National Courts, Global Cartels: F. Hoffman-LaRoche Ltd. v. Empagran, S.A. (U.S. Supreme Court 2004)

By Hannah L. Buxbaum[*]

A. Introduction

In its most recent term, the United States Supreme Court heard a case arising out of the activities of a price-fixing cartel in the vitamins market.[1] The defendants were a number of major international pharmaceuticals companies, including F. Hoffman-LaRoche, Rhone-Poulenc, Daiichi Pharmaceutical, and BASF, that had fixed prices for bulk vitamins and vitamin pre-mixes in markets around the world.[2] The cartel, which has been described as "probably the most economically damaging cartel ever prosecuted under U.S. antitrust law," is estimated to have affected over $5 billion of commerce worldwide.[3] Previous proceedings against the participants in the cartel, initiated in Australia, Canada and the European Union as well as in the United States, included administrative investigations and criminal prosecutions of individual executives. In these various proceedings, the cartel participants were found to have violated antitrust laws in the United States and elsewhere, and were subjected to heavy – indeed, record – fines in many countries.[4] By all accounts, the countries engaged in investigating and then prosecuting the cartel participants did so in full cooperation with each other. In particular, they made use of the mutual assistance and information sharing agreements that have become an important component of

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[1] F. Hoffman-LaRoche Ltd. v. Empagran S.A., 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004).

[2] 124 S.Ct. at 2363.

[3] Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST LAW JOURNAL 711, 712 (2001). *See also EU Fines Eight Companies For Roles in Vitamin Cartels*, 81 ANTITRUST & TRADE REGULATION REPORTS (BNA) 483, 483 quoting Mario Monti, who described it as "the most damaging series of cartels the [European C]ommission has ever investigated."

[4] *See* First, *supra* note 3, at 715-19 for a description of the various penalties assessed against cartel participants.

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coordinated international antitrust enforcement.[5]

The case that eventually made its way to the U.S. Supreme Court was a private action, initiated by foreign vitamin distributors who had purchased the cartelized goods in Australia, Ecuador, Panama, and Ukraine.[6] It presented a jurisdictional question: whether foreign plaintiffs, who had suffered overcharges in transactions occurring outside the United States, could nevertheless maintain claims in U.S. courts under U.S. antitrust law. When the appellate court hearing the litigation held that they could,[7] foreign receptivity to U.S. enforcement efforts came to an end. In *amicus curiae* briefs filed in the Supreme Court, several foreign governments argued that permitting such claims would interfere with, not enhance, global antitrust enforcement.[8] They protested the encroachment of U.S. laws on their own enforcement efforts, criticizing the failure of the appellate court to respect the sovereign authority of other nations.[9] In particular, they resisted the potential availability of treble damages in U.S. actions – both because it would encourage local plaintiffs to bring their claims in the United States, thus superseding local policies limiting recovery on private claims to actual damages, and also because treble damages might be awarded against local companies.[10] Overall, foreign regulators viewed the assertion of jurisdiction over such actions as an illegitimate attempt by U.S. courts to act as "world courts" in actions against global cartels.[11]

In other quarters, the prospect of U.S. jurisdiction over the claims of foreign purchasers met with more approval. Some commentators, both legal scholars and economists, suggested that global cartels are currently under-deterred due to regulato-

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[5] For instance, both the Chairman of the Australian Competition and Consumer Commission and a spokesman for the European Commission mentioned cooperation with the U.S. authorities as part of their investigative efforts. *See* 76 ANTITRUST & TRADE REGULATION REPORTS (BNA) 585, 586 (1999).

[6] 124 S.Ct. at 2363-64. Domestic purchasers of the vitamins had consolidated their claims into a separate lawsuit.

[7] Empagran S.A. v. F. Hoffman-LaRoche Ltd., 315 F.3d 338 (D.C. Cir. 2003).

[8] Such briefs were filed by the governments of Belgium, Canada, Germany, Ireland, Japan, the Netherlands, and the United Kingdom. All are available in the Briefs file on WESTLAW.

[9] *See, e.g.,* Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 2, 7.

[10] *See, e.g.,* Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 14.

[11] *See, e.g.,* Otto Graf Lambsdorff, *Wettbewerbsrecht als Ordnungsfaktor einer globalisierten Marktwirtschaft*, 7/8 WIRTSCHAFT UND WETTBEWERB 710 (2003).

ry gaps worldwide.[12] Citing OECD data and other recent economic studies, they contended that aggregate global sanctions against hard-core cartels are insufficient to deter price-fixing.[13] On this basis, they argued that permitting private lawsuits in U.S. courts would enhance deterrence and thereby not only protect the U.S. market but also maximize global welfare.[14] The case therefore presented the Supreme Court with a question at the intersection of antitrust policy and international jurisdictional law – and with the opportunity to consider the role of private rights of action in U.S. courts as part of the global network of antitrust enforcement strategies.

B. Interpretation of the FTAIA in the Courts of Appeal

The question in *Empagran* turned on a provision of the Foreign Trade Antitrust Improvements Act (FTAIA) of 1982, a statute enacted to clarify the reach of U.S. antitrust law to export commerce.[15] To paraphrase, the FTAIA states that the Sherman Act does not apply to conduct involving export trade or commerce with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect on domestic (U.S.) commerce and (2) such effect gives rise to a claim under the Sherman Act.[16] In the *Empagran* litigation, it was established that the conduct of the vitamin cartel had indeed caused direct and substantial effects

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[12] *See* Brief Amici Curiae of Legal Scholars in Support of Respondents at 12. This argument played a significant role in the court below. The Court of Appeals had noted the following:

> We are persuaded that, if foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be under-deterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability.

315 F.3d at 356. This point had been made by the Supreme Court itself in an earlier case addressing the ability of foreign governments to assert private antitrust claims in U.S. courts. *See* Pfizer, Inc. v. Government of India, 434 U.S. 308, 315 (1978).

[13] *See* Brief of Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents at 8-12; Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents 5-12.

[14] *See* Brief of Joseph E. Stiglitz and Peter R. Orszag, *supra* note 13, at 12.

[15] For a discussion of the FTAIA generally, *see* IA PHILLIP E. AREEDA AND HERBERT HOVENCAMP, ANTITRUST LAW ¶ 272 (2d ed. 2000).

[16] 15 U.S.C. §6A (2001).

on U.S. markets; the issue, therefore, was whether the second part of the jurisdictional requirement had been met.[17]

Empagran was not the first case to address this issue. In 2001, the Court of Appeals for the Fifth Circuit had decided a case brought by a Norwegian oil company against the providers of heavy-lift barge services in the North Sea as well as the Gulf of Mexico and the Far East.[18] The plaintiff in that case alleged that the defendants had engaged in unlawful territory allocation and bid fixing in all of the relevant markets worldwide; its own injuries, however, arose only from projects conducted in the North Sea. The court acknowledged that the defendants' conduct had adversely affected the U.S. market,[19] but read the FTAIA narrowly. It held that the plaintiff's own claim "must stem from the effect" on the U.S. market in order to be actionable in a U.S. court.[20] One year later, the Court of Appeals for the Second Circuit decided another claim by foreign plaintiffs.[21] That case involved allegations that the two major international art auction houses had fixed prices worldwide for their auctioneering services.[22] The plaintiffs were buyers and sellers of art who had participated in auctions held outside the United States.[23] The Second Circuit disagreed with the conclusion in *Statoil* that the effect on domestic commerce must give rise to the plaintiff's own injury. Rather, it held, the FTAIA requires only that "the 'effect' on domestic commerce violate the substantive provisions of the Sherman Act" – thereby giving rise to *a* claim, even if not *the* claim of the plaintiff.[24]

At the appellate stage of the vitamins cartel case, the D.C. Circuit Court of Appeals sided with the Second Circuit.[25] It held that as long as anti-competitive conduct has the requisite effect on U.S. commerce, then plaintiffs injured by the effect of that

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[17] 315 F.3d at 344.

[18] Den Norske Stats Oljeselskap A.S. v. Heeremac V.O.F., 241 F.3d 420 (5th Cir. 2001) [hereinafter "*Statoil*"].

[19] *Id.* at 426.

[20] *Id.* at 427.

[21] Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d. Cir. 2002).

[22] *Id.* at 389.

[23] *Id.*

[24] *Id.* at 399-400.

[25] 315 F.3d 338.

conduct on foreign commerce can sue in U.S. courts.[26] This, then, was the question of interpretation that the Supreme Court sought to resolve. The stakes were quite high, as the narrow interpretation of the FTAIA would in essence bar all claims based on foreign harm, whereas the broad interpretation would bar none.[27]

C. The Decision in the Supreme Court

The Court framed the issue before it as follows: whether, when there is (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim, a purchaser of cartelized goods who suffers injury in a foreign transaction can bring a Sherman Act claim in a U.S. court.[28] Its unanimous holding was that it can not.[29] The Court adopted the narrow interpretation of the FTAIA, holding that the plaintiff's own claim must arise from the effects of conduct on U.S. commerce. The Court provided two major bases for its decision: first, the principle that ambiguous statutes will ordinarily be construed "to avoid unreasonable interference with the sovereign authority of other nations;"[30] and second, that the language and legislative history of the FTAIA indicated no intent of Congress to expand the reach of the Sherman Act to foreign commerce.[31] I will confine my remarks primarily to an analysis of the first issue.

In a welcome development, the Court situates its analysis of the FTAIA within the

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[26] *Id.* at 350. The precise test adopted in *Empagran* varied slightly from that adopted by the Second Circuit. The *Kruman* court held that "the 'effect' on domestic commerce need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the Sherman Act." 284 F.3d at 400. The *Empagran* court, on the other hand, held that the effects of the conduct "must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." 315 F.3d at 350. This view is slightly more restrictive in that it requires that the conduct be sufficient to give rise to a private claim; creating the basis for a government action would not be sufficient. *Id.*

[27] As I have argued elsewhere, it is possible to imagine an intermediate interpretation of the FTAIA – one that recognizes the regulatory interests of the United States, but counsels jurisdictional restraint when another nation in fact has a competing interest. *See* Hannah L. Buxbaum, *Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOYOLA CONSUMER LAW REVIEW 365, 367-72 (2004). Such a view would recognize the distinction between countries that do in fact prosecute cartels and those that do not. On this point, *see also* Ralf Michaels & Daniel Zimmer, *US-Gerichte als Weltkartellgerichte?*, IPRAX (2004 forthcoming); Eleanor Fox, *International Antitrust and the Doha Dome*, 43 VIRGINIA JOURNAL OF INTERNATIONAL LAW 911, 923 (2003).

[28] 124 S.Ct. at 2363.

[29] The decision was 8-0, with Justice O'Connor taking no part in the consideration or decision of the case.

[30] 124 S.Ct. at 2366.

[31] 124 S.Ct. at 2369.

framework of international law. It notes that the applicable rule of construction – that statutes should be construed to avoid interference with foreign sovereign authority – reflects principles of customary international law,[32] and that it "helps the potentially conflicting laws of different nations work together in harmony."[33] And, importantly, the Court takes a broad view in considering potential conflicts in the area of antitrust regulation. It stresses that interference with foreign regulation may occur even when there is agreement internationally as to the legality or illegality of the conduct in question – as, in the case of hard-core price-fixing cartels, there is.[34] As the Court notes, "even where nations agree about primary conduct … they disagree dramatically about appropriate remedies."[35] In this part of its opinion, the Court acknowledges to a far greater extent than in previous cases the ongoing controversy created by U.S. antitrust remedies – in particular, the availability of treble damages in private lawsuits.[36] It cites the briefs filed by foreign governments,[37] addressing directly the concern of other nations that the availability of remedies in U.S. courts would "upse[t] a balance of competing considerations that [foreign] antitrust laws embody."[38]

The Court is clear that the principle of non-interference is not absolute. Statutes must be construed to prevent *unreasonable* interference – but, as the Court notes, sometimes interference with foreign sovereign authority is justified:

No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that *application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable*, and hence consistent with prin-

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[32] 124 S.Ct. at 2366.

[33] *Id*.

[34] *See* OECD Council Recommendation Concerning Effective Action Against Hard-Core Cartels, C(98)/35/FINAL, 25 March 1998, *available at* www.oecd.org/document.

[35] 124 S.Ct. at 2368.

[36] This has been a particular point of conflict in international antitrust cases. *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation*, 26 YALE JOURNAL OF INTERNATIONAL LAW 251-53 (2001). Other elements of the U.S. system that are questioned abroad include the use of class actions and contingency fee arrangements to support private litigation under regulatory laws.

[37] *See supra* note 8.

[38] 124 S.Ct. at 2368. This section also addresses the concern that specific programs granting amnesty to whistle-blowers would be disrupted by the availability of private actions – a point in which the U.S. government concurred. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 19-21.

ciples of prescriptive comity, *insofar as they reflect a legislative effort to redress domestic antitrust injury* that foreign anticompetitive conduct has caused.[39]

In this case, however, the Court asks, "[W]hy is it reasonable to apply those laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?"[40] Proceeding from the assumption that the claims in *Empagran* stem from purely foreign effects,[41] it concludes that in such cases the justification for interfering with the regulatory authority of other nations is insubstantial.

The opinion signals a renewed interest on the part of the Supreme Court in using principles of comity to confine the extraterritorial reach of U.S. antitrust law. This is particularly noteworthy as the Court's most recent case on this point, prior to *Empagran,* was widely viewed as more or less eliminating comity as a relevant consideration.[42] That case, *Hartford Fire Insurance v. California*, addressed claims that U.S. and U.K. members of the insurance industry had conspired to restrict the terms of certain insurance available in the United States.[43] The U.K. defendants, whose conduct had caused harmful effects within the United States, argued that the application of U.S. law should be restrained in the interest of comity, pointing to the competing regulatory interest of the United Kingdom in the conduct in question.[44] The Supreme Court rejected this argument, taking an extremely narrow view of what comity requires. It held that "international comity would not counsel against exercising jurisdiction" unless there is a "'true conflict between domestic and foreign law.'"[45] And, in the Court's view, a true conflict would be presented only if foreign law *required* conduct that violated U.S. law, or if "compliance with the laws of both countries is otherwise impossible."[46] In *Hartford Fire* itself, because the United Kingdom's competition law merely permitted the reinsurers' conduct,

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[39] 124 S.Ct. at 2366 (emphasis added).

[40] 124 S.Ct. at 2367.

[41] See further discussion of this point in Part IV below.

[42] *See, e.g.*, Spencer Weber Waller, *The Twilight of Comity*, 38 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 563 (2000).

[43] 509 U.S. 764 (1993).

[44] *Id.* at 797.

[45] *Id.* at 798, citing Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

[46] *Id.* at 799.

the Court felt that a consideration of competing sovereign interests was not required.[47]

In some respects, the *Empagran* decision can rightly be celebrated for turning away from the anti-comity attitude of *Hartford Fire*. As noted above, it is careful to consider the particular regulatory interests, including those related to enforcement mechanisms, asserted by other nations. In addition, by referring to "prescriptive comity,"[48] it signals acceptance of the notion that comity operates actually to limit the reach of U.S. law to foreign conduct, and not merely as a doctrine of judicial abstention.[49] On a broader level, the decision is simply more internationally aware. In his dissent in the *Hartford Fire* case, Justice Scalia stated that the majority's opinion would "bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries – particularly [the United States'] closest trading partners."[50] In *Empagran*, by contrast, it is the majority that considers the interests of other countries, and the structure of the international system. Indeed, at one point the Court sounds a deliberately anti-hegemonic note:

Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.[51]

For all of these reasons, the opinion is properly regarded as a positive step in the Supreme Court's jurisprudence on the extraterritorial application of U.S. regulatory law.

Nevertheless, the salient question remains to what extent *Empagran* has undermined the holding in *Hartford Fire*. The Court in *Empagran* explicitly confines its hol-

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[47] *Id.*

[48] 124 S.Ct. at 2366.

[49] This distinction, reflected in the Restatement (Third) of the Foreign Relations Law of the United States, was the subject of dispute in *Hartford Fire.* Justice Scalia, in his dissent in that case, characterized the issue as one of prescriptive jurisdiction; the majority, as one of subject-matter jurisdiction. *See* 509 U.S. at 813-15 (Scalia, J., dissenting). The *Empagran* opinion in fact cites that very dissent; *see* 124 S.Ct. at 2366. Further to the distinction between prescriptive jurisdiction and subject-matter jurisdiction, and its relevance in international antitrust cases, see Michaels & Zimmer, *supra* note 27.

[50] 509 U.S. at 820 (Scalia, J., dissenting).

[51] 124 S.Ct. at 2369.

ding to claims that arise solely from the effects of conduct on foreign commerce,[52] repeatedly emphasizing the phrase "independent foreign harm." On this point, the case (like the other global cartel cases addressing whether the FTAIA bars such claims) is entirely distinguishable from *Hartford Fire.* There, the plaintiffs sued on the basis of injuries stemming from effects of import commerce in the United States – indeed, in *Hartford Fire* the effects of the anti-competitive conduct were felt *only* in the United States.[53] *Empagran* might in fact be read to confirm the holding of *Hartford Fire* with respect to claims arising out of domestic effects: to return to the quotation discussed above, the Court states that "application of [U.S.] antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."[54] This passage, which does not refer to potential limits on reasonableness in cases of domestic injury, might even be interpreted to suggest that interference is *per se* reasonable in cases of domestic effect. Thus, while *Empagran* might have prevented the further expansion of U.S. antitrust law to cases involving foreign injury, it does not actually suggest that comity need be considered in cases involving domestic injury. To that extent, it neither directly undermines the *Hartford Fire* holding nor guarantees that comity will be considered in the more common anti-competition cases involving foreign conduct that causes *domestic* effects leading to *domestic* injury.

D. Remand for Consideration of the Independent Nature of Harm

The Supreme Court's decision did not completely resolve the claims of the foreign purchasers in *Empagran*. As I have emphasized, the Court confined its analysis to claims arising solely out of foreign harm. In doing so, it relied on the assumption that in the vitamins cartel case, the foreign harm *was* in fact independent of the cartel's effects in the United States.[55] At the end of its opinion, however, it remands the case to the D.C. Circuit court for a determination of this point.[56] The foreign plaintiffs in *Empagran* had argued that the cartel's effects on U.S. commerce were in

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[52] At one point, the Court states this explicitly: "[W]e reemphasize that we base our decision upon the following: … the adverse foreign effect is independent of any adverse domestic effect." *Id.* at 2366.

[53] *See* AREEDA AND HOVENCAMP, *supra* note 15, at ¶ 273.

[54] 124 S.Ct. at 2366 (emphasis in original). Interestingly, the Court here cites only the 1945 decision in United States v. Aluminum Co. of America, 148 F.2d 416, which itself predated the development of interest balancing and other comity-driven tests.

[55] 124 S.Ct. at 2372.

[56] *Id*.

fact intertwined with the foreign injury. They contended that "because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury."[57] On remand, the foreign purchasers will therefore have the opportunity[58] to show that, due to the possibility of arbitrage in the vitamins market, the effects caused by the cartel in the United States did in fact cause (at least in part) the plaintiffs' injuries. If they can establish this, then the Supreme Court's restrictive reading of the FTAIA would not directly bar plaintiffs' claims.

E. Conclusion

It is plain that the *Empagran* decision leaves certain issues unresolved. One such issue is the future applicability of, and precise content of, a comity analysis in different kinds of antitrust cases. This might become relevant even upon remand of the vitamins case itself: what result if the plaintiffs establish that their injuries were connected with the effects of the cartel's conduct on U.S. commerce? The FTAIA would not necessarily bar their claims – but would principles of comity nevertheless limit the extraterritorial reach of U.S. law to the defendants' conduct? Would it matter that, in contrast to *Hartford Fire,* the claims in this case (considering the nationality of the parties and the location of the purchase transactions) are linked much more closely to foreign countries than to the United States?[59]

Another issue the Court touches on but does not fully analyze is the relationship of private claims and public enforcement activity. While the opinion includes a fairly lengthy discussion of certain differences between public and private enforcement of U.S. antitrust law,[60] the Court undertakes this analysis for a very narrow purpose. The second basis for its decision is its finding that the language and legislative his-

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[57] *Id.* The foreign plaintiffs in the other global cartel cases made similar claims. In *Statoil,* the plaintiffs argued that "because the defendants operating in the Gulf of Mexico were able to maintain their monopolistic pricing only because of their overall market allocation scheme …, Statoil's injury in the North Sea was a 'necessary prerequisite to' and was 'the quid pro quo for' the injury suffered in the United States domestic market." 241 F.3d at 425. In *Kruman,* too, the plaintiffs argued that "the domestic price-fixing agreement could only have succeeded with the foreign price-fixing agreement." 284 F.3d at 401. This interdependence was also stressed in the briefs of economists supporting U.S. jurisdiction in *Empagran*. *See, e.g.,* Brief for Certain Professors of Economics, *supra* note 14, at 5-7 (discussing the connections between effects on U.S. and foreign commerce in cartels affecting mobile products).

[58] If, as the Supreme Court notes, they properly preserved that argument. 124 S.Ct. at 2372.

[59] At the least, the lack of connections to the United States would suggest the greater likelihood of dismissal on the basis of *forum non conveniens*. *See* Buxbaum, *supra* note 27, at 374.

[60] 124 S.Ct. at 2370-71.

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tory of the FTAIA did not indicate Congressional intent to expand the reach of U.S. antitrust law to foreign commerce.[61] In arriving at this conclusion, the Court finds "no significant indication" that Congress, at the time the FTAIA was enacted, would have believed the Sherman Act to be applicable to claims based on foreign injuries.[62] The plaintiffs, however, pointed to three Supreme Court decisions predating the FTAIA in which relief had in fact been granted in connection with injuries suffered abroad.[63] They argued that Congress would have been aware of these cases, and therefore believed that the Sherman Act did in fact apply in such circumstances. Because the FTAIA did not explicitly exclude such claims, then, Congress must have intended that they would be permitted post-enactment as well. It is in the context of this argument that the Court addresses the distinction between private and public claims.

The Court suggests that the role of the government as plaintiff, "unlike a private plaintiff, [is to] seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm."[64] It at least implies, then, that private actions serve only a remedial, and not a deterrent, function – a characterization that would be at odds with much of the history behind the use of "private attorneys general" to vindicate public interests.[65] The Court also touches on other differences between public and private enforcement, including the relative unwillingness of private plaintiffs to consider "foreign governmental sensibilities."[66] Ultimately, however, the Court uses these differences merely to conclude that pre-FTAIA cases initiated by the government cannot be used to ascertain what Congress would have intended regarding private cases, and does not discuss further the role of private actions in today's regulatory environment.

Finally, the decision does not grapple directly with the economic policy contentions that might support U.S. jurisdiction over claims based on foreign transactions.[67] The Court acknowledges the argument that permitting U.S. claims would increase global deterrence of anti-competitive behavior; it notes, however, that it is counte-

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[61] 124 S.Ct. at 2369.

[62] *Id.*

[63] See discussion of these cases at 124 S.Ct. at 2369-70.

[64] 124 S.Ct. at 2370.

[65] *See* Buxbaum, *supra* note 36, at 222-225.

[66] 124 S.Ct. at 2370 [internal citation omitted]. This argument has been used in the past to support the notion that courts should apply comity analysis in private claims.

[67] *See supra* notes 12-14 and accompanying text.

red by the argument that permitting such claims would interfere with the prosecution of cartels, by undermining national policies granting amnesty to whistleblowers.[68] It then simply declines to address which is the better argument. That decision is understandable – elsewhere in the opinion, the Court notes the legal and economic complexities that would attend such an analysis in a particular case.[69] In the conclusion to its opinion, however, the Court states that "[W]e can say that the answer to the dispute is neither clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion."[70] Even if the Supreme Court feels that the judiciary is not the appropriate branch of government to consider the question, it is certainly one of empirical significance, and can be expected to play a role in the future development of global antitrust regulation.

Ultimately, the opinion highlights the difficulty inherent in using a system based on territorial authority to address global economic behavior. But pending the development of truly unified global antitrust regulation – whether accomplished under the auspices of the WTO or otherwise[71] – it at least signals a commitment on the part of the U.S. judiciary to consider both the international law limits on jurisdiction and the competing interests of other nations.

[68] 124 S.Ct. at 2372.

[69] 124 S.Ct. at 2368-69.

[70] 124 S.Ct. at 2372.

[71] *See* Fox, *supra* note 27.

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