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Case Comment on F. Hoffman-LaRoche Ltd. v. Empagran S.A. In 'The Supreme Court 2003 Term: Leading Cases. III Federal Statutes and Regulations: E. Foreign Trade Antitrust Improvement Act'

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tle (if anything) to the Executive's ability to influence the dismissal of cases involving foreign sovereigns.⁷⁶

Instead of straying beyond the facts of the case and reviving the process of executive suggestion in immunity determinations, the *Altmann* Court should have confined its opinion strictly to the retroactivity of the FSIA. Such an approach, although leaving unresolved the academic tension between sovereign immunity principles and practice, would have yielded far better practical results by preserving ample opportunity for the Executive to exercise its political clout while steering clear of the uncertainty and troublesome constitutional questions the *Altmann* Court has injected into sovereign immunity doctrine.

E. Foreign Trade Antitrust Improvement Act

Foreign Antitrust Liability. — After much deliberation, the World Trade Organization has added antitrust cooperation to the list of issues to be negotiated in the Doha Round of multilateral trade talks.¹ This development reflects the realization that increasing economic interdependence creates opportunities for a multinational corporation to harm consumers from beyond a nation's borders, often with the tacit approval of that corporation's home country.² The United States has long been aware of this phenomenon; since Judge Learned Hand penned *United States v. Aluminum Co. of America*³ (*Alcoa*) in 1945, U.S. courts have routinely extended the Sherman Act beyond our shores to encompass anticompetitive behavior abroad that affects prices in the American market.⁴ Last Term, in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*,⁵ the Supreme Court reined in this practice by placing substantial limits on the Sherman Act's extraterritorial reach. The Court's elevation of comity over consumer protection was a dramatic departure from previous antitrust cases and failed to appreciate the value of the Sherman Act's deterrent effect in an era of increasing globalization.

⁷⁶ This is particularly so considering the Court's reluctance to describe how much deference should be given to the Executive's immunity suggestions. See *supra* note 70.

¹ See Edward T. Swaine, *Against Principled Antitrust*, 43 VA. J. INT'L L. 959, 959-60 (2003).

² See, e.g., Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified in scattered sections of 12, 15, and 30 U.S.C.) (exempting from U.S. antitrust prosecution companies whose anticompetitive activities harm only foreign markets); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 779 (1993) (holding that British reinsurance agencies violated the Sherman Act through anticompetitive activities that were legal in the United Kingdom).

³ 148 F.2d 416 (2d Cir. 1945).

⁴ See, e.g., *Hartford Fire*, 509 U.S. at 779; *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 612 (9th Cir. 1976).

⁵ 124 S. Ct. 2359 (2004).

At issue in *Empagran* was the meaning of a single article — “a” — in the Foreign Trade Antitrust Improvement Act of 1982⁶ (FTAIA). The FTAIA, an unnecessarily complicated statute that “has been charitably described as ‘cumbersome and inelegant,’”⁷ generally excludes from the Sherman Act any anticompetitive behavior arising from foreign trade.⁸ It does, however, contain a two-pronged exception to this exclusion: foreign trade is actionable under the Sherman Act if that trade has a “direct, substantial, and reasonably foreseeable effect” on U.S. trade or commerce⁹ and if the effect would give rise to “a claim” under the Sherman Act.¹⁰ How courts should interpret the phrase “a claim” would determine whether the FTAIA permits foreign plaintiffs to sue foreign defendants in a U.S. court for anticompetitive behavior that injured the plaintiffs abroad but also affected U.S. commerce. The plaintiffs, a consortium of foreign and domestic consumers, alleged that the defendants comprised a worldwide cartel to fix the price of vitamins in violation of the Sherman Act.¹¹ The defendants filed a motion to dismiss, arguing that the FTAIA denied subject matter jurisdiction over the plaintiffs’ claim because the alleged injury took place outside U.S. territory.¹² The plaintiffs contended that Congress’s use of “a claim” rather than “the claim” in the FTAIA permitted them to sue for anticompetitive injury suffered abroad, as long as the injury stemmed from conduct that also affected U.S. commerce.¹³ The district court disagreed, finding that “the effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws.”¹⁴

⁶ 15 U.S.C. § 6a (2000).

⁷ Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. REV. 2151, 2157 (2003) (quoting 1A PHILIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 272 (2d ed. 2000)). Another commentator states that the FTAIA is “not destined for inclusion in a manual of style.” Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT’L L. 275, 288 (2002) (quoting MILTON HANDLER ET AL., *TRADE REGULATION: CASES AND MATERIALS* 1197 (4th ed. 1997)) (internal quotation marks omitted).

⁸ See 15 U.S.C. § 6a.

⁹ *Id.* § 6a(1).

¹⁰ *Id.* § 6a(2).

¹¹ *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, Civ. No. 00-1686, 2001 U.S. Dist. LEXIS 20910, at *3 (D.D.C. June 7, 2001).

¹² *Id.* at *4-5.

¹³ See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 340-41 (D.C. Cir. 2003).

¹⁴ *Empagran*, 2001 U.S. Dist. LEXIS 20910, at *7; see also *id.* at *13. The district court dismissed only the foreign plaintiffs, because the domestic plaintiffs’ injuries could be actionable despite being suffered abroad if the plaintiffs could prove they had purchased their vitamins in interstate commerce. See *id.* at *13. The domestic plaintiffs later transferred their claims to another pending case and settled, while the foreign plaintiffs appealed. See *Empagran*, 315 F.3d at 343.

The D.C. Circuit reversed, seeking a middle ground between the two then-existing interpretations of the FTAIA.¹⁵ The Fifth Circuit had previously held that the second prong of the FTAIA exception required the effect on U.S. markets to give rise to “the antitrust claim” at issue.¹⁶ In contrast, the Second Circuit had recognized the deterrence value of allowing foreign plaintiffs to punish companies that violated the Sherman Act, and therefore interpreted the FTAIA to make actionable any conduct whose domestic effects violated the Sherman Act.¹⁷ The D.C. Circuit explained that it found the Fifth Circuit’s test “overly rigid” and that the Second Circuit’s test “seem[ed] to reach too far” in the other direction.¹⁸ After determining that the plain language of the statute “does not clearly resolve the question whether ‘a claim’ means the plaintiff’s claim,”¹⁹ the court looked to legislative history and to the importance of deterring anticompetitive behavior.²⁰ Although both parties were able to find some support in the legislative history, the court reasoned that the only way to read the otherwise conflicting history consistently was to conclude that, “as a whole,” it “support[ed] the less restrictive interpretation of the FTAIA.”²¹

The D.C. Circuit found further guidance in *Pfizer Inc. v. Government of India*.²² In *Pfizer*, the Supreme Court permitted a foreign government to seek treble damages for a Sherman Act violation, holding that “denying a foreign plaintiff injured by an antitrust violation the right to sue . . . ‘would lessen the deterrent effect’ of the antitrust laws.”²³ Although it recognized that *Pfizer* differed from the case at bar, the D.C. Circuit found that deterrence was a persuasive rationale for permitting the foreign plaintiffs to sue.²⁴ Unlike the Second Circuit, however, the D.C. Circuit was unwilling to permit foreign plaintiffs to sue for just *any* Sherman Act violation. Instead, the court determined, subject matter jurisdiction exists only if “[t]he anti-competitive conduct itself [violates] the Sherman Act *and* the conduct’s harmful effect on United States commerce [gives] rise to ‘a claim’ by someone, even if not the foreign plaintiff who is before the court.”²⁵

¹⁵ See *Empagran*, 315 F.3d at 341.

¹⁶ *Den Norske Stats Oljeselskap AS v. Heeremac VOF*, 241 F.3d 420, 426 (5th Cir. 2001).

¹⁷ *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 390, 403 (2d Cir. 2002).

¹⁸ *Empagran*, 315 F.3d at 341.

¹⁹ *Id.* at 349.

²⁰ See *id.* at 350.

²¹ *Id.* at 352.

²² 434 U.S. 308 (1978).

²³ *Empagran*, 315 F.3d at 355 (quoting *Pfizer*, 434 U.S. at 315).

²⁴ See *id.* at 356.

²⁵ *Id.* at 341 (emphasis added).

The Supreme Court reversed.²⁶ Writing for the Court, Justice Breyer first resolved the threshold issue of whether the FTAIA's blanket exclusion applies only to export commerce (American goods produced for sale abroad) and not to import commerce (such as that at issue in *Empagran*).²⁷ The Court quickly debunked this myth, noting that "the FTAIA originated in a bill that initially referred only to 'export trade or export commerce'"²⁸ but that, according to the House Report, the language was changed "deliberately to include commerce that did not involve American exports but which was wholly foreign."²⁹

After finding that the FTAIA exempts import commerce in general from Sherman Act jurisdiction, the Court then determined whether the FTAIA exception resurrected the plaintiffs' claim.³⁰ In deciding that it did not, the Court relied heavily on the notion that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."³¹ This rule, Justice Breyer wrote, reflects customary international law, which "(we must assume) Congress ordinarily seeks to follow."³² Courts must recognize, the majority reasoned, that "in today's highly interdependent commercial world," this rule assumes that legislators "take account of the legitimate sovereign interests of other nations when they write American laws" so as to achieve international legal harmony.³³ The Court acknowledged that in previous cases comity had taken a backseat to Congress's desire "to redress *domestic* antitrust injury that foreign anticompetitive conduct [had] caused."³⁴ But when the conduct "causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim," the justification for interference with another nation's sovereignty "seems insubstantial."³⁵ The FTAIA's purpose was to release from Sherman Act prosecution any conduct causing foreign harm,³⁶ and while there is an exception if that conduct also causes domestic harm, "any independent domestic harm the foreign conduct causes here has, by definition, little or nothing to do with the matter."³⁷

²⁶ *Empagran*, 124 S. Ct. at 2363.

²⁷ *See id.* at 2365–66. Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, and Ginsburg joined Justice Breyer. Justice O'Connor took no part in the case.

²⁸ *Id.* at 2365 (quoting H.R. 5235, 97th Cong. § 1 (1981)).

²⁹ *Id.*

³⁰ *See id.* at 2366.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2367 (emphasis omitted).

³⁶ *See id.*

³⁷ *Id.*

Justice Breyer also cited the amicus briefs of foreign governments, which argued that applying U.S. antitrust remedies — particularly the granting of treble damages — would unjustifiably upset the balance of policy interests those countries had achieved in determining their own antitrust schemes.³⁸ While plaintiffs asserted that courts could account for comity considerations on a case-by-case basis, the majority rejected this approach as “too complex to prove workable.”³⁹ Overall, the Court held that it must assume Congress meant to respect the legislative processes of other nations and that, “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.”⁴⁰

Additionally, the Court reasoned that the FTAIA’s language and legislative history indicate Congress sought either to clarify or to limit the scope of the Sherman Act, not to expand it.⁴¹ The Court found no indication that, prior to enactment of the FTAIA, the Sherman Act had permitted foreign plaintiffs to sue for foreign harm in U.S. courts when the same conduct created domestic harm as well.⁴² In fact, the Court cited *Timberlane Lumber Co. v. Bank of America*,⁴³ “a leading contemporaneous lower court case,” for the notion that the domestic effect had to be “sufficiently large to present a cognizable injury to the plaintiffs.”⁴⁴

Justice Scalia filed a short opinion concurring in the judgment, which Justice Thomas joined.⁴⁵ Justice Scalia concurred because “the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries’ laws within their own territories.”⁴⁶

At first glance, *Empagran*’s reliance on comity seems to fit within the jurisprudence of an increasingly cosmopolitan Court. But the international flavor of the decision masks the dissonance between this case and previous antitrust opinions. Since the 1940s, the Court has

³⁸ See *id.* at 2368. Several countries, including Germany, Canada, and Japan, submitted amicus briefs. See *id.*

³⁹ *Id.*

⁴⁰ *Id.* at 2369.

⁴¹ *Id.*

⁴² *Id.* The Court distinguished six cases that respondents offered to support their argument; in three cases, the plaintiff was the United States, which is not subject to FTAIA restrictions, while the other three did not involve independently caused foreign injuries. See *id.* at 2369–71.

⁴³ 549 F.2d 597 (9th Cir. 1976).

⁴⁴ *Empagran*, 124 S. Ct. at 2371 (quoting *Timberlane*, 549 F.2d at 613 (emphasis added)).

⁴⁵ *Id.* at 2373 (Scalia, J., concurring in the judgment).

⁴⁶ *Id.*

not wavered from the belief that the congressional intent underlying the Sherman Act was to protect American consumers from the ill effects of anticompetitive behavior, regardless of formalities such as the defendant's nationality or the location of the conduct at issue.⁴⁷ In reversing this trend, the Court's overly formalistic distinction between foreign and domestic plaintiffs added an unnecessary layer of protection for foreign governments, while decreasing the deterrence value of the Sherman Act and hindering its goal of protecting the American public.

Empagran's substantial deference to the legislative processes of foreign countries marks a sea change in antitrust jurisprudence. Beginning with Justice Learned Hand's famous *Alcoa* decision,⁴⁸ extraterritorial application of the Sherman Act has turned almost exclusively on the effects of the foreign conduct on domestic commerce; comity has functioned primarily as a tool of the dissent. The reigning test before *Alcoa*, established in *American Banana Co. v. United Fruit Co.*,⁴⁹ had confined the Sherman Act to conduct occurring on U.S. territory.⁵⁰ Recognizing the growing effect of foreign conduct on domestic markets, *Alcoa* eschewed this test and instead permitted a Sherman Act claim if the conduct in question "intended to affect imports [into the United States] and did affect them."⁵¹ Many courts promulgated a version of the *Alcoa* test, narrowing the extraterritoriality debate to the definitions of "intent" and "effects."⁵² Concerned about the interests of foreign states — interests unrepresented in these cases — the Ninth Circuit in *Timberlane* added a comity-based balancing test to the domestic effects test when assessing whether subject matter jurisdiction extended to the foreign conduct in question.⁵³ In an era of growing international friction regarding the extraterritorial application of the Sherman Act,⁵⁴ *Timberlane* opened the door for courts to rein in American antitrust law.

But although the Restatement endorsed the *Timberlane* test,⁵⁵ the Supreme Court did not. In the 1993 case *Hartford Fire Insurance Co.*

⁴⁷ See, e.g., *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 313–15 (1978).

⁴⁸ *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

⁴⁹ 213 U.S. 347 (1909).

⁵⁰ See *id.* at 355–58.

⁵¹ *Alcoa*, 148 F.2d at 444.

⁵² See Cavanagh, *supra* note 7, at 2154 & n.13.

⁵³ See *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976).

⁵⁴ See Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 563–64 (2000).

⁵⁵ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987); see also ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 42–43 (1996) (stating that the author, who served as reporter for the Restatement, understood section 403 to follow the *Timberlane* approach).

v. California,⁵⁶ the Court was faced with a situation in which British reinsurance agencies, acting in London, engaged in conduct that was legal under British law but violated the Sherman Act through its effect on U.S. commerce.⁵⁷ The British government, in an amicus brief, appealed to comity in much the same way foreign governments did in *Empagran*: the British Parliament had established a “comprehensive regulatory regime over the London reinsurance market,”⁵⁸ and an American decision to ban behavior that Britain permits would upset the balance of interests inherent in British law.⁵⁹ But the *Hartford Fire* majority saw no need to avoid the “legal imperialism[] through legislative fiat”⁶⁰ that so troubled the *Empagran* Court. It asserted 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.”⁶¹ Over a vociferous dissent by Justice Scalia highlighting the importance of comity,⁶² the majority stated that if foreign conduct affects domestic commerce, comity warrants dismissal only when “compliance with the laws of both countries is otherwise impossible” — that is, when foreign law commands the company to do what the Sherman Act prohibits.⁶³ *Hartford Fire* was widely considered to be a “near death blow” to comity as a factor in antitrust cases, a recognition that Congress intended to deter anticompetitive behavior that harmed American consumers, regardless of the source.⁶⁴

The *Empagran* Court’s resurrection of international comity from its *Hartford Fire* deathbed was particularly surprising given the number of safeguards the D.C. Circuit had already provided to protect foreign governments’ interests. First, the D.C. Circuit’s test would permit a claim only when the plaintiff could show a “direct, substantial, and reasonably foreseeable effect”⁶⁵ on U.S. commerce — language that the FTAIA lifted almost verbatim from traditional comity analysis.⁶⁶ This threshold test acts as a tripwire to prevent U.S. courts from interfering

⁵⁶ 509 U.S. 764 (1993).

⁵⁷ *See id.* at 798–99.

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *Empagran*, 124 S. Ct. at 2369.

⁶¹ *Hartford Fire*, 509 U.S. at 797 n.24 (emphasis added).

⁶² *Id.* at 817–19 (Scalia, J., dissenting).

⁶³ *Hartford Fire*, 509 U.S. at 799.

⁶⁴ *See* Waller, *supra* note 54, at 564–65; *see also* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT’L L. 219, 234 (2001) (stating that *Hartford Fire* “essentially eliminated” comity); Mehra, *supra* note 7, at 277 (stating that *Hartford Fire* “virtually eliminated” the use of comity).

⁶⁵ *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 315 F.3d 388, 340 (D.C. Cir. 2003) (quoting 15 U.S.C. § 6a (2000) (internal quotation mark omitted)).

⁶⁶ *See* Andrew Stanger, Note, *Analyzing U.S. Antitrust Jurisdiction over Foreign Parties After Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2003 B.Y.U. L. REV. 1453, 1481.

unreasonably with foreign sovereignty: if the domestic effects are not direct and substantial, U.S. interest is relatively weak and a court would decline to find jurisdiction to hear the foreign plaintiff's complaint. By comparison, if there is a direct and substantial effect on the U.S. market, U.S. interest is strong regardless of the putative plaintiff's nationality.

If, despite this safeguard, the D.C. Circuit's test were proved to infringe unnecessarily upon foreign sovereignty, foreign legislatures would still have several tools that could be, and historically have been, deployed to combat excessive extraterritoriality. For example, when the United States first began applying the Sherman Act extraterritorially in the 1980s, nations such as Britain and Australia countered with "blocking statutes," which prevented foreign companies from complying with American discovery requests, and "claw-back statutes," which allowed foreign companies to recover in foreign courts the judgments they lost in American antitrust actions.⁶⁷ These countermeasures forced the executive and legislative branches to hammer out bilateral treaties governing Sherman Act application abroad,⁶⁸ which calibrate the interests of the various countries involved much more precisely than a judicial panel's guesswork ever could.⁶⁹ Given the element of comity built into the FTAIA, combined with the additional remedies available to foreign governments to combat American "legal imperialism," the *Empagran* Court's additional emphasis on protecting foreign sovereignty over protecting American consumers seems misplaced.

Lurking as the elephant in the courtroom is the potential administrative burden of the D.C. Circuit's rule, but this concern would ultimately be alleviated by the standing doctrine. Whether the American "litigation crisis" is real or only perceived,⁷⁰ one can imagine the judiciary's reluctance to permit foreign claimants, lured by broad discovery rules and the possibility of punitive damages, to flood American courts instead of their own home venues. In theory, the Supreme Court's denial of subject matter jurisdiction will shift many purely

⁶⁷ See, e.g., Protection of Trading Interests Act, 1980 (U.K.), reprinted in A.V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS 186 (1983).

⁶⁸ See William Knighton, *Britain: Blocking and Claw-Back*, in ACT OF STATE AND EXTRATERRITORIAL REACH: PROBLEMS OF LAW AND POLICY 52, 54-55 (John R. Lacey ed., 1983) (stating that the "general policy disposition" of the British government was to deal with extraterritorial Sherman Act claims through negotiation prior to deploying countermeasures).

⁶⁹ See, e.g., Agreement Relating to Co-operation on Antitrust Matters, June 29, 1982, U.S.-Austl., 1369 U.N.T.S. 43 (agreeing that the U.S. would involve the Australian government when prosecuting Sherman Act claims against Australian corporations in exchange for increased cooperation).

⁷⁰ See generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

foreign antitrust claims back to foreign courtrooms and protect U.S. taxpayers from shouldering the burden of global antitrust enforcement. But in reality, the formidable doctrine of antitrust standing already protects U.S. courts from a deluge of *Empagran*-like cases. Even if subject matter jurisdiction is found under the FTAIA, a foreign plaintiff must still prove that he "is in the best position to sue on the claim."⁷¹ In the vast majority of cases, then, even a foreign plaintiff who could show injury from conduct that also injured American consumers would find he lacked standing "to preserve the effectiveness of the superior plaintiffs."⁷²

Given the doctrine of antitrust standing, *Empagran* has two primary effects. First, it prevents foreign plaintiffs from suing when anti-competitive behavior harms Americans who for some reason lack the capacity to sue. Second, it prevents foreign victims from joining their American counterparts in suits to disgorge the ill-gained profits of a worldwide cartel. These effects undermine the deterrence rationale that underlies post-*Alcoa* extraterritorial antitrust actions. One of the Court's most devastating rhetorical weapons was its claim that the injury for which the plaintiffs sought remedy was "independent" of the domestic effect of the anticompetitive behavior.⁷³ But this description is misleading. *Alcoa* stands for the proposition that the judiciary should not allow legal formalism to impede congressional interest in deterring conduct with anticompetitive effects on U.S. commerce. The Sherman Act seeks to punish the *conduct* at issue, not the effects. To the extent that the same conduct both causes the foreign plaintiff's injury and gives rise to "a claim" in violation of the Sherman Act, a sufficient jurisdictional nexus exists between the conduct and the foreign plaintiff's claim.⁷⁴ A judgment in such a case would end current transgressions, deter future violations, and preserve the competitiveness of the U.S. market, regardless of the nationality of the named plaintiff receiving the damage award. Courts should thus interpret antitrust law so as to deter as much anticompetitive behavior in the United States as possible, as long as the administrative costs do not exceed the benefits of deterrence (a balance preserved by the standing doctrine).⁷⁵

⁷¹ Cavanagh, *supra* note 7, at 2187.

⁷² *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 29 (D.C. Cir. 1987).

⁷³ See *Empagran*, 124 S. Ct. at 2363-64, 2366-71.

⁷⁴ See Brief of Amici Curiae Law Professors in Support of Respondents, *Empagran*, 124 S. Ct.

2359 (No. 03-724), available in 2004 WL 542780, at *9-14.

⁷⁵ But see Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1510-24 (1998) (discussing the possibility of global overdeterrence when each nation pursues a self-interested antitrust policy abroad).

As the D.C. Circuit noted, previous Supreme Court cases have welcomed foreign proxy plaintiffs as an important tool for antitrust deterrence. In *Pfizer*, the Supreme Court granted certain foreigners standing to sue for antitrust violations alongside their American counterparts, because foreign participation enhanced American antitrust law's goals of compensation and disgorgement of ill-gotten gains.⁷⁶ A highly profitable global cartel may not be sufficiently deterred by the prospect of paying even punitive damages to its American victims, a point Judge Higginbotham made when dissenting from the Fifth Circuit's rigid interpretation of the FTAIA:

A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.⁷⁷

Empagran also increases the government's costs when prosecuting its own antitrust claims. The Department of Justice, of course, is not limited by the second prong of the FTAIA test as private plaintiffs are: the government can prosecute any Sherman Act violation without identifying an American victim.⁷⁸ But resource constraints are a substantial limit on the Justice Department's Antitrust Division. The D.C. Circuit's rule would have alleviated this problem: expanding FTAIA jurisdiction widens the scope of potential whistleblowers who stand to gain from the Sherman Act's punitive damages provisions. As foreign whistleblowers come forward, the Justice Department can more easily identify worldwide cartels and gain inexpensive access to the information required to defeat them. *Empagran* denies the government access to that treasure trove of information by destroying the incentive for foreign whistleblowers to come forward, on the ground that doing so might offend foreign nations' notions of sovereignty.

Empagran asked 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?"⁷⁹ The majority claimed, "[w]e can find no good answer to the question."⁸⁰ But the answer is simple. Conduct is actionable under the FTAIA if it has "direct and substantial" effects on the American market and if permitting foreign claimants to sue

⁷⁶ See *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 313–15 (1978).

⁷⁷ *Den Norske Stats Oljeselskap AS v. Heeremac VOF*, 241 F.3d 420, 435 (5th Cir. 2001) (Higginbotham, J., dissenting).

⁷⁸ See 15 U.S.C. §§ 15(a), 45(m) (2000).

⁷⁹ *Empagran*, 124 S. Ct. at 2367 (emphasis omitted).

⁸⁰ *Id.*

both increases the government's ability to defeat existing cartels and deters new cartels from forming. Existing "effects" tests and the doctrine of antitrust standing already rein in excessive extraterritoriality, provide due deference to foreign sovereignty, and safeguard American courts from a flood of meritless claims. Given these protections, the proper question should have been "why is it reasonable to deny jurisdiction under these circumstances?" To the extent that the Court has placed the interests of foreign governments and its own institutional concerns above the interests of the American consumer, there is "no good answer to the question."

F. Tax Injunction Act

Constitutional Challenges to State Tax Systems. — The Tax Injunction Act (TIA or the Act),¹ enacted in 1937, states that federal "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."² Gradually over the course of the Act's almost eighty-year history, its scope has been interpreted more expansively, diverging from the congressional intent behind it, so that before last Term the TIA had come to stand for the broad principle that federal courts must not interfere with any aspect of state tax systems. Last Term, in *Hibbs v. Winn*,³ the Supreme Court held that the Act does not bar district courts from hearing constitutional challenges to state tax credits because credits do not fall within the definition of "assessment," the federal-court review of which is specifically enjoined by the Act.⁴ By refusing to interpret the Act as requiring a complete bar to federal jurisdiction over challenges to state tax systems, the Court has signaled a limit to the gradual expansion of the Act's scope and has brought it back in line with the more limited purpose that Congress intended for it.

Underlying this case is a 1997 Arizona statute⁵ that allows taxpayers to reduce their state tax liability by up to \$500 per person by claiming a credit for donations to an Arizona School Tuition Organization (STO).⁶ STOs must allocate at least ninety percent of their annual revenue to scholarships or tuition grants for children attending private primary or secondary schools that do not discriminate based on race, color, sex, handicap, familial status, or national origin.⁷ Schools re-

¹ 28 U.S.C. § 1341 (2000).

² *Id.*

³ 124 S. Ct. 2276 (2004).

⁴ *See id.* at 2282, 2286.

⁵ ARIZ. REV. STAT. ANN. § 43-1089 (West 1998).

⁶ *Id.* § 43-1089(A).

⁷ *Id.* § 43-1089(E).