup> The Second Circuit disagreed. In line with the foregoing analytical dichotomy drawn between the Sherman Act and the Clayton Act, the court ruled that the FTAIA—an amendment to the Sherman Act—focuses on a defendant’s conduct and not on a plaintiff’s injury.<sup>185</sup> According to the Second Circuit, the “FTAIA does not regulate which plaintiffs can bring suit under the Clayton Act and it would be inappropriate to import the element of injury from the Clayton Act and graft it onto the FTAIA.”<sup>186</sup> “Conduct” under the FTAIA therefore refers only to acts illegal under the Sherman Act. The illegal act in this case was not the imposition of overcharges, but the formation of the conspiracy; and that conduct occurred in the United States.<sup>187</sup>

The trial court had held that the anticompetitive effects that give rise to subject matter jurisdiction must also be the basis for a plaintiff’s alleged injury under § 6a(2) of the FTAIA.<sup>188</sup> The court of appeals disagreed.

179. *Id.* at 397.

180. *Id.* at 398.

181. *Id.* at 397.

182. *Id.*

183. *Id.*

184. *Id.* at 398-99.

185. *Id.* at 398.

186. *Id.*

187. *Id.*

188. *Id.* at 399.

First, as discussed above,<sup>189</sup> the appellate court reasoned that the interpretation below would necessarily mean that the FTAIA modified prior case law; the court stated categorically that this was not the case.<sup>190</sup> Second, the trial court's interpretation would inappropriately impact the concept of injury a plaintiff must suffer to bring a Clayton Act action when the FTAIA refers only to the Sherman Act.<sup>191</sup> The statutory language requires only that the "effect" on domestic commerce violate the Sherman Act, and a violation of the Sherman Act is complete upon the agreement to fix prices.<sup>192</sup> While the court acknowledged that a private plaintiff must prove overt acts in furtherance of a conspiracy to establish a right to money damages, it noted that the federal government is empowered under the Sherman Act to enjoin Sherman Act violations regardless of whether a private plaintiff has been injured.<sup>193</sup>

Third, the interpretation by the district court would effectively rewrite § 6a(2). That section states that the "anticompetitive effect gives rise to a claim under [the Sherman Act]."<sup>194</sup> The court below would construe "a" claim as "the plaintiff's" claim. Invoking the plain meaning rule, the Second Circuit concluded that the "effect" on domestic commerce under § 6a(2) need not be the basis for the plaintiff's injury; it must only violate the substantive standards of the Sherman Act.<sup>195</sup>

Applying these principles, the court of appeals found that the plaintiffs had alleged sufficient effect on domestic commerce by averring that the domestic price-fixing agreement could only have succeeded with the foreign price-fixing agreement. The offending conduct could be described in two ways.<sup>196</sup> The illegal conduct in question might be characterized as an agreement to fix prices in both the foreign and domestic markets. The conduct has an effect on domestic commerce because it includes acts targeted at a domestic market.<sup>197</sup> Alternatively, the offending conduct may be described as an agreement to fix prices in a foreign auction market that made possible an agreement to fix prices in the domestic auction market.<sup>198</sup> Because the foreign agreements made domestic price-fixing agreements possible, the effect of the foreign agreements gives rise to a claim under the Sherman Act. The court concluded that the "unambiguous text" of the FTAIA would support jurisdiction on the record before it.<sup>199</sup>

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189. See *supra* notes 162-72 and accompanying text.

190. *Kruman*, 284 F.3d at 399.

191. *Id.*

192. *Id.*

193. *Id.* at 399-400.

194. *Id.* at 400 (emphasis added).

195. *Id.*

196. *Id.* at 401.

197. *Id.*

198. *Id.*

199. *Id.* at 389.

## E. EMPAGRAN

The D.C. Circuit's ruling in *Empagran S.A. v. F. Hoffman La Roche Ltd.*<sup>200</sup> is perhaps the most detailed treatment of FTAIA issues. This case involved private treble damages actions by foreign purchasers of alleged price-fixed vitamins in the wake of Justice Department prosecutions of an international cartel in vitamins and vitamin products. The plaintiffs alleged that the conspiracy was world-wide in scope and affected virtually every market where the defendants operated.<sup>201</sup> They further alleged that the defendants' unlawful conduct had adverse effects in the United States and elsewhere that caused injury to the plaintiffs in connection with vitamin purchases abroad.<sup>202</sup> The district court granted the defendants' motion to dismiss for lack of subject matter jurisdiction under the FTAIA. The court of appeals reversed.<sup>203</sup>

At issue before the D.C. Circuit was the same question that had divided the Second and Fifth Circuits: whether § 6a(2) of the FTAIA requires that foreign plaintiffs show the requisite anticompetitive effects on United States commerce *and* that the domestic effects giving rise to jurisdiction are also the basis of their claim (*Statoil*); or whether foreign plaintiffs need only show that the defendants' conduct gives rise to "a" claim cognizable under the Sherman Act and not "the" claim which the foreign plaintiffs assert (*Kruman*). The D.C. Circuit, nevertheless, declined to take sides. It found the Fifth Circuit's view of the FTAIA "overly rigid" and the Second Circuit's position as reaching "too far in its view of subject matter jurisdiction."<sup>204</sup>

The D.C. Circuit instead sought to stake out a middle ground. Acknowledging that § 6a(2) "does not plainly resolve this case," the court held that where the anticompetitive conduct has the requisite adverse effect on domestic commerce, foreign plaintiffs injured solely by that conduct's effect on domestic commerce may sue under the FTAIA.<sup>205</sup> Foreign plaintiffs must also show that the anticompetitive conduct itself violates the Sherman Act and that the conduct's adverse effects on domestic commerce give rise to "a claim" by someone, not necessarily the foreign plaintiffs.<sup>206</sup> Because the plaintiffs alleged that the cartel caused anticompetitive effects in the United States giving rise to antitrust claims by parties injured in the United States by transactions occurring in the United States, the court upheld jurisdiction.<sup>207</sup> The court based its holding on a literal reading of the FTAIA and its statutory history and in light of the "underlying policies of deterrence emanating from the Supreme

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200. *Empagran S.A. v. F. Hoffman La Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *reh'g denied*, 2003 U.S. App. LEXIS 19042 (D.C. Cir. Sept. 11, 2003).

201. *Id.* at 340.

202. *Id.*

203. *Id.* at 341.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

Court's decision in *Pfizer*.”<sup>208</sup>

### 1. Statutory Language

First, the court focused on the language of the FTAIA itself. The majority concluded that the “gives rise to a claim” language does not resolve the question of whether “a claim” means *this plaintiff's* claim.<sup>209</sup> The court rejected the argument that the Fifth Circuit's restrictive construction of “gives rise to a claim” would render superfluous the proviso to § 6a(1)(B) that if the Sherman Act applies only because the conduct “affects export commerce or export commerce with foreign nations of a person engaged in such trade of commerce in the United States,” it applies “to such conduct only for injury to export business in the United States.”<sup>210</sup> It held that the language could mean that “the Sherman Act does not extend to *all* injury sustained by such a person as a result of the anticompetitive conduct, but, rather, only to injury to his export business sustained within the United States.”<sup>211</sup> As construed, the proviso would bar an exporter from suing for damages incurred to its export business outside the United States.

The court also criticized *Kruman's* holding that “gives rise to a claim” means only that the domestic effect of a defendant's conduct need “violate the substantive provisions of the Sherman Act.”<sup>212</sup> It found that *Kruman* gave “short shrift” to the “gives rise to a claim” language in the statute.<sup>213</sup> Accordingly, more than a violation which could be addressed by a government action was required; but the court stopped short of saying that the domestic effect of the illegal conduct must give rise to the foreign plaintiff's claim. Rather, it said that (1) the anticompetitive conduct must violate the Sherman Act; (2) the conduct's harmful effect on domestic commerce must give rise to a claim by someone; and (3) that someone need not be the foreign plaintiff before the court.<sup>214</sup>

### 2. Structure of the FTAIA

Second, the D.C. Circuit parsed the structural argument set forth by the Second Circuit in *Kruman*.<sup>215</sup> The court rejected as “plausible but ultimately unconvincing” the Second Circuit's thesis that the FTAIA amends the Sherman Act and that the Sherman Act addresses only conduct not remedy.<sup>216</sup> The court noted that the Clayton Act confers a cause of action upon those injured by a violation of the Sherman Act. It also found that it is equally plausible that Congress, in drafting the FTAIA,

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 348-49.

212. *Id.* at 349.

213. *Id.*

214. *Id.* at 350.

215. *Id.*

216. *Id.*

referred both to prohibited conduct and injury *and* imported concepts from the Sherman and Clayton Acts “in *making* the nexus of ‘conduct,’ ‘effect’ and ‘claim’ key to the FTAIA.”<sup>217</sup>

The court observed that the decision in *Kruman* was overly expansive in scope.<sup>218</sup> It found that “a claim” means a private action; it is not sufficient that a violation of the Sherman Act gives rise to a claim by the government.<sup>219</sup> The court further elaborated that the phrase “a claim” means giving rise to a private party’s claim for damages or equitable relief.<sup>220</sup> This hurdle is satisfied if the foreign plaintiff alleges that a person “has suffered actual or threatened injury as a result of the U.S. effect of the defendant’s violation of the Sherman Act.”<sup>221</sup>

### 3. Legislative History

Third, the court of appeals turned to the legislative history of the FTAIA. The court acknowledged that while there are isolated statements in the legislative history of the FTAIA to support the Fifth Circuit’s restrictive view of the statute, much of the legislative history supports the Second Circuit’s less restrictive view.<sup>222</sup> Moreover, in the court’s mind, the isolated statements in the legislative history that support the more restrictive view neither designate nor preclude the less restrictive view.<sup>223</sup>

### 4. Deterrence

Fourth, the appellate court explored the interrelationship between jurisdiction under the FTAIA and the deterrent function of the antitrust laws. The heart of the court’s rationale was that the Supreme Court’s decision in *Pfizer* supported exercise of subject matter jurisdiction on the facts before it.<sup>224</sup> As discussed above,<sup>225</sup> *Pfizer* involved claims by foreign governments in the Antibiotics Antitrust Litigation.<sup>226</sup> The question before the Supreme Court was whether a foreign government was a “person” within the meaning of section 4 of the Clayton Act and hence entitled to sue for treble damages under the antitrust laws.<sup>227</sup> In holding that foreign governments could sue for treble damages, the court emphasized the deterrent function of the treble damage remedy and how deterrence would be enhanced if foreign plaintiffs victimized by illegal conduct could sue.<sup>228</sup> On the other hand, deterrence would be severely undermined if foreign plaintiffs were barred from suit, and price-fixers could use pro-

217. *Id.* at 351.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 352.

222. *Id.* at 352-54.

223. *Id.*

224. *Id.*

225. See *supra* notes 25-30 and accompanying text.

226. *Pfizer Inc. v. India*, 434 U.S. 308 (1978).

227. *Id.*

228. *Id.*

ceeds from foreign cartels to subsidize domestic cartel activity, thereby permitting the cartel to “remain profitable and undeterred.”<sup>229</sup>

The D.C. Circuit noted that the legislative history of the FTAIA cites *Pfizer* with approval and embraces the Supreme Court’s concern that barring foreign claims in some instances may impair the deterrent function of the antitrust laws: “As the Supreme Court pointed out in *Pfizer* . . . to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons.”<sup>230</sup> The court then concluded that *Pfizer* supported its argument that the legislative history, on balance, supports a less restrictive reading of § 6a(2) and the exercise of jurisdiction on the record before it.<sup>231</sup>

#### IV. A CRITIQUE

##### A. “GIVES RISE TO A CLAIM”

Construction of the phrase “gives rise to a claim” in § 6a(2) of the FTAIA has proven most troublesome for courts. Some courts have done better than others, but no court has been perfect.

##### 1. *Fifth Circuit*

The most interesting and doctrinally pure debate on § 6a(2) has been the face-off between the majority and Judge Higginbotham’s dissent in *Statoil*. Both sides rely on the same authorities—the language of the FTAIA and its legislative history and case law—yet come to polar opposite results. The majority’s view is at odds with the statutory language but probably consistent with the will of Congress. The dissent’s view is consistent with a literal reading of the statute but probably inconsistent with the drafters’ intent.

Judge Higginbotham’s dissent, while well-written and skillfully argued, is ultimately wide of the mark. Although he criticizes the majority for relying on presumptions as a tool for interpretation, he utilizes the same technique. The centerpiece of his argument is based on a canon of statutory interpretation—the plain meaning rule—and is ultimately unconvincing. First, there is nothing “plain” about the wording of the FTAIA; it is simply a poorly drafted statute. Given that fact, something more in the statutory language beyond the purported plain meaning of the word “a” is needed, but Judge Higginbotham offers none. Nor should the plain meaning rule dictate the results here. The plain meaning rule is a canon of statutory interpretation designed to assist courts in construing statutes; it is a tool, not a trump card. Yet, Judge Higginbotham asserts that the plain meaning rule trumps the majority’s arguments.

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229. *Id.*

230. *Id.* at 356 (citing H.R. Rep. No. 97-686, at 10).

231. *Id.* at 358.

Moreover, his approach is at odds with formidable Supreme Court authority. In *Standard Oil*,<sup>232</sup> the Supreme Court construed the phrase “every contract, combination . . . or conspiracy” contained in § 1 of the Sherman Act.<sup>233</sup> A literal construction of this phrase would mean that every contract involving interstate or international commerce would violate § 1, since the very essence of a contract is to restrain the parties thereto in some way. Writing for the Court, Justice White recognized that Congress could not possibly have intended that the word “every” be construed literally.<sup>234</sup> Justice White wrote that Congress intended under § 1 to prohibit only unreasonable restraints of trade.<sup>235</sup> Thus, the plain meaning rule may not be invoked to construe the antitrust laws in a way that is at odds with the intent of Congress.

Second, if Judge Higginbotham is right, Congress, by using “a” rather than “the,” intended to abolish the doctrine of antitrust injury in cases involving foreign plaintiffs. Given the fact that Congress, by enacting the FTAIA, was seeking to limit—not expand—subject matter jurisdiction, that argument is not persuasive. Nowhere in the legislative history is there any suggestion that the FTAIA was intended to modify the antitrust injury doctrine, enunciated five years before by the Supreme Court, so as to *facilitate* claims by foreign plaintiffs based on foreign transactions. It is inconceivable that Congress, in enacting the FTAIA with the view of limiting jurisdiction over foreign claims, intended to create a broad exception to rule in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>236</sup> The *Brunswick* case was handed down in 1977.<sup>237</sup> The Supreme Court held that a plaintiff in a treble damage action must establish more than a violation of an antitrust statute and injury flowing from that violation; a plaintiff must prove “antitrust injury”—i.e., “injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.”<sup>238</sup>

Indeed, the legislature made clear that it had no intention of altering the concept of antitrust injury.<sup>239</sup> The district court in *In re Copper Antitrust Litigation*, although ultimately reversed on the issue of subject matter jurisdiction, was on target with its observation that: “It is not reasonable to think that Congress wanted to provide a forum for mostly foreign plaintiffs who were injured abroad by effects felt abroad and not in American markets, even if the wrongdoer’s conduct produced other

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232. *United States v. Standard Oil Co.*, 221 U.S. 1, 60-71 (1911).

233. 15 U.S.C. § 1.

234. *Standard Oil*, 221 U.S. at 60.

235. *Id.*

236. See Brief of Amici Curiae United States and Federal Trade Commission, *Empagran*, 315 F.3d 338 (No. 01-7115) (FTAIA does not abrogate rule that plaintiff must suffer antitrust injury), available at [www.usdoj.gov/atr/cases/f200800.htm](http://www.usdoj.gov/atr/cases/f200800.htm).

237. 429 U.S. 477 (1977).

238. *Id.* at 489.

239. H.R. Rep. No. 97-686, at 11.



anticompetitive effects in the United States.”<sup>240</sup>

The *only* reason for including § 6a(2) in the FTAIA is to make clear that foreign claimants, like domestic claimants, must show antitrust injury.<sup>241</sup> Otherwise, the clause is superfluous. Judge Higginbotham’s attempt to give independent meaning to § 6a(2) is unavailing. He argues that § 6a(2) requires that foreign commerce have an effect—apparently procompetitive or anticompetitive—and that § 6a(2) removes subject matter jurisdiction over conspiracies that are beneficial or benign.<sup>242</sup> That reading is unnecessarily strained. Antitrust statutes do not prohibit or even address conduct that is beneficial or benign. The most logical reading of § 6a(1) and § 6a(2) is that § 6a(1) requires that *anticompetitive* effects be “direct, substantial and reasonably foreseeable;” and § 6a(2) requires that anticompetitive acts that create a basis for subject matter jurisdiction be the same acts which gave rise to the claim asserted.

In addition to relying on the “plain language” of the statute, Judge Higginbotham argues that foreign purchasers injured by a domestic cartel must be treated the same as domestic purchasers victimized by the same cartel, lest the deterrent function of the antitrust laws be undermined.<sup>243</sup> It is true that the legislative history of the FTAIA supports the proposition that there should be no distinction between foreign and domestic purchasers who have participated in the domestic arena and who have been victimized by cartel behavior, provided the effects test is met. However, the same House Report also provides that “the conduct has the requisite effects in the United States even if some purchasers take title abroad or suffer economic injury abroad.”<sup>244</sup> As Judge Motz pointed out in *Microsoft*: “[i]t does not say that jurisdiction exists if the plaintiff actually makes the purchase abroad and does not otherwise participate in a U.S. market.”<sup>245</sup> Thus, there is a difference between a foreign purchaser who transacts business in the United States but takes title and thus suffers injury abroad and a foreign purchaser who has no involvement in the American marketplace, transacts business abroad, takes title abroad, and suffers injury abroad. As Judge Motz further explained:

Although this distinction may seem legalistic, it is significant. The concept that a purchaser may take title or suffer injury at a place different from the place where he engages in the sales transaction is well known to the law. However, by using language embodying that concept, the legislative history reflects that Congress was proceeding from the premise that, wherever title is taken or economic injury is suffered, at least some aspect of the sales transaction took place in

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240. *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 887 (W.D. Wis. 2000), *rev'd sub nom.*, *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836 (7th Cir. 2003).

241. See Brief of Amici Curiae, *Empagran* (No. 01-7115) (foreign claimants, like domestic claimants, must show antitrust injury).

242. *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 432-33 (5th Cir. 2001) (Higginbotham, J., dissenting), *cert. denied*, 534 U.S. 1127 (2002).

243. *Id.* at 434-35, 439.

244. H.R. Rep. No. 97-686, at 10.

245. *In re Microsoft Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001).

the United States. Any doubt on that score is resolved by the next-to-last quoted sentence which states that “[f]oreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace, just as our citizens do.” Nothing is said about protecting foreign purchasers in foreign markets.

I therefore have no difficulty in concluding that foreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim.<sup>246</sup>

While antitrust deterrence is important, the question of deterrence is legally distinct from the question of subject matter jurisdiction. Subject matter jurisdiction must be established first before courts can address deterrence concerns.

## 2. Second Circuit

Unfortunately, the Second Circuit in construing § 6a(2) got it dead wrong. Reduced to its lowest terms, the Second Circuit’s rationale for reversal turns on two points: (1) the trial court erred by importing Clayton Act concepts of injury into the Sherman Act; and (2) the trial court’s construction of § 6a(2) of the FTAIA is contrary to the plain meaning of the Act. Neither argument can withstand scrutiny.

The Second Circuit calls to task the decision below because it would “conflate the Clayton Act with the FTAIA.”<sup>247</sup> The court’s analysis of the FTAIA turns on the dubious proposition that the Clayton and Sherman Acts are separate statutory schemes—the Clayton Act remedial and the Sherman Act substantive—and never the twain shall meet. This analysis is riddled with error.

First, the construct is both artificial and without support in case law. The court relied on the fact that the Clayton Act contains remedial provisions and the Sherman Act does not. While that is true now, it was not always so; the conclusions that the court drew from this fact are off track. There is no legal basis for the assertion that the Sherman and Clayton Acts are separate statutes and separate legal schemes; instead, the opposite is true. The Clayton and Sherman Acts are to be read *in pari materia*.<sup>248</sup> It is a matter of historic accident that remedial provisions of the antitrust laws are now housed in the Clayton Act.

The court’s position is refuted by the fact that the Sherman Act as originally enacted contained a treble damages provision substantially identical to the one now contained in the Clayton Act that applied to Sherman Act claims. In 1914, § 4 of the Clayton Act was enacted to provide a treble damage remedy for any person injured “by reason of anything forbidden in the antitrust laws.”<sup>249</sup> From its inception, § 4 of the Clayton

246. *Id.* (citations omitted) (emphasis added).

247. *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 397 (2d Cir. 2002).

248. *Coop. De Sequiror Multipler de Puerto Rico v. San Juan*, 289 F. Supp. 983, 987 (D.P.R. 1968).

249. 15 U.S.C. § 4 (2000).

Act has applied to violations of both the Sherman and the Clayton Acts.<sup>250</sup> As a result, the Sherman Act's remedial provision became vestigial and was repealed as unnecessary in 1955.<sup>251</sup> Given that it is by historic accident that the treble damages provision governing all antitrust actions is contained within the Clayton Act, the Second Circuit erred in holding that Congress intended the Sherman Act to apply to conduct and the Clayton Act to apply to remedy.

In addition, the Second Circuit thesis is refuted by the fact that the Clayton Act, as well as the Sherman Act, contains provisions governing conduct: § 3 prohibiting certain vertically imposed restraints restricting the customer, such as exclusive dealing and tying, where the effect may be to substantially lessen competition;<sup>252</sup> § 7 barring mergers where the effect may be to substantially lessen competition in any line of commerce in any section of the country;<sup>253</sup> and even § 2—the Robinson-Patman Act—prohibiting price discrimination.<sup>254</sup> In other words, the assertion that the Sherman Act applies to conduct and the Clayton Act to remedy is a false premise because both Acts contain similar provisions.

Second, the court of appeals erred in embracing Judge Higginbotham's dissenting opinion in *Statoil* involving the "plain meaning rule." The Second Circuit fashions an overly literal construction of § 6a(2) of the FTAIA that is too broad and at odds with the statute's fundamental purpose to limit subject matter jurisdiction over foreign claims. Equally important, the Second Circuit, like Judge Higginbotham, would abrogate the antitrust injury requirement in FTAIA cases and thereby make it easier for foreign plaintiffs to sue in American courts. Rather than parsing the FTAIA and viewing the statute in its historical context, the court took the dubious position that the FTAIA does not alter prior Second Circuit case law and then, backing and filling attempted to craft a Procrustean argument that interprets the FTAIA in a way that is consistent with its prior case law.

### 3. D.C. Circuit

The Achilles heel of the majority's opinion in *Empagran* is its undue and, in the end, inappropriate reliance on *Pfizer* for the proposition that the goal of deterrence supports the finding of subject matter jurisdiction. This is the "*Pfizer* fallacy." As previously noted,<sup>255</sup> *Pfizer* predated the FTAIA by four years. *Pfizer* dealt with a straightforward issue of statutory interpretation of substantive antitrust law; specifically, whether a foreign government was a person within the meaning of section 4 of the Clayton Act.

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250. *Id.*

251. *See Pfizer Inc. v. India*, 434 U.S. 308, 311 n.8 ("Section 7 of the Sherman Act was repealed in 1955 as redundant.").

252. 15 U.S.C. § 14 (2000).

253. 15 U.S.C. § 18 (2000).

254. 15 U.S.C. § 2 (2000).

255. *See supra* note 31 and accompanying text.

That issue is wholly separate from the issue of subject matter jurisdiction under the FTAIA. Without subject matter jurisdiction, a federal court lacks adjudicatory authority to proceed with a case. Subject matter jurisdiction is conferred by the legislature. It is true that permitting foreign purchasers injured by price-fixing in transactions in the domestic market—the facts of *Pfizer*—would enhance antitrust deterrence. Even if one accepts the majority's view in *Empagran* that permitting the foreign plaintiffs injured in foreign transactions to sue would also enhance deterrence, the case for subject matter jurisdiction is unaffected. Nothing in the statute or its legislative history—not even the approving citation of *Pfizer*—suggests that Congress intended to broaden subject matter jurisdiction under the FTAIA so as to increase deterrence. Congress, in fact, was trying to limit subject matter jurisdiction through the FTAIA.

Moreover, it is not clear that *barring* foreign plaintiffs from suing would necessarily impair deterrence. The *Empagran* court cited no empirical data to support its assertion that precluding foreign plaintiffs from suing on a foreign claim would undermine the deterrent function of antitrust. Instead, the court relied on legislative history. The legislative history says only that “[t]o deny foreigners a recovery could *under some circumstances* so limit the deterrent effect of the United States antitrust laws that defendants would continue to violate our laws, willingly risking the small amount of damages payable only to injured domestic persons.”<sup>256</sup>

Congress does not appear to have subscribed to the view that keeping foreign plaintiffs out of American antitrust courts would necessarily decrease deterrence. On the other hand, even if the majority in *Empagran* were correct that allowing foreign antitrust plaintiffs to sue in American courts on transactions carried out abroad would enhance deterrence in civil cases, permitting such suits may well have the perverse effect of decreasing overall deterrence. The key to the Antitrust Division's success in prosecuting international cartels during the last decade has been its corporate leniency policy.<sup>257</sup> Under this policy, a company, if certain specific conditions are met, may avoid criminal prosecution by cooperating with the government.<sup>258</sup> The company would, however, remain vulnerable to private treble damage suits. Faced with significant potential treble damage exposure based on foreign claims, a company may choose not to cooperate with the government.<sup>259</sup> Such a decision may have a snowball effect, making it more difficult for the Antitrust Division to detect and prosecute violations and more difficult for private plaintiffs to sue. In

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256. See H.R. Rep. No. 97-686, at 10.

257. See Corporate Leniency Policy, 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993), available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>.

258. *Id.* For example, the party seeking leniency must be the first defendant in the door and must not be a ringleader in the conspiracy.

259. See Brief of Amici Curiae, *Empagran* (No. 01-7115), available at [www.usdoj.gov/atr/cases/f200800.htm](http://www.usdoj.gov/atr/cases/f200800.htm).

short, *Pfizer* provides no support for the expansion of subject matter jurisdiction under the FTAIA.

Even if one were to accept the court's view that *Pfizer* supports a more expansive approach to jurisdiction under the FTAIA, that argument loses considerable force when viewed in the context of today's global economy.<sup>260</sup> The antitrust landscape has changed drastically since the *Pfizer* decision. At the time *Pfizer* was decided, and indeed at the time the FTAIA was enacted, the United States was the only sheriff in town when it came to antitrust.<sup>261</sup> Twenty-five years later, that is no longer the case. Over ninety countries now have antitrust regimes in place.<sup>262</sup> The EU and Canada have especially aggressive enforcement policies. In large part, that remarkable transformation is due to the vigorous efforts of the United States through its enforcement agencies to convince industrialized countries of the virtues of competition and of the need to assure free markets. The bottom line is that today there is no reason to assume, as the majority in *Empagran* seemed to assume, that if the United States does not prosecute conduct affecting foreign plaintiffs, no antitrust authority in any other country will.

#### B. "DIRECT, SUBSTANTIAL AND REASONABLY FORESEEABLE"

The requirements of § 6a(1) of the FTAIA have proven less troublesome for courts and hence are less controversial. While courts have not yet developed a unified "effects test" under the FTAIA, there is an emerging consensus on several issues that offers a useful guideline in construing § 6a(1). Thus, courts generally agree that it is the situs of the anticompetitive *effects*, not the situs of the anticompetitive *conduct*, that matters under the FTAIA.<sup>263</sup> The fact that American companies allegedly engaged in illegal conduct does not by itself establish the requisite anticompetitive effects on the domestic market.<sup>264</sup> On the other hand, where anticompetitive conduct is wholly foreign but specifically targeted at the United States, the requisite effects will ordinarily be found.<sup>265</sup> An effect is direct if it results in an increase in process in the United States or a reduction in output, including a reduction in imports.<sup>266</sup> An effect is also direct if there is elimination of significant competition in the domestic marketplace.<sup>267</sup> However, a mere spillover effect on domestic com-

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260. *Id.*

261. While other nations, notably Canada, the United Kingdom and Germany, had antitrust regimes in place at that time, enforcement 25 years ago was far less intense than it is today.

262. William J. Kolasky, International Convergence Efforts: U.S. Perspective, Address to the International Dimensions of Competition Law Conference (Mar. 22, 2002), available at [www.usdoj.gov/atr/public/speeches/10885.htm](http://www.usdoj.gov/atr/public/speeches/10885.htm).

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

264. *Id.*

265. See *Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997).

266. *Ferromin Int'l Trade Corp. v. UCAR Int., Inc.* 153 F. Supp. 2d 700, 705 (E.D. Pa. 2001).

267. See *Coors Brewing Co. v. Miller Brewing Co.*, 889 F. Supp. 1394, 1397-98 (D. Colo. 1995).

merce is not sufficiently direct to meet the FTAIA standards.<sup>268</sup> In addition, the effects on the domestic marketplace must be “substantial”; mere ripple effects in the United States from anticompetitive conduct abroad do not meet the statutory standard.<sup>269</sup> Further, the effect must be “direct” in that there is a causal link between the wrongful conduct and the anticompetitive effect felt in the United States.<sup>270</sup> Finally, the plaintiff bears the initial burden of showing anticompetitive effects in the domestic arena, and the mere intent to affect the United States market is insufficient to meet the FTAIA standard.<sup>271</sup>

### C. STANDING

Even where a foreign plaintiff can establish that its claim is not barred by the FTAIA, it still faces the formidable hurdle of demonstrating standing to sue. Antitrust standing involves two related but distinct concerns: (1) whether the plaintiff has a stake in the litigation; and (2) whether this particular plaintiff is in the best position to sue on the claim.<sup>272</sup> The first concern is statutory; the second is a prudential concern of the courts.

Section 4 of the Clayton Act<sup>273</sup> provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” may sue for treble damages. Despite the broad wording of the statute, courts have consistently held that the right to sue does not extend to everyone who might suffer from the ripple effects of antitrust violations and have restricted the class of plaintiffs who may prosecute a suit to those in the best position to sue.<sup>274</sup> Antitrust standing is lacking where a plaintiff’s claims are indirect, remote or consequential.<sup>275</sup> Thus, courts consistently deny standing to employees,<sup>276</sup> shareholders,<sup>277</sup> and suppliers<sup>278</sup> of antitrust victims.

In FTAIA cases, courts have treated the question of standing as separate from the question of whether a plaintiff is outside the statutory exemption. For example in *Kruman*, the Second Circuit, after concluding that the FTAIA did not bar the foreign claims, remanded the matter for

268. *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1102, 1106 (S.D.N.Y. 1984).

269. *Dee-K Enters., Inc. v. Heveafil Snd. Bhd.*, 299 F.3d 281, 292 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2638 (2003). “Links to the United States are mere drops in the sea of conduct that occurred in Southeast Asia.” *Id.*

270. *Info. Res. Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 417 (S.D.N.Y. 2000); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1002, 1106-07 (S.D.N.Y. 1984) (finding no jurisdiction under FTAIA where “the link between the defendants’ conduct abroad and the price . . . in the United States is far from apparent”).

271. *Dee-K*, 299 F.3d at 292.

272. BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 53.3 (Robert L. Haig ed., West Group & ABA) (1998).

273. 15 U.S.C. § 15 (2000).

274. *Billy Baxter, Inc. v. Coca Cola Co.*, 431 F.2d 183 (2d Cir. 1970).

275. *Id.* at 187.

276. *Reibert v. Atl. Richfield Co.*, 471 F.2d 727 (10th Cir.).

277. *J.O. Pollack Co. v. L.G. Balfour Co.*, No. 72 C 845, 1972 U.S. Dist. LEXIS 10787, at \*4 (N.D. Ill. Dec. 8, 1972).

278. *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 393-95 (6th Cir. 1962).

consideration of the standing issue.<sup>279</sup> In *Galavan*<sup>280</sup> and *Microsoft*,<sup>281</sup> the courts dismissed the foreign claims on standing grounds alone where foreign plaintiffs suffered injury solely from diminution of competition in foreign markets. Standing in a United States federal court is, by definition, lacking. A foreign plaintiff injured outside of the United States also may not assert a claim based on the domestic injury suffered by someone else. Even where a foreign plaintiff can show some injury in domestic commerce, standing will be denied "to preserve the effectiveness of the superior plaintiffs."<sup>282</sup>

## V. SYNTHESIS

The FTAIA is a poorly drafted, needlessly complicated and woefully inadequate statute. Yet, Congress is unlikely to revisit its subject matter in the near term. Therefore, the burden falls on the courts to construe this law in a way that makes sense. Set forth below are some guiding principles in FTAIA construction.

First, the United States antitrust laws do not, and were never intended to, govern commercial conduct throughout the world. Only conduct that substantially and directly affects the trade or commerce of the United States should be a concern of its antitrust laws. Neither the fact that a defendant or defendants in an antitrust action by a foreign purchaser is American nor the fact that the alleged illegal conduct took place in the United States establishes subject matter jurisdiction under the Sherman Act.

Second, the FTAIA was meant to limit, not expand, the reach of the antitrust laws. The expansive approach taken in *Kruman* and *Vitamins* and proposed by Judge Higginbotham in *Statoil* would have the opposite effect on antitrust laws by broadening subject matter jurisdiction where foreign plaintiffs are involved. While foreign purchasers participating in the domestic market should be treated the same as domestic purchasers in the domestic market, the foregoing approaches would have the anomalous effect of treating foreign plaintiffs *more favorably* than domestic plaintiffs by effectively abolishing the requirements of antitrust injury in FTAIA cases. There is nothing in the statutory language or the legislative history of the FTAIA that would support such a liberal interpretation of the FTAIA.

Third, deterrence is an important policy goal of private treble damage actions. Nevertheless, deterrence and subject matter jurisdiction are separate inquiries. The deterrence considerations cannot even be addressed until after subject matter jurisdiction has been established. Equally important, failure to assert Sherman Act jurisdiction does not necessarily

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279. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 403 (2d Cir. 2002).

280. *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C97-3259 FMS, 1997 US Dist. LEXIS 18585 (N.D. Cal. Nov. 18, 1997).

281. *In re Microsoft Antitrust Litig.*, 127 F. Supp. 2d 702, 716 (D. Md. 2001).

282. *See Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 29 (D.C. Cir. 1987).

lessen deterrence. The conduct in question may well be within the jurisdiction of another antitrust authority, which may then take appropriate enforcement measures. The antitrust sun does not rise and set in Washington, D.C.

Fourth, the *Kruman* and *Empagran* holdings, by making it easier for foreign plaintiffs to sue, create a dangerous likelihood of overdeterrence contrary to the fundamental purpose of the FTAIA to *limit* the scope of antitrust in cases involving foreign transactions. Moreover, the generous approaches of the D.C. and Second Circuits threaten further to tax an already overburdened judiciary.

Fifth, this generous approach to antitrust jurisdiction increases the likelihood of marginal lawsuits. The tactical value of creating a class of foreign plaintiffs for settlement purposes alone is significant, even if on the merits the case is marginal. Thus, *Kruman* and *Empagran* tilt the antitrust playing field decidedly in favor of foreign plaintiffs.

Sixth, even under a very broad approach to FTAIA jurisdiction, most cases brought by foreign plaintiffs are doomed to failure on standing grounds. Standing in the antitrust context involves two interrelated questions: (1) whether a plaintiff has a stake in the litigation; and (2) whether a particular plaintiff is in the best position to sue. While foreign plaintiffs may have little difficulty establishing a stake in the litigation, they invariably fail the second prong of standing because other plaintiffs are typically better situated to sue.

## VI. CONCLUSION

Congress intended the FTAIA to limit the extraterritorial reach of the antitrust laws and to clarify the confusing precedents that have evolved in the wake of *Alcoa*. Recent decisions on the court of appeals level that allow foreign plaintiffs to proceed in United States courts on claims based on foreign transactions have shattered what had been a solid consensus at the district court level to bar such suits. The circuit court decisions have both undermined the FTAIA by expanding jurisdiction and created greater confusion in the law by relying on shaky rationales. The battle lines have been drawn; it is now up to the Supreme Court to provide a definitive construction of the FTAIA and to assure that the lower courts are faithful to the will of Congress.



