RECENT DEVELOPMENTS

Hoffman-La Roche Ltd. v. Empagran S.A.: The Supreme Court Trusts that Foreign Nations Can Preserve Competition Without American Interference

I. OVERVIEW

The major vitamin manufacturers and distributors of the late 1980s and the 1990s allegedly formed a massive international cartel to carve up the international vitamin market, thereby driving up and fixing vitamin prices.[1] This conspiracy forced purchasers to pay inflated prices for vitamins both within the United States and abroad.[2] In order to recover compensation for the inflated prices they paid, these purchasers brought a class action antitrust suit against the manufacturers and distributors in the United States District Court for the District of Columbia.[3]

The court divided the plaintiffs into two categories: the domestic purchasers domiciled in the United States and the foreign purchasers domiciled outside of the United States.[4] Because the conduct in question involved trade with foreign nations, in order to bring a Sherman Act claim against the defendants, the district court interpreted the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) as requiring the plaintiffs to allege that the defendants' conduct caused a "direct,

1. Empagran S.A. v. F. Hoffman-La Roche, Ltd., 315 F. 3d 338, 342 (D.C. Cir. 2003).

2. *Id.* at 340; Empagran S.A. v. F. Hoffman-La Roche, Ltd., No. CIV.001686TFH, 2001 WL 761360, at *1 (D.D.C. June 7, 2001).

3. *Empagran S.A.*, 2001 WL 761360, at *1. While the plaintiffs alleged that the conspiracy inflated the prices of vitamins within the United States and abroad, the class of plaintiffs only included purchasers who bought vitamins "for delivery outside of the United States." *Id.* at *1-*3. The plaintiffs sued under section 1 of the Sherman Act, 15 U.S.C. § 1 (2000); sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26; foreign antitrust laws; and international law. *Empagran S.A.*, 315 F.3d at 340.

4. *Empagran S.A.*, 2001 WL 761360, at *1. The plaintiffs represented corporations domiciled in the United States, Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia, and the Ukraine. *Id.*

substantial, and reasonably foreseeable effect . . . on U.S. commerce" and that the plaintiffs' injuries arose from the same effects.[5] The foreign purchasers failed to allege that the conduct that caused their injuries had "direct, substantial, and reasonably foreseeable effect[s] on U.S. commerce," and the district court dismissed the foreign purchasers' claims for lack of subject matter jurisdiction.[6] The foreign plaintiffs appealed, and the United States Court of Appeals for the District of Columbia Circuit reversed, interpreting the FTAIA to permit suits by foreign plaintiffs whose injuries arose solely from the anticompetitive conduct's effect on foreign commerce, provided the conduct also had the requisite effect on domestic commerce.[7] The United States Supreme Court granted certiorari and *held* that if anticompetitive conduct causes foreign harm that is independent of any domestic harm giving rise to a Sherman Act claim, the FTAIA makes the Sherman Act inapplicable to a claim that arises solely out of the foreign harm. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2363 (2004).

II. BACKGROUND

American business tycoons of the late Nineteenth Century, such as Andrew Carnegie, John D. Rockefeller, and J. Pierpont Morgan, treated competition as an impediment to running their businesses efficiently.[8] Rockefeller in particular was known for creating trusts with smaller oil companies and then consolidating them into the Standard Oil Company, forcing those competitors that were not part of the trusts out of the

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5. *Id.* at *2-*3 (citing Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001)).

6. *Id.* at *3-4. The district court asked the domestic purchasers to supplement their complaint with facts to show how the defendants' allegedly anticompetitive conduct adversely affected U.S. commerce. *Id.* at *4.

7. *Empagran S.A.*, 315 F.3d at 341. The United States Court of Appeals for the District of Columbia Circuit had not previously interpreted the issue of "whether FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct." *Id.* at 346. The United States Court of Appeals for the Fifth Circuit had held that the plaintiff's injury had to arise from the conduct's anticompetitive effect on domestic commerce, and this was the reasoning that the district court followed. *Id.* (citing Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 427 (5th Cir. 2001)). The United States Court of Appeals for the Second Circuit came to the opposite conclusion when it held that, as long as the conduct had a domestic effect that violated the Sherman Act, a plaintiff could sue if injured by the same conduct even if the injury were unrelated to the domestic effect. *Id.* at 347 (citing Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (2d Cir. 2002)). The United States Court of Appeals for the District of Columbia in this case essentially followed the Second Circuit's rationale, but it narrowed its interpretation of the FTAIA by requiring that the requisite domestic effect give rise to a private claim and not just a claim by the government. *Id.* at 351-52.

8. THOMAS A. BAILEY & DAVID M. KENNEDY, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 545 (10th ed. 1994).

market.[9] This systematic elimination of competition built a plutocracy that state legislatures could not weaken because interstate commerce was under the sole jurisdiction of the federal government.[10] Congress finally enacted the Sherman Anti-Trust Act of 1890 (Sherman Act), which prevented companies from joining together in order to suppress competition.[11]

The first Supreme Court case to consider whether U.S. courts could apply the Sherman Act to conduct that occurred outside U.S. boundaries was *American Banana Co. v. United Fruit Co.*, in which the Court held that a nation's laws apply only to actions taken within that nation's borders.[12] Under this rule, even if an American suffered injury within the United States as a result of anticompetitive conduct by another American, domestic antitrust laws would not apply if the conduct that caused the injury did not occur within the United States.[13]

The courts did not apply this rule of restraining a nation's laws to conduct within its borders in other instances; instead, they strictly confined the rule to the facts of the *American Banana* case.[14] The United States Court of Appeals for the Second Circuit sharply limited the *American Banana* decision's relevance and greatly expanded American extraterritorial jurisdiction in 1945 when the Second Circuit held in *United States v. Aluminum Co. of America* (*Alcoa*) that a nation may apply its laws to conduct that occurs outside its borders if such conduct causes effects within the nation for which the laws are designed to prevent.[15] In *Alcoa*, Justice Learned Hand developed the "effects test," which states that if a party intends to affect domestic commerce through illegal anticompetitive conduct and such conduct does affect domestic

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9. *Id.*

10. *Id.* at 550.

11. *Id.* at 551.

12. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909); *see also* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 3 (1st Cir. 1997). *But see* Hunt v. Mobil Oil Corp., 550 F.2d 68, 74 (2d Cir. 1977).

13. *Am. Banana Co.*, 213 U.S. at 355-57. The plaintiff in this case was an Alabama corporation, the defendant was a New Jersey corporation, and the anticompetitive conduct occurred in Costa Rica. *Id.* at 354-55.

14. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 609 (9th Cir. 1976); *Hunt*, 550 F.2d at 74; United Phosphorus, Ltd. v. Angus United Chem. Ltd., 322 F.3d 942, 946 (7th Cir. 2003). These courts all declined to apply *American Banana* in favor of more modern rules. *See Timberlane*, 549 F.2d at 609; *Hunt*, 550 F.2d at 74; *United Phosphorus*, 322 F.3d at 946.

15. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945). The Circuit Court was designated as a court of last resort for this antitrust case. *Nippon Paper Indus.*, 109 F.3d at 3.

commerce, the Sherman Act applies even if the conduct occurs abroad.[16] However, without deciding the question, the court stated that Congress might not have intended for the Sherman Act to apply to foreign conduct if either the intent to affect domestic commerce or the effect on domestic commerce were lacking.[17]

While most antitrust cases that deal with foreign conduct cite *Alcoa*'s effects test,[18] the United States Court of Appeals for the Ninth Circuit found the test too far-reaching to provide sufficient guidance in *Timberlane Lumber Co. v. Bank of America National Trust & Savings Ass'n.*[19] The court found that the effects test alone did not give the issue of when to apply American antitrust laws to foreign conduct sufficient consideration, even though earlier cases tended to supplement their reasoning with discussions of international comity.[20] In order to improve upon the effects test, the court developed a "balancing test" to determine whether antitrust laws apply to foreign conduct, which requires: (1) either an actual or intended effect on American foreign commerce; (2) proof that the effect is great enough to cause a "cognizable injury" to the plaintiffs and give rise to a civil violation; and (3) American interest that is strong enough in comparison to the interests of other countries to justify the imposition of American antitrust laws on the foreign conduct.[21] The court went on to list factors to weigh when considering the third prong, such as the degree of conflict between the domestic and foreign policies, the nationalities of the parties, and the importance of the decision to the nations involved.[22] The court treated the issue of the extraterritorial application of antitrust laws as one of prescriptive jurisdiction, deciding not whether the conduct supported an antitrust

16. *Alcoa*, 148 F.2d at 443-44; *see United Phosphorus*, 322 F.3d at 947; *see also* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) (endorsing the effects test by holding that *American Banana* does not control when a defendant's conduct has an anticompetitive impact within the United States).

17. *Alcoa*, 148 F.2d at 443-44.

18. *See Cont'l Ore Co.*, 370 U.S. at 704; Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); Kruman v. Christie's Int'l PLC, 284 F.3d 384, 393 (2d Cir. 2002); Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 424 n.12 (5th Cir. 2001); *Timberlane*, 549 F.2d at 609.

19. *Timberlane*, 549 F.2d at 611-12 (stating that the test seems "poorly defined" because it has not been put to a "real test").

20. *Id.* at 612-14. The court in *Alcoa* discussed the limitations on the exercise of power that conflict of laws rules impose, and the Court in *Continental Ore Co.* based its decision in part on the fact that the American interest in enforcing its antitrust laws outweighed Canada's interest in preserving its company's monopoly. *Id.*

21. *Id.* at 613.

22. *Id.* at 614. While this is a Ninth Circuit case, other jurisdictions have also adopted the balancing test. *See, e.g.*, Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) ("The proper standard is a balancing test.").

claim but whether Congress intended the law to apply to the conduct in question.[23] The effects test alone could potentially extend the jurisdiction of U.S. courts to reach any conduct that the actors intended to affect domestic commerce, which did affect it, even if the effects in the United States were negligible compared to those in another country.[24] Like the effects test, the *Timberlane* balancing test requires "*some* effect-actual or intended-on American foreign commerce," but it goes further by also requiring that the effect be "sufficiently large to present a cognizable injury," and third, that the interest of the United States be "sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[25] This test requires courts to find that it would be reasonable to exercise prescriptive jurisdiction over the conduct before passing judgment.[26]

While the *Timberlane* decision stressed the policy reasons for restraining the application of American antitrust laws to foreign conduct in order to preserve international comity, two years later the Supreme Court in *Pfizer Inc. v. Government of India* found a different policy to be of importance to the application of antitrust laws—the deterrent effect of applying American antitrust laws to foreign conduct by allowing foreign plaintiffs to sue under U.S. federal laws.[27] The Court allowed several foreign nations to bring antitrust suits in federal courts in the same manner that an individual could bring a suit.[28] American antitrust laws, and in particular the treble damage remedy available under 15 U.S.C. § 15, were intended to "compensate victims" but also to "deter" anticompetitive behavior.[29] The Court held that if foreign plaintiffs were not allowed to sue to the full extent of the antitrust laws, parties may decide to engage in anticompetitive behavior that affects both domestic

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23. *Timberlane*, 549 F.2d at 610 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965), which discusses prescriptive jurisdiction).

24. *See* United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 444 (2d Cir. 1945).

25. *Timberlane*, 549 F.2d at 613. *Compare id. with* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (stating that "*[s]ubject to § 403*, a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory" (emphasis added)). *Restatement (Third)* § 403(1) states that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1). Factors to consider are "the extent to which the activity . . . has substantial, direct, and foreseeable effect upon or in the territory" and "the extent to which another state may have an interest in regulating the activity." *Id.* § 403(2)(a), (g).

26. *See Timberlane*, 549 F.2d at 613-14.

27. Pfizer Inc. v. Gov't of India, 434 U.S. 308, 314 (1978).

28. *Id.* at 320.

29. *Id.* at 310, 314.

and foreign commerce, intending to offset the liability to domestic consumers with the profits from their anticompetitive injuries to foreign consumers.[30] Therefore, by allowing foreign plaintiffs to sue under American antitrust laws, Congress allows American consumers to enjoy the benefit of the deterrent effect of treble damages on anticompetitive behavior throughout the world.[31]

The Second Circuit also brushed aside *Timberlane*'s suggestion to make discussion of international comity a factor when determining the extraterritorial reach of American antitrust laws.[32] In *National Bank of Canada v. Interbank Card Ass'n.*, the Second Circuit pulled *Timberlane*'s balancing test back toward *Alcoa*'s effects test and came up with a new test: the Sherman Act applies to foreign conduct if the restraint on competition "has, or is intended to have, any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States."[33] This test rejects *Timberlane*'s "cognizable injury" prong and instead requires an injury that "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation" without regard for the relative size of the injury.[34] This test disregards the interests of foreign nations in the anticompetitive conduct and allows courts to make decisions without considering international comity.

In 1982, Congress added a new wrinkle to the jurisprudence surrounding the extraterritorial application of antitrust laws by passing the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).[35] The FTAIA excludes from the Sherman Act "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations."[36] The FTAIA then exempts from this rule "conduct [that] has a direct, substantial, and reasonably foreseeable effect" on domestic commerce, import commerce, or American export commerce as long as

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30. *Id.* at 315.

31. *See id.* ("Moreover, an exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages.").

32. Nat'l Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981) (stating that it would not discuss the third prong of *Timberlane*, the justification for imposing American laws on foreign conduct with regard to international comity).

33. *Id.*

34. *Id.*

35. *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2363 (2004) (stating that the FTAIA "excludes from the Sherman Act's reach much anti-competitive conduct that causes only foreign injury"). The FTAIA, 15 U.S.C. § 6a (1982), is an amendment to the Sherman Act. *Id.*

36. 15 U.S.C. § 6a.

"such effect gives rise to a claim" under the Sherman Act.[37] According to the House Report, one purpose of the act was to clarify the scope of the Sherman Act and reconcile the various tests that the courts had developed.[38] While the FTAIA does not require an effect that is "sufficiently large to present a cognizable injury" as the court in *Timberlane* required, the FTAIA does demand more of the effect than the test in *National Bank of Canada*, requiring it to be "direct, substantial, and reasonably foreseeable."[39] It also clarifies the question in *Alcoa* of whether both intent to affect and an effect are necessary, or if either alone is sufficient, by requiring that the conduct have an effect but not necessarily the intent.[40] The FTAIA also follows *National Bank of Canada* by not including considerations of international comity as an element of the test of extraterritorial application, yet the FTAIA leaves it to the courts to use such considerations as they had before Congress passed the FTAIA.[41] The House Report cites *National Bank of Canada* and *Pfizer* approvingly, suggesting that Congress intended to maintain an "effects test" similar to that in *National Bank of Canada* and to reinforce that deterrence is still a major goal of the Sherman Act along with compensation.[42]

One of the most important cases to address the extraterritorial reach of the Sherman Act since the enactment of the FTAIA is *Hartford Fire Insurance Co. v. California*, in which the Court actually declined to discuss the FTAIA's effect on the Sherman Act's reach because it found the FTAIA's application to the facts to be unclear.[43] Instead, the Court relied on the common law rule that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some

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37. *Id.*

38. H.R. REP. NO. 97-686, at 2 (1982).

39. *Nat'l Bank of Can.*, 666 F.2d at 8; 15 U.S.C. § 6a(1); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976).

40. 15 U.S.C. § 6a(1); United States v. Aluminum Co. of Am. (ALCOA), 148 F.2d 416, 444 (2d Cir. 1945). In this respect, the FTAIA resembles *National Bank of Canada* and differs from *Timberlane*, which would allow either an "actual or intended" effect on domestic commerce. *Timberlane*, 549 F.2d at 613. After the FTAIA was passed, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* confirmed that the Sherman Act only applies extraterritorially if there is an effect on domestic commerce, even if there was an intent to injure competition in domestic commerce. 475 U.S. 574, 583 (1986).

41. *See* H.R. REP. NO. 97-686, at 13 (1982).

42. *Id.* at 10-11.

43. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.23 (1993). The Court mentioned the FTAIA's contribution in a footnote, and dismissed it by saying that its application was unclear to the facts of this case, but if it did apply then "the conduct alleged plainly [met] its requirements."

substantial effect in the United States."[44] More importantly, the Court addressed the relationship of international comity with the Sherman Act, a topic that courts had largely avoided since *Timberlane*.[45] The Court stated that "concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction."[46] This contradicted the *Timberlane* court's balancing test, which found considerations of international comity to be an essential prong of the test.[47] The Court supported its rationale with Congress's apparent indifference to the issue of whether a court should ever decline to exercise jurisdiction out of consideration for international comity when it enacted the FTAIA.[48] While this does not foreclose a court from dismissing a Sherman Act claim on grounds of international comity, the Court in this case found that, when there is no conflict, which it defines as impossibility of complying with the laws of the nations at issue, there is no need to consider international comity.[49] The Court also found that there was no need to address prescriptive jurisdiction because the exercise of prescriptive jurisdiction is presumably appropriate whenever the Court finds that the Sherman Act applies.[50]

In a dissenting opinion, Justice Scalia argued that the Court should have decided both whether the federal courts had subject matter jurisdiction over the conduct and whether the exercise of prescriptive jurisdiction under the Sherman Act was reasonable.[51] Justice Scalia agreed that the district court had subject matter jurisdiction over the case because the plaintiffs brought a nonfrivolous case that arose under the Sherman Act.[52] However, under Justice Scalia's approach, when a plaintiff wishes to invoke the Sherman Act against extraterritorial conduct, there is a second step to the inquiry, and the courts *must* decide

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44. *Id.* at 796 (citing *Matsushita*, 475 U.S. at 582 n.6).

45. *Id.* at 797 n.24.

46. *Id.* (citing United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 444 (2d Cir. 1945)).

47. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976).

48. *Hartford Fire*, 509 U.S. at 798 (citing H.R. REP. NO. 97-686, at 13 (1982)).

49. *Id.* at 799; *see* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 937-45 (D.C. Cir. 1984) (discussing which approach to take when there is an impossibility of compliance with the laws of multiple nations). *Compare Hartford Fire*, 509 U.S. at 764, *with id.* at 820-21 (Scalia, J., dissenting) ("Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary.").

50. *Hartford Fire*, 509 U.S. at 796 n.22. The Court found that it was "well established that Congress has exercised [prescriptive] jurisdiction under the Sherman Act."

51. *Id.* at 818 (Scalia, J., dissenting).

52. *Id.* at 812.

if prescriptive jurisdiction exists.[53] Like the majority, Justice Scalia treated prescriptive jurisdiction as a power that Congress may exercise when writing legislation, not as a factor in determining the jurisdiction of U.S. courts.[54] However, unlike the majority, Justice Scalia did not accept the concept that when a court finds that there is subject-matter jurisdiction under a law, this implies that the lawmaker has already considered prescriptive jurisdiction to be appropriate.[55] Instead, it is the duty of the courts to decide "whether, in enacting the [legislation], Congress asserted regulatory power over the challenged conduct," and this is a necessary second step when considering conduct that occurs in a foreign state.[56] In order to determine whether Congress exercised its prescriptive jurisdiction, Justice Scalia cited two canons of statutory construction: the presumption against extraterritorial jurisdiction and the instruction that American laws "ought never to be construed to violate the law of nations if any other possible construction remains."[57] Under these canons, "the scope of generally worded statutes must be construed

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53. *Id.* at 813. This differs from the approach in *Timberlane*, which combined the two steps; nonetheless, both rules require courts to consider the sovereignty of foreign nations before applying the Sherman Act to extraterritorial conduct. *Compare* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *with* Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 69 (3d Cir. 2000) (holding that the FTAIA requires courts to first determine whether the Sherman Act applies to the conduct in question before determining whether or not the court has subject matter jurisdiction under the Sherman Act itself). However, the court in *Carpet Group* decided the issue of whether to apply the Sherman Act to the conduct in question based on its interpretation of the FTAIA, not based on considerations of international comity. *Carpet Group*, 227 F.3d at 69.

54. *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting).

55. *See id.* at 814 ("[T]he question . . . is whether, and to what extent, Congress *has* exercised that undoubted legislative jurisdiction in enacting the Sherman Act.").

56. *Id.* at 813.

57. *Id.* at 814-15 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248, 264 (1991); Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804)). Justice Scalia explained the use of the second canon by using three maritime cases. *Id.* at 815-18 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959); Lauritzen v. Larsen, 345 U.S. 571 (1953)). He also relied on the *Restatement (Third) of the Foreign Relations Law of the United States*, which demands that a state may not exercise prescriptive jurisdiction when to do so would be "unreasonable" with respect to conduct having a connection with another state. *Id.* at 818 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987)). The *Restatement (Third)* lists several factors to consider when determining whether the exercise is unreasonable, such as "the link of the activity to the territory of the regulating state," "the importance of the regulation to the international political, legal, or economic system," and "the likelihood of conflict with regulation by another state." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(a), (e), (h). In his dissent, Justice Scalia instead used two canons of statutory interpretation to determine whether it would be unreasonable for Congress to exercise prescriptive jurisdiction over the conduct in question. *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting).

in light of international law."[58] Justice Scalia argued that consideration of "prescriptive comity" is inherent in all statutes that may have extraterritorial reach, and courts must consider this when interpreting their scope even when there is no direct conflict of laws.[59] In support of these assertions, Justice Scalia stressed the importance of avoiding conflict with the interests of our trading partners.[60]

A source of Justice Scalia's disagreement with the *Hartford* majority's opinion was the definition of the term "conflict."[61] While the majority opinion required an impossibility of compliance with the laws of multiple nations for a conflict to exist,[62] Justice Scalia wrote that whenever "applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary."[63] This expansive definition of conflict could require courts to consider the impact of exercising jurisdiction over foreign conduct in all cases where there is no harmonization of the laws among foreign nations, while the majority's narrow view would permit courts to ignore these considerations of international comity in most cases.

The circuit and district courts finally grappled with the precise interpretation of the character of the domestic effects that the FTAIA requires in *Caribbean Broadcast System Ltd. v. Cable & Wireless PLC*, *Den Norske Stats Oljeselskap As v. HeereMac Vof*, and *Kruman v. Christie's International PLC*.[64] In *Caribbean Broadcast System*, the United States District Court for the District of Columbia Circuit addressed the first prong of the FTAIA and held that the requisite effect must be an anticompetitive effect on domestic commerce, not simply an injury to a single domestic plaintiff.[65] In *Den Norske* and *Kruman*, the Fifth and Second Circuits attacked the second prong of the FTAIA,

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58. *Compare Hartford Fire*, 509 U.S. at 816 (Scalia, J., dissenting), *with* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(f) (stating that a factor to consider when determining if the exercise of prescriptive jurisdiction is unreasonable is "the extent to which the regulation is consistent with the traditions of the international system").

59. *Hartford*, 509 U.S. at 817-18 (Scalia, J., dissenting). However, the "likelihood of conflict with regulation by another state" is one of the factors that the *Restatement (Third)* requires a state to consider when deciding whether to exercise prescriptive jurisdiction. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(h).

60. *Hartford Fire*, 509 U.S. at 820 (Scalia, J., dissenting).

61. *Id.*

62. *Id.* at 799.

63. *Id.* at 820-21 (Scalia, J., dissenting).

64. *See generally* Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC, CIV.A.No. 93-2050, 1995 LEXIS 19225 (D.C. Cir. Dec. 21, 1995); Kruman v. Christie's Int'l PLC, 241 F.3d 384 (2d Cir. 2002); Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420 (5th Cir. 2001).

65. *Caribbean Broad. Sys. Ltd.*, 1995 U.S. Dist. Ct. LEXIS 19225, at *7-*10.

which requires that the effect "[give] rise to a claim under" the Sherman Act, and the two courts arrived at conflicting conclusions.[66]

In *Den Norske*, the plaintiff brought a Sherman Act suit alleging that the defendant's anticompetitive conduct increased the plaintiff's operating costs in the North Sea and also caused prices to rise in the United States.[67] While the allegations would constitute a violation of the Sherman Act because of the anticompetitive domestic effect, the Fifth Circuit dismissed the case because the plaintiff's "injury did not arise from that domestic anticompetitive effect, i.e. the raising of prices in the United States."[68] Because the conflict was between two foreign parties and the action took place abroad, the court classified the conduct as "non-import foreign conduct," which the FTAIA places outside the scope of the Sherman Act unless it meets the two prongs of the FTAIA's exception.[69] While the alleged conduct met the first prong by having "a direct, substantial, and reasonably foreseeable effect . . . on the United States market," the plaintiff did not show that "this effect on United States commerce in any way '[gave] rise' to its antitrust claim."[70]

The court rejected the plaintiff's argument that the FTAIA only requires that the defendant's *conduct* give rise to a claim, and instead the court stated the rule that the FTAIA requires "that the domestic effect 'gives rise' to the [plaintiff's] claim."[71] This precludes suits by plaintiffs whose injuries arise from the foreign effects of anticompetitive conduct even if that conduct also has domestic effects.[72] In support of this ruling, the court cited the FTAIA House Report, which states that Congress intended the FTAIA to exclude "purely foreign transactions" from the Sherman Act, and the court also pointed to the absence of any cases where jurisdiction existed on analogous facts.[73]

In *Kruman*, the Second Circuit held that conduct that the FTAIA would otherwise exclude from the Sherman Act falls within the exception as long as the defendant's anticompetitive conduct had an effect on domestic commerce that gave rise to a claim under the Sherman Act, even if the domestic effect was not the basis for the plaintiff's alleged injury.[74] This case involved a conspiracy between two auction

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66. 15 U.S.C. § 6(2) (2000); *Den Norske*, 241 F.3d at 421-22; *Kruman*, 241 F.3d at 389.
67. *Den Norske*, 241 F.3d at 421.
68. *Id.*
69. *Id.* at 426.
70. *Id.* at 426-27 (citing 15 U.S.C. § 6(a)(1)).
71. *Id.* at 427.
72. *Id.* at 428.
73. *Id.* at 428, 430; *see also* H.R. REP. NO. 97-686, at 5, 8 (1982).
74. Kruman v. Christie's Int'l PLC, 284 F.3d 384, 399-400 (2d Cir. 2002).

houses, one foreign and one domestic, by which the two auction houses raised and fixed prices for consumers in the United States and in foreign countries in violation of antitrust laws.[75] The court supported this holding based on its interpretation of the "*National Bank of Canada* rule,"[76] the structure of the FTAIA and antitrust laws,[77] the plain language of the FTAIA,[78] the legislative history of the FTAIA,[79] and policy considerations.[80]

The court found that the FTAIA did not alter the *National Bank of Canada* rule, which it interpreted as holding that "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 the competitiveness of a domestic market; or (2) making possible anticompetitive conduct directed at domestic commerce."[81] Once these conditions are met, a plaintiff has a cause of action if he was injured by such anticompetitive conduct, and there is no additional requirement regarding the nature of the plaintiff's injury.[82]

The court held that the structure of the antitrust laws also supported this interpretation. Generally, the Clayton Act determines whether a plaintiff has suffered an injury caused by a Sherman Act claim, and the Sherman Act determines whether the defendant's actions give rise to a claim.[83] This is so because the FTAIA amended only the Sherman Act, and thus the FTAIA must be concerned more with the defendant's conduct than the plaintiff's injury as long as there is "a claim."[84]

Next, the court found that the text of the FTAIA requires that the domestic effect gives rise to "a claim," and the court held that Congress would have substituted "the plaintiff's claim" for "a claim" if Congress had intended to allow only plaintiffs who suffered injury directly from the domestic effect to sue.[85] Because the United States can bring a Sherman Act suit whenever there is an antitrust violation regardless of whether there is also a domestic injury, the *Kruman* decision would allow a foreign plaintiff to sue whenever a party violated the Sherman Act

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75. *Id.* at 389.
76. *Id.* at 390.
77. *See id.* at 398-99 ("The text of the FTAIA clearly reveals that its focus is not on the plaintiff's injury but on the defendant's conduct, which is regulated by the Sherman Act.").
78. *Id.* at 400.
79. *Id.*
80. *See id.* at 402-03 (addressing "general policy considerations").
81. *Id.* at 390.
82. *Id.*
83. *Id.* at 397.
84. *Id.*
85. *Id.* at 399-400 (referring to 15 U.S.C. § 6a(2) (2000)).

through conduct that *could* harm domestic commerce even if there was no actual domestic harm sufficient to give rise to a private claim.[86] For further support, the court cited the House Judiciary Committee Report, which specifically excluded from the scope of the Sherman Act "conduct with no anticompetitive effects in the domestic marketplace," implying that if there are such domestic effects then there is jurisdiction under the Act.[87]

As a matter of policy, the court viewed its reading of the FTAIA as necessary to protect domestic commerce because "the success of an anticompetitive scheme in foreign markets may enhance the effectiveness of an anticompetitive scheme in the domestic market."[88] However, the court found that the FTAIA placed some boundaries on the scope of the Sherman Act because the FTAIA would exclude wholly foreign conduct if the conduct had no anticompetitive effect on domestic commerce.[89] The Supreme Court denied certiorari in *Den Norske* and dismissed it in *Kruman*, leaving the circuit courts in disagreement.[90]

III. THE COURT'S DECISION

In the noted case, the United States Supreme Court relied on the canons of statutory interpretation that Justice Scalia used in his dissenting opinion in *Hartford Fire Insurance Co. v. California*, the absence of controlling case law, the FTAIA's language, and policy considerations in holding that if foreign anticompetitive conduct has both an "adverse domestic effect" and "an independent foreign effect giving rise to the claim," the FTAIA bars the plaintiff suffering the independent foreign injury from seeking compensation under the Sherman Act.[91] The Court accepted as true that there was anticompetitive conduct that injured domestic and foreign customers but that the foreign effects were independent of the domestic effects, so the issue was whether the FTAIA excluded the foreign effect from the Sherman Act application.[92] To interpret the FTAIA, the Court revived the line of reasoning that Justice

86. *See id.* at 398.

87. *Id.* at 400 n.8 (quoting H.R. REP. NO. 97-686, at 11-12 (1982) (quoting the House Report as saying that the impact of the illegal conduct does not need to "be experienced by the injured party within the United States")).

88. *Id.* at 403.

89. *Id.* at 402.

90. Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002), *cert. denied*, 539 U.S. 978 (2003); Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 528 U.S. 814 (1999).

91. F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2363, 2365-66, 2369 (2004).

92. *Id.* at 2367.

Scalia used in his *Hartford Fire* dissent, which found that Congress may not prescribe law with respect to conduct that occurs extraterritorially when doing so would be unreasonable.[93] Because the Court did not find it reasonable to interpret the FTAIA as applying the Sherman Act to foreign effects that are independent of the domestic effects required by the FTAIA, the Court concluded that Congress must not have intended such a result.[94] To support this conclusion, the Court noted the absence of case law in support of the judgment of the court of appeals.[95] No cases decided before Congress passed the FTAIA found it reasonable to apply the Sherman Act to similar conduct; therefore, if Congress did not intend the FTAIA to expand the extraterritorial scope of the Sherman Act, the Sherman Act would not apply to the conduct at issue.[96] The Court also examined the text of the statute, which supported its assertion that Congress did not intend the FTAIA to expand the Sherman Act's scope.[97] Finally, the Court considered the plaintiff-respondents' policy arguments, but it found them unpersuasive.[98] In light of these determinations, the Court held that it would vacate the judgment of the court of appeals and remand the case.[99]

First, the Court's analysis in this case resembles Justice Scalia's analysis in his *Hartford Fire* dissent, in which he required courts to consider the reasonableness limitation on prescriptive jurisdiction when interpreting legislation.[100] To test the reasonableness of applying the Sherman Act in this case, the Court began by applying the rule that the "Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[101] The Court cited four cases in which the Court construed various statutes so as not to interfere with the sovereignty of other nations,[102] which were the same four cases Justice Scalia cited to support the rule of interpreting statutes

93. *See id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987), which says that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable").

94. *Empagran S.A.*, 124 S. Ct. at 2367.

95. *Id.* at 2371.

96. *Id.*

97. *Id.*

98. *Id.* at 2372.

99. *Id.*

100. *See id.* at 2366.

101. *Id.*

102. *Id.* (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959); Lauritzen v. Larsen, 345 U.S. 571 (1953); Murray v. Schooner Charming Betsy, 2 Cranch 64 (1804)).

so as not to violate foreign laws.[103] While acknowledging that there are occasions when it is reasonable to apply antitrust laws to foreign anticompetitive conduct that harms domestic commerce, the Court found that consideration of prescriptive comity makes it unreasonable to apply American antitrust laws to foreign conduct that causes an independent foreign injury.[104] In determining that it would be unreasonable to apply the FTAIA to the conduct in question, the Court considered that such application would interfere with the ability of foreign nations to regulate anticompetitive conduct, and the U.S. interest in regulating such conduct was not enough to justify the interference.[105] In support of these statements, the Court cited several amici curiae briefs from both foreign countries and the United States, which argued that extending the Sherman Act to the conduct in question would undermine the amnesty incentives that regulators use to encourage cooperation by the violating companies because the threat of treble civil damages would be a strong deterrent.[106] While in some cases American remedies may not differ significantly from those of foreign nations, determining the appropriate application in each case individually would not be practical.[107] The Court decided that these considerations of prescriptive comity required the presumption that Congress did not intend the Sherman Act to interfere with the laws of foreign nations in order to redress injuries that did not arise from any anticompetitive domestic effect.[108]

Second, the Court found that the FTAIA's text and history suggest that Congress intended the FTAIA "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce," and the Court found no case law to the contrary.[109]

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103. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting).

104. *Empagran S.A.*, 124 S. Ct. at 2366. While the rules from these cases are still good law, courts rarely cited them in their decisions considering the extraterritorial scope of the Sherman Act. Justice Scalia's dissent in *Hartford Fire* and the noted case are the only two significant international trust cases to date that rely on the earlier maritime cases. *Id.*; *Hartford Fire*, 509 U.S. at 814-18 (Scalia, J., dissenting).

105. *Empagran S.A.*, 124 S. Ct. at 2367 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(c), (h) (1987) (stating that factors to consider are "the importance of regulation to the regulating state" and "the likelihood of conflict with regulation by another state")).

106. *Id.* at 2368 (citing, e.g., Brief for the Federal Republic of Germany as Amicus Curiae in Support of Petition for a Writ of Certiorari, at 28-30, *Empagran S.A. v. F. Hoffman-La Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003); Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Defendants-Appellees, at 19-21, *Empagran S.A. v. F. Hoffman-La Roche Ltd.*, 124 S. Ct. 2359 (2004)).

107. *Id.*

108. *Id.* at 2369.

109. *Id.*

The respondents cited several cases, but the Court did not find that any of them supported the decision of the Court of Appeals.[110] The first three were Supreme Court cases, but the Court found they were not controlling because, in each case, the plaintiff was the U.S. government, which has broader legal authority to sue than does a private plaintiff such as the plaintiffs in this case.[111] The Court then distinguished the three lower court cases. In the first case cited, *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.*, the foreign injury was not independent of the anticompetitive domestic effect.[112] In the second case cited, *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, the domestic injury partly depended on the foreign injury so the court did not consider the injuries to be independent.[113] In the third case cited, *Hunt v. Mobil Oil Corp.*, the court decided the case based on the "act of state doctrine," and the Sherman Act discussion was not relevant.[114] In the absence of any factually analogous cases, the Court found that its determination that the FTAIA does not make the Sherman Act applicable to "independently caused foreign injury" should stand.[115]

While the Court depended upon comity and history to support its decision, it also addressed the text of the FTAIA, and it found that the text of the FTAIA supports the Court's holding.[116] The FTAIA allows the Sherman Act to cover anticompetitive conduct if the conduct's "domestic effect gives rise to '*a* claim,' not to '*the plaintiff's* claim' or '*the* claim *at issue*.'"[117] The Court acknowledged that the most natural reading of the text itself does support the argument that all the FTAIA requires is that the domestic effects give rise to any claim and not necessarily the plaintiff's claim, but the Court was not dissuaded because the language does not *require* that reading.[118] The considerations of comity and history allow the Court to interpret the FTAIA as requiring the claim in 15 U.S.C. § 6(2) to be the plaintiff's claim.[119]

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110. *Id.*

111. *Id.* at 2367-70. The respondents cited to *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. National Lead Co.*, 332 U.S. 319 (1947); and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

112. *Empagran S.A.*, 124 S. Ct. at 2370; *see* Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co., No. 75 CIV. 5828-CSH, 1977 WL 1353 (S.D.N.Y. Jan 18,1977).

113. *Empagran S.A.*, 124 S. Ct. at 2370-71; *see* Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680 (S.D.N.Y. 1979).

114. *Empagran S.A.*, 124 S. Ct. at 2371; *see* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977).

115. *Empagran S.A.*, 124 S. Ct. at 2370.

116. *Id.* at 2371.

117. *Id.* (citing 15 U.S.C. § 6a(2) (2000)).

118. *Id.* at 2372.

119. *Id.*

The last argument that the respondents made was that the policy of deterring foreign anticompetitive conduct to protect domestic commerce required a broad interpretation of the FTAIA in order to prevent the violating defendants from escaping full liability.[120] Alternatively, the courts could consider the appropriate interpretation of the FTAIA on a case-by-case basis and abstain from adjudicating only when the interests of other nations required it.[121] The Court weighed these policy considerations against the considerations of international comity, and it found that neither consideration was so much more significant than the other so as to influence the interpretation of the FTAIA on a policy basis, and that allowing the interpretation of the FTAIA to depend on the particular case at hand would be too complex.[122] With all of the respondents' arguments addressed, the Court concluded that considerations of comity and history supported the interpretation that the scope of the Sherman Act should not be expanded.[123] The Court assumed that the foreign injury in this case *was* independent, and it did not discuss what the result would have been if the injury had not been independent, leaving that issue for the remand.[124] Justices Scalia and Thomas concurred in the judgment because the language of the statute supported the interpretation the Court used, and because the consideration for foreign countries' sovereignty required such an interpretation.[125]

IV. ANALYSIS

In the noted case, the Supreme Court brought American international antitrust jurisprudence back in line with the traditions of international law. The *Restatement (Third) of the Foreign Relations Law of the United States* allows a state to exercise its jurisdiction to prescribe only when it is reasonable, even when there is a basis for jurisdiction under the effects test and even when there is no impossibility of compliance with the laws of all nations involved.[126] Unlike the earlier cases that interpreted the FTAIA based on its text or the House Report, the Court in the noted case began its analysis by considering Congress's intention in light of the limitations of prescriptive jurisdiction, as the

120. *Id.*
121. *Id.* at 2368.
122. *Id.*
123. *Id.* at 2369.
124. *Id.* at 2372.
125. *Id.* at 2373.
126. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-403 (1987).

Restatement (Third) requires.[127] While this is a departure from the earlier cases, excepting *Timberlane* and the dissent in *Hartford*, the reasoning is consistent with the *Restatement (Third)*, which finds support in the laws of many foreign nations as well as the laws of the United States, including those for the Federal Trade Commission.[128] The Court in the noted case did not discuss the majority opinion in *Hartford Fire* at length, but, by following the reasoning of Justice Scalia's dissent, the case may draw the *Hartford Fire* decision into question.[129] However, the facts in the noted case and the facts in *Hartford Fire* are easily distinguishable, so the Court's decision will not automatically render *Hartford Fire* superseded.[130]

The Court in the noted case also had the opportunity to clarify a body of law that has been in dispute since the beginning of the twentieth century.[131] Yet, while the Court decisively settled the question of whether "a claim" means "a claim" or "the plaintiff's claim," it also addressed the newer issue of what constitutes an "independently caused foreign injury."[132] The Court defined such an injury as one that "the conduct's domestic effects did not help to bring about," but in a global economy in which fungible goods are shipped all over the world, it will be difficult to draw a line to determine how much the domestic effects have to bring about the foreign injury in order to give the plaintiff suffering from a

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127. *See, e.g.*, Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002); Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420 (5th Cir. 2001); Carpet Group Int'l v. Oriental Rug Importers Ass'n Inc., 227 F.3d 62 (3d Cir. 2000).

128. *See* Brief for the Federal Republic of Germany as Amicus Curiae in Support of Petition for a Writ of Certiorari, at 4-7, *Empagran S.A. v. F. Hoffman-La Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003); Brief for the United Kingdom of Great Britain and Northern Ireland, Ireland, and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, at 20-22, *Empagran v. F. Hoffman-La Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003); Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Defendants-Appellees, at 3, *Empagran S.A. v. F. Hoffman-La Roche Ltd.*, 124 S. Ct. 2359 (2004).

129. *See Empagran S.A.*, 124 S. Ct. at 2366 (citing Justice Scalia's dissent in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)).

130. In *Hartford Fire*, the foreign defendants' conduct was aimed at the United States, and the plaintiffs were American. *Hartford Fire*, 509 U.S. at 796.

131. Though courts have considered the question of the extraterritorial reach of American antitrust laws since *American Banana* in 1909, no court has established a clear rule that the federal court system as a whole has embraced. *Alcoa* is cited approvingly in nearly every case that deals with this issue; however, most courts have added something to *Alcoa*'s effects test. *See, e.g.*, United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945); Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 583 (1986) (holding that the effect must injure the plaintiffs); Nat'l Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 7 (2d Cir. 1981) (adapting the effects test to require either an effect or the intent to affect); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 613 (1951) (requiring that the effect be large).

132. *Empagran S.A.*, 124 S. Ct. at 2372.

foreign injury a cause of action.[133] Because this is only the second Supreme Court decision to consider the FTAIA, and *Hartford Fire* did not address the issue of an independent foreign injury,[134] future courts will have to interpret this new rule on their own, which may result in further disunity among the circuits.

The Supreme Court's departure from cases that discussed the FTAIA will also make it more difficult for courts to determine which aspects of those cases are still good law. The Court did not discuss the post-FTAIA circuit court cases or the cases that the FTAIA was based upon in any detail, but instead it focused on earlier cases that have less value as precedent because they did not construe the Act in question.[135] The House Report on the FTAIA cites *Pfizer* and *National Bank of Canada* at much greater length than any of the cases discussed in that section of the noted case, suggesting that they would be more relevant to the interpretation of the FTAIA.[136] The Court also declined to discuss in greater detail the two cases, *Den Norske* and *Kruman*, in which it had addressed the precise issue of whether "a claim" means "a claim" or "the plaintiff's claim."[137] The Court instead made a clean break from these cases and imposed the requirement that courts rely on considerations of prescriptive comity when considering the extraterritorial scope of statutes if the foreign injury is independent of the domestic effect.[138] While this rule is consistent with the traditions of international law, it will probably not be sufficient to decide future international antitrust cases without further clarification of what constitutes an independent injury.

Ultimately, the Court based its decision on the assumption that Congress would not have passed a law that violated the limitations of prescriptive jurisdiction.[139] This decision will placate foreign countries that oppose the effect of American treble-damage remedies, and it may ultimately improve the enforcement of international antitrust laws if it encourages violators to cooperate in return for amnesty. However, it may also lessen the deterrent effect of American antitrust laws upon companies that are not likely to cooperate. If a company can increase its

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133. *Id.*

134. *See generally Hartford Fire*, 509 U.S. at 764.

135. *Id.* at 2369-71.

136. H.R. REP. NO. 97-686, at 10-11 (1982) (citing Pfizer Inc. v. Gov't of India, 434 U.S. 308 (1978); *Nat'l Bank of Can.*, 666 F.2d at 6).

137. *Compare* Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420 (5th Cir. 2001), *with* Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002).

138. *See Empagran S.A.*, 124 S. Ct. at 2372.

139. *Id.* at 2369; *see Pfizer Inc.*, 434 U.S. at 308 (discussing the policy in favor of extending the extraterritorial reach of the FTAIA).

profits through price fixing, and it only has to consider liability to American customers and not to customers in foreign countries, the cost of settling an American antitrust suit may not deter the behavior if the profits from other customers offset the liability. Those foreign customers may have recourse in their own courts, but the laws of most foreign jurisdictions are not as favorable toward plaintiffs as those enforced in American courts. However, in the absence of any decisive policy argument, the Court held to its determination of the statutory interpretation.

V. CONCLUSION

The Supreme Court's approach to the extraterritorial scope of the Sherman Act in light of the FTAIA is both refreshing and confusing. Unlike the courts in earlier cases such as *Den Norske* and *Kruman*, the Court did not attempt to pick apart the wording of the statute, the structure of the antitrust laws, or the House Report on the FTAIA, which have all proven inconclusive because they can be construed to support many different interpretations of the FTAIA.[140] Instead, the Court chose to take an approach that it had only used before in a dissenting opinion based on different facts. This approach is arguably more relevant both because the canon of interpreting statutes so as not to interfere with the sovereignty of nations remains an influential part of American law,[141] and because this approach promotes the valid policy of allowing foreign countries to regulate anticompetitive behavior with their own antitrust laws. This decision is the new precedent for courts to follow when considering the scope of the Sherman Act. However, this case will not be controlling in other cases unless the foreign injury is unquestionably independent of the domestic effect, which will depend on how much distinction the court in future cases will require to consider them to be independent. Despite this possible ambiguity, this decision will surely limit the amount of litigation brought by foreign plaintiffs whose injuries are clearly independent, and it will also reduce the tension between American and foreign courts. The Court reintroduced the broader definition of "conflict," which will require courts to consider prescriptive jurisdiction when there are conflicting interests between two states, even when the laws of the states do not create an impossibility of compliance

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140. *See generally Den Norske Stats Oljeselskap As*, 241 F.3d at 420; *Kruman*, 284 F.3d at 384.

141. *See generally* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959); Lauritzen v. Larsen, 345 U.S. 571 (1953).

with both. By making considerations of prescriptive comity the primary tool for interpreting statutes that apply extraterritorially, the Court has curbed the imperialistic tendencies of some of the earlier decisions and created a new standard for extraterritorial interpretation of American antitrust laws.

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