

# NOTE

## FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT: A THREE RING CIRCUS—THREE CIRCUITS, THREE INTERPRETATIONS

### ABSTRACT

*This note explores differing judicial interpretations of the Foreign Trade Antitrust Improvements Act (FTALA). While the FTALA is over twenty years old, the expanding global marketplace has created a new paradigm under which the judiciary is called upon to interpret the applicability of United States antitrust legislation to foreign marketplaces and foreign litigants. Recent antitrust litigation has pushed the interpretation of the FTALA to the forefront of the federal judiciary. The FTALA was intended to clarify application of the Sherman Act and Clayton Act to foreign antitrust claims. Judicial interpretation of the FTALA, though, varies greatly and a has developed between the Second and Fifth Circuits over what protection, if any, the FTALA should provide to foreign plaintiffs wanting to litigate antitrust claims against foreign companies in United States courts. The recent price-fixing case of Empagran S.A. v. F. Hoffman-LaRoche, Ltd., forced the District of Columbia Circuit to examine the reasoning behind prior interpretations of the FTALA and to adopt a compromise position that strikes a balance between the restrictive and expansive interpretations of the FTALA propounded by the Fifth and Second Circuits. As the global marketplace expands, the applicability of United States antitrust legislation will continue to be a topic of controversy.*

### I. INTRODUCTION

The word "cartel" evokes images of clandestine meetings in abandoned warehouses, semiautomatic weapons, and brick-like packages. Despite these connotations, many cartels are conducted in plush corporate offices around the world and involve innocuous products such as vitamins,<sup>1</sup> oil barge services,<sup>2</sup> and auctioneer fees.<sup>3</sup> These cartels surreptitiously reach

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<sup>1</sup>Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338, 340 (D.C. Cir. 2003).

<sup>2</sup>Den Norske Stats Oljeselskap As v. Heeremac Vof, 241 F.3d 420, 422 (5th Cir. 2001).

<sup>3</sup>Kruman v. Christie's Int'l PLC, 284 F.3d 384, 389 (2d Cir. 2002).

into consumer's pockets by artificially inflating prices in the global marketplace.

Price-fixing cartels have far-reaching effects. For instance, the principal case in this analysis concerns price-fixing in the vitamin industry.<sup>4</sup> Vitamins are not only an end product for direct human consumption, but also form an ingredient in many other types of products including milk, cereal, bread, and animal feed.<sup>5</sup> As a result, a single industry engaged in an international price-fixing cartel can have substantial extraterritorial and extra-industrial effects.

For example, the state of West Virginia recently settled claims involving price-fixing in the vitamin industry amounting to \$1.8 million, with the domestic settlement totaling over \$225 million.<sup>6</sup> Attorney General Darrel V. McGaw, Jr. stated that "[t]he vitamin cartel caused more economic damage to consumers in the United States than any other illegal cartel in history."<sup>7</sup> The Swiss giant Roche Holding, an international conspirator in the scheme, announced a liability of \$1.3 billion during 2002 for its involvement in an international vitamin cartel.<sup>8</sup>

To what extent, though, should the American justice system redress an injury to a foreign plaintiff caused by a foreign price-fixing conspiracy? Are the domestic effects of the cartel and the injury suffered by the foreign plaintiff too attenuated to qualify for protection under the antitrust laws of the United States?<sup>9</sup> The statutes are ambiguous and the interpretations by the circuit courts are diametrically opposed.<sup>10</sup>

Of central importance to the resolution of these issues is the manner in which courts construe the Foreign Trade Antitrust Improvements Act (FTAIA).<sup>11</sup> This analysis discusses the background of the Sherman Act and the Clayton Act, as well as two divergent interpretations of the FTAIA by

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<sup>4</sup>*Empagran*, 315 F.3d at 340.

<sup>5</sup>Press Release, West Virginia Office of the Attorney General, Consumer Protection Div., Attorney General Darrell V. McGraw, Jr. recovers \$1.8 Million in Settlement With an International Vitamins Price-Fixing Cartel (June 21, 2001), available at <http://www.wvs.state.wv.us/wvag/press/2001/june21.hRm>.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>Alison Langley, *Swiss Drug Giant Takes Charges Resulting in a Big Loss*, N.Y. TIMES, Feb. 27, 2003, at W1, W7.

<sup>9</sup>The only antitrust laws discussed in this analysis are the Sherman Act, 15 U.S.C. §§ 1-7 (2000); the Clayton Act, 15 U.S.C. §§ 12-27a (2000); and the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000).

<sup>10</sup>See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 389-90 (2d Cir. 2002); *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420, 423-24 & n.12 (5th Cir. 2001).

<sup>11</sup>15 U.S.C. § 6a (2000).

the circuit courts. The primary focus of this analysis, though, involves a recent decision by the D.C. Circuit in which the court declined to follow either of the two prevailing interpretations.<sup>12</sup> The following analysis will demonstrate that application and interpretation of the FTAIA is as unsettled as a trapeze artist performing without a net.

## II. BACKGROUND

Originally, federal antitrust law was instituted to provide "the most efficient allocation of economic resources, producing both the lowest possible prices and the highest quality for the greatest number" of people.<sup>13</sup> Anticompetitive conduct targeting the international market can have a direct impact on the domestic market;<sup>14</sup> however, the question of whether foreign plaintiffs may seek a remedy under U.S. antitrust law "has received surprisingly little substantive academic commentary or judicial analysis."<sup>15</sup> The FTAIA is the primary legislation at issue in this analysis, but to provide a contextual framework for the discussion it is essential to discuss the basic background of the Sherman Act and the Clayton Act.

### A. Act III or Three Acts

#### 1. The Sherman Act

The purpose of the Sherman Act,<sup>16</sup> which was enacted in 1890, is to protect American consumers in a free-market economy,<sup>17</sup> and its provisions delineate a defendant's actionable conduct.<sup>18</sup> As a result of its animating purpose, a price-fixing scheme is per se illegal under the Sherman Act.<sup>19</sup> Unfortunately, the statute is exceedingly broad,<sup>20</sup> and some have characterized it as "little more than a legislative command that the judiciary

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<sup>12</sup>*Empagran*, 315 F.3d at 350.

<sup>13</sup>Harvard Law Review Assoc., *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122, 2125 (2001) (citing Terry Calvani, *What is the Objective of Antitrust?*, in *ECONOMIC ANALYSIS AND ANTITRUST LAW* 7, 8 n.7, 12-13 (Terry Calvani & John Siegfried eds., 2d ed. 1988)).

<sup>14</sup>*Kruman*, 284 F.3d at 393.

<sup>15</sup>Harvard Law Review Assoc., *supra* note 13, at 2122.

<sup>16</sup>15 U.S.C. §§ 1-7 (2000). Only sections 1 and 2 are relevant to this analysis.

<sup>17</sup>James S. McNeill, *Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction*, 28 CAL. W. INT'L L.J. 425, 429 (1998).

<sup>18</sup>*Kruman*, 284 F.3d at 398.

<sup>19</sup>*Id.* at 393.

<sup>20</sup>Harvard Law Review Assoc., *supra* note 13, at 2126.

develop a common law of antitrust."<sup>21</sup> The primary purpose of the Sherman Act is to proscribe restraint of trade and monopolies.<sup>22</sup> Section 1 of the Act states in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."<sup>23</sup> Section 2 of the Act provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."<sup>24</sup>

In 1909, the Supreme Court of the United States first applied the statute in *American Banana v. United Fruit Co.*<sup>25</sup> In that case, the Court refused to extend the reach of the Sherman Act outside the borders of the United States.<sup>26</sup> The Court was influenced in its decision by issues of sovereignty and comity.<sup>27</sup> Subsequently, the Court reversed its position in *United States v. Sisal Sales Corp.*<sup>28</sup> and held that the Act could be applied extraterritorially.<sup>29</sup>

This reversal in course marked the beginning of judicial uncertainty in the application of antitrust law. The unpredictable nature of judicial interpretation of the Sherman Act has escaped neither academic nor judicial notice. "The history of Sherman Act enforcement via the federal courts has proven to be a mixed bag."<sup>30</sup> "Predictability of result depends greatly on which circuit hears the case."<sup>31</sup> "It is not helpful that the federal courts have generally disagreed as to the extraterritorial reach of the antitrust laws . . . . The history of this body of case law is confusing and unsettled."<sup>32</sup>

The most well-known judicial interpretation of the Sherman Act as applied to international trade is *United States v. Aluminum Co. of*

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<sup>21</sup>*Id.*

<sup>22</sup>15 U.S.C. §§ 1-7 (2000).

<sup>23</sup>*Id.* § 1.

<sup>24</sup>*Id.* § 2.

<sup>25</sup>213 U.S. 347, 353 (1909).

<sup>26</sup>*Id.* at 357.

<sup>27</sup>*See id.* at 357-58. *See also* BLACK'S LAW DICTIONARY 261 (7th ed. 1999) (defining comity as "[c]ourtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts").

<sup>28</sup>274 U.S. 268, 275 (1927).

<sup>29</sup>*Id.* at 276.

<sup>30</sup>McNeill, *supra* note 17, at 454.

<sup>31</sup>*Id.*

<sup>32</sup>*Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420, 423-24 (5th Cir. 2001).

*America*.<sup>33</sup> In that case, Judge Learned Hand enunciated an "effects test" to determine if foreign antitrust conduct had the requisite *effect* on the domestic market, rather than focusing on where the conduct was initiated.<sup>34</sup> Under the "effects test," foreign conduct is actionable under United States antitrust laws if the action was "intended to affect domestic commerce" and "actually did."<sup>35</sup> This is close in identity to the language used by the original author. The "effects test" has received favorable treatment by the United States Supreme Court,<sup>36</sup> however, the test has not been unanimously accepted by the circuit courts.<sup>37</sup> A hundred years after its enactment, the judiciary still continues to struggle with jurisdictional applicability of the Sherman Act to conduct involving international commerce.<sup>38</sup>

## 2. The Clayton Act

The Clayton Act<sup>39</sup> was enacted in 1914<sup>40</sup> and is the enforcement mechanism of the Sherman Act. Its primary purpose is to deter and punish antitrust violators,<sup>41</sup> as well as delineating the type of injury that the plaintiff must suffer to qualify for a remedy through an antitrust action.<sup>42</sup> The remedial effects of the Clayton Act deter both domestic and international antitrust violations. "Our markets benefit when antitrust suits stop or deter any conduct that reduces competition in our markets regardless of where it occurs and whether it is also directed at foreign markets."<sup>43</sup> Section 15(a) of the Act provides in pertinent part: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages

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<sup>33</sup>148 F.2d 416 (2d Cir. 1945).

<sup>34</sup>*Id.* at 444.

<sup>35</sup>*Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 393 (2d Cir. 2002) (citing *Aluminum Co. of Am.*, 148 F.2d at 443-44).

<sup>36</sup>*See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

<sup>37</sup>*Compare Kruman*, 284 F.3d at 394 (recognizing "that an unmodified 'effects test' is too broad in its regulation of conduct") with *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-15 (9th Cir. 1976) (holding that the "effects test" is only one factor to consider to support the exercise of extraterritorial jurisdiction).

<sup>38</sup>*McNeill*, *supra* note 17, at 430-31.

<sup>39</sup>15 U.S.C. §§12-27a (2000) (noting only sections 4 and 16 are relevant to this analysis, and sections 4 and 16 of the Clayton Act are codified in 15 U.S.C. §§ 15, 26 (2000)).

<sup>40</sup>Todd Marcus Young, *Unestablished Businesses and Treble Damage Recovery Under Section Four of the Clayton Act*, 49 U. CHI. L. REV. 1076, 1082 (1982).

<sup>41</sup>*Id.* at 1078.

<sup>42</sup>*Kruman*, 284 F.3d at 398.

<sup>43</sup>*Id.* at 393.

...<sup>44</sup> Section 26 of the Clayton Act allows private injunctive relief.<sup>45</sup> It provides in part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States *having jurisdiction* over the parties, against threatened loss or damage by a violation of the antitrust laws."<sup>46</sup> The jurisdictional directive contained in the Clayton Act has been the topic of much litigation.

### 3. Foreign Trade Antitrust Improvement Act (FTAIA)

Muddying the waters further, Congress amended the Sherman Act with the FTAIA in 1982. Its purpose is to clarify the jurisdictional reach of the Sherman Act<sup>47</sup> and to "exempt from the Sherman Act export transactions that did not injure the United States economy."<sup>48</sup> The FTAIA provides:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
  - (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
  - (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If 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>49</sup>

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<sup>44</sup>15 U.S.C. § 15(a) (2000).

<sup>45</sup>*Id.* § 26.

<sup>46</sup>*Id.* (emphasis added).

<sup>47</sup>McNeill, *supra* note 17, at 445.

<sup>48</sup>Kruman, 284 F.3d at 395.

<sup>49</sup>15 U.S.C. § 6a (2000).

The courts have relied on the FTAIA to establish the applicable boundaries of United States "antitrust law to foreign conduct."<sup>50</sup> This legislation does not delineate what conduct is actionable because its primary focus is the *effects* of international trade.<sup>51</sup> The FTAIA speaks only of "effects" and "conduct"; it does not speak to nationality or citizenship.<sup>52</sup> The FTAIA sets forth a general requirement that international anticompetitive behavior meet a two-prong test to qualify for protection under the U.S. antitrust laws: (1) the conduct produces a "direct, substantial, and reasonably foreseeable effect"<sup>53</sup> on U.S. commerce, and (2) that the U.S. effect "give[s] rise to a claim"<sup>54</sup> under the Sherman Act. "The ambiguity of the statute and its legislative history has led to conflicting interpretations."<sup>55</sup> The basic understanding of the FTAIA is that a conduct involving non-import foreign trade will not fall within the confines of the Sherman Act unless that "conduct has sufficient effects on U.S. import or domestic trade, or on the U.S. activities of a U.S.-based exporter."<sup>56</sup>

The cause of the circuit split lies in the language of the second prong of the FTAIA applicability test. The positions taken by the circuits are not evenly divided, and it is more appropriate to call this dichotomy a fracture. Some circuits have interpreted the language literally and held that the effect must give rise to "a" claim, while others have interpreted the language to mean that the effect must give rise to "the" claim that is the subject of the suit.<sup>57</sup> Moreover, the legislative history of the FTAIA is inconclusive as to which interpretation is correct.<sup>58</sup>

### B. *Fifth Circuit: Restrictive Interpretation of the FTAIA*

In *Den Norske Stats Oljeselskap As v. Heeremac Vof*,<sup>59</sup> the plaintiff brought suit alleging that defendant's price-fixing conduct resulted in its

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<sup>50</sup>Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 277 (2002).

<sup>51</sup>*Id.*

<sup>52</sup>Harvard Law Review Assoc., *supra* note 13, at 2138.

<sup>53</sup>15 U.S.C. § 6a(1) (2000).

<sup>54</sup>*Id.* § 6a(2).

<sup>55</sup>Mehra, *supra* note 50, at 277.

<sup>56</sup>*Id.* at 289.

<sup>57</sup>*See generally* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 393, 395-96 (2d Cir. 2002) (holding that an expansive interpretation of the FTAIA is appropriate); *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420, 428 (5th Cir. 2001) (finding that a narrow interpretation of the FTAIA is warranted).

<sup>58</sup>*Den Norske*, 241 F.3d at 425 & nn.15-16, 426 n.19, 427 n.23, 428-29.

<sup>59</sup>241 F.3d 420 (5th Cir. 2001).

paying higher prices for barge lifting services in the North Sea.<sup>60</sup> Plaintiff Den Norske Stats Oljeselskap was a Norwegian company and defendants were three barge service providers operating in the North Sea, the Far East, and the Gulf of Mexico.<sup>61</sup> Den Norske tried to establish subject matter jurisdiction in federal court under the United States antitrust laws by claiming that the higher prices it had paid for barge lifting services were passed along to United States consumers and businesses in the form of higher oil prices.<sup>62</sup> Additionally, plaintiff argued that United States businesses that purchased barge services in the Gulf of Mexico were also victims of the price-fixing conspiracy.<sup>63</sup>

From the inception of its analysis, the court recognized that its task of statutory interpretation was an unsettled area of federal law.<sup>64</sup> The case was one of first impression for the Fifth Circuit because it directly addressed the applicability of the FTAIA to "global conspiracies and resulting foreign injury."<sup>65</sup>

Den Norske argued that section 2 of the FTAIA conferred subject matter jurisdiction over their claim because the defendants' conduct had the requisite effect on U.S. commerce and the FTAIA "was not intended to preclude recovery to foreign plaintiffs based on the *situs* of the injury."<sup>66</sup> To support its arguments, plaintiff relied on legislative history stating that even though "the 'effect' providing the jurisdictional nexus must also be the basis for the injury . . . . This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States."<sup>67</sup> The plaintiff also cited several cases in support of its position, but the court distinguished these cases because their claims rested on other provisions of the FTAIA.<sup>68</sup>

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<sup>60</sup>*Id.* at 422.

<sup>61</sup>*Id.* at 422 & n.2 (noting that one of the defendants, McDermott, Inc., is an American company but did not provide services to the plaintiff).

<sup>62</sup>*Id.* at 422 & n.4.

<sup>63</sup>*Den Norske*, 241 F.3d at 422. The United States Department of Justice brought suit against HeereMac and one of its directors for the anticompetitive behavior resulting in fines of \$49 million for the corporation and \$100,000 for its director. *Id.* at 422-23.

<sup>64</sup>*Id.* at 423-24.

<sup>65</sup>*Id.* at 424.

<sup>66</sup>*Id.* at 425 (emphasis added).

<sup>67</sup>*Den Norske*, 241 F.3d at 425 & n.15 (citing H.R. REP. NO. 97-686, at 12 (1982)).

<sup>68</sup>*Id.* at 425 n.17 (citing *Hartford Fire Ins. Co. v. California* 509 U.S. 764 (1993); *Pfizer, Inc. v. India*, 434 U.S. 308 (1978); *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (supporting plaintiff's proposition that as long as the conspiratorial conduct affected U.S. commerce subject matter jurisdiction exists)). The court noted that these cases are not on point with 15 U.S.C. § 6a(2) and, therefore, are irrelevant to the present inquiry. *Id.*

In rejecting plaintiff's claim, the court held that the commerce at issue "was not United States commerce with foreign nations" as set forth in the Sherman Act and, as a result, was not a cognizable action.<sup>69</sup> More importantly, the court concluded that while the claim does fall within the first prong of the FTAIA test (i.e., it does have "a direct, substantial, and reasonably foreseeable effect" on the domestic market), it fails under the second prong of the FTAIA test, and that the effect "'gives rise' to its antitrust claim."<sup>70</sup> As applied to the facts of the case, the holding means that the higher prices paid by American businesses as a result of defendants' price-fixing conspiracy do not give rise to Den Norske's cause of action under the FTAIA for inflated prices paid in the North Sea.<sup>71</sup>

This interpretation means that while there may be an interdependence between the effects of an international price-fixing cartel and the domestic market, the relationship is too attenuated to give rise to a foreign plaintiff's claim under United States antitrust laws.<sup>72</sup>

In an insightful dissent, Judge Higginbotham focused on the plain language of section 2 of the FTAIA "requir[ing] that this effect 'give[] rise to a claim . . . [.]' [not] *the plaintiff's* claim."<sup>73</sup> He reasoned that a claim can satisfy the requirements of the FTAIA as long as the injury gives rise to a cognizable claim by a party in the United States.<sup>74</sup> As part of his analysis, Judge Higginbotham stated:

The word "a" has a simple and universally understood meaning. It is the indefinite article. There are many terms of art about which one can debate whether Congress uses the term as courts do, but this word is not one of them. If the drafters of the FTAIA had wished to say "the claim" instead of "a claim," they certainly would have.<sup>75</sup>

Finally, he brings attention to the point that under the majority's interpretation of the FTAIA, American cartels would be liable under the Clayton Act for the international effects of their anticompetitive behavior, while foreign cartels would be liable only to American consumers directly

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<sup>69</sup>*Id.* at 426 (citing 15 U.S.C. §§ 1-2 (2000) (emphasis omitted)).

<sup>70</sup>*Id.* at 426-27.

<sup>71</sup>*Den Norske*, 241 F.3d at 427.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.* at 432.

<sup>74</sup>*Id.*

<sup>75</sup>*Den Norske*, 241 F.3d at 432.

affected.<sup>76</sup> Moreover, these cartels would escape liability in the international marketplace entirely.<sup>77</sup> Consequently, the law would be unable to deter international price-fixing cartels because they "could cross-subsidize [their] American operations with profits from abroad."<sup>78</sup>

### C. Second Circuit: Expansive Interpretation of the FTAIA

Thirteen months after the Fifth Circuit's decision in *Kruman v. Christie's International PLC*,<sup>79</sup> a case decided the Fifth Circuit's decision in *Den Norske*, the Second Circuit reached a contrary holding and permitted a foreign plaintiff to proceed with a cause of action under the FTAIA. This was an action between "the two largest auction houses in the world."<sup>80</sup> Plaintiff alleged that the defendant conspired to set commissions and fees for its services.<sup>81</sup> The court prefaces its FTAIA analysis by reviewing a two-step test for determining whether the alleged conduct violates the Sherman Act.<sup>82</sup> Once the court determined that the defendant's conduct violated the Sherman Act, it focused on the issue of subject matter jurisdiction under the FTAIA.

The Second Circuit determined that the FTAIA applied because the conduct affected the domestic market and did not involve imports, even though some of the goods may have been imported into the United States at a later date.<sup>83</sup> The defendants did not dispute that their price-fixing scheme had "a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce,"<sup>84</sup> so, the court did not discuss the first requirement under the FTAIA.

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<sup>76</sup>*Id.* at 434.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* at 435

<sup>79</sup>284 F.3d 384 (2d Cir. 2002).

<sup>80</sup>*Den Norske*, 241 F.3d at 389. The defendants, Christie's International PLC and Sotheby's Holdings, control ninety-seven percent of the international marketplace involving auctions of fine art, antiques, and collectibles. *Id.* at 390.

<sup>81</sup>*Id.* at 389. A domestic class of plaintiffs settled with the auction houses on April 12, 2001 for \$512 million. *Id.* at 392 n.2. This litigation involves a class of eight foreign plaintiffs, four of whom are from the United States but who purchased their goods overseas. *Id.* at 391.

<sup>82</sup>See 15 U.S.C. § 6a(1)-(2) (2000). An act violates the Sherman Act where the conduct "caus[es] injury to domestic commerce by (1) reducing the competitiveness of a domestic market; or (2) making possible anticompetitive conduct directed at domestic commerce." *Kruman*, 284 F.3d at 390. The court refers to this test as the *National Bank of Canada* rule based on their decision in *National Bank of Canada v. Interbank Card Assoc.*, 666 F.2d 6, 8 (2d Cir. 1981).

<sup>83</sup>*Kruman*, 284 F.3d at 395-96.

<sup>84</sup>*Id.* at 399 n.5 (quoting 15 U.S.C. § 6a(1) (2000)).

The court instead focused on section 2 of the FTAIA, specifically that the anticompetitive conduct "gives rise to a claim."<sup>85</sup> The court concluded that the FTAIA specifically refers to the provisions of the Sherman Act, which requires that the defendant's conduct substantively violate the statute to support a finding of subject matter jurisdiction over a claim.<sup>86</sup> The court reasoned that to find that the *injury* suffered by the plaintiff gives rise to a claim is to incorporate provisions of the Clayton Act into the FTAIA.<sup>87</sup> As discussed above, the Clayton Act concerns the injury of the plaintiff while the Sherman Act addresses the conduct of the defendant. Therefore, by correlating the injury with the claim to create a cause of action, rather than the conduct of the defendant, the court would be grafting a part of the Clayton Act onto the FTAIA.<sup>88</sup> The court in *Kruman* surmises that if Congress had intended to bring about such a result, the legislature would have amended the Clayton Act and Sherman Act at the time of the enactment of the FTAIA.<sup>89</sup>

The court then turned to the plain language of the statute and, in agreement with Judge Higginbotham's dissent in *Den Norske*, concluded that if Congress had intended the language to mean "gives rise to the plaintiff's claim," then it would have so stated.<sup>90</sup> Preserving the case's precedential value for determining whether a violation of the Sherman Act has occurred, the court equated the first prong with section 1(B) of the FTAIA and the second prong with section 2 of the FTAIA.<sup>91</sup> The court ultimately found that the FTAIA permitted the plaintiff's claim as a violation of the Sherman Act, and remanded for further proceedings.<sup>92</sup>

### III. ANALYSIS

#### A. *Factual and Procedural History*

In *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*,<sup>93</sup> the plaintiffs were "[f]oreign purchasers of vitamins [who] brought [an] anti-trust suit against

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<sup>85</sup>*Id.* at 399.

<sup>86</sup>*Id.*

<sup>87</sup>*Kruman*, 284 F.3d at 399 (emphasis added).

<sup>88</sup>*Id.* at 398.

<sup>89</sup>*Id.* at 400.

<sup>90</sup>*Kruman*, 284 F.3d at 400.

<sup>91</sup>*Id.* at 401.

<sup>92</sup>*Id.* at 401, 403.

<sup>93</sup>315 F.3d 338 (D.C. Cir. 2003).

[vitamin] manufacturers" for purchases made outside of the United States.<sup>94</sup> Section 1 of the Sherman Act and sections 4 and 16 of the Clayton Act<sup>95</sup> formed the basis of the claim and required the court to determine whether subject matter jurisdiction exists under the FTAIA.

The plaintiffs filed a class action suit in the United States District Court for the District of Columbia "on behalf of all foreign and domestic purchasers of"<sup>96</sup> vitamins and "sought injunctive relief and damages under § 1 of the Sherman Act; §§ 4 and 16 of the Clayton Act" and other pertinent international laws respectively.<sup>97</sup> Plaintiffs allege that the defendants "engaged in an over-arching worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins" that affected the global marketplace.<sup>98</sup> The defendants moved to dismiss the suit alleging lack of subject matter jurisdiction<sup>99</sup> and standing because all of the alleged conduct occurred outside of the United States.<sup>100</sup> Defendants also moved the court to defer "supplemental jurisdiction over the foreign law claims . . . for failure to state a claim upon which relief may be granted."<sup>101</sup> The district court ultimately held that the suit lacked subject matter jurisdiction under the FTAIA.<sup>102</sup> In so holding, the district court found that the domestic effects of the conspiracy did not give rise to the foreign purchaser's injury;<sup>103</sup> a view that is consistent with the Fifth Circuit's interpretation of the FTAIA. The issue of standing became a moot point and was not addressed by the court.<sup>104</sup> Supplemental jurisdiction was also denied "because of comity and efficiency reasons."<sup>105</sup> Moreover, the court declined to decide the issue based upon international law because it could find no relevant law that proscribed the alleged conduct.<sup>106</sup> As a result, "the foreign plaintiffs filed an interlocutory appeal."<sup>107</sup>

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<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at 340.

<sup>96</sup>*Id.*

<sup>97</sup>*Empagran*, 315 F.3d at 342. *See also* *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, No. 00-1686, 2001 U.S. Dist. LEXIS 20910 (D.D.C. June 7, 2001) (holding that foreign plaintiffs lacked standing under the FTAIA to bring a claim).

<sup>98</sup>*Empagran*, 315 F.3d at 340.

<sup>99</sup>FED. R. CIV. P. 12(b)(1); *Empagran*, 315 F.3d at 342.

<sup>100</sup>*Empagran*, 315 F.3d at 340, 342.

<sup>101</sup>*Id.* at 342.

<sup>102</sup>*Id.*

<sup>103</sup>*Id.* at 343.

<sup>104</sup>*Empagran*, 315 F.3d at 343.

<sup>105</sup>*Id.* (quoting *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, No. 00-1686, 2001 U.S. Dist. LEXIS 20910, at \*26 (D.D.C. June 7, 2001)).

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

"The [d]istrict [c]ourt deferred ruling on the defendants' motion to dismiss the domestic plaintiffs' federal antitrust claims," while granting plaintiffs permission to amend their complaint.<sup>108</sup> "The domestic plaintiffs . . . subsequently entered into a court-approved stipulation that transferred their claims to another action pending before the [d]istrict [c]ourt, which involved similar claims against substantially the same defendants."<sup>109</sup> With the domestic plaintiffs no longer a party to the suit, the district court granted final judgment in favor of the defendants.<sup>110</sup> This disposed of the foreign plaintiffs' interlocutory appeal and the foreign plaintiffs requested the appellate review of the final judgment.<sup>111</sup>

The defendants accepted that their price-fixing cartel produced "a direct, substantial, and reasonably foreseeable effect on domestic commerce"<sup>112</sup> under section 6a(1) of the FTAIA. Therefore, the only issue on appeal was whether the plaintiffs met the "gives rise to a claim" test set forth under section 6a(2) of the FTAIA. Specifically, the court concerned itself with whether the foreign plaintiff's claim, based upon the cartel's foreign effects that likewise affected domestic commerce, qualified for subject matter jurisdiction in the federal courts of the United States.<sup>113</sup>

#### B. D.C. Circuit: *A Position in the Middle*

The District of Columbia Circuit court of Appeals has interpreted the FTAIA only on one previous occasion in *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*.<sup>114</sup> The decision, however, was based only upon the first prong of the FTAIA test; the second prong, which is at issue in this case, was not discussed.<sup>115</sup> Therefore, the issue presented in *Empagran* was one of first impression.

The court first recognized the split between the Fifth and Second Circuits on this issue.<sup>116</sup> The appellants adopted the reasoning of the Second Circuit, while the appellees urged the court to follow the reasoning

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<sup>108</sup>*Empagran*, 315 F.3d at 343.

<sup>109</sup>*Id.* (citation omitted).

<sup>110</sup>*Id.*

<sup>111</sup>*Id.*

<sup>112</sup>*Empagran*, 315 F.3d at 344 (citing 15 U.S.C. § 6a(1) (2000)).

<sup>113</sup>*Id.*

<sup>114</sup>148 F.3d 1080, 1087 (D.C. Cir. 1998) (holding that subject matter jurisdiction was appropriate where the defendant's anticompetitive conduct resulted in higher advertising costs in the American market and caused harm to American advertisers).

<sup>115</sup>*See id.* at 1085-87.

<sup>116</sup>*Empagran*, 315 F.3d at 348.

of the Fifth Circuit.<sup>117</sup> The court ultimately settled on a middle ground, but acknowledged that its decision falls closer to the reasoning of the Second Circuit than the Fifth Circuit.<sup>118</sup>

### 1. The Plain Language

In reviewing the Second Circuit's decision, the D.C. Circuit found that its reasoning tracked the plain language of the statute. The court disagrees with the proposition that a claim brought under the FTAIA only concerns conduct that violates the Sherman Act, while ignoring the Clayton Act's role in providing a cause of action for injured plaintiffs.<sup>119</sup> The court points out that when FTAIA was enacted, the Clayton Act essentially provided a cause of action for Sherman Act violations. Therefore, it is likely that Congress "imported" concepts from the Sherman Act, as well as the Clayton Act, when drafting the FTAIA.<sup>120</sup> In addition, the court opines that it is unreasonable to expect legislative precision from Congress.<sup>121</sup> Consequently, the FTAIA's use of the terms "conduct," "effect," and "claim" likely includes terms from both the Clayton Act and the Sherman Act.<sup>122</sup>

In its decision, the court reasoned that the Second Circuit's reading of the FTAIA will lead to an "expansive holding" that any violation of the Sherman Act is actionable under the FTAIA.<sup>123</sup> The opinion also disagrees with the Second Circuit's interpretation of "a claim" as simply a violation of the Sherman Act.<sup>124</sup> According to the court, this interpretation permits the government to bring an enforcement action even when there is no injury to a private party for the alleged violation.<sup>125</sup> Under *Empagran*, though, "a claim" refers to a private action.<sup>126</sup> The court held:

"[G]iv[ing] rise to a claim" means giving rise to someone's private claim for damages or equitable relief. To satisfy this requirement, the plaintiff must allege that some private person

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<sup>117</sup>*Id.*

<sup>118</sup>*Id.* at 350.

<sup>119</sup>*Id.*

<sup>120</sup>*Empagran*, 315 F.3d at 350.

<sup>121</sup>*Id.* at 351.

<sup>122</sup>*Id.* at 350.

<sup>123</sup>*Id.* at 351.

<sup>124</sup>*Empagran*, 315 F.3d at 351.

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act.<sup>127</sup>

In this case, the effects of the price-fixing conspiracy on the domestic market did give rise to a claim similar to the one brought by the domestic plaintiffs that were previously parties to this action. Consequently, the court rejected the Fifth Circuit's holding in *Den Norske* as not being true to the plain language of the FTAIA.<sup>128</sup>

## 2. Legislative History

An extensive review of the FTAIA's legislative history led the court to conclude that the legislative history more closely follows the Second Circuit's reasoning. Where the legislative history supports the reasoning set forth by the Fifth Circuit, it does not expressly exclude a more liberal interpretation.<sup>129</sup>

## 3. Deterrent Effect

In evaluating the deterrent effect of each interpretation, the court found that the Second Circuit's reasoning, and Judge Higginbotham's dissent in *Den Norske*, best serve the public interest in deterring companies from engaging in price-fixing cartels. The court distinguishes Judge Higginbotham's view that domestic liability alone is not enough to deter global price-fixing schemes because the benefits derived from the international scheme will outweigh any potential liability for suits brought in the U.S. based upon domestic claims.<sup>130</sup> The court reasoned that "[u]nless 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>131</sup> The legislative history of the FTAIA also supports the deterrent aspect of the less restrictive interpretation. Additionally, the court noted that one of the principal reasons that the United States Supreme Court allowed foreign plaintiffs to sue for treble

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<sup>127</sup>*Id.* at 352 (second alteration in original).

<sup>128</sup>*Empagran*, 315 F.3d at 349.

<sup>129</sup>*Id.* at 352.

<sup>130</sup>*Id.* at 356.

<sup>131</sup>*Id.* (citing *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420, 435 (5th Cir. 2001) (Higginbotham, J., dissenting)).

damages under the Clayton Act<sup>132</sup> was to deter defendants from reaping benefits of foreign anticompetitive behavior while risking a small amount of damages to domestic claimants.<sup>133</sup> The court found that the deterrent effect, as evidenced by the legislative history of the FTAIA, supports a less restrictive view of subject matter jurisdiction.<sup>134</sup>

#### 4. A Compromise Holding

The court ultimately concluded that a foreign plaintiff may pursue a claim under American antitrust laws even if the plaintiff's injury is caused by the foreign effects of anticompetitive conduct; however, the offensive behavior must give rise to a claim by a domestic plaintiff who was injured by the domestic effects of the same behavior.<sup>135</sup> Comparatively speaking, the court's holding is clearly broader than the Fifth Circuit's restrictive requirement that a claim brought by a foreign plaintiff must have its foundation in the effect on the domestic market.<sup>136</sup> Likewise, the court's holding is not as expansive as the position taken by the Second Circuit because more is required under the FTAIA than just a violation of the Sherman Act.<sup>137</sup>

#### C. Subsequent Case

Six weeks after the D.C. Circuit handed down their decision, the Seventh Circuit was called upon to interpret the same provisions of the FTAIA.<sup>138</sup> The court focused its analysis on whether the FTAIA set forth requirements for subject matter jurisdiction or enumerated additional elements to a claim under the Sherman Act.<sup>139</sup> In *United Phosphorus, Ltd. v. Angus Chemical Co.*, plaintiffs brought suit alleging that the defendant, the sole manufacturer of chemicals used in the production of tuberculosis medication, had engaged in a conspiracy to monopolize the market for those chemicals.<sup>140</sup> After analyzing the FTAIA, the majority of the court agreed with the Second, Fifth, and D.C. Circuits that the FTAIA is a

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<sup>132</sup>*Pfizer, Inc. v. India*, 434 U.S. 308, 320 (1978) (holding that foreign plaintiffs could sue for treble damages under the Clayton Act).

<sup>133</sup>*Empagran*, 315 F.3d at 356 (citing H.R. REP. NO. 97-686, at 10 (1982)).

<sup>134</sup>*Id.* at 357.

<sup>135</sup>*Id.*

<sup>136</sup>*See Den Norske*, 241 F.3d at 428.

<sup>137</sup>*See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002).

<sup>138</sup>*See United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003).

<sup>139</sup>*Id.* at 944.

<sup>140</sup>*Id.* at 945.

mechanism intended by Congress to be used to establish or destroy subject matter jurisdiction.<sup>141</sup> Dissenting from the majority's opinion, Judge Diane P. Wood argued that neither circuit has correctly interpreted the FTAIA.<sup>142</sup> Judge Wood propounded the view that the FTAIA does not concern subject matter jurisdiction and should be adopted as an additional element required to bring a claim under the Sherman Act.<sup>143</sup> Judge Wood further argues that although the *Empagran* case was decided under subject matter jurisdiction, the court's standard was more properly characterized as a dismissal for failure to state a claim.<sup>144</sup> She adds: "[T]o the extent that others should follow what the *Empagran* court did, rather than what it said in passing, one should take this as a case acknowledging that a dismissal for failure to meet the standards of the FTAIA is one for failure to state a claim."<sup>145</sup>

This holding highlights the confusion surrounding the interpretation and application of the FTAIA. Not only have three circuits arrived at three different interpretations of the statute, but another circuit also holds that the analysis applies to an entirely different rule of law, failure to state a claim, rather than a determination of subject matter jurisdiction.

#### IV. EVALUATION

##### A. *The Statutory Language*

The interpretations of the Second and Fifth Circuit are not implausible. For instance, the Fifth Circuit's interpretation would have the unlikely effect of excluding those Americans who purchased goods overseas.<sup>146</sup> Further, if the Second Circuit had adopted the restrictive interpretation set forth by the Fifth Circuit, those plaintiffs would have been left without a remedy. Surely Congress did not intend such a peculiar result. Furthermore, because the FTAIA is concerned with conduct rather than the *situs* of the conduct, courts would have to distinguish between the nationalities of the plaintiffs if they were to afford the protection of the antitrust laws to American citizens doing business overseas.<sup>147</sup>

A benefit of the restrictive interpretation is the immediacy of the causal chain, which limits the type of plaintiffs to those persons who have

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<sup>141</sup>*Id.* at 951.

<sup>142</sup>*United Phosphorus*, 322 F.3d at 945.

<sup>143</sup>*Id.* at 953-54.

<sup>144</sup>*Id.* at 963.

<sup>145</sup>*Id.*

<sup>146</sup>Mehra, *supra* note 50, at 294.

<sup>147</sup>*Id.*

been injured by the effects on the domestic market. The less restrictive interpretation stretches the causal chain almost beyond comprehension, subjecting foreign businesses to non-sovereign jurisdiction. For example, "a non-U.S. plaintiff injured by non-U.S. effects—potentially from non-U.S. conduct—could bring a U.S. antitrust claim . . . based on the U.S.-related effects of the complained-of conduct."<sup>148</sup> The less restrictive interpretation would also be more faithful to the underlying purpose of American antitrust law and the FTAIA by providing a remedy that deters anticompetitive conduct.<sup>149</sup> Furthermore, the expansive view of the FTAIA is a natural consequence of the expanding global marketplace where anticompetitive conduct is likely to affect more than one nation.<sup>150</sup>

The compromise position adopted by the D.C. Circuit is logical and equitable. It is true to the plain language of the statute and avoids the breadth that would place the United States in a position as a worldwide arbiter of antitrust litigation.

### B. *Deterrence*

The deterrence argument weighs heavily in favor of an expansive interpretation of the FTAIA. Because the primary purpose of the antitrust laws is to deter anticompetitive behavior, it is logical to read the FTAIA from a deterrence perspective. Profits obtained from an international price-fixing cartel can easily outweigh the imposition of domestic liability and actually encourage an international as opposed to a domestic, price-fixing scheme.<sup>151</sup> On the other hand, if foreign citizens can easily access the American justice system, foreign nations would have no incentive to take a responsible role in mitigating international anticompetitive behavior.

The D.C. Circuit's position strikes a favorable balance between these competing interests by permitting some foreign plaintiffs to seek remedies under the American antitrust laws. Enough plaintiffs will qualify to bring a claim to serve a deterrence purpose; however, the number of plaintiffs who meet the criteria for such protection is not so large that it will act as a disincentive for other nations to enact antitrust laws of their own.

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 295.

<sup>150</sup> Mehra, *supra* note 50, at 310.

<sup>151</sup> *Empagran*, 315 F.3d at 356.

### C. Docket Load

Under the less restrictive view, many foreign plaintiffs would bring suit in the United States and further burden the already busy court dockets.<sup>152</sup> Additionally, while the requirements of venue and personal jurisdiction would have a mitigating effect on the number of claims brought in U.S. courts,<sup>153</sup> it would be the American taxpayer who would ultimately fund the additional costs associated with this increased litigation. A more restrictive interpretation would force foreign plaintiffs to seek remedies in their own countries, thus transferring the costs to the nations in which the plaintiffs reside.<sup>154</sup>

The D.C. Circuit has alleviated the expense and burden on the court system by placing some limits on the number of plaintiffs likely to raise a claim under the FTAIA. The court has also remained true to the public policy inherent in the antitrust laws—to offer a remedy to those who have been harmed by anticompetitive behavior.

### V. CONCLUSION

As the global market expands, American antitrust laws, as well as the laws of other countries must keep pace with the evolving international economy. The divergent views of the federal circuit courts, though, coupled with existing litigation concerning the statutory language of antitrust law, are not an adequate foundation to build a consumer-friendly and anticompetitive marketplace.

Since the enactment of the FTAIA twenty years ago, the economic globalization blurred jurisdictional boundaries. Therefore, clear and consistent guidelines for the application of FTAIA must be established. For the moment, though, the FTAIA is the waiting for a spotlight of clarity to shine upon it.

*Deborah J. Buswell*

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<sup>152</sup>Harvard Law Review Assoc., *supra* note 13, at 2139.

<sup>153</sup>Mehra, *supra* note 50, at 307.

<sup>154</sup>*Id.* at 294.

