Supreme Court Review of the Foreign Trade Antitrust Improvements Act: A Case of a Misleading Question?

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AN ATTORNEY DEFENDING a deposition may at times raise a relatively obscure objection—that the interlocutor has asked a "misleading question." The objection is appropriate when any answer will provide erroneous information.[1] The classic example is, "Have you stopped beating your wife?"[2] As a useful book on the topic explains, "If the witness answers [']yes,[] the implication is that he at one time did beat his wife; if he answers 'no,' it sounds as though he continues to beat her."[3] The query calls naturally for one of two responses and both are misleading.

The United States Supreme Court recently granted certiorari in *Empagran S.A. v. F. Hoffmann-La Roche, Ltd.*,[4] raising a question that risks being similarly misleading. The statute at issue is the Foreign Trade Antitrust Improvements Act[5] (the "Act" or "FTAIA"), which limits the application of the Sherman Act, a federal antitrust statute, for conduct that occurs at least partially outside of the United States.[6]

The question presented by petitioners in seeking review before the Supreme Court was: "Whether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside [United States] commerce"?[7] That question seems to call for a yes or no answer—either transactions occurring

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1. *See* DAVID M. MALONE & PETER T. HOFFMAN, THE EFFECTIVE DEPOSITION § 14.5, at 189 (2d ed. 1996).

2. *Id.*

3. *Id.* (internal quotation marks added for stylistic consistency).

4. 315 F.3d 338 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 966 (2003).

5. 15 U.S.C. § 6a (2000).

6. *Id.*

7. Petition for a Writ of Certiorari at i, F. Hoffmann-La Roche, Ltd. v. Empagran S.A., 124 S. Ct. 966 (2003) (No. 03-724).

entirely outside of United States commerce are excluded from the Sherman Act or they are not. This stark choice may cause the Court to fail to consider an attractive interpretation of the FTAIA, one that offers a compromise between either simple answer to the petitioners' inquiry. For that reason, the question is misleading.

The key point of contention in *Empagran* arises over an important exception to the FTAIA. Confusion over this exception has stemmed in part from the odd statutory framework Congress has put in place, which relies in significant measure on double negatives. In general, the FTAIA *excludes* some conduct from the Sherman Act. The FTAIA in turn has *exceptions* that limit the exclusion. In other words, conduct that falls within an exception to the FTAIA's exclusion *is* subject to the Sherman Act, unless some other limitation on the Sherman Act applies.[8]

At issue in *Empagran* is an exception to the FTAIA exclusion for anticompetitive conduct that: (1) has a direct, substantial, and reasonably foreseeable effect on United States commerce (2) which gives rise to a claim under the Sherman Act. As an example, consider the conduct at issue in *Empagran*, an alleged conspiracy to fix prices for vitamins throughout the world, including in the United States.[9] There is little doubt that the alleged conspiracy had a direct, substantial, and reasonably foreseeable effect on United States commerce. As could easily have been foreseen, if the conspiracy occurred, it raised prices for vitamins throughout the United States. The difficulty lies in interpreting the second requirement that the effect of the conspiracy on United States commerce must give rise to a claim.

One possible interpretation of this exception to the FTAIA exclusion is that as long as conduct has the requisite effect on United States commerce, and that effect gives rise to a claim by someone, then any person injured by the conduct may bring a claim under the Sherman Act. This interpretation was adopted by the Second[10] and D.C. Circuits,[11] and in a dissent by Judge Higginbotham in the Fifth Circuit.[12]

8. For a discussion of other limitations on the Sherman Act, see *infra* Part I.C.

9. *See* Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 315 F.3d 338, 342 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 966 (2003).

10. *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002).

11. *See Empagran*, 315 F.3d 338.

12. *See* Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 431 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

Because this interpretation follows from a careful reading of the text of the FTAIA, one might call it the "literal" interpretation of the Act.[13]

Under the literal interpretation, the FTAIA exclusion applies *to conduct as a whole.* In other words, either the FTAIA excludes the entire course of anticompetitive conduct from the Sherman Act or it does not. If the FTAIA exclusion does apply, then no injured party may bring a claim under the Sherman Act. On the other hand, if the FTAIA exclusion does not apply, then anyone injured by the anticompetitive conduct, whether in the United States or abroad, may sue for damages under the Sherman Act (assuming that an injured party meets all other requirements for bringing a claim under federal antitrust law). In *Empagran,* because the conspiracy had the requisite effect on United States commerce, which gave rise to a claim by some injured purchasers, the literal interpretation of the FTAIA would allow any person injured by the international conspiracy to bring a claim for damages under United States antitrust law. Even a foreign corporation that bought all of its vitamins outside of the United States from another foreign corporation for delivery in a foreign country could bring such a claim.[14]

A second possible interpretation is that only those claims that arise from the effect of conduct on United States commerce fall within the exception to the FTAIA exclusion. The petitioners in *Empagran* would have the Supreme Court adopt this view of the FTAIA, which marks the opposite extreme from the literal interpretation. The petitioners can find significant support for their position in policy and some support in the legislative history of the FTAIA, but little support in the language of the Act. One might call this the "policy-based" interpretation of the Act.[15]

13. For the sake of precision, it is important to note that the Second and D.C. Circuits disagreed as to what it means for conduct to "give rise to a claim" by someone other than the plaintiff in the case before a court. The Second Circuit held that any violation of the Sherman Act would suffice, even if the only party capable of pursuing a claim for a monetary recovery was the United States government. *See Kruman,* 284 F.3d at 400. The D.C. Circuit, in contrast, held that some private individual must be able to bring a claim for damages for the effect of conduct on United States commerce to "give rise to a claim" under the FTAIA. *Empagran,* 315 F.3d at 350.

14. This statement assumes that no other limitation on the Sherman Act applies.

15. For a comparison of what I have labeled the literal and policy-based interpretations of the FTAIA, see, e.g., 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, 2180 (2003) ("The [policy-based interpretation] is at odds with the statutory language but probably consistent with the will of Congress. The [literal interpretation] is consistent with a literal reading of the statute but probably inconsistent with the drafters' intent.").

Under the policy-based interpretation, the exclusion of the FTAIA varies *by claim.* A court must assess whether each claim arises from the effect of conduct on United States commerce;[16] only those claims for damages that do are permitted by the FTAIA. As a result, in *Empagran* a purchaser would be able to bring claims for monetary recovery under United States antitrust law for purchases of vitamins in United States commerce but not for purchases of vitamins in purely foreign commerce.

A third possible interpretation of the FTAIA has been overlooked, perhaps because of the adversarial nature of litigation. That interpretation is that only persons injured by the effect of conduct on United States commerce may bring claims under United States antitrust laws, but those persons may bring all of their claims under United States antitrust laws, even if some of the claims arise from purely foreign commerce. One might call the third approach the "intermediate" interpretation of the Act. This interpretation follows somewhat less naturally from the language of the Act than its literal interpretation, but it is more easily reconciled with that language than the policy-based interpretation. Moreover, the intermediate position reconciles competing strands in the Act's legislative history. It also strikes a balance between the policies that support the literal interpretation and those that support the policy-based interpretation.

The intermediate position varies the FTAIA exclusion *by plaintiff.* A person injured by the effect of conduct on United States commerce may pursue all of its claims under United States antitrust laws, even though some of those claims arise from the effect of the conduct on purely foreign commerce. Under the intermediate interpretation, injured purchasers in *Empagran* may seek recovery under United States antitrust laws for all of the antitrust injuries they suffered, as long as some of their purchases occurred in United States commerce. On the other hand, those purchasers who bought all of their vitamins in purely foreign commerce cannot bring any claim for monetary recovery under United States antitrust laws.

The goals of this Article are to lay out a greater range of options for interpreting the FTAIA than the parties may present to the Court and to offer some of the strengths and weaknesses of each option. Part I sets forth the basic structure of the FTAIA. Part II offers three differ-

16. *See, e.g.,* Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001), *rev'd,* 284 F.3d 384 (2d Cir. 2002); Empagran S.A. v. F. Hoffmann-La Roche, Ltd., No. 00-1686, 2001 U.S. Dist. LEXIS 20910, at *7 (D.D.C. June 7, 2001), *rev'd,* 315 F.3d 338 (D.C. Cir. 2003).

ent interpretations of one of the most controversial issues under the Act and explores the strengths and weaknesses of each interpretation. Part III analyzes the issues that the Supreme Court is likely to decide in *Empagran*.

I. The Statutory Framework

A. The Statutory Provisions

The Sherman Act makes illegal certain anticompetitive conduct, providing in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[17]

The FTAIA excludes some conduct from the Sherman Act:

> [The Sherman 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 [the Sherman Act], other than this section.
>
> If [the Sherman Act] appl[ies] to such conduct only because of the operation of paragraph 1(B), then [the Sherman Act] shall apply to such conduct only for injury to export business in the United States.[18]

B. The Rules

As is likely apparent, the FTAIA is not drafted in the most straightforward manner.[19] Understanding it requires a bit of work. Toward that end, this part divides the FTAIA into three relevant rules. The rules govern when conduct—for example, the price-fixing con-

17. 15 U.S.C. § 1 (2000).

18. *Id.* § 6a.

19. As courts have noted, it is "inelegantly phrased." *See* Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 69 (3d Cir. 2000) (quoting United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997)).

spiracy in *Empagran*—is subject to the FTAIA exclusion and, therefore, beyond the scope of the Sherman Act.[20] The rules are:

> Rule 1. The FTAIA does not exclude from the Sherman Act conduct that involves United States imports.
>
> Rule 2. The FTAIA does not exclude from the Sherman Act conduct that meets two criteria: (1) it has a direct, substantial, and reasonably foreseeable effect on United States commerce (2) which gives rise to a claim under the Sherman Act.
>
> Rule 3. If, under Rule 2, the direct, substantial, and reasonably foreseeable effect of conduct is only on United States exports, then United States antitrust law allows for recovery only for injuries to United States export business.

1. Rule 1. The FTAIA does not exclude from the Sherman Act conduct that involves United States imports.

The FTAIA excludes from the Sherman Act conduct involving trade or commerce with foreign nations, unless certain criteria are met. This exclusion, however, has an exception for import trade or import commerce. This brings us to Rule 1. The FTAIA does *not* exclude from the Sherman Act conduct involving import trade or import commerce with foreign nations. To put the same point affirmatively, if the conduct at issue involves United States imports, United States antitrust law applies (unless the conduct falls within some limitation on the Sherman Act other than the FTAIA).[21]

Scenario 1. To understand how Rule 1 works, assume that Widgets are goods used as components in manufacturing other goods, Whatsits. Manufacturers of Widgets in Japan conspire to fix their prices. They sell their Widgets to manufacturers of Whatsits in the United States.

Rule 1 resolves Scenario 1. The conduct at issue—a price-fixing conspiracy on United States imports—involves imports to the United

20. Courts have generally understood the word "conduct" to refer to the underlying anticompetitive acts. *See* Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 315 F.3d 338 (D.C. Cir. 2003); Kruman v. Christie's Int'l PLC, 284 F.3d 384, 398–99 (2d Cir. 2002); Den Norske Stats Oljeselskap As v. HerreMac Vof, 241 F.3d 420, 426–27 (5th Cir. 2001). An exception was the trial court in *Kruman. See Kruman*, 129 F. Supp. 2d at 625. See *infra* Part II.B.2.a for a discussion of the competing interpretations of the word "conduct" in the FTAIA.

21. *See, e.g.*, Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 302–03 (3d Cir. 2002); *Carpet Group Int'l*, 227 F.3d at 69, 72; Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81, 85 (S.D.N.Y 1995); *see also* 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 18 & n.90 (1996) (citing *Eskofot*, 872 F. Supp. 81).

States. As a result, the FTAIA does not exclude the conduct from the Sherman Act.[22]

2. Rule 2. The FTAIA does not exclude from the Sherman Act conduct that meets two criteria: (1) it has a direct, substantial, and reasonably foreseeable effect on United States commerce (2) which gives rise to a claim under the Sherman Act.

The second rule is that the FTAIA does *not* exclude from the Sherman Act conduct involving trade or commerce with foreign nations if it meets two criteria. The first criterion is that the conduct must have a "direct, substantial, and reasonably foreseeable effect" on United States commerce, which includes an effect on United States imports, an effect on purely domestic United States commerce, or an effect on United States exports.[23] The second criterion is that the effect on United States commerce must "give rise to a claim" under the Sherman Act.[24]

Scenario 2. Traditional manufacturers of Widgets in Japan conspire to influence the Japanese export board not to give its standard package of financial assistance to a new, smaller Japanese manufacturer of Widgets that sells at discount prices.[25] The board withholds financial assistance from the new company, greatly reducing the new company's manufacturing capacity and inflating the prices for Widgets manufactured in Japan. Each Japanese Widget manufacturer sells its goods directly to manufacturers of Whatsits in the United States and France.

At first blush, Rule 1 might seem to apply. It states that the FTAIA does not exclude from the Sherman Act conduct that "involves" import trade or commerce in the United States.[26] The effect of the alleged conspiracy in Scenario 2 is to increase prices on United States imports. However, the conspiracy does not involve import directly. It

22. A somewhat more complicated issue arises if the conduct at issue involves not just United States imports, but also other foreign transactions. The rule most courts have adopted is that if the conduct involves *any* United States imports, the FTAIA does not bar claims under the Sherman Act. *See, e.g., Turicentro*, 303 F.3d at 302–03; *Carpet Group Int'l*, 227 F.3d at 69, 72; *Eskofot*, 872 F. Supp. at 85; *see also* 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 18 & n.90 (citing *Eskofot*, 872 F. Supp. 81). I discuss this issue, and an alternative interpretation of this provision of the FTAIA, *infra* Part II.

23. 15 U.S.C. § 6a(1) (2000).

24. *Id.* § 6a(2).

25. These hypothetical circumstances borrow from the real alleged conspiracy in *Carpet Group International*, 227 F.3d at 64–65. I do not mean to take a position on whether the acts in the text, by themselves, would constitute a violation of the Sherman Act.

26. 15 U.S.C. § 6a.

involves financial assistance (or the withholding of financial assistance) and only affects imports. The difficult question then is whether this *effect* means that the conduct *involves* import trade or import commerce, as required by Rule 1. The best answer is that it does not. The reason is that, according to paragraph 1(A), the first criterion of Rule 2 is met if conduct has the requisite *effect* on import trade or commerce. Reading Rule 1 to apply to conduct that merely has an *effect* on import trade or commerce, but does not involve United States imports directly, would render paragraph 1(A) superfluous. As a result, if the claims in Scenario 2 fall within an exception to the FTAIA exclusion, it must be because of Rule 2.[27]

Rule 2 has two criteria. First, the conduct must have a direct, substantial, and reasonably foreseeable effect on United States commerce.[28] The conduct at issue in Scenario 2 is the conspiracy to persuade the board to withhold financial assistance from the new Japanese manufacturer of Widgets. Its effect on prices for United States imports would seem to be direct and reasonably foreseeable. An increase in prices on imports to the United States is a direct and foreseeable consequence of the impaired capacity of a low-cost Japanese manufacturer to produce Widgets. Indeed, that was the aim of the conspiracy. If any significant number of sales were affected, the effect on United States imports would also be substantial.

Far trickier is the second criterion under Rule 2, which is that the effect on United States commerce must "give rise to a claim" under the Sherman Act. It has led to great confusion. What does this language mean? Is it that the effect on United States commerce must give rise to any claim by anyone? If the effect on United States commerce does give rise to such a claim, does the FTAIA then create no limitation on the scope of United States antitrust law? If not, is it that plaintiffs may pursue only those claims that arise from the effects of the conduct on United States commerce? In other words, in Scenario 2

27. For an analysis along these lines, see *Carpet Group International*, 227 F.3d at 72 (noting that conduct described in Scenario 2 would likely not qualify as involving import commerce, but that other conduct in the case before the court did meet that standard); *see also* Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 626 (S.D.N.Y. 2001) (reading commerce that "involves" import commerce narrowly).

28. 15 U.S.C. § 6(a)(1). Courts have begun to develop general rules for applying this requirement. *See, e.g.*, Cavanagh, *supra* note 15, at 2186–87 (summarizing court decisions interpreting the first criterion of Rule 2); Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11 (2003) (same).

may French Whatsit manufacturers sue Japanese Widget manufacturers for damages under United States antitrust law?

The Supreme Court is likely to answer some or all of these questions in *Empagran*. This Article seeks to analyze the main options available to the Court, including one that has been largely overlooked, and to discuss strengths and weaknesses of each argument. Before turning to those tasks, however, attention is necessary to one more rule under the FTAIA.

3. Rule 3. If, under Rule 2, the direct, substantial, and reasonably foreseeable effect of conduct is only on United States exports, then United States antitrust law allows for recovery only for injuries to United States export business.

The third rule under the FTAIA applies to conduct that has an effect only on United States *exports*. The third rule limits the claims permitted by Rule 2. Under Rule 3, when the effect is only on United States exports, United States antitrust law allows recovery only to the extent that the conduct at issue gives rise to injuries to United States export businesses.

Scenario 3. Manufacturers of Widgets in the United States and Japan sell their goods for use by manufacturers of Whatsits in France. The United States companies manufacture some of their Widgets in the United States for export and some of their Widgets in France. Widget distributors in France conspire not to do business with any Widget manufacturers who sell Widgets directly to Whatsit manufacturers in France. American and Japanese Widget manufacturers need the help of French distributors to sell their goods in France. The conspiracy is designed to ensure that the distributors maximize their profits by playing a role (and receiving some payment) in every sale of Widgets to French Whatsit manufacturers. It succeeds. The effects are twofold—higher prices for Widgets paid by Whatsit manufacturers in France and correspondingly lower sales of Widgets for Japanese and United States manufacturers.

Rule 1 does not apply in Scenario 3. The conspiracy does not involve United States imports, only United States exports.

Rules 2 and 3 apply in Scenario 3. Under Rule 2, purchasers have no claim under United States antitrust laws unless the conduct at issue had the requisite effect on United States commerce and that effect gives rise to a claim. The French distributors' conspiracy could well have a direct, substantial, and reasonably foreseeable effect on United States exports by a person engaged in that business in the United

States. Moreover, that effect could give rise to claims by the United States manufacturers.

Assuming Rule 2 is satisfied, Rule 3 limits the injuries that are actionable under the United States antitrust laws. Because the only effect on United States commerce is on *exports*, only injuries to a United States export business can serve as a basis for recovery. The Japanese manufacturers therefore cannot recover under the United States antitrust laws. Moreover, United States businesses can recover under the United States antitrust laws only for their losses on exports from the United States, not for their losses on Widgets manufactured and sold in France.

C. The FTAIA Only Limits the Scope of the Sherman Act

One final point about the FTAIA is important. It is drafted in an awkward manner in part because it only limits the scope of the Sherman Act; it does not create a basis for bringing a claim under the Sherman Act. Rather, the FTAIA creates an exclusion to the ordinary scope of the Sherman Act and then contains specified exceptions to that exclusion. Conduct that falls within an exception to the FTAIA exclusion therefore still may not give rise to an action under the Sherman Act. Whether it does depends in part on the extent to which Congress had the power to draft, and did draft, the Sherman Act so that it applies to conduct that occurs at least partially outside of the United States.[29] Further, to sue in the United States under the Sherman Act, or otherwise, a plaintiff would have to establish that a United States court may properly exercise personal jurisdiction over a defendant.[30] The plaintiff also must have standing to sue under the United States antitrust laws.[31] These limitations add to the constraints placed on the scope of the Sherman Act by the FTAIA. Any of these limita-

29. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 & n.22 (1993) (holding that under the Sherman Act there is subject matter jurisdiction and prescriptive jurisdiction over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States") (citations omitted); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (same); Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81, 85 (S.D.N.Y. 1995) (holding that the FTAIA does not apply to commerce involving imports to United States but effects test still must be, and was, met).

30. *See, e.g., Hartford Fire Ins. Co.*, 509 U.S. at 812 (Scalia, J., dissenting) (noting personal jurisdiction as a potential issue, although it was not contested in the case before the Court).

31. *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111–13 (1986) (discussing standing); Turicentro, S.A. v. Am. Airlines, Inc. 303 F.3d 293, 307 (3d Cir. 2002) (same); *In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 715–16 (D. Md. 2001); Empagran S.A. v. F. Hoffmann-La Roche, Ltd., No. 00-1686, 2001 U.S. Dist. LEXIS 20910, at *16–*19 (D.D.C. June 7, 2001), *rev'd*, 315 F.3d 338 (D.C. Cir. 2003).

tions may provide a basis for a court to refuse to hear a claim under the Sherman Act, regardless of the FTAIA.

II. Interpreting the Requirement That the Effects on United States Commerce Must "Give Rise to a Claim"

With the basic rules of the FTAIA in place, it is possible to assess the competing interpretations of the second criterion of Rule 2—that an effect on United States commerce must "give rise to a claim."

Scenario 4. A fourth and final scenario is helpful in exploring the second criterion of Rule 2. Assume United States and Japanese Widget manufacturers conspire to fix prices. The Japanese manufacturers sell Widgets only in France to French Whatsit manufacturer. The United States manufacturers manufacture Widgets in the United States and France and sell them to United States and French Whatsit manufacturers. Some French Whatsit manufacturers buy some of their United States Widgets in the United States and some in France.

Rule 1 does not apply because Scenario 4 does not involve United States imports.

More challenging is determining whether, in Scenario 4, Rule 2 creates an exception to the FTAIA exclusion (and therefore whether the Sherman Act may apply). Rule 2 requires a direct, substantial, and reasonably foreseeable effect on United States commerce, which gives rise to a claim. The conspiracy in Scenario 4 applies to United States domestic and export sales, so it would seem to have the requisite effect on United States commerce. The key issues are whether that effect "gives rise to a claim" and, if so, who may pursue damages based on which transactions.

Before turning to those issues, it should be noted that Rule 3 does not apply. Rule 3 limits recoveries to claims based on injuries to United States export business, if the requisite effect on United States commerce is *only* on those exports. In this case, the predicate for Rule 3 is not met. The conspiracy had an effect on both United States domestic and export sales, not just on United States exports.

How then should the second criterion of Rule 2 be interpreted? When does the effect on United States commerce "give rise to a claim"?

A. The Literal Interpretation

According to the literal interpretation, the second criterion of Rule 2 is met as long as the conduct's effect on United States com-

merce gives rise to anyone's claim. The Second and D.C. Circuits adopted this approach, as did Judge Higginbotham in his dissent in *Den Norske Stats Oljeselskap As v. HeereMac Vof.*[32]

1. Applying the Literal Interpretation

In Scenario 4, a literal interpretation of the Act would likely mean that all United States and French manufacturers of Whatsits could sue for all of their purchases of Widgets subject to the alleged conspiracy. Assuming that the first criterion is met, the remaining issue is whether the effect on United States commerce "gives rise to a claim," to wit, by United States or French Whatsit manufacturers against United States Widget manufacturers. Once the second criterion is satisfied, the FTAIA does not exclude any claims under United States antitrust laws by anyone. The FTAIA does not even prevent French Whatsit manufacturers from bringing claims under United States antitrust laws for goods bought in France directly from Japanese Widget manufacturers, as long as the prices were affected by the same underlying conspiracy.

2. Assessing the Literal Interpretation

The literal interpretation finds its strongest support in the text of the FTAIA for two reasons. First, Rule 2 requires that the effect of conduct on United States commerce give rise to "a claim," not to *the* claim of a particular plaintiff. Second, the FTAIA excludes conduct, not particular claims, from the Sherman Act. The literal interpretation is also consistent with the legislative history of the Act, although that history is somewhat ambiguous on the crucial point. The literal interpretation also promotes one understanding of the goal of the FTAIA, that is, to provide a strong deterrent to anticompetitive conduct that affects United States commerce.

32. 241 F.3d 420, 431 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002). As noted above, *supra* note 13, the holdings of the Second and D.C. Circuit are not identical on this point. The Second and D.C. Circuits disagreed as to what it means for conduct to "give rise to a claim" by someone other than the plaintiff. The Second Circuit held that any violation of the Sherman Act would suffice, even if the only party capable of pursuing a claim for recovery of money was the United States government. *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (2d Cir. 2002). The D.C. Circuit, in contrast, held that some private individual must be able to bring a claim for damages arising from the effect of conduct on United States commerce to satisfy the second criterion of Rule 2. *See* Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 315 F.3d 338, 350 (D.C. Cir. 2003).

a. Text

The literal interpretation finds strong support in the language of the FTAIA for two reasons. First, the Act requires that the conduct at issue must give rise to "a claim," not that it must give rise to the claims of a particular plaintiff. The most straightforward interpretation is that as long as the conduct at issue does give rise to "a claim," and the other relevant requirements are met, the FTAIA does not exclude conduct from the scope of the Sherman Act.[33] Anyone may bring any claim based on the conduct without running afoul of the FTAIA (although some other doctrine may deprive a plaintiff of the benefit of the Sherman Act or of access to the United States judiciary).[34]

A second, related point in support of the literal interpretation is that the Act excludes "conduct" from the scope of United States antitrust laws, not particular claims. In other words, it requires a binary approach in which the conduct at issue is or is not excluded from the antitrust laws by the FTAIA. Read in conjunction with the words "a claim," it follows that as long as the requisite effect of conduct on United States commerce gives rise to a claim by anyone, the conduct in general does not fall within the FTAIA's exclusion from the Sherman Act.

A possible concern with the literal interpretation of the FTAIA is that it renders the second criterion of Rule 2 superfluous.[35] If conduct has a direct, substantial, and reasonably foreseeable effect on United States commerce, does that mean that it automatically gives rise to a claim? The answer is that the second criterion of Rule 2 requires that the effect on United States commerce causes antitrust injury (which it must do to give rise to a claim).[36] Not every effect on United States commerce does. For example, a conspiracy among manufacturers in Canada to raise prices for the Widgets they sell in Canada might allow a manufacturer in the United States to increase its market share without increasing its prices. The effect on United States export commerce might be direct, substantial, and reasonably foreseeable, but it

33. This point figures prominently in Judge Higginbotham's dissent in *Den Norske*, 241 F.3d at 432 (Higginbotham, J., dissenting), and in the majority's opinion in *Kruman*, 284 F.3d at 400.

34. *See supra* Part I.C.

35. The petitioners before the United States Supreme Court made this argument. *See* Brief for Petitioners at 20, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 966 (2003) (No. 03-724).

36. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) (holding parties have standing to sue under antitrust laws only if they have suffered the kind of injury antitrust laws are intended to prevent).

also might cause no antitrust injury in United States commerce and therefore fail to give rise to a claim. Indeed, an explanation along these lines is provided by the House Report on the FTAIA:

> [T]he domestic "effect" that may serve as the predicate for antitrust jurisdiction . . . must be of the type that the antitrust laws prohibit . . . . For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.[37]

As a result, the literal interpretation of the Act still gives meaning to the second criterion of Rule 2.

b. Legislative History

This last point serves as a nice transition from the language of the Act to its legislative history, which offers some support for the literal interpretation of the FTAIA. Consider, for example, the above passage of the House Report. It states that a plaintiff seeking recovery based on an extraterritorial effect of conduct is prevented from doing so if the only effect in the United States is beneficial and the plaintiff's claim is based on some harm that occurs only outside of the United States. This implies that if the conduct at issue has a harmful effect in the United States, and it is of the appropriate sort for an antitrust claim, then a plaintiff is not prevented by the FTAIA from bringing Sherman Act claims based on the extraterritorial effect of the conduct.[38]

On the other hand, this passage is somewhat ambiguous. After all, it simply addresses circumstances when a plaintiff would *not* be able to bring a claim under United States antitrust laws; that is, if the only effect in the United States were beneficial. It only implies, but it never quite says, that a plaintiff could bring a claim under United States antitrust laws based on foreign injuries if the conduct had the requisite injurious effect on United States commerce, thus giving rise to a claim by someone else.

Similarly, the House Report states that the FTAIA adopted "a single, objective test—the 'direct, substantial and reasonably foreseeable effect' test" that "will serve as a simple and straightforward clarifica-

37. H.R. REP. No. 97-686, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2496.

38. I understand the D.C. Circuit to make this point. *See* Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 315 F.3d 338, 353–54 (D.C. Cir. 2003).

tion of existing American law."[39] Before the FTAIA, existing law did not exclude from the scope of the Sherman Act purely foreign transactions, if the underlying conduct met the so-called "effects test," that is, the conduct was meant to produce and did produce an effect on United States commerce.[40] If the FTAIA simply clarified existing law, as the House Report indicates, Rule 2, much like the "effects test," would seem to apply to anticompetitive conduct as a whole. However, the FTAIA not only clarified existing law, but changed it somewhat as well. Rule 2 is not identical to the "effects test." As a result, a comparison between the two does not provide an authoritative resolution of the issue in *Empagran.*

The legislative history of the FTAIA, then, is ambiguous. That is not to say, however, that the FTAIA serves no clear purpose. At least one of its aims is clear. As noted by the Supreme Court in *Hartford Fire Insurance Company v. California,*[41] the FTAIA precludes claims under United States antitrust law based on export transactions if there was no injury to exporters in the United States.[42] In other words, if the only effect of conduct is to benefit exporters in the United States, that conduct is not subject to United States antitrust laws. This rule prevents United States antitrust laws from placing United States exporters at a disadvantage in competing with businesses in foreign countries.[43] However, the literal, policy-based, and intermediate interpretations of the Act are all consistent with this goal. As a result, what is clear about the legislative history of the FTAIA is simply not very useful in choosing between the competing interpretations of the second criterion of Rule 2.

c. Policy

A policy argument that favors the literal interpretation derives from the United States Supreme Court's analysis in *Pfizer v. Government of India.*[44] The Court explained:

> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and

39. H.R. REP. NO. 97-686, at 2.

40. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 & n.22 (1993) (holding that under the Sherman Act there is subject matter jurisdiction and prescriptive jurisdiction over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States").

41. 509 U.S. 764.

42. *See id.* at 796–97 n.23 (citing H.R. REP. NO. 97-686, at 2–3, 9–10).

43. *See* H.R. REP. NO. 97-686, at 4 (indicating that the purpose of FTAIA is to stop United States antitrust laws from discouraging United States exports).

44. 434 U.S. 308 (1978).

> 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. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.[45]

The Court set as its apparent goal "maximum deterrent effect."[46] Based on that goal, it concluded that when an international antitrust violation injures American consumers, all claims to which that conduct gives rise should be subject to United States antitrust laws and allow for a recovery of treble damages.[47]

One problem with the Court's reasoning, however, is that it is not true that maximum deterrence is achieved by allowing all foreign claimants to pursue treble damages. Quadruple damages would provide greater deterrence yet. So would quintuple damages. Of course, this reasoning can be extended endlessly. Optimal deterrence cannot be "maximum deterrence." The key is to strike the right balance. *Pfizer* is somewhat arbitrary in deciding how far to go in that effort.

One way to interpret *Pfizer*, or perhaps to expand on and support its reasoning, is to recognize that for some international antitrust violations to work, including price-fixing conspiracies, it may be necessary for conspirators to include the United States. Otherwise, American purchasers may engage in arbitrage—for example, by purchasing goods at competitive prices in the United States and then reselling those goods abroad. In addition, some of those injured might have transacted business in the United States if, by doing so, they could have escaped the effects of the antitrust violation. The participants in the price-fixing conspiracy may be willing to incur the risks of damages under the United States antitrust laws, if the profits from the conspiracy elsewhere are sufficiently high and the risk of the conspiracy being undermined by competition in the United States would otherwise be sufficiently large.[48] The premise of American antitrust law in general is that deterrence is set at the right level if injured parties recover treble damages. If this level of deterrence is right, then imposing treble damages for all injuries from an international anti-

45. *Id.* at 315.

46. *Id.*

47. *Id.*

48. For an argument along these lines, see *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 338, 435 (5th Cir. 2003) (Higginbotham, J., dissenting) (citing Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102, 1104 (S.D.N.Y. 1984) as an example of arbitrage).

trust violation may achieve optimal deterrence against international antitrust violations.[49]

This reasoning has intuitive force. On the other hand, the FTAIA indicates that Congress was somewhat less concerned with antitrust injuries abroad than with those in the United States.[50] And it is not clear that treble damages for all injuries from an international antitrust violation are necessary to deter conspirators from affecting United States commerce by their conduct. Competitive markets in the United States are likely to deprive conspirators of some, but not all, of the spoils from anticompetitive conduct. Exposure under United States law to liability for less than the full injuries a conspiracy causes throughout the world may generally suffice as deterrence against causing harm in United States commerce.

In the end, then, while deterrence may help to justify the literal interpretation of the FTAIA, that goal does not lead to a determinate result. Setting the right scope of United States antitrust laws to achieve optimal deterrence would require subtle judgments about the harms caused by antitrust violations, about the likelihood that the violators will be caught and made to pay, about the cost of potentially excessive liability, and about the tendency of competitive markets in the United States to suffer from and undermine anticompetitive conduct in foreign markets.[51] A simple argument based on deterrence cannot provide an adequate policy justification for the literal interpretation of the FTAIA.

B. The Policy-Based Interpretation

A much narrower reading of Rule 2's exception to the FTAIA exclusion is possible, although it is difficult to reconcile with the language of the Act. This reading is the policy-based interpretation. It

49. *See* Ryan A. Haas, Comment, *Act Locally, Apply Globally: Protecting Consumers from International Cartels by Applying Domestic Antitrust Laws Globally*, 15 LOY. CONSUMER L. REV. 99, 119 (2003) (arguing literal interpretation of the FTAIA better serves deterrence than policy-based interpretation).

50. This discrepancy is manifest, for example, in Rule 3, which allows recovery for injuries from the effect of anticompetitive conduct on United States export businesses, but does not allow recovery for injuries from the same conduct by foreign persons who purchase those United States exports.

51. Note, however, that in light of the limitation of recovery under federal antitrust laws to direct purchasers, *see* Ill. Brick v. Illinois, 431 U.S. 720 (1977), an argument can be made that the only plausible case for sufficient deterrence is under the literal interpretation of the FTAIA. For an analysis of this position, see Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 302–10 (2002).

finds support in portions of the legislative history of the Act and in policy.

Courts rejecting the literal interpretation of the FTAIA, including the Fifth Circuit in *Den Norske,* have nevertheless generally taken the same approach as the Second and D.C. Circuits on the first criterion of Rule 2.[52] The anticompetitive conduct at issue—in *Empagran,* the price-fixing conspiracy—must have a direct, substantial, and reasonably foreseeable effect on United States commerce.[53]

Where courts adopting the policy-based interpretation have consistently differed from the literal interpretation is over the second criterion of Rule 2—that the "effect" on United States commerce must "give rise to a claim." The trial courts in *Kruman v. Christie's International PLC*[54] and *Empagran S.A. v. F. Hoffmann-La Roche, Ltd.*,[55] for example, interpreted the FTAIA to allow United States antitrust law to extend only to those claims that arise from the effects of conduct on United States commerce.[56] As a result, those courts concluded that claims based on transactions that occurred entirely in foreign commerce, even if subject to the same conspiracy, were beyond the scope of United States antitrust laws.[57]

52. *See Den Norske,* 241 F.3d at 426–27.

53. *See, e.g., id.*

54. 129 F. Supp. 2d 620, 625–26 (S.D.N.Y. 2001) (adopting a position along these lines).

55. No. 00-1686, 2001 U.S. Dist. LEXIS 20910, at *7–*8 (D.D.C. June 7, 2001) (adopting a position along these lines).

56. It is unclear whether the Fifth Circuit in *Den Norske,* on which the trial courts in *Empagran* and *Kruman* relied, in fact adopted this view. The Fifth Circuit read Rule 2 as requiring that the effect on United States commerce must give rise to a claim on the part of each plaintiff seeking recovery. However, this position is consistent not only with the policy-based interpretation, but also with the intermediate interpretation discussed *infra* Part II.C.

57. *See Kruman,* 129 F. Supp. 2d at 626; *Empagran,* 2001 U.S. Dist. LEXIS 20910, at *13. It is worth noting that these courts' decision to equate a claim with an injury from a transaction does not follow necessarily. Courts could interpret a plaintiff's claim to include the injuries it suffered both in the United States and abroad from a single course of conduct. A single claim, in other words, may be based on a series of closely related transactions, only some of which occurred in the United States. Some courts have taken a similar approach, for example, in defining the scope of a claim for purposes of claim preclusion. *See, e.g.,* RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.4 (3d ed. 1999). If a claim includes all the transactions that injure a single plaintiff, some of which occurred in the United States and some abroad, the policy-based interpretation of the FTAIA would collapse into the intermediate interpretation.

1. Applying the Policy-Based Interpretation

To see how the policy-based interpretation works in practice, recall Scenario 4, in which United States and Japanese manufacturers of Widgets conspire to fix their prices to United States and French Whatsit Manufacturers. Further, some French Whatsit manufacturers buy their Widgets directly from Japan, others directly from the United States, and yet others in France from United States Widget manufacturers. According to the policy-based interpretation, in Scenario 4 the French manufacturers of Whatsits may bring claims under United States antitrust laws only against United States Widget manufacturers and only for purchases in United States commerce. This conclusion follows from the second criterion of Rule 2 that claims may be brought only if they arise from the effect of conduct on United States commerce. Claims based on transactions between French purchasers and Japanese sellers, and claims based on Widgets manufactured and sold in France by United States companies abroad, do not arise from the effect of the price-fixing conspiracy on United States commerce. Thus, the FTAIA excludes them from the federal antitrust laws.[58]

2. Assessing the Policy-Based Interpretation

The policy-based interpretation is not consistent with the literal meaning of the text of the FTAIA. It does, however, find some support in the Act's legislative history and significant support in important policy considerations.

a. Text

Oddly, although the Fifth Circuit in *Den Norske* asserted that its interpretation was most consistent with the plain meaning of the statute, it never explained its reasoning.[59] This failure meant that the court never addressed the numerous difficulties that beset its interpre-

58. Note that all of the claims of the United States Whatsit manufacturers would be permissible under the policy-based interpretation. They arise from the effect of the conspiracy on United States commerce, whether the transactions involve United States imports or purely domestic sales.

59. The Fifth Circuit merely asserted repeatedly that its reading of the FTAIA honors its plain meaning. *See* Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 425–26, 428 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); *see also Empagran*, 2001 U.S. Dist. LEXIS 20910, at *7, *12 (holding FTAIA requires that injuries arise from effect of conduct on United States commerce without explaining exactly how the text of the FTAIA supports this conclusion).

tation of the FTAIA.[60] First, there is the need to contend with the words "a claim." The statute says that the effect on United States commerce must give rise to "a claim," not to "the plaintiff's claims." If the effect of conduct on United States commerce gives rise to a claim by anyone—in Scenario 4, for example, a claim by any manufacturer of Whatsits in the United States—then the literal language of the second criterion would seem to be satisfied. Under the circumstances, Rule 2 would seem to provide an exception to the FTAIA exclusion for any party seeking recovery for its injuries under United States antitrust law. Use of the indefinite article, rather than the definite article, thus undermines the view that the effect on United States commerce must give rise to each claim.[61] *Den Norske* never addressed this concern.

Further, the *Den Norske* court never explained how the Act's exclusion of certain *conduct* from United States antitrust laws can be interpreted to exclude certain *claims.* For this reason, to support the majority's conclusion in *Den Norske,* it would not suffice, as some have suggested,[62] to read the words "a claim" in the Act to mean "the claim." If the second criterion of Rule 2 were changed to require that the effect of conduct must give rise to "the claim," the result would be nonsensical. We would be left with a statute that says that *conduct* is excluded from the Sherman Act, unless its effect on United States commerce gives rise to "the plaintiff's claim." If the claims of some plaintiffs, but not others, did arise from the effect of conduct on United States commerce, we would arrive at conflicting results. A single course of conduct simultaneously would be, and would not be,

60. *See* Haas, *supra* note 49, at 115 ("The Fifth Circuit's interpretation of the plain language of the FTAIA, however, is not really a 'plain language' reading because it assumes that Congress intended to preclude United States law from applying to injuries sustained outside of the United States") (footnote omitted). Perhaps the Fifth Circuit equated "plain meaning" with an initial intuitive response to language. Granted, understanding the text of the FTAIA requires some work. Still, that does not mean that the text allows for more than one interpretation. On this point, perhaps the language of the FTAIA in many instances is best described as "plain, albeit tortured." *See* Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws,* 114 HARV. L. REV. 2122, 2138 (2001) (citation omitted).

61. For various sources making this point, see, e.g., *Kruman v. Christie's International PLC,* 284 F.3d 384, 400 (2d Cir. 2002) and *Den Norske,* 241 F.3d at 432 & n.5 (Higginbotham, J., dissenting); *see also A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws, supra* note 60, at 2139; David V. Dzara, Den Norske Stats Oljeselskap As v. HeereMac Vof: *Interpreting the Foreign Trade Antitrust Improvements Act to Determine Whether "A Claim" Means "The Claim,"* 16 TEMP. INT'L & COMP. L.J. 411 (2002).

62. *See Den Norske,* 241 F.3d at 432 & n.5 (Higginbotham, J., dissenting); *see also* Salil K. Mehra, *"A" Is for Anachronism: The FTAIA Meets the World Trading System,* 107 DICK. L. REV. 763, 766 (2003) (arguing that interpretation of the second criterion of Rule 2 turns on interpretation of the words "a claim"); Mehra, *supra* note 51, at 291 (appearing to make the same assumption).

excluded from the scope of the Sherman Act. As long as we understand the "conduct" at issue to be the underlying antitrust violation, as did the court in *Den Norske*,[63] the Second[64] and D.C. Circuits,[65] and the House Report,[66] the policy-based reading of the Act makes little sense.[67]

An alternative approach has been proposed to render the policy-based interpretation consistent with the statutory language. It entails reading the provision that conduct is exempted from the Sherman Act "unless" it meets the criteria in Rule 2 as if it stated instead that the conduct is excluded from the Sherman Act "except to the extent that" it meets those criteria.[68] At least two problems undermine this approach. First and foremost, it would involve changing the language of the statute. Second, arriving at the Fifth Circuit's view in this way is in tension with Rule 3. Recall that Rule 3 holds that if the direct, substantial, and reasonably foreseeable effect of conduct is on United States exports, but not on other United States commerce, then only injuries to United States export business are actionable under the United States antitrust laws. Rule 3 shows that Congress had language readily at hand if it wanted to limit actionable claims to those based

63. *See Den Norske*, 241 F.3d at 426–27.

64. *See Kruman*, 284 F.3d at 398–99.

65. *See* Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 315 F.3d 338, 344 (D.C. Cir. 2003).

66. *See* H.R. REP. No. 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495. ("The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad.") (citation omitted); *id.* at 13 (discussing whether overall effect of "a world-wide shortage or artificially inflated world-wide price" is conduct that would satisfy requirement of "a direct, substantial and reasonably foreseeable effect on domestic commerce").

67. To see this point, consider the conspiracy in Scenario 4. Assume a lawsuit that involves a French Whatsit manufacturer who bought Widgets from Japan and an American Whatsit manufacturer who bought Widgets in the United States. The prices in both sets of transactions were inflated by the same price-fixing conspiracy. As to the French Whatsit manufacturer, "the plaintiff's claims" did not arise from the effect of the conspiracy on United States commerce. As a result, the conduct—meaning the entire underlying conspiracy—falls within the FTAIA exclusion, the conspiracy is not subject to the Sherman Act, and *no* injured party may sue under United States antitrust law for damages caused by the conspiracy. But as to the American Whatsit manufacturer, "the plaintiff's claims" arose from the effect of the conspiracy on United States commerce. As a result, the conduct—meaning the entire underlying conspiracy—falls within Rule 2's exception to the FTAIA exclusion, the conspiracy is subject to the Sherman Act, and *any* injured party may sue under United States antitrust law for damages caused by the conspiracy. The same rule yields two conflicting results.

68. The appellate court in *Empagran* recognized this distinction, but then expressed skepticism about its importance, without offering much of an explanation of its decision to ignore the meaning of the text. *See Empagran*, 315 F.3d at 349. The court simply stated that following the literal language of the text would involve "overreading." *Id.*

on injuries that occurred from the effect of a conspiracy on United States commerce. It could have said so. The statute could have been drafted to specify that the Sherman Act applies only to injuries arising from the effect of conduct on United States commerce. It was not.[69]

Yet another interpretive strategy for reconciling the policy-based interpretation with the text of the FTAIA is to give the word "conduct" a counter intuitive meaning. The Second[70] and D.C. Circuits[71] have read "conduct" to refer to the underlying actions that violate the antitrust laws—for example, a conspiracy to fix prices. So did the House Report on the FTAIA.[72] On this point, the Fifth Circuit agreed.[73] However, one might argue that the word "conduct" refers not only to the anticompetitive actions, but also to the commerce that gave rise to a particular plaintiff's injury.[74] In other words, in Scenario 4, the con-

69. Rule 3 thus undermines the claim, implied but not stated by the District Court in *Empagran*, that when the FTAIA excludes conduct from the Sherman Act "unless" it satisfies Rule 2, the statute really means that the FTAIA excludes conduct from the Sherman Act "except to the extent that" it satisfies Rule 2. *See* Empagran S.A. v. F. Hoffmann-La Roche, Ltd., No. 00-1686, 2001 U.S. Dist. LEXIS 20910, at *12–*13 (D.D.C. June 7, 2001).

A slightly different—but closely related—point is in Judge Higginbotham's dissent in *Den Norske*. He suggests that the majority's interpretation renders Rule 3 superfluous. Under the policy-based view of the FTAIA, Rule 3 appears to be unnecessary. As Judge Higginbotham explains, one might conclude that it is always true that the only claims that can be pursued are those that arise from the effect of conduct on United States commerce. Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 432, 438 n.37 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002). No special rule for effects on United States *exports* appears necessary. However, Rule 3 can supply an additional limitation. If the only effect on United States commerce is to benefit United States exporters at the expense of foreign purchasers, one might say that the conduct has a direct, substantial, and reasonably foreseeable effect on United States commerce and that the effect gives rise to a claim. Rule 3, however, precludes recovery under United States antitrust law. Under Rule 3, if the only effect of a conspiracy is to benefit United States exporters—for example, if they have conspired to fix prices on their sales—no plaintiff may bring a claim under the Sherman Act. True, the conspiracy would have an effect on United States commerce, by increasing the prices for goods exported from the United States. Further, that effect appears to give rise to the claims of the foreign purchasers. Still, the foreign purchasers are not in the business of exporting goods from the United States and so their claims are excluded from the Sherman Act. So Rule 3 adds a restriction to the scope of the Sherman Act.

70. *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 398–99 (2d Cir. 2002).

71. *See Empagran*, 315 F.3d at 344.

72. *See* H.R. REP. No. 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495. ("The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad.") (citation omitted); *id.* at 13 (discussing whether overall effect of "a world-wide shortage or artificially inflated world-wide price" is conduct that would satisfy requirement of "a direct, substantial and reasonably foreseeable effect on domestic commerce").

73. *See Den Norske*, 241 F.3d at 426–27.

74. Appellants made this argument before the D.C. Circuit in *Empagran*, which the court rejected. *See Empagran*, 315 F.3d at 344. This approach seems to be the one adopted by the district court in *Kruman*, although the court did not explain how its interpretation

duct at issue would include not only the price-fixing conspiracy, but also the sales of goods to a particular plaintiff at the inflated prices. According to this understanding, the court would have to consider whether the particular sales that injured an individual plaintiff had the requisite effect on United States commerce and give rise to a claim. If not, the FTAIA exclusion from the Sherman Act would apply.

This clever approach to the language of the FTAIA avoids one major difficulty for the policy-based interpretation by converting an exemption of *conduct* from the Sherman Act into an exemption of *claims* from the Sherman Act. Nevertheless, it leaves in place some of the difficulties of the policy-based interpretation. In particular, it does not explain why Congress chose to be so obscure when it was much clearer in articulating Rule 3. Why not just say that only those claims may be brought that arise from the effect of the conduct on United States commerce, if that was what Congress intended?

More important, interpreting the word "conduct" in this creative way gives rise to new difficulties. First, the very inventiveness of this approach counsels against it. It would be odd, to say the least, for Congress to use the word "conduct" in a way that would be so likely to mislead readers—including not only the Second[75] and D.C. Circuits,[76] and the House Report,[77] but also the Fifth Circuit,[78] which liked the result that this interpretation would achieve.

In any case, this interpretation of "conduct" creates problems as significant as those it resolves. In particular, while it allows the exemption of *conduct* from the Sherman Act to exempt, in effect, particular *claims* from the Act, it makes the first criterion of Rule 2 difficult, if not impossible, to apply in any meaningful way. To see this, recall that the first criterion of Rule 2 requires that conduct must have a direct, substantial, and reasonably foreseeable effect on United States commerce. According to the counter-intuitive definition of conduct, it is

of the word "conduct" could make sense throughout the statute as a whole. *See* Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 625–26 (S.D.N.Y. 2001). An approach along these lines was also apparently adopted by the defendants in *Sniado*, which the Second Circuit rejected based on its opinion in *Kruman*. *See* Sniado v. Bank Austria AG, 352 F.3d 73, 78 (2d Cir. 2003) (citing *Kruman*, 284 F.3d at 398–99).

75. *See Kruman*, 284 F.3d at 398–99.

76. *See Empagran*, 315 F.3d at 344.

77. *See* H.R. REP. NO. 97-686, at 10 ("The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad.") (citation omitted); *id.* at 13 (discussing whether overall effect of "a world-wide shortage or artificially inflated world-wide price" is conduct that would satisfy requirement of "a direct, substantial and reasonably foreseeable effect on domestic commerce").

78. *See Den Norske*, 241 F.3d at 426–27.

to be understood as varying for each claim, that is, as including not only the underlying anticompetitive conduct but also the full series of actions leading to the ultimate injury from each transaction. In Scenario 4, this means that the conduct includes not only the conspiracy to fix the price of Widgets, but also each sale of Widgets to a particular plaintiff. The first criterion of Rule 2 then requires an inquiry into whether these particular sales have a direct, substantial, and reasonably foreseeable effect on United States commerce.

The problem this creates is that it is very difficult to explain the requirement that the effect of particular transactions on United States commerce must be substantial. Consider the price-fixing conspiracy in Scenario 4, which involves both domestic and foreign commerce. Interpreting "conduct" to include the transactions that injure a particular plaintiff would mean that a purchaser of a number or amount of a good too small to be "substantial" would not establish a basis for a claim under the Sherman Act. This would be true even if the purchases are part of purely domestic commerce and even if many other plaintiffs bought Widgets in United States commerce and were injured by the same conspiracy. An American purchaser of Widgets from an American manufacturer could not rely on the Sherman Act, if the price-fixing conspiracy involved not just domestic, but also foreign commerce, and if the plaintiff made purchases too small to cause a substantial effect on United States commerce. This rule simply would not make sense. Far more plausible is to gauge whether a conspiracy as a whole had the requisite effect on United States commerce. That is the manner in which the requirement had been understood before the FTAIA.[79] To parcel out the analysis of substantiality on a claim by claim basis would be truly odd.[80] The better view is that the word "conduct" refers to the underlying anticompetitive actions common to all plaintiffs—in Scenario 4, the price-fixing conspiracy. Consistency then requires that the anticompetitive conduct in general is

79. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945) (Hand, J.) (discussing effect of conduct as a whole on United States commerce in formulating "effects test" for jurisdiction of United States antitrust law) (*cited in* H.R. REP. No. 97-686, at 5).

80. Somewhat similar difficulties arise in applying the requirement that the effect on United States commerce must be reasonably foreseeable. How can a court determine whether the effect on United States commerce of particular sales would be reasonably foreseeable? If the conspiracy affected only the one plaintiff, it would be difficult to foresee it having any effect at all. It is only in the aggregate—when one looks to an overall anticompetitive scheme—that one can assess in a meaningful way whether the defendants could foresee the effect of the scheme on United States commerce.

or is not excluded from the Sherman Act, not that particular claims are or are not excluded.

In sum, the policy-based reading of the FTAIA rewrites its language. Nevertheless, the policy-based interpretation finds some support in the Act's legislative history and, especially, in the policies it might be interpreted to serve.

b. Legislative History

Some of the legislative history of the FTAIA lends support to the policy-based interpretation. It contains statements that suggest that the FTAIA excludes from United States antitrust laws purely foreign transactions. For example, the House Report at one point says, "It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not."[81] This language suggests that purely foreign transactions should be exempted from United States antitrust laws. On the other hand, as the D.C. Circuit noted in *Empagran*, even this comment appears in a context where the House Report is discussing conduct that does *not* have the requisite effect on United States commerce.[82] The concern of the House Report was that United States exporters would not be placed at a competitive disadvantage against foreign actors and therefore those United States exporters would be free from American antitrust jurisdiction "absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor."[83] In other words, the House Report may just be indicating that when conduct does not have the requisite effect on United States commerce, neither United States exports nor purely foreign transactions are subject to the Sherman Act. This claim is consistent with both the literal and policy-based interpretation of the Act.

Similarly, the House Report states that "the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws."[84] This language can be read to suggest that only injuries in United States commerce "give rise to a claim" under the Sherman Act. On the other hand, when the House Report says "the effect" must give rise to "the injury alleged," it is ambiguous on the key point. By the words "the injury," the House Report may be referring to

81. H.R. REP. No. 97-686, at 10.

82. *See id.* at 9–10; Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 315 F.3d 338, 353 (D.C. Cir. 2003).

83. H.R. REP. No. 97-686, at 9–10.

84. *Id.* at 12.

the injury of the plaintiff or to the injury that gives rise to "a claim," whether by the plaintiff or someone else. For this reason, the language in the Report can again support either the literal or policy-based interpretation.

Another passage of the House Report seems to support the policy-based interpretation, but, on reflection, it too ultimately proves ambiguous:

> The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—*e.g.*, price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g.,* Pfizer v. Gov't of India, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.[85]

One might read this passage as confirming the policy-based interpretation of the Act. After all, it states that foreign purchasers should be protected by United States antitrust laws "in the domestic marketplace." This assertion may suggest that only claims arising in United States commerce may be brought under the Sherman Act. The problem, however, is that the passage does not say foreign purchasers should not be protected by United States antitrust laws for injuries suffered abroad. To the contrary, it says that conduct may have the requisite effect on United States commerce under the FTAIA, even if some purchasers suffer economic injury abroad. This implies that those purchasers who suffer injuries in foreign markets may be able to bring claims under United States antitrust laws. The enigmatic citation to *Pfizer*—what precisely does "Cf., e.g." mean?—only adds to the ambiguity. *Pfizer* held that foreign nations are "persons" for purposes of the Clayton Act, which means they may bring claims seeking treble damages under United States antitrust laws.[86] In reaching this conclusion, the Court reasoned that proper deterrence of international antitrust violations can be achieved only if injuries that occur in foreign countries, and not only those that occur in the United States, are actionable under United States antitrust laws.[87] The citation to *Pfizer* implies, then, that the House Report was endorsing the view that the

85. *Id.* at 10.
86. Pfizer v. Gov't of India, 434 U.S. 308, 320 (1978).
87. *Id.* at 315.

FTAIA allows claims under the Sherman Act for injuries occurring in foreign commerce, provided that they arise from conduct with the requisite effect on United States commerce.

In the end, then, although there is some support in the legislative history for the policy-based interpretation of the FTAIA, it is at best ambiguous. If the judiciary is to adopt that interpretation, powerful policy reasons must weigh against the reasoning of the Court in *Pfizer.*

c. Policy

Policy arguments offer the strongest support for the policy-based view. One such argument is that extending the Sherman Act to purely foreign transactions will result in excessive recoveries, producing greater deterrence than is desirable.[88] Cumulative sanctions are possible under United States law for antitrust violations, including treble damages under federal law, treble damages under state law, and penalties under criminal law. Assuming, for purposes of argument, that these laws together provide appropriate deterrence, the likelihood of additional liability based on the overlapping laws of a foreign jurisdiction may go too far.

However, this argument about optimal deterrence is no more—but perhaps no less—persuasive on its face than the argument for the literal interpretation. Some line must be drawn for optimal deterrence. Where that line should be drawn is a policy decision. It should rest on a full understanding of the harm from antitrust violations, the likelihood of their discovery, the harm of excessive liability, and the tendency of anticompetitive conduct abroad to affect and require support from similar anticompetitive behavior in domestic markets. Without a fully developed analysis of these considerations, the risk that a literal interpretation of the FTAIA will cause excessive deterrence and liability is no more compelling than the risk that the policy-based interpretation will result in insufficient deterrence.

A second, related argument for the policy-based interpretation derives from the value of amnesty.[89] It follows from the notion that some consolidation of control over prosecution of antitrust laws may assist their enforcement. In particular, effective government prosecution of antitrust violations at times depends on the ability to provide amnesty in exchange for voluntary information about illegal activities.

88. *See* Brief for Petitioners at 37–39, F. Hoffmann-La Roche, Ltd. v. Empagran S.A., 124 S. Ct. 966 (2003) (No. 03-724).

89. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 7–8, 26–28, *F. Hoffmann-La Roche, Ltd.* (No. 03-724).

As potential prosecutors of antitrust claims proliferate, amnesty becomes less attractive. Currently, federal, state, and private prosecutions are possible in the United States, all for the same injuries. Extending these potential sources of liability to cases in which foreign prosecution may also occur could render amnesty programs unworkable. It may not be possible for all potential prosecutors to coordinate their efforts so that amnesty provides meaningful protection, thereby creating incentive to cooperate.[90]

Again, this argument has some force. Judgment is necessary to determine whether on the whole the harm to amnesty programs from the literal interpretation is adequately compensated for by enhanced exposure to possible liability. In other words, the likelihood of one or more participants revealing anticompetitive activity as part of an amnesty program might well increase if private plaintiffs cannot pursue civil actions under United States antitrust laws. On the other hand, the ultimate liability for such actions would increase if those claims are available. The right balance between these competing policy concerns is not obvious.

A third argument in favor of the policy-based interpretation relies on comity.[91] Other nations may bristle if American courts seek to apply American law to purely foreign transactions involving parties with no direct connection to the United States.[92] Based on this concern, various countries have filed briefs in support of the petitioners in *Empagran* objecting to the broad international effect of United States antitrust laws under the literal interpretation of the FTAIA.[93] In the past the Court has at times been reluctant to read the international scope

90. *See id.* at 26–29.

91. *See id.* at 28–30.

92. For a discussion of foreign criticism of the international application of United States antitrust law, see William J. Tuttle, *The Return of* Timberlane *?: The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust*, 36 VAND. J. TRANSNAT'L L. 319, 334 & nn.118–19 (2003) (citing Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 9 (1992); J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195 (1978)); *see also* Kareen O'Brien, *Giving Rise to a Claim: Is FTAIA's Section 6a(2) an Antitrust Plaintiff's Key to the Courthouse Door?*, 9 SW. J. L. & TRADE AM. 421, 424 & n.25 (2002–03) (describing foreign legislation designed to resist foreign enforcement of United States antitrust laws).

93. *See* Brief for the Government of Canada as Amicus Curiae Supporting Reversal, *F. Hoffmann-La Roche, Ltd.* (No. 03-724); Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, *F. Hoffmann-La Roche, Ltd.* (No. 03-724); Brief of the Government of Japan as Amicus Curia in Support of Petitioners, *F. Hoffmann-La Roche, Ltd.* (No. 03-724); Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, *F. Hoffmann-La Roche, Ltd.* (No. 03-724).

of United States antitrust laws narrowly based on a concern about the reaction of foreign sovereigns.[94] Still, this concern is worthy of serious consideration. This argument from policy, in combination with the others in favor of the policy-based interpretation, suggest that an interpretation of the FTAIA might be desirable that resulted in a less expansive understanding of the scope of United States antitrust laws than its literal interpretation. Such an interpretation is possible, without reading United States laws as restrictively as the policy-based interpretation of the FTAIA.

C. The Intermediate Interpretation

An alternative interpretation of the FTAIA allows for an intermediate position, one that has been overlooked. According to this interpretation, if and only if the effect of conduct on United States commerce gives rise to a claim on the part of a particular plaintiff, then that plaintiff may pursue all of its claims under the Sherman Act or, to be more precise, it falls under an exception to the FTAIA exclusion. In other words, the intermediate interpretation varies the Rule 2 exception to the FTAIA exclusion by plaintiff. It does not apply the exception to anticompetitive conduct as a whole, as does the literal interpretation. Nor does it vary the exclusion by claim, as does the policy-based interpretation.

The intermediate interpretation offers a compromise between the literal and policy-based interpretations of Rule 2 of the FTAIA. It allows for a less expansive understanding of United States antitrust laws than the literal interpretation. It is not true under the intermediate interpretation that if conduct is within the Rule 2 exception, anyone injured by the conduct may sue under United States antitrust laws, even a party who was injured only in purely foreign commerce. This distinguishes the intermediate from the literal interpretation of the FTAIA.

On the other hand, the intermediate interpretation extends United States antitrust laws farther than the policy-based interpretation. The intermediate interpretation would avoid the difficulty posed by the policy-based interpretation that a single plaintiff might be forced to bring some of its claims under United States antitrust law and some of its claims under foreign antitrust laws, even though the party suffered all of its injuries from the same underlying conduct.

94. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (refusing to read the scope of United States antitrust laws narrowly out of concern for comity to foreign nations).

1. Applying the Intermediate Interpretation

Recall that in Scenario 4, United States and Japanese manufacturers of Widgets conspire to fix the prices paid by American and French Whatsit manufacturers. The French purchasers buy some of their Widgets directly from Japan, some in the United States, and some in France from United States Widget manufacturers. Under the intermediate interpretation, the French Whatsit manufacturers who bought any of their Widgets in the United States could bring all of their claims for damages under United States antitrust laws. In this way, the scope of the Sherman Act is broader than under the policy-based interpretation, which would restrict recovery to claims arising from the effect of the conspiracy on United States commerce. On the other hand, under the intermediate interpretation, those French Whatsit manufacturers who bought Widgets only from Japanese Whatsit manufacturers could not bring any of their claims under the Sherman Act. The intermediate interpretation therefore is more confining of United States antitrust law than the literal interpretation, which would allow anyone to bring any claim for damages based on the conspiracy.

2. Assessing the Intermediate Interpretation

The intermediate interpretation is not as easy to reconcile with the statutory language as the literal interpretation, but it is more compatible with that language than the policy-based interpretation. The intermediate interpretation also offers a way to weave together the apparently conflicting strands in the Act's legislative history. Finally, it strikes a balance between the policies that favor the literal interpretation and those that favor the policy-based interpretation of the FTAIA.

Of interest is that the intermediate approach may well be consistent with the Fifth Circuit's decision in *Den Norske.* The holding of *Den Norske* is a bit unclear. The court concluded that plaintiffs who engaged in transactions that had no direct relationship with United States commerce could not pursue their claims under federal antitrust law.[95] As the court emphasized, the particular plaintiff suffered no injury at all in United States commerce.[96] The court therefore had no reason to clarify whether, if the plaintiff had "a claim" that arose from the effects of conduct on United States commerce, the plaintiff could

95. Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 428 (5th Cir. 2001), *cert. denied,* 534 U.S. 1127 (2002).

96. *Id.* at 422 & nn.3–5.

have pursued Sherman Act claims for all of its injuries from the same antitrust violation.

a. Text

The intermediate interpretation avoids some, but not all, of the difficulties of the policy-based interpretation. In particular, it gives some meaning to the statute's use of the indefinite rather than the definite article. True, the intermediate interpretation, just like the policy-based interpretation of the FTAIA, does not follow from the words "a claim." In applying the intermediate interpretation, a court would have to read those words to mean "a claim of a particular plaintiff." Still, the intermediate interpretation does less violence to the language of the Act than the policy-based interpretation. The policy-based interpretation would require changing the words to "the claims of a particular plaintiff," an additional step away from the plain language of the Act.

Nevertheless, the language of the Act poses significant difficulties for the intermediate position. Most important, much like the policy-based interpretation, the intermediate position is not consistent with the exclusion of *conduct* from United States antitrust laws rather than *claims*. The Act would have to be interpreted as if it stated that the *claims* of an injured party are excluded from the Sherman Act unless the effect of the conduct on United States commerce gives rise to "a claim" by the plaintiff. That is not what the statute provides. As a result, the departures from the language of the Act necessary to reach the intermediate interpretation may be somewhat less substantial than those required for the policy-based interpretation, but they are still significant.

b. Legislative History

The intermediate interpretation may help to resolve the tension in the legislative history between the literal and policy-based interpretations. The strongest support for the literal interpretation is that the House Report at times appears to contemplate that some purely foreign transactions will be actionable under the Sherman Act. On the other hand, the strongest support for the policy-based interpretation is that the House Report indicates that the injured parties who may bring claims are those who suffered injuries in United States commerce. The intermediate interpretation is consistent with both positions. The only plaintiffs who may sue are those who have suffered

injuries in United States commerce, but some of the claims they bring may be for purely foreign transactions.

c. Policy

The intermediate position may also strike the proper balance in serving the conflicting policy concerns that have animated interpretation of the FTAIA. The first policy concern is deterrence. The intermediate position would offer greater deterrence than the policy-based interpretation, although not as much deterrence as the literal interpretation. Of course, compromise is not always ideal. Choosing a standard for the scope of actionable claims under the FTAIA based on optimal deterrence would require a clearer framework than is currently available. Nonetheless, the intermediate interpretation provides an alternative. Moreover, there is some logic to the intermediate position. The injured parties who are most likely to take advantage of free competition in United States commerce, if an international antitrust violation does not include the United States, may be those parties injured partially in the United States and partially in foreign commerce. Their injuries in foreign commerce may be a rough measure of the antitrust violators' improper profits on transactions that would have migrated to the United States, had the conspiracy not crossed American borders. As a result, allowing parties injured by the effect of an antitrust violation on United States commerce to bring all of their claims under United States antitrust law may offer some approximate measure of optimal deterrence, one that will discourage international actors from extending their conduct to the United States without imposing excessive liability.

The second policy concern is that prosecutors will not be able to offer meaningful amnesty. The intermediate interpretation would ameliorate this problem by excluding from United States antitrust laws purely foreign transactions that involve parties unaffected by the impact of conduct on United States commerce. If other nations were to adopt a similar rule, the number of prosecutors for any one transaction would be reduced. The intermediate interpretation does not provide as complete a solution as the policy-based interpretation, but it creates only a limited overlap in jurisdictions. It would allow for efficient and effective prosecution of antitrust violations in a way that the literal interpretation might not. Moreover, the policy-based interpretation would place a substantial burden on injured parties who were injured in commerce both within the United States and outside of the United States. They would have to pursue redress in more than one

judicial system. This provides a strong reason to adopt the intermediate position.

Finally, the intermediate position addresses in significant part concerns about comity. True, it would permit application of United States antitrust laws to transactions that have no direct relationship to United States commerce. It would do so, however, only for those transactions that involve parties who were also injured by the effect of anticompetitive conduct on United States commerce. Each party pursuing a claim under United States antitrust law would have an individual relationship with United States commerce. This requirement should moderate the protests of foreign sovereigns.

III. Applying the FTAIA in *Empagran*

The conflict over interpretation of the FTAIA may soon be resolved by the United States Supreme Court. The Court granted review in *Empagran*.[97] The alleged illegal conduct in *Empagran* was a conspiracy to fix the prices of vitamins around the world.[98] The plaintiffs in the case are foreign corporations in various foreign countries who purchased vitamins outside of the United States for delivery abroad.[99] An issue before the Supreme Court is whether the FTAIA excludes the plaintiffs' claims from the Sherman Act.

The first issue that *Empagran* presents is whether Rule 1 applies, although it is not an issue that the lower courts addressed.[100] (Nor do the petitioners discuss the issue in their brief to the United States Supreme Court.) Rule 1 is that the FTAIA does not apply to conduct involving United States imports. The alleged conspiracy in *Empagran* involves imports to the United States, but it also involves purely foreign commerce.[101] The application of the FTAIA in these circumstances is unclear. It requires interpretation of the initial passage of the FTAIA: The Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . ."[102]

At least two interpretations of Rule 1 are possible. First, one could interpret Rule 1 to mean that if conduct involves any United States imports, then the FTAIA simply does not apply. Most courts that have

97. Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 315 F.3d 338 (D.C. Cir. 2003).
98. *Id.* at 342.
99. *Id.*
100. The trial and appellate courts in *Empagran* did not discuss Rule 1, presumably because the plaintiffs did not raise the issue.
101. *Id.*
102. 15 U.S.C. § 6a (2000).

addressed the issue have adopted this interpretation.[103] Under this approach, it would not matter whether the conduct also involves purely foreign commerce. The conduct as a whole would fall within Rule 1's exception to the FTAIA exclusion. Reading the Rule 1 exception this broadly would mean that it is unnecessary to look to Rule 2 in *Empagran*, and that the Petitioners overlooked a dispositive argument.

This broad interpretation of Rule 1, however, is difficult to reconcile with the language or structure of the statute. As to the language, the text does not say that the Sherman Act does not apply to conduct, "other than conduct involving import trade or import commerce," that meets certain conditions. If it did, the implication would be that if conduct involves United States imports, the FTAIA does not apply. Rather, the Act excludes from the Sherman Act conduct involving foreign commerce, other than United States imports, that meets certain requirements. In other words, if the only connection between anticompetitive conduct and foreign nations involves imports into the United States, the FTAIA has no effect. On the other hand, if the conduct does involve foreign commerce, even if it also involves United States imports, Rule 1 does not create an exception to the FTAIA still exclusion.

This interpretation is not only more consistent with a parsing of the text, but it also fits better within the structure of the Act. It would be strange, indeed, if conduct involving purely United States commerce and purely foreign commerce could be excluded from the Sherman Act (unless it met the criteria of Rule 2), while conduct involving United States imports and purely foreign commerce were automatically subject to the Sherman Act.

Assuming, then, that Rule 1 does not resolve *Empagran*, the next issue is the application of Rule 2. The first criterion requires that the conduct at issue must have a direct, substantial, and reasonably foreseeable effect on United States commerce. Assuming the Court interprets the word "conduct" to refer to the underlying price-fixing conspiracy, the alleged conspiracy had the requisite effect. It increased the prices paid on many millions of dollars of vitamins sold in the United States.

The next issue is application of the second criterion of Rule 2, which requires that the effect of the conspiracy on United States com-

103. *See, e.g.*, Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 302–03 (3d Cir. 2002); Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 69, 72 (3d Cir. 2000); Eskofot A/S v. E.I. Du Pont De Nemours, 872 F. Supp. 81, 85 (S.D.N.Y 1995); *see also* 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 18 & n.90 (2003) (citing *Eskofot*, 872 F. Supp. 81).

merce "gives rise to a claim." It is on this point that the literal, policy-based, and intermediate interpretations diverge. According to the literal interpretation, every injured foreign corporation may pursue all of its claims under United States antitrust laws as long as the effect of the conduct on United States commerce gives rise to a claim by someone. It did. Of course, the plaintiffs still must establish that they have standing, that the court has personal jurisdiction over the defendants, and that the court has subject matter jurisdiction. Still, the prospect is real of a United States federal court adjudicating the claims of foreign corporations across the world, many of which engaged in no transactions in United States commerce that were related to the alleged conspiracy.

It is understandable that judges would balk at this possibility. They might feel compelled to resist an interpretation of the FTAIA that extends the jurisdiction of United States courts so far beyond the nation's borders. Notwithstanding the text of the FTAIA, they might wish to rein in the Sherman Act in some way. Perhaps this explains the decision of the trial court in *Empagran* to conclude that the effect of the conspiracy on United States commerce must give rise to each claim for damages that a plaintiff may bring under United States antitrust laws. A similar explanation may apply to the Fifth Circuit's decision in *Den Norske.* The Fifth Circuit claimed to follow the plain meaning of the statute, but then never explained how it arrived at the meaning. It was far clearer, however, about its policy concerns—under the literal interpretation:

> [A]ny entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to the United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States.[104]

The district court in *Empagran* and the Fifth Circuit in *Den Norske* may have adopted the policy-based interpretation of the FTAIA[105] because they perceived no other way to avoid opening United States courts to parties from around the world whose injuries had no connection at all to the United States.

Another approach was possible. The trial court in *Empagran* could have permitted claims based on foreign transactions only by those

104. Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 427–28 (5th Cir. 2001), *cert. denied,* 534 U.S. 1127 (2002). This concern has some force.

105. This assumes that the Fifth Circuit did adopt the policy-based interpretation, as opposed to the intermediate interpretation, which is unclear, as discussed *supra* Part II.C.2.

plaintiffs who also had claims arising from the same conspiracy based on injuries suffered in United States commerce. This intermediate position has several advantages over the policy-based interpretation of the FTAIA. It does not stray as far from the text of the FTAIA. It makes better sense of the Act's legislative history. It ensures that an injured party will not have to pursue damages from a single conspiracy under different, and perhaps inconsistent, legal standards. At the same time, the intermediate interpretation of the FTAIA, much like the policy-based interpretation, circumscribes the extraterritorial scope of United States antitrust laws in a sensible way. For these reasons, if the United States Supreme Court is to depart from a literal understanding of the FTAIA, the intermediate interpretation is worthy of consideration.

Conclusion

Courts interpreting what I have called Rule 2 of the FTAIA have limited themselves to two basic interpretations. The literal interpretation allows claims under the Sherman Act as long as the conduct at issue has a direct, substantial, and reasonably foreseeable effect on United States commerce and that effect gives rise to a claim by anyone.[106] This interpretation honors the literal language of the Act and provides strong deterrence against antitrust violations that have an effect on United States commerce, but it gives rise to significant policy concerns.

A second, policy-based interpretation would limit claims permitted by Rule 2 to those that arise from the effect of anticompetitive conduct on United States commerce. This policy-based interpretation may avoid excessive liability for antitrust violations, assist enforcement of the antitrust laws through effective amnesty programs, and diminish encroachments on the jurisdiction of foreign sovereigns. However, it is difficult to reconcile with the language of the FTAIA.

A third interpretation of the FTAIA is possible, one that strays less from the literal language of the Act than the policy-based interpretation, but promotes many of the same policies. It would be a shame if this option were not considered because litigation is adversarial by nature and each party proposes only its ideal interpretation of the FTAIA.

106. As noted above, courts have split over whether the claim must be by a private individual or may be on behalf of the government. *See supra* note 13.