Fix Prices Globally, Get Sued Locally?
U.S. Jurisdiction over International Cartels

Christopher Sprigman†

The American antitrust laws "do not regulate the competitive conditions of other nations’ economies." But they do regulate conduct, even when it occurs abroad, that harms domestic competition. "[I]t is well established" that the Sherman Act reaches "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."

This jurisdictional "effects" test is theoretically simple, but difficult to apply. One recurring problem is determining whether foreign victims injured abroad by cartels may bring damages claims in U.S. courts. Skirmishes over jurisdiction have featured prominently in many of the private suits that have followed the mid-1990s upsurge in government anticartel enforcement, and circuit courts have split over the proper interpretation of the Foreign Trade Antitrust Improvements Act (FTAIA), a statute that was meant to provide, but has failed to deliver, clarity respecting the Sherman Act’s extraterritorial reach. With the issue ripe for resolution, the Supreme Court in December 2003 granted certiorari in *F Hoffmann-LaRoche, Ltd v Empagran S.A.*, a case involving claims pressed by foreign victims of the global vitamins cartel.

Resolution is, unfortunately, not what we got. The Court issued an opinion reversing the D.C. Circuit, but what the Court actually did

† Fellow, Center for Internet & Society, Stanford Law School. Thanks to Mark Lemley, William Kovacic, Spencer Weber Waller, and John Connor for helpful comments and conversations. The views expressed herein are my own.

1 *Matsushita Electric Industrial Co v Zenith Radio Corp*, 475 US 574, 582 (1986) (denying recovery where alleged cartelization is limited to the Japanese market).


5 124 S Ct 966 (2003), granting cert to 315 F3d 338 (DC Cir 2003).

6 *F Hoffmann-LaRoche, Ltd v Empagran S.A.*, 124 S Ct 2359 (2004).
cannot, on any fair reading, be understood as a reversal. Rather, the Court constructed a hypothetical—whether jurisdiction extends to claims of foreigners who suffer foreign harm “independent” from the domestic harm caused by a cartel—and refused to extend jurisdiction in such a situation.

This Essay attempts, briefly, to sketch the opinion that the Court might have written in Empagran had it addressed the real jurisdictional issue, rather than a hypothetical orthogonal to the case. Law review articles second-guessing Supreme Court decisions can be entertaining and even correct but are usually futile. In this case, however, futility is not inevitable. The Court remanded to the D.C. Circuit for a determination of whether the plaintiffs’ injury is “independent” of domestic harm. For reasons I hope to make clear, the D.C. Circuit should find that foreign and domestic injuries are connected, and, on that basis, allow the suit to proceed. On the same premises, most cases involving claims of foreign plaintiffs will proceed.

If we’re focusing narrowly on subject matter jurisdiction, that’s probably the right answer. But if we think more broadly about the purpose of our antitrust laws and our long-term interest in deterring cartels, it’s clear that the effects test has been asked to bear too much weight. We need jurisdictional rules that encourage the spread of antitrust enforcement responsibility. Unfortunately, however, throughout the recent litigation over the meaning of the FTAIA, courts have focused on (and often botched) the narrow statutory interpretation questions while neglecting the broader enterprise of developing jurisdictional doctrines appropriate to a globalized economy that induces globalized cartels.

In this Essay, I argue that the Empagran Court has gotten the jurisdiction question wrong—it has misapplied the effects test as codified in the FTAIA—but that the right answer does not have to mean what the Court fears it does. Rather, by reintroducing comity considerations into a “jurisdictional rule of reason,” courts will no longer be obliged to distort the test for subject matter jurisdiction in order to conserve U.S. judicial resources, respect the autonomy of other nations, and promote the long-term development and convergence of antitrust regimes around the world.

To that end this Essay proceeds in two parts. Part I examines how courts and Congress have approached extraterritorial application of antitrust law, and traces how subject matter jurisdiction has come to

---

7 Id at 2372 (noting that the Court assumed the injury was independent, but that this was a factual issue to be resolved by the D.C. Circuit on remand).
dominate the analysis and supplant other doctrines that should play a role, including and most importantly, comity.

I argue that the Empagran decision, had it addressed the issues squarely, would have found jurisdiction under the effects test. However, a finding of jurisdiction, even when permitted by the effects test, does not always serve the policy interests of the United States. In Part II, I suggest that rather than do violence to the effects test, courts should reintroduce an expanded analysis that incorporates comity considerations as a second filter supplementing the effects test.

I. THE "EFFECTS TEST" IN THE COURTS AND CONGRESS

A. The Effects Test as a Threshold Inquiry

To understand why the Supreme Court came out as it did in Empagran, it is helpful to look back at the early development of the effects test. The first disputes concerned whether the Sherman Act applied at all to foreign conduct. In American Banana Co v United Fruit Co,\(^8\) the Supreme Court, through Justice Holmes, held that the Act regulated only conduct occurring inside U.S. territory.\(^9\)

That narrow approach began almost immediately to break down. Two years after American Banana, the Court upheld, in United States v American Tobacco Co,\(^10\) a decree ordering the dissolution of a U.K.-based cartel composed of British and American tobacco companies.\(^11\) And in the years following American Tobacco, courts continued to apply the Sherman Act to foreign conduct, at least when some of the impugned conduct occurred domestically and some of the parties were American.\(^12\)

American Banana’s desuetude became clear, however, only three decades later, when Judge Learned Hand confronted a foreign cartel in United States v Aluminum Co of America (Alcoa).\(^13\) Alcoa involved agreements among the Canadian subsidiary of a U.S. firm and several European firms to limit production of aluminum ingot. No U.S.-domiciled company was found to have participated. Judge Hand found that the agreements nonetheless violated the Sherman Act “if they were intended to affect imports [into the United States] and did

---

\(^8\) 213 US 347 (1909).
\(^9\) Id at 359.
\(^10\) 221 US 106 (1911).
\(^11\) Id at 187.
\(^12\) See, for example, United States v Sisal Sales Corp, 274 US 268, 276 (1927) (applying the Sherman Act to conduct that occurred both in the United States and Mexico).
\(^13\) 148 F2d 416 (2d Cir 1945).
affect them. And because the government had demonstrated intent, the burden shifted to defendants to show lack of effect.  

Alcoa thus laid down an “effects” test that emerged as the jurisdictional standard. The test, at least as implemented, has focused on objective evidence of effect. The intent element dutifully has been included in most courts’ articulations of the test, but in practice is usually ignored. This is perhaps not surprising given the difficulty of discerning intent, but something valuable was lost in the compression process: the intent element marked a concern with principles of comity missing from a purely objective test. As Judge Hand wrote in Alcoa:

There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. . . . [W]hen one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.

Three decades after Alcoa, comity concerns began to reemerge. The Ninth Circuit, in its opinion in Timberlane Lumber Co v Bank of America, suggested that the objective test did not account adequately for the interests of foreign states in judging conduct occurring within their territories. Reconceptualizing the effects test as the threshold element of a broader analysis, the Timberlane court proposed a tripartite “jurisdictional rule of reason”:

The antitrust laws require in the first instance that there be some effect—actual or intended—on American foreign commerce . . . . Second, a greater showing of burden or restraint may

---

14 Id at 444 (noting that it did not matter that the agreements were made abroad).
15 Id.
16 See, for example, Sisal Sales Corp, 274 US at 276; United States v Imperial Chemical Industries, Ltd, 100 F Supp 504, 592 (SD NY 1951) (“[A] conspiracy to divide territories, which affects American commerce, violates the Sherman Act.”); United States v Timken Roller Bearing Co, 83 F Supp 284, 309 (ND Ohio 1949), modified and affd, 341 US 593 (1951).
19 148 F2d at 443.
20 549 F2d 597 (9th Cir 1977).
21 Id at 611-12 (“The effects test by itself is incomplete because it fails to consider other nations’ interests.”).
22 Id at 613 (referring to this “jurisdictional rule of reason” as “an evaluation and balancing of the relevant considerations in each case”), quoting Kingman Brewster, Antitrust and American Business Abroad 446 (McGraw-Hill 1958).
be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws. Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.

The *Timberlane* court didn’t tarry on the second element, which, as it explained, functioned simply to filter out cases too small to be worth caring about. The court was much more interested in the third element, which, it said, required that in each case a balance be struck:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The Ninth Circuit’s approach was emulated by other circuits, particularly in *Mannington Mills, Inc v Congoleum Corp.* So although the effects test remained vital, it was, until the Supreme Court’s 1993 decision in *Hartford Fire Insurance Co v California*, increasingly treated as a threshold element of a broader comity-driven analysis.

---

23 549 F2d at 613 (internal citations omitted).
24 Id at 615 n 35 (noting that the quantitative test of substantiality is not based on a formula, but is rather a practical, case-by-case economic judgment).
25 Id at 614.
26 595 F2d 1287 (3d Cir 1979). See also *In re Uranium Antitrust Litigation*, 617 F2d 1248, 1255 (7th Cir 1980) (refusing to reverse as an abuse of discretion a district court judgment finding jurisdiction that did not employ the factors set out in *Timberlane* and *Mannington Mills*, but suggesting that those factors “certainly provide an adequate framework for such a [jurisdictional] determination”); *American Rice, Inc v Arkansas Growers Cooperative Association*, 701 F2d 408 (5th Cir 1983) (adopting a similar approach in a case involving extraterritorial application of the Lanham Act). But see *Laker Airways, Ltd v Sabena, Belgian World Airlines*, 731 F2d 909 (DC Cir 1984) (rejecting the *Timberlane/Mannington Mills* comity balancing test as judicially unworkable).
28 Id at 798–99.
B. Codification of the Effects Test

In 1982, in "a fit of industrial-policy enthusiasm and anti-Japanese hysteria,"
Congset itself to the task of legalizing export cartels. The result was the FTAIA, enacted as part of the Export Trading Company Act of 1982.

Characterized as enacting "a single, objective test" that "will serve as a simple and straightforward clarification of existing American law," the FTAIA largely codifies the Alcoa test, albeit, importantly, without the intent element. As codified in § 6a of the Sherman Act, the FTAIA provides that:

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

Congress expected that the FTAIA would clarify the law. It hasn't worked out that way. In Hartford Fire, its first post-FTAIA engagement with extraterritorial antitrust jurisdiction, the Supreme Court relegated the statute to a footnote: "[I]t is unclear how [the Act] might apply to the conduct alleged here[, and] whether the Act's 'di-

29 Michael Greve and Richard Epstein, Foreign Headaches, Natl L J 27 (July 12, 2004) (discussing how recent Supreme Court decisions have muddied the jurisdictional line between foreign and U.S. law).
32 15 USC § 6a.
rect, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it."

Fifteen years later, lower courts were struggling with basic questions that *Hartford Fire* pushed aside: To what conduct does the FTAIA apply? Does it enact any material change to the effects test? And there is another, deeper, question about the place of comity in the jurisdictional analysis. *Hartford Fire* made note of *Timberlane*, but did not explicitly reject its comity-centered balancing test. The Court did, however, state that comity considerations would be relevant only in cases of “true conflict,” which it defined narrowly as a situation in which it is not possible for a party to comply with the law of both jurisdictions.35 Hannah Buxbaum has noted that “the practical impact of the Court’s decision was to reject the interest-balancing approach.”36 It is unclear whether this “practical rejection” is equivalent to a formal one. Nonetheless, after the FTAIA and *Hartford Fire*, courts weighing subject matter jurisdiction have employed a one-dimensional effects test.

C. *Empagran*

*Empagran* arose from a price fixing and market allocation conspiracy involving many of the largest producers of bulk vitamins and vitamin premixes.38 The conspiracy, dubbed “Vitamins, Inc.” by one of the participants,39 resulted in overcharges estimated to exceed $8 bil-

33 509 US at 796 n 23 (declining to delve into a deeper analysis of the Act because the conduct alleged “plainly meets [the FTAIA’s] requirements”).
34 Id at 798.
35 Id at 798–99 (“No conflict exists, for these purposes, ‘where a person subject to regulation by two states can comply with the laws of both.’”).
37 See Spencer Weber Waller, *The Twilight of Comity*, 38 Colum J Transnatl L 563, 569 (2000) (noting that *Hartford Fire*, while appearing to limit use of comity analysis to instances of “true conflict,” nonetheless “hedged its bets as to whether any other aspect of the *Timberlane* comity analysis could be used”).
lion worldwide,\textsuperscript{40} of which a significant portion was suffered in the United States. The U.S. government reached plea agreements whereby twelve corporations and thirteen individuals admitted to violations and agreed to pay fines exceeding $900 million. Eleven individuals also served prison terms. Cartel participants have also been pursued by antitrust authorities in the European Union, Canada, Australia, and Korea, which together have obtained fines of almost $1 billion.\textsuperscript{41} In addition, plaintiffs in U.S. private lawsuits have recovered in excess of $2 billion — an amount that, even when combined with U.S. and foreign government fines, still falls well short of even single recovery of the total overcharge imposed by the cartel.

The \textit{Empagran} plaintiffs originally filed a class action complaint on behalf of both foreign and domestic purchasers who took delivery outside the United States.\textsuperscript{42} Defendants moved to dismiss the claims of foreign purchasers. The district court, framing the question as "whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws,"\textsuperscript{43} granted defendants' motion.

The district court read the FTAIA to require (1) "that the conduct causing [plaintiffs'] injuries resulted in a direct, substantial, and reasonably foreseeable effect on U.S. commerce,"\textsuperscript{44} and (2) that plaintiffs' injuries must "arise" from the same conduct that harmed U.S. commerce. That the second requirement is redundant of the first isn't hard to see, especially considering the court's characterization of the relevant "conduct" as not the unlawful agreement, but rather the particular "overt acts" (that is, the specific price-fixed transactions) that

\textsuperscript{40} If we account for the time value of money, the overcharge rises to $18 billion. Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents, \textit{F. Hoffmann-La Roche, Ltd v Empagran S.A.}, No 03-724, *10 (S Ct filed Mar 15, 2004) (available on Westlaw at 2004 WL 533930) (approximating profits of roughly $13.6 billion in spite of heavy fines in numerous countries).

\textsuperscript{41} See id at *1a (Appendix); Brief for the United States as Amicus Curiae Supporting Petitioners, \textit{F. Hoffmann-La Roche, Ltd v Empagran S.A.}, No 03-724, *2 (S Ct filed Feb 3, 2004) (available on Westlaw at 2004 WL 234125) ("U.S. Amicus").

\textsuperscript{42} See U.S. Amicus at *2. A civil action has also been filed in the United Kingdom. That action is pending. See \textit{Provimi Ltd v Aventis Animal Nutrition SA and Other Actions}, 2003 Eng & Wales High Ct 961 (Commercial Ct) (holding that a British claimant can sue for its entire loss in the British courts for damages suffered as a result of a breach of European competition law, irrespective of where the loss was suffered, provided that it had jurisdiction over one of the claimants).

\textsuperscript{43} \textit{Empagran S.A. v F. Hoffmann-La Roche, Ltd}, 2001 WL 761360, *1 (D DC).

\textsuperscript{44} Id at *2.

\textsuperscript{45} Id (internal quotation marks and citations omitted).
Based on these premises, the district court decided what it saw as an easy case: “Plaintiffs have not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction.”

A divided panel of the D.C. Circuit reversed. First, the majority found that the relevant “conduct” was the worldwide agreement, not specific transactions that harmed the plaintiffs. Noting that defendants “do not contest that the vitamin cartel produced substantial effects in the United States,” the D.C. Circuit found that § 6a(1)’s “direct, substantial, and reasonably foreseeable effect” requirement had been met.

This holding is, of course, correct. The FTAIA refers to “conduct involving trade or commerce . . . with foreign nations.” The FTAIA amends the Sherman Act; the “conduct” referenced in the statute is, accordingly, the same “conduct” the Sherman Act makes illegal. Sherman Act § 1 prohibits every “contract, combination . . . or conspiracy” in restraint of trade. It is a price-fixing agreement itself, and not individual “transactions,” that is unlawful. Likewise, it is the agreement that counts as “conduct” relevant in the FTAIA analysis.

The balance of the D.C. Circuit’s opinion focuses on the “give rise to a claim” requirement of FTAIA § 6a(2). The central question, in the D.C. Circuit’s view, was whether FTAIA precludes actions under the Sherman Act unless a plaintiff shows that the injuries it seeks to remedy arise from the anticompetitive effects of the defendant’s conduct on U.S. commerce; or, alternatively, is it enough for a plaintiff to show that the anticompetitive effects of the defendant’s conduct on U.S. commerce give rise to an antitrust claim under the Sherman Act by someone, even if not the plaintiff who is before the court?

Put another way, does “a claim” mean “any claim,” or “the plaintiff’s claim”?

---

46 Id.
47 Id at *3.
49 Id at 344.
50 Id.
51 15 USC § 6a (emphasis added).
52 15 USC § 1.
53 Summitt Health, Ltd v Pinhas, 500 US 322, 330 (1991) (“[T]he essence of any violation of § 1 is the illegal agreement itself—rather than the overt acts performed in furtherance of it.”).
54 Empagran, 315 F3d at 344.
The Second and Fifth Circuits had analyzed this question and reached opposite conclusions. In *Den Norske Stats Oljeselskap As v HeereMac Vof*,

a case involving a worldwide conspiracy to allocate territories in the provision of barges used in constructing offshore oil platforms, the Fifth Circuit, reading § 6a(2) to limit jurisdiction to instances in which the plaintiff's injury arises from a U.S. anticompetitive effect, dismissed the claims of a Norwegian oil company that suffered injuries limited to its North Sea operations. In contrast, in *Kruman v Christie's International PLC,*

the Second Circuit allowed to proceed claims brought by buyers and sellers at foreign auctions subject to a worldwide agreement to fix auction fees. Section 6a(2)'s "gives rise to a claim" language, the Second Circuit stated, required only that "the domestic effect violate the substantive provisions of the Sherman Act." Adopting a position close to the Second Circuit's, the D.C. Circuit held that so long as anticompetitive conduct affects U.S. commerce, the "FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce." Unlike the Second Circuit, however, the D.C. Circuit read the "gives rise to a claim" language to require something more than the substantive violation that would allow a government action. Some injured *domestic private plaintiff* must have a claim for parties injured abroad also to have one.

The Supreme Court granted certiorari and—at least nominally—reversed. As explained earlier, the Court's decision is based not on the plaintiffs' jurisdictional allegations, but on a hypothetical. To wit: "We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury." The Court restates its hypothetical several times, but repetition doesn't make it fit the facts. In their complaint, the plaintiffs alleged a

55 241 F3d 420 (5th Cir 2001).
56 Id at 427 ("[T]he FTAIA . . . demands that the domestic effect 'gives rise' to the claim.").
57 284 F3d 384 (2d Cir 2002).
58 Id at 400.
59 *Empagran*, 315 F3d at 350.
60 Id.
61 *Empagran*, 124 S Ct at 2372.
62 Id at 2363 (emphasis added).
63 See, for example, id ("To clarify: The issue before us concerns (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim."); id at 2367 ("We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?"). The Court uses some version of the word "independent" more than twenty times to characterize plaintiffs' injuries.
single conspiracy that "involved the global market for each vitamin or series of vitamins" and that raised the price of vitamins "both within and outside the United States." A global product market is, definitionally, one in which suppliers located anywhere in the world can compete for any particular sale, regardless of geography. The vitamins involved in Empagran trade in a global market: they can be transported cheaply enough, relative to their value, that suppliers anywhere in the world can compete for any particular sale. Accordingly, the vitamin conspirators were obliged to cartelize globally: that is, to bring into the cartel enough of the worldwide supply that the supracompetitive price is defensible against arbitrage.

Not surprisingly, the Empagran complaint alleges that the cartelists sought to do precisely what economic theory would recommend. The complaint charges that the cartel worked "to eliminate competition . . . and to fix the [vitamin] prices and allocate markets worldwide" by conspiring to "injure and destroy businesses that would have reduced defendants' illegal market control" and by "coordinat[ing] price increases . . . throughout the United States and foreign countries." The disconnect between the Court's hypothetical and the plaintiffs' allegations—which must be credited on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure—is troubling. The Court hasn't complied with the spirit of 12(b)(6), but hasn't exactly violated the letter either. Rather, it has simply ignored the allegations.

But there is a deeper problem: the Supreme Court's hypothetical will seldom, if ever, be relevant in a private antitrust action involving a multinational cartel. Harm suffered abroad may be "independent" when separate U.S. domestic and foreign agreements affect goods that trade in national or regional markets. In such an instance, there may be no possibility of arbitrage. How often will this occur? Perhaps the regional market allocation agreements for heavy-lift barge services at issue in HeereMac are an example: if the barges spend their useful lives within a single region, then perhaps harm suffered in the North Sea is "independent" of harm suffered in the United States.

---

64 See Amended Class Action Complaint, Empagran S.A. v E. Hoffmann-LaRoche, Ltd, No 00-1686 ¶ 89 (DC Cir filed Nov 14, 2000) (on file with author) (emphasis added).
65 Id ¶ 1.
66 See Bush Amicus at *7 (cited in note 38) ("International shipping costs for vitamins in the 1990s were well under 5% of the manufacturers' price.").
67 Amended Class Action Complaint ¶ 2 (cited in note 64).
68 Id.
69 Id ¶ 3(a).
70 See text accompanying note 55.
In addition, there are narrow circumstances, even in the context of cartelized products that trade in a global market, where foreign harm may be “independent.” Posit two conspiracies, one limited to U.S. sales and the other affecting some, but not all, foreign markets. The U.S. conspiracy involves all or most major suppliers worldwide. If conspirators are able reliably to detect when consumers are attempting to purchase in a noncartelized jurisdiction, then these regional conspiracies may succeed—albeit temporarily, as significant and durable regional price differences for a transportable good usually attract attention. Similarly, there may be instances in which regulatory barriers prevent arbitrage in goods that would otherwise trade in a world market. These cases may readily be identified.

In most instances, however, cartels dealing in products subject to arbitrage will be forced to reach a global agreement. And under these conditions, harm inflicted on U.S. markets cannot be “independent” of foreign harm. The domestic harm simply would not have occurred but for the globalization of the cartel.

The Court’s interpretation of the FTAIA’s text, like its hypothetical framing of the “facts,” is an exercise in abstraction. The Court assures us that “in all statutory construction cases,” it “begin[s] with the language of the statute.” 7 Yet the Court does not examine the FTAIA’s text. Rather, the Court opens its analysis with a summary declaration of the statute’s ambiguity,72 and moves immediately to policy concerns—namely, the desire “to avoid unreasonable interference with the sovereign authority of other nations.”

We will return to the Court’s policy analysis. First, however, a few words on the statute’s supposed ambiguity. Various commentators have remarked that the FTAIA is badly drafted. But poor drafting doesn’t necessarily entail ambiguity, nor does it mean that the statute as a whole is ambiguous.73

---

72 Empagran, 124 S Ct at 2366.
73 Id.
74 The FTAIA’s preamble—the part that determines where the statute’s jurisdictional test applies—is ambiguous. The statute is applicable to “conduct involving trade or commerce (other than import trade or import commerce) with foreign nations.” 15 USC § 6a. U.S. commerce with foreign nations that is not import commerce would either be export commerce (to which the FTAIA clearly applies) or commerce between and among entities operating abroad—a category of “purely foreign transactions” that the legislative history suggests, see HR Rep No 97-686 at 9-10 (cited in note 31), and the Court in Empagran holds, 124 S Ct at 2365, is also covered.

But there is a word in the preamble with which no court has yet grappled: the statute’s application to conduct involving certain types of trade or commerce. The term “involving” suggests that “conduct” may affect more than one category of commerce. That proposition is certainly true, as may be seen from the vitamins cartel: price-fixed vitamins were imported into the U.S., exported from the U.S., and purchased abroad.
Sections 6a(1) and 6a(2) of the FTAIA are not ambiguous. Section 6a(1) limits jurisdiction to "conduct" that has the requisite "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce, import commerce, or the export opportunities of a U.S. exporter. Section 6a(2) further limits jurisdiction to instances in which the "effect" required to satisfy § 6a(1) "gives rise to a claim" under the Sherman Act. "A claim," not "the plaintiff's claim."

There is nothing ambiguous about the requirement that the domestic effect give rise to "a claim." The text's natural reading in its Sherman Act context is to limit jurisdiction to those instances where the "effect" on U.S. commerce is of the kind—that is, a harm to competition—that the antitrust laws prohibit, and that, as a consequence, the U.S. may wish to regulate. The requirement of harm to competition is the traditional test for antitrust injury. And this is exactly the reading supported, with uncommon clarity, in the legislative history.

The House Report states, under the heading "Type of Domestic Impact," that the language of § 6a(2) is intended to ensure that jurisdiction will arise only where foreign conduct had some harmful, rather than beneficial, effect on U.S. markets:

[T]he legislation . . . could have been read as ignoring whether conduct has an adverse effect on competition. . . . Under such an interpretation, conduct which has an anticompetitive effect which impinges only on defendants located in foreign nations and which has a neutral or procompetitive domestic effect would be subject to the antitrust laws.

The committee did not believe that the bill . . . was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full committee added language to the Sherman and FTC Act amendments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct

---

So how does the presence of the term "involving" affect the FTAIA's scope? One may read the statute as applying whenever an unlawful agreement affects any export or purely foreign commerce, no matter what other effects it might have on U.S. domestic or import commerce. But the language also permits a second reading antithetical to the first: that the statute does not apply whenever an unlawful agreement affects any U.S. domestic or import commerce.

providing the basis of the claim has had the requisite impact on ... United States [commerce].

The same section of the House Report refers approvingly to *National Bank of Canada v Interbank Card Association,* a decision of the Second Circuit holding that courts have jurisdiction to hear antitrust claims arising out of foreign conduct if it had the “effect” of causing “injuries to United States commerce which reflect the ... anticompetitive acts made possible by the violation.” Under this test, foreign anticompetitive conduct is actionable if it either (1) reduces the competitiveness of a domestic market, or (2) makes possible anticompetitive conduct directed at domestic commerce.” The first prong addresses foreign cartels aimed, at least in part, at the United States. The second prong addresses cartels that affect only foreign commerce but that enable a separate U.S.-focused cartel—by, for example, protecting it against arbitrage. Neither prong focuses on the plaintiff's injury; jurisdiction depends on injury to U.S. commerce.

The plain language in § 6a(2) fits perfectly with the legislative history and with common sense. The U.S. interest in applying its antitrust law to foreign conduct is limited to instances where domestic competition is harmed; accordingly, § 6a(2) withdraws jurisdiction where foreign conduct does not harm the home market. Any remaining doubt on that score is eliminated by Congress’s rejection of language proposed by business groups that explicitly would have prohibited suits by persons injured abroad. Those who would require a link between U.S. harm and particular transactions that injured the plaintiff are, therefore, arguing for what Congress spurned. And, perhaps even

---

76 HR Rep No 97-686 at 11-12 (cited in note 31).
77 666 F2d 6 (2d Cir 1981).
78 Id at 8.
79 Id.
80 Business groups offered varied proposals in order to limit the FTAIA’s reach to persons injured abroad. See Foreign Trade Antitrust Improvements Act, Hearings on S 795 Before the Committee on the Judiciary, 97th Cong, 1st Sess 130 (1981) (statement of the Business Roundtable) (“If conduct involving trade or commerce with foreign nations does directly, substantially, and foreseeably restrain trade or commerce within the United States, then the parties engaging in such conduct shall be liable only for any injury so occurring within the United States by reason of such restraints”) (emphasis added); Foreign Trade Antitrust Improvements Act, Hearings on HR 2326 Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, 97th Cong, 1st Sess 39 (1981) (statement of David N. Goldsweig, General Motors Corporation) (emphasis added):

This Act shall not apply to conduct involving trade or commerce with any foreign national unless, and only to the extent that, such conduct has a direct, substantial and foreseeable effect on trade or commerce within the United States or has the direct, substantial and foreseeable effect of excluding a domestic person from trade or commerce with such foreign nation.
more disturbingly, the argument is based on a determination to see statutory ambiguity where there is none. Such an approach disrespects Congress's lawmaking primacy.

II. REVIVING THE JURISDICTIONAL RULE OF REASON

As a matter of judicial forensics, it is not difficult to reconstruct why the Empagran Court ended up issuing an unconvincing and mostly irrelevant opinion. Caught between the need to avoid a situation where U.S. courts become the global forum of choice for antitrust plaintiffs and a statute that, if treated as the sole jurisdictional test, opens the door to most foreign plaintiffs, the Court did the best it could: it stalled for time.

Empagran shows that we cannot rely solely on the effects test. We need, instead, to develop a more subtle analysis that admits foreign plaintiffs where U.S. interests are directly advanced, but turns away those claims where we should leave regulation to others. We need to revive a "jurisdictional rule of reason."81

The competing interests that courts must balance are clear enough. On the one hand, if foreign claimants who lack remedies at home cannot recover in U.S. courts, there is a risk, as the Court noted a quarter century ago in Pfizer, Inc v Government of India,82 of under-deterrence:

If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home.83

There is, however, a countervailing dynamic not yet in evidence when the Court decided Pfizer. Ultimately, our interest in protecting U.S. markets will be better served if we convince our trading partners to set up both vigorous government enforcement and the provision of private damages. Overassertion of U.S. antitrust jurisdiction will not conduce to that end.

81 See generally Spencer Weber Waller, The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation, 14 Loyola Consumer L Rev 523, 525–26 (2002) (explaining the "jurisdictional rule of reason" as allowing "no subject matter jurisdiction unless there is a substantial intended effect on the United States" and the "U.S. interest is not out-weighed by the interests of the foreign parties and the foreign countries affected by the exercise by our jurisdiction").
83 Id at 315 (permitting a sovereign foreign nation to sue under U.S. antitrust law).
Of course, balancing these factors will require a fact-specific analysis in each case, which may threaten to become, as the Empagran Court suggested with respect to the Timberlane/Mannington Mills approach, "too complex to prove workable." The challenge is to formulate a test that is both flexible and administrable. What follows are a few notes toward a simplified comity analysis that recaptures most of the benefits of the Timberlane/Mannington Mills approach, without increasing the risk that courts will be overmatched by the complexities of a multidimensional test.

A threshold question is whether the narrow compass given to comity concerns in Hartford Fire and Empagran forecloses the supplementation of a broader comity-based jurisdictional analysis. Hartford Fire likely does not, for the Court in that case stated explicitly that it was expressing no view "on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity." The Court's decision in Empagran is a somewhat harder case, but is also best read as not foreclosing an expanded comity analysis. The Empagran opinion is, as we have seen, limited to an analysis of whether the FTAIA extends jurisdiction to the claims of foreigners who have suffered "independent" foreign harm. The Court held that in such an instance comity concerns militate strongly against jurisdiction. But it is important to note that the Court uses comity only to inform its application of the statute to its hypothetical. It does not consider whether comity has a role when the foreign harm is not "independent"—which, as we have seen, will be the case for most foreign plaintiffs. Nor does the Court address whether, having found the effects test satisfied, a court may nonetheless deny jurisdiction based on comity concerns.

In sum, Hartford Fire and Empagran leave sufficient space for lower courts to develop comity-based limitations on jurisdiction. The next question, then, is how courts might begin to reintroduce comity into the analysis. There are many factors—such as those contained in the lengthy lists offered in Timberlane and Mannington Mills—that

---

84 See notes 20–26 and accompanying text.
85 Empagran, 124 S Ct at 2368–69 (explaining how courts would have to compare foreign law with American law with respect to how it treats a variety of potentially anticompetitive conduct and that “[t]he legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings”).
86 509 US at 798 (noting that Congress expressed no view on whether a court should ever decline jurisdiction based on international comity and that the Court "need not decide that question here" because "international comity would not counsel against exercising jurisdiction in the circumstances alleged here").
87 124 S Ct at 2366–67.
could be relevant. An important goal, however, is to simplify the analysis by identifying a core set of comity concerns that will both be easily administrable and enable courts to inquire effectively into whether U.S. interests are advanced by accepting jurisdiction or repelling it. In the remainder of this Essay, I outline three broad principles that could help organize such an analysis: (1) limiting the expanded jurisdictional test to cartel claims; (2) taking account, either as a matter of comity or forum non conveniens, of available foreign remedies; and (3) measuring the U.S. effect of a cartel relative to its effect abroad. Operating together, these three principles will enable courts to account for comity concerns without allowing what should be a threshold jurisdictional analysis to overwhelm the substantive issues in the dispute.

A. Applying Comity Analysis to Cartel versus Noncartel Claims

Price fixing and market allocation cartels, which have been termed the "supreme evil" of antitrust, are condemned in the antitrust laws of nearly all major trading countries. So there will seldom be a direct conflict in substantive competition policies similar to that faced in *Hartford Fire.*

Obversely, there are large variances among nations in the treatment of other potentially anticompetitive practices, including, most notably, vertical restraints. As a consequence, there is a potentially greater risk of conflict between substantive rules where foreign plaintiffs come to U.S. courts complaining of injuries arising from noncartel conduct.

Exploring the application of comity principles to foreign non-cartel claims is outside the scope of this Essay, but suffice to say that comity analysis is made more difficult by uncertainty regarding the degree of conflict between foreign and U.S. rules. The problem, as the *Empagran* Court saw it, is that courts will have to expend significant resources in determining whether there is a policy conflict:

88 See *Timberlane*, 549 F2d at 614-15; *Mannington Mills*, 595 F2d at 1297-98.
91 509 US at 797-99 (noting that the alleged conspiracy, while prohibited under U.S. antitrust laws, was legal in the U.K.).
92 See Wilbur Fugate, 2 *Foreign Commerce and the Antitrust Laws* § 16.6 (Little, Brown 5th ed 1996).
The Sherman Act covers many different kinds of anticompetitive agreements. Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, and various forms of joint venture, in respect both to primary conduct and remedy.\footnote{Empagran, 124 S Ct at 2368–69.}

We will return to the problem of differing remedies in a moment. With respect to courts' ability to determine the compatibility of substantive rules, the concerns raised in Empagran are valid, though probably overblown. Given the substantial convergence of developed-world antitrust regimes, and the relatively isolated and well-understood areas of nonconvergence, there will be many cases where the compatibility of or conflict between foreign and domestic legal rules, and therefore the related comity interests, are clear. In all of these cases, comity interests are readily discernable. In cases where comity interests are not clear, courts may always choose to restrict their jurisdictional analysis to the effects test. However, it remains true that because there is agreement on illegality, U.S. courts are less likely in cartel cases to invade the comity interests arising from foreign nations’ commitment to a particular legal policy.

B. Declining to Extend Jurisdiction in Favor of a Foreign Remedy

Even in cartel cases, a conflict may arise in the application of U.S. remedies when a plaintiff's home jurisdiction has established remedies of its own. Comity concerns are most likely to arise when foreign remedy schemes differ from ours. But even where a foreign jurisdiction offers equivalent remedies, comity concerns may still arise if foreign plaintiffs come to U.S. courts to avoid foreign procedural hurdles—such as stinting discovery provisions—that make recovery less likely.

Whether foreign and U.S. remedies are aligned or not, dismissal on comity or \textit{forum non conveniens} grounds will often be appropriate if a plaintiff's home jurisdiction provides adequate remedies—a proposition with which counsel for the plaintiffs in Empagran agreed at oral argument.\footnote{See Transcript of Oral Argument, \textit{F. Hoffmann-La Roche Ltd v Empagran S.A.}, No 03-724, *40–41 (S Ct Apr 26, 2004) (available on Westlaw at 2004 WL 1047902).} An aggressive policy favoring comity-based dismissals might create a two-tiered system, where foreign plaintiffs from developed antitrust regimes such as the EU, Australia, and Canada are often barred from U.S. courts, while plaintiffs from many developing countries are admitted. Given the significant damage done by multinational cartels to developing country markets with weak antitrust
enforcement programs,\textsuperscript{9} preserving U.S. courts as a forum for developing country plaintiffs makes sense.

It is important to note, however, that the real impetus for such a policy is to spread enforcement responsibility and encourage better overall results, and not to avoid disagreements regarding antitrust remedies. Indeed much of the supposed disagreement about antitrust remedies—in particular, about treble damages—is misguided.\textsuperscript{98} As Clifford Jones has noted, “the vision of windfall treble damages in the United States perceived from abroad falls rather short of reality.”\textsuperscript{99} The U.S. rule does not include provision for prejudgment interest, whereas the EU compensatory damages regime does, and “[d]epending on the length of time from injury to judgment . . . the lack of prejudgment interest alone can reduce nominally treble damages to single damages or less.”\textsuperscript{100}

There is significant reason to doubt, moreover, that even treble damages are sufficient. Adequate deterrence requires the imposition of penalties that not only remove all of a cartel’s supracompetitive profits, but that also reflect the likelihood of detection.\textsuperscript{97} The economic literature on the risk of cartel detection is scanty. One empirical study examining U.S. domestic cartels finds, at most, a risk of detection of between 13 and 17 percent.\textsuperscript{100} That would imply that penalties must equal between six- and sevenfold the cartel’s profits for deterrence to be optimal, and potentially higher if international cartels are more difficult to detect and prosecute than domestic ones.\textsuperscript{101}

\textsuperscript{95} See Margaret Levenstein and Valerie Y. Suslow, Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy, 71 Antitrust L J 801 (2004).

\textsuperscript{96} See ABA Section of Antitrust Law, 2 Antitrust Law Developments 1208-09 (5th ed 2002) (noting foreign blocking statutes).


\textsuperscript{98} Id.

\textsuperscript{99} See Richard A. Posner, Economic Analysis of Law § 4.9 at 77–78 (Little, Brown 1972) (suggesting that damages in excess of compensation are necessary to deter intentional torts because not all perpetrators are caught).


\textsuperscript{101} See James M. Griffin, An Inside Look at a Cartel at Work: Common Characteristics of International Cartels, remarks before the ABA Section of Antitrust Law Annual Spring Meeting, Washington, D.C. (Apr 6, 2000), online at http://www.usdoj.gov/atr/public/speeches/4489.pdf (visited Nov 20, 2004) (illuminating the many means of hiding international cartels, such as use of trade association meetings).
Yet the Organisation for Economic Co-operation and Development (OECD) found that fines imposed on international cartels in the late 1990s failed to recover even single damages.\textsuperscript{102} The OECD surveyed enforcement schemes and concluded that while the laws of most member countries allow for large fines (and many countries have actually recovered large fines), fewer than half of OECD member countries provide for recovery of compensatory damages by cartel victims.\textsuperscript{103} Even in those countries—other than the U.S.—in which compensatory damages are theoretically available, they are seldom awarded in fact.\textsuperscript{104}

U.S. courts should focus on the interests of domestic enforcement in deciding whether to extend jurisdiction. And ordinarily, if foreign authorities recover fines adequate to provide deterrence for their proportion of a cartel’s total activities, a particular jurisdiction’s failure to provide for civil damages is of no concern to U.S. antitrust policy. But against the baseline of underenforcement found by the OECD and others, courts should be cautious in disclaiming jurisdiction.

There are situations nonetheless where deference to foreign remedies will make sense. The U.S. government does obtain prison sentences—it did so against several participants in the vitamins cartel that was the source of the Empagran litigation—and the threat of prison provides extra deterrence that is not readily quantifiable but likely very significant (especially considering Congress’s recent expansion of prison sentences for criminal Sherman Act violations from three to ten years).\textsuperscript{105} So for cartels where participants have been sentenced to prison terms, courts may allow foreign jurisdictions to determine civil penalties for injured foreign parties without as great a likelihood of systematic underdeterrence. The same opportunity for comity-based deference would arise where a foreign jurisdiction has imposed prison terms. Aside from the U.S., however, only Canada at present has sentenced individuals to terms of imprisonment, and it has

\textsuperscript{102} OECD Report at Annex A (cited in note 90). See also Simon J. Evenett, Margaret C. Levenstein, and Valerie Y. Suslow, \textit{International Cartel Enforcement: Lessons from the 1990s}, 24 World Economy 1221, 1237 (2001) (discussing how in the age of international cartels, “even those anti-trust authorities that base their fines on the illicit gains from cartelization do not consider the harm done outside their jurisdiction and so current practices are unlikely to deter multi-market cartels”).

\textsuperscript{103} OECD Report at 15 (cited in note 90) (noting that compensatory damages by cartel victims are often considered “as a component of pecuniary sanctions to which cartel participants are exposed”).

\textsuperscript{104} Id.

done so in only three instances. If we wish to expand the circumstances in which courts may defer to foreign remedies, we should seek to expand the number of jurisdictions that criminalize cartel activity and that punish violations with prison terms for individuals. Perhaps by extending the carrot of judicial deference to foreign remedies, the U.S. will find more success in convincing our trading partners to expand their enforcement efforts beyond fines.

Courts should also feel more comfortable deferring to foreign remedies when U.S. or foreign enforcement authorities have explicitly sought fines based on a cartel’s worldwide overcharges. Somewhat oddly, the policy of the U.S. government, as revealed in its amicus brief recommending denial of certiorari in HeereMac, is to consider only affected domestic commerce in calculating fines. The government states that it may request upward adjustment to reflect foreign overcharges. But apparently this power is little-used: the government cited only two plea agreements in which fines were enhanced, providing as an example one conspirator’s agreement to increase fines by a paltry $20 million to reflect foreign price-fixed sales of over $1 billion. In contrast, the EU has suggested in proceedings related to the vitamins cartel that it will calculate fines based on worldwide cartel overcharge:

The Commission considers it appropriate [in determining fines] to appraise the relative importance of an undertaking in each of the vitamin product markets concerned on the basis of their respective worldwide turnover. This is supported by the fact that each cartel was global in nature, the object of each was, inter alia, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA [European Economic Area] market.

---

106 See OECD Report at 11-12 (cited in note 90). The U.S. has actively imposed imprisonment as punishment for cartel involvement, sentencing twenty-eight individuals in 1999 and eighteen in 2000, with an average imprisonment term of eight months in 1999 and ten months in 2000. Canada imprisoned three defendants, with the longest sentence term being one year; other defendants were required to perform community service for a specified period. Id.

107 Brief for the United States and the Federal Trade Commission as Amici Curiae, Statoil ASA v HeereMac V.O.F., No 00-1842, *8 (S Ct filed Jan 3, 2002) (available on Westlaw at 2002 WL 32157022) ("It is the policy of the United States to calculate the Base Fine by using only the domestic commerce affected by the illegal scheme, and in all but two of the dozens of international cartel cases prosecuted, fines obtained by the government were based solely on domestic commerce.").

108 Id ("[T]he level of foreign sales was used as an indication of the company’s culpability.").

Were the U.S. authorities to adopt the EU approach, courts would find additional opportunity to defer to foreign remedies.

C. Reformulation of the Effects Test

Finally, the first element of an expanded jurisdiction analysis, the effects test, may be reformulated to encompass comity concerns. It is important first to note that a perceived offense to comity no longer attends every instance of jurisdiction over extraterritorial conduct: the effects test has now been accepted by many nations—including our major trading partners—as a valid basis for assertion of regulatory authority. Additionally, the U.S. now has international antitrust enforcement cooperation agreements with Germany, Australia, Canada, the EU, Brazil, Israel, Japan, and Mexico. While these agreements are limited to government enforcement actions and do not affect private litigation, "they indicate that tensions related to extraterritorial enforcement of U.S. antitrust law have eased as other jurisdictions have become more cognizant of the need for antitrust enforcement."

So an analysis that uses domestic effects as its starting point does not in itself raise significant comity concerns—at least in the ordinary case found in a multinational cartel where foreign harms are not "independent" from domestic harm. And the opportunity exists to reintroduce, in a limited way, comity concerns into the effects test itself. One way would be to strengthen the substantiality requirement. While it is impractical to set an absolute threshold for substantiality, it may make sense to inquire whether a cartel's effect on U.S. commerce is substantial relative to its effect abroad. Deference may be warranted when the foreign effect predominates, especially when the relevant foreign jurisdictions are able and willing to enforce their antitrust laws in a manner that will provide adequate deterrence.

CONCLUSION

The Sherman Act extends to foreign conduct that affects U.S. commerce. Yet just because a court may exercise jurisdiction over such conduct doesn't mean that it should in every instance. There are

---

112 Jones, 16 Loyola Consumer L Rev at 420 (cited in note 97) (further explaining how the EU has adopted "something akin to the U.S. 'effects' doctrine," making the United States' actions more internationally accepted).
cases for which other nations should be bearing the burdens of enforcement, at least for the claims of their own nationals.

The infirmities of the Supreme Court's opinion in Empagran make clear that we cannot rely solely on the current one-dimensional test for subject matter jurisdiction to allocate responsibility. It is too early still to forecast the revival of a jurisdictional rule of reason, but the D.C. Circuit and other courts, forced to deal with foreign cartel plaintiffs in the aftermath of Empagran, may be obliged by circumstances to begin a path back to the case-specific, comity-based analysis that the Supreme Court has slighted but never fully repudiated.