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"A" Is for Anachronism: The FTAIA Meets the World Trading System

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I. Introduction

Maybe statutes, like volcanoes, often act up when they are not expected to.[1]

But volcanoes and statutes are technically inanimate; human expectations about volcanoes and judicial statutory interpretation is what causes surprise. A decade ago, after *Hartford Fire Insurance Co.* v. *California*,[2] commentators by and large echoed a single criticism: The death of interest-balancing[3] meant that courts were left with no choice but to apply the Sherman Act to foreign conduct in a manner that would create foreign relations trouble for the United States.[4]

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1. David Winder, *A Volcano That Surprised Everyone*, CHRISTIAN SCI. MONITOR, Apr. 14, 1980, at 15 (discussing eruption of Mount St. Helens, previously thought inactive).

2. 509 U.S. 764 (1993).

3. Or near-death. *See* Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 564 (2000) (describing *Hartford Fire* as dealing a "near death blow" to comity); *see also* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 234 (2001) (stating that *Hartford Fire* "essentially eliminated" comity); Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L. L 275, 277 (2002) (stating that *Hartford Fire* "virtually eliminated" comity). All the hedging stems from the fact that the opinion leaves open whether balancing would be appropriate if a "true conflict" as defined by the Court—a situation in which an actor could not comply with the laws of both sovereigns—existed. *See Hartford Fire Ins. Co.*, 509 U.S. at 798-99.

4. *See, e.g.*, Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on* Hartford Fire Insurance Co. v. California, 34 VA. J. INT'L L. 213, 225 (1993); Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The* Hartford Fire *Case*, 1993 SUP. CT. REV. 289, 328 (1993).

Perhaps fear of an unbridled effects approach was well founded.[5] But, a decade after *Hartford Fire*, a single word in a dormant statute that was briefly mentioned in the majority opinion has created a split—or possibly multiple splits—among American courts as to whether federal antitrust law applies to conduct involving foreign trade. Given the growth of foreign trade and the importance of antitrust law, resolving the split to avoid ambiguity involving Sherman Act jurisdiction could be a compelling interest in and of itself.

But there are other, more important concerns as well. The issue at stake is essentially whether plaintiffs injured by the non-United States effects of anti-competitive conduct (foreign-injured plaintiffs) that also had effects on United States commerce can maintain damages actions in American courts. The overwhelming number of decisions on this issue run in one direction; however, the two decisions that countervail are notably from the Second Circuit and the District of Columbia Circuit.[6] And, although the split at stake is based on statutory language, neither the language nor the legislative history of the statute compels any of the judicial conclusions so far.[7]

Given the apparent indeterminacy of the relevant statutory text and legislative history, the resolution of this conflict inevitably must turn on policy grounds. And how the Supreme Court finally answers this question will impact three issues important to antitrust and the world trade regime. First, the resolution will determine how wide a scope of allies that American antitrust agencies will have; this aspect of United States antitrust law has attracted recent attention, and imitation, abroad. Second, it may establish whether, when it comes to private enforcement, the United States antitrust regime will have overlapping enforcement power with other national antitrust regimes—or whether national

5. Not all applications of the "effects" approach that impact foreign relations are the product of American prosecutors or plaintiffs. *See, e.g.*, Neal R. Stoll & Shepard Goldfein, *A Tale of Two Regulators*, N.Y. L.J., July 17, 2001, at 3.

6. Indeed, opinions on both sides argue that they are compelled by "plain meaning" and legislative history. *See* Empagran S.A. v. F. Hoffman-La Roche, Ltd., 315 F.3d 338, 349 (D.C. Cir. 2003) (observing that the preceding opinions of "the Second Circuit and the Fifth Circuit found the [language of the statute] to be plain in opposite ways") (citing Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002); Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom.* Statoil ASA v. HeereMac v.o.f., 534 U.S. 1127 (2002)); *see also* Gen. Elec. Co. v. Latin Am. Imps., S.A., 227 F. Supp. 2d 685 (W.D. Ky. 2002); *In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 715-716 (D. Md. 2001); Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620 (S.D.N.Y. 2001), *aff'd in part and vacated in part*, 284 F.3d 384 (2d Cir. 2002); Ferromin Int'l Trade v. UCAR Int'l Inc., 153 F. Supp. 2d 700, 705 (E.D. Pa. 2001); *In re* Copper Antitrust Litig., 117 F. Supp. 2d 875 (W.D. Wis. 2001), *aff'd sub nom.* Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002).

7. *See infra* Part II.

antitrust regimes will have "exclusive," non-overlapping jurisdiction. Finally, courts favoring the narrower reading have relied on the concept of being injured in a hypothetical "American marketplace"—a creative fiction that appears to represent an attempt to reinvigorate a territorial notion of sovereignty. A resolution to the split could finally do away with this approach, which already seems doomed to fail by the complexity of its application and its tension with existing world trade reality.

Part II outlines the conflict that has emerged. Part III discusses the policy issues at stake, and a brief conclusion follows.

II. One Little Word

Three circuit courts have come to strikingly different conclusions about the impact of Congress's choice of one word in the Foreign Trade and Antitrust Improvements Act (FTAIA). Essentially, Congress drafted the FTAIA as a cut-back of Sherman Act jurisdiction[8] that states that, for the Sherman Act to apply to conduct involving foreign trade,[9] two requirements must be fulfilled. The first requirement is a variant of the familiar "effects" test most famously enunciated in *United States v. Aluminum Co. of America*.[10] The conduct must have a "direct, substantial and reasonably foreseeable effect" on United States commerce—that is, on domestic commerce, on imports into the United States, or on United States-engaged exporters.[11] And, second, "such effect" must "give[] rise to a claim under" the Sherman Act's substantive provisions.[12]

Although the FTAIA is often criticized for its ungainly syntax and drafting,[13] the main dispute thus far stems from the second, far less

8. The FTAIA also enacted a similarly worded cut-back to the FTC Act. *See* 15 U.S.C. § 45a (2000). Although written as a cut-back of jurisdiction, the Court has recognized that it is "unclear . . . whether the [FTAIA's] 'direct, substantial and reasonably foreseeable effect' standard amends existing law or merely codifies it." *Hartford Fire*, 509 U.S. at 796 n.23.

9. Other than "import" trade—which is carved out of the cut-back, creating another issue of interpretation that may in the future create conflict. *See* Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd, 299 F.3d 281, 287 (4th Cir. 2002) (concluding that, "[b]ecause this case involves importation of foreign-made goods, however—conduct Congress *expressly exempted* from FTAIA coverage as 'involving . . . import trade or import commerce . . . with foreign nations,'—the FTAIA standard obviously does not directly govern this case, even though it may constitute an effort to 'clarify the application of United States antitrust laws to foreign conduct' in other circumstances").

10. 148 F.2d 416 (2d Cir. 1945).

11. 15 U.S.C. § 6a(1).

12. *Id.* § 6a(2).

13. *See, e.g.*, *Den Norske*, 241 F.3d at 426 n.19 (stating that it is "difficult" to obtain a "clear understanding"); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997) (stating that the provisions are "inelegantly phrased"); *Kruman*, 129 F. Supp.

convoluted, of its two prongs.[14] Essentially, the question is whether the requirement that the domestic effect must give rise to "a claim" means that the effect must give rise to (1) *the plaintiff's* Sherman Act claim, (2) a *hypothetical* claim by the government to enforce or prevent a violation of the Sherman Act, or (3) an *actual* claim by someone *other than the plaintiff* under the Sherman Act. Essentially, these are three different readings of what the word "a" means.

A. "A Claim" Means "the Plaintiff's Claim"

Perhaps surprisingly, the first reading has been adopted by the vast majority of courts to address the issue.[15] Most notably, the Fifth Circuit in *Den Norske Stats Oljeselskap As v. HeereMac Vof*[16] came to the conclusion that the "plain language" compelled the conclusion that "a" must mean "the."[17]

The claim of the plaintiff in *Den Norske* was that, when it paid for services in connection with offshore oil drilling in the North Sea, it was

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at 624 ((stating that the provisions are "not elegantly drafted"); *see also* MILTON HANDLER ET AL., TRADE REGULATION: CASES AND MATERIALS 1197 (4th ed. 1997) (stating that the provisions are "not destined for a inclusion in a manual of style").

14. The relevant Sherman Act text is set forth as follows:

> Sections 1 to 7 of this title 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 sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a.

15. *See, e.g.*, *Den Norske*, 241 F.3d 420 (holding that plaintiff must show that a substantial anticompetitive effect on American commerce "gives rise" to *its* antitrust claim); Ferromin Int'l Trade v. UCAR Int'l Inc., 153 F. Supp. 2d 700, 705 (E.D. Pa. 2001); *Kruman*, 129 F. Supp. 2d at 625; *see also* S. Megga Telecomms. Ltd. v. Lucent Techs., Inc., No. 96-357-SLR, 1997 WL 86413 (D. Del. Feb. 14, 1997); The In Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494 (M.D.N.C. 1987); de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510 (S.D.N.Y. 1985); *In re* Copper Antitrust Litig., 117 F. Supp. 2d 875 (W.D. Wis. 2001), *aff'd sub nom.* Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002); *infra* notes 26-31 and accompanying text.

16. 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom.* Statoil ASA v. HeereMac v.o.f., 534 U.S. 1127 (2002).

17. *Id.* at 421.

victimized by the same cartel that also had an anticompetitive effect on similar commerce involving offshore oil drilling "in the territorial waters of the United States in the Gulf of Mexico."[18] Two of the defendants had already pled guilty to a related criminal complaint filed by the United States Department of Justice; injured parties other than the plaintiff had already filed damages complaints based on these American effects.[19] Thus, it was fairly clear that the same conduct had had an anticompetitive effect in the United States, and gave rise to "a" claim under the Sherman Act.

Thus, the Fifth Circuit had to determine whether it was enough that the "effect" on American commerce—here the anticompetitive effects in the Gulf of Mexico—gave rise to Sherman Act claims, or whether it was necessary that the effects gave rise to *the plaintiff's* claim.[20] The majority opinion sided with the latter view based on what it saw as the plain language of the statute, as well as a legislative history, which it viewed as reinforcing its conclusion.[21] The majority was relatively unconcerned with policy implications, save for an unsupported assertion that "[a]ny reading of the FTAIA authorizing jurisdiction" in the case "would open United States courts to global claims on a scale never intended by Congress."[22]

A focused dissent by Judge Higginbotham pointed out that the majority's "plain language" argument was undercut by the fact that "'a' has a simple and universally understood meaning" as "the indefinite article."[23] The dissent, like the majority, was able to point to legislative history in support of its reading.[24] Notably, the dissent raised a policy

18. *See id.* at 422-23 & n.8.

19. *Id.* at 420.

20. The court stated that, although the plaintiff "exported an average of 400,000 barrels of oil a day into the United States" in recent years—which incidentally represents $12 million of imports *daily* and over $4 billion *annually* (at $30 per barrel)—the plaintiff did not "allege any injury to itself derived from its export of oil to the United States." *Id.* at 422 n.5. For that reason, presumably, the court was spared from having to consider whether all or part of the plaintiff's claim could be said to arise from *that* domestic effect.

21. *Id.* at 428.

22. *Id.* at 431; *see also id.* at 421 (stating that "[t]he plaintiff is a Norwegian oil corporation that conducts business solely in the North Sea" that "seeks redress under the United States antitrust laws" and citing *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), to the effect that "United States antitrust laws 'do not regulate the competitive conditions of other nations' economies'").

23. *Id.* at 432 (Higginbotham, J., dissenting) (stating that "[t]here are many terms of art about which one can debate whether Congress uses the term as courts do, but this word is not one of them").

24. *Id.* at 433 n.11 (Higginbotham, J., dissenting). This is not surprising—any holistic view of the statute's legislative history makes clear that it contains language to support *both* interpretations, and is perhaps *intentionally* vague. *See* Mehra, *supra* note 3, at 296-99.

argument to which the majority did not respond: that private enforcement of United States antitrust laws supplements the efforts of the Justice Department and that the dissent's reading of the FTAIA "ensures that parties injured by foreign aspects of the same conspiracy that harms American commerce are part of the phalanx of enforcers."[25]

B. *"A Claim" Means "Anybody's Hypothetical Claim, Including the Government's"*

In *Kruman* v. *Christie's International PLC*,[26] the Second Circuit sided with the dissent in *Den Norske* in concluding that the FTAIA's "language is clear," and that, since "Congress used the indefinite article," the "'effect' on domestic commerce need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the Sherman Act."[27] As a result, the court concluded that, where a conspiracy to rig auctions for art, antiques, and collectibles had effects on United States commerce, buyers and sellers injured by the foreign effects of that conspiracy *could* maintain a Sherman Act claim.[28] The court also considered the legislative history and the policy interest of making it hard for violators to use the foreign effects of a worldwide scheme to supplement the domestic branch of their conspiracy.[29]

Interestingly, the court in *Kruman* suggested a very wide interpretation of the second prong of the FTAIA. In particular, the court concluded that "[t]he language 'gives rise to a claim' only requires that the 'effect' on domestic commerce violate the substantive provisions the Sherman Act" and is not actually "predicated on the existence of *an* injury to *a* plaintiff."[30] As a result, a fair interpretation of the Second Circuit's reading is that a plaintiff whose claim does not arise from the domestic effect of a conspiracy does not need to show that "the violation has caused injury to *a* plaintiff" in particular.[31]

C. *"A Claim" Means "Somebody's Private Claim, Including Somebody Else's"*

Three circuit courts, three different readings.[32] That is the score

25. *Den Norske*, 241 F.3d at 439 (Higginbotham, J., dissenting) (describing "the Clayton Act as recruit[ing] private parties [to assist] the Department of Justice").
26. 284 F.3d 384 (2d Cir. 2002).
27. *Id.* at 400.
28. *Id.* at 403.
29. *See id.* at 400, 403.
30. *Id.* at 399-400.
31. *Id.* This is also how the District of Columbia Circuit construed *Kruman*. *See* Empagran S.A. v. F. Hoffman-La Roche, Ltd., 315 F.3d 338, 351-52 (D.C. Cir. 2003).
32. *See also* Metallgesellschaft AG v. Sumtitomo Corp. of Am., No. 00-3700, 2003

after the District of Columbia Circuit's opinion in *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*[33] The court considered whether the FTAIA permitted subject matter jurisdiction over the claims of foreign purchasers of vitamin products who alleged injury based on the foreign effects of a worldwide vitamin cartel that also had adverse effects in the United States.[34]

The District of Columbia Circuit ruled that the plaintiffs did have standing, rejecting the Fifth Circuit majority's conclusion that the FTAIA requires that their claim must arise from the domestic effects. But, unlike the Second Circuit, the *Empagran* court concluded that "'giving rise to a claim' means giving rise to *someone's* private claim for damages or equitable relief," and, "[t]o satisfy this requirement, the plaintiff must allege that some private person or entity has suffered actual or threatened injury as a result of the United States effect of the defendant's violation of the Sherman Act."[35] In other words, even if the plaintiff's claim need not arise from the domestic effect, there must be a potential Sherman Act claim that another private party *could* bring arising from that effect.[36]

III. Three Bigger Issues

How these circuit courts got to their various conclusions is interesting in and of itself. But how the courts read the second prong of the FTAIA will bear directly on three policy questions that are little analyzed in these cases, and yet are quite important to how antitrust policy will operate in the world trade regime. First, who has standing—in essence, to whom can the enforcement agencies look as allies against international cartels? Second, will the private enforcement of United States antitrust laws be allowed to overlap with the jurisdiction of other nations? Finally, can the court opinions that favor the narrower reading, the concept of being injured in a hypothetical "American marketplace," be reconciled with a world trading regime?

WL 1665352, at *5 (7th Cir. Mar. 31, 2003) ("Although we need not come to a definitive resolution of the issue in this case, the [7th Circuit's en banc decision in *United Phosphorous, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003),] appears to point in the direction of the approach taken by the D.C. and Second Circuit's.").

33. 315 F.3d 338 (D.C. Cir. 2003).

34. *Id.* at 340.

35. *Id.* at 352.

36. It is interesting that the District of Columbia Circuit chose to reach the question of whether or not the claim arising from the United States-related effect needs to be actual or merely hypothetical given that it recognized that, "[i]n the instant case, the conspiracy's effects did allegedly injure and did give rise to the claims of some private entities—namely the domestic plaintiffs who filed suit along with the foreign plaintiffs against the vitamin companies." *Id.* at 352.

A. Who Will Be the Enforcement Agencies' Allies?

Each of the cases discussed addressed the proposition that private antitrust actions aid enforcement through increasing deterrence of potential violators.[37] If a plaintiff can bring American treble damages actions for a claim derived from non-American effects of anticompetitive conduct that also had American anticompetitive effects, that will serve to increase the level of deterrence of such antitrust conspiracies.

But the additional deterrence of private actions does not lie merely in the added cost that a violator must pay when private plaintiffs piggyback off of previously successful government action. Instead, the private right of action encourages private plaintiffs to *aid* and *inform* government enforcement agencies—thus providing a force-multiplier to those agencies' own resources.[38] And, of course, although the evidence would be hard to obtain, some violators probably are deterred by the knowledge of the incentives that private claims provide to their victims and their co-conspirators.[39]

Recently, European Union and Japanese antitrust regulators have begun to examine the mechanisms by which they, like their American counterparts, can find private allies. The European Union has recently adopted a regulation that clarifies that European Union competition law can be enforced at the national court level, including through private actions.[40] Additionally, the European Union has added an amnesty

37. *Id.* at 355-56 (noting that, in the international context, to eschew such marginal deterrence by foreign-injured claimants could, as a practical matter, make worldwide cartels profitable *even* where they were forced to pay treble damages to United States-injured claimants); Kruman v. Christie's Int'l PLC, 284 F.3d 384, 403 (2d Cir. 2002); Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 435 (5th Cir. 2001) (Higginbotham, J., dissenting), *cert. denied sub nom.* Statoil ASA v. HeereMac v.o.f., 534 U.S. 1127 (2002). *But see id.* at 430 n.30 (dismissing this argument based on notion that it was dicta in a pre-FTAIA Supreme Court case, *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), without addressing merits of the argument).

38. And indeed, not all private actions can be described as mere piggybacking where private parties arrive at the scene after the government has made the case. *See, e.g.*, Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST 711, 712-13 (2001) (recounting how private plaintiffs' attorneys gathered information on international vitamin cartel *prior* to Justice Department empanelment of a grand jury in an investigation that ultimately led to record-setting civil penalties).

39. *See* Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 451 (1997) (observing that, even though the same aim of enhanced deterrence might be achieved by raising public penalties for anticompetitive conduct, "it is likely that many antitrust class actions still play a useful role, especially through deterring conduct that stops short of being criminal and through identification of antitrust violations that might otherwise go unchallenged").

40. *See* Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1 (E.C.).

program that gives conspirators an incentive to inform on each other that is similar to the revised program adopted by the Justice Department in 1993.[41] Similarly, the Japan Fair Trade Commission has lately recognized the utility of private enforcement,[42] and has made attempts to seek out such private allies.[43]

Interestingly, at a time when the antitrust enforcers of our major trading partners are reaching out to their private citizens as allies in enforcement, the United States could actually be poised to step back from this position. The resolution of the FTAIA split will determine whether those same private citizens[44] will have the treble damages incentive under United States law to reach out and help United States enforcement agencies. Essentially, the question is whether we will be willing to "purchase" information from these foreign-affected victims of international cartels.

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41. *See* Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3 (E.C.); *see also* James M. Griffin, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice, Presentation at the American Bar Association Section of Antitrust Law 49th Annual Spring Meeting (Mar. 28, 2001) (explaining program), *available at* http://www.usdoj.gov/atr/public/criminal/8278.pdf (last visited February 15, 2003).

42. *See*, e.g., Akio Yamada, Secretary General of the Japan Fair Trade Commission, Competition Policy in the Future, Address Before the American Chamber of Commerce (Feb. 2, 2001) (stating that "lawsuits demanding a huge amount of damages are filed after the FTC issue [s] a cease[] and desist order. I believe that such lawsuits are serving as an effective deterrent."), *available at* http:// www.jftc.go.jp/e-page/speech/index.htm.

43. *See Jumin e No Kaigon Wa Go Ho—Dango Jihen Meguru Ko Torii Kiroko [Disclosure of JFTC Documents in Bid-Rigging Case to Residents Lawful]*, ASAHI SHIMBUN (Japan), Oct. 18, 2001, at 39 (reporting district court decision upholding JFTC disclosure of investigation documents to citizens). *But see Residents Thwarted in Bid-Rigging Suit: High Court Forbids FTC Disclosure*, JAPAN TIMES, Jun. 6, 2002 (reporting that appeals court "ordered the Fair Trade Commission not to disclose information about bid-rigging cases involving five companies to residents in Tokyo and Yokohama who have sued the firms for damages" despite the FTC's prior decision "to grant partial disclosure").

44. Although the FTAIA does not mention the citizenship of who may sue, as a practical matter, those whose claims arise from foreign effects of anticompetitive conduct are more likely to be foreigners than those whose claims arise from American effects. *Cf.* 15 U.S.C. § 6a (2001). Although, it certainly cannot be said that only Americans have claims that arise from American effects, and that only foreigners have claims that arise from non-American effects. Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 ANTITRUST 53 (2001).

B. *How Much Will Private Enforcement of United States Antitrust Laws Be Allowed To Overlap with the Antitrust Jurisdiction of Other Nations?*

The ascendance of effects-based approaches over territorial ones makes jurisdictional overlap possible in antitrust. When conduct occurs in one nation with effects in another—or when effects occur in multiple nations—the widespread acceptance of the effects test means that several nations' antitrust regimes may apply concurrently.

The resolution of the FTAIA's "gives rise to a claim" prong will determine whether the applicability of the effects test to private claims will be limited in a manner that reduces this overlap. Prior to *Hartford Fire*, some courts had adopted an "interest balancing" approach to allocate jurisdiction to nations with "greater interest" in cases of such overlap.[45] As with territorial approaches, the result is to create nonoverlapping jurisdiction for one nation.

Currently, there is an ongoing discussion over whether it is more efficient to allocate exclusive jurisdiction to one nation, or to allow concurrent jurisdiction by more than one nation.[46] The extent to which private antitrust actions will be possible in overlapping jurisdictions will be determined under United States law by which reading of the FTAIA ultimately triumphs. This result is important for at least two reasons. First, to the extent that the less plaintiff-friendly reading wins out, the enforcement agencies will potentially have wider jurisdiction under the effects test than private plaintiffs, since they will need only to show that the conduct of which they complain has a United States effect.[47] Presumably, unlike private plaintiffs, the agencies would not be subject to the limiting principle of having to show an injury from the United States effect.[48]

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45. *See* William S. Dodge, *An Economic Defense of Concurrent Antitrust Jurisdiction*, 38 TEX. INT'L L.J. 27, 30-31 (2003) (asking why "a court [should] even attempt such an exercise [as interest balancing] if not to assign jurisdiction to the state with the greater interest").

46. *See id.* at 39 (arguing that a "system of concurrent antitrust jurisdiction produced by the effects approach is Pareto efficient and that Pareto efficiency is a more appropriate standard in th[e] [antitrust] context than Kaldor-Hicks efficiency"). *But see* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 906-09 (2002) (observing that, with concurrent antitrust jurisdiction, for a "transaction to be permitted, being globally efficient is not enough, it must improve the welfare of every country [individually]").

47. *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997).

48. No court has yet concluded that the FTAIA's "gives rise to a claim" language sets a limit on agency enforcement under the effects test, although the Second Circuit's opinion in *Kruman* could be read to do so in the uncontroversial manner of requiring that the United States-related "effect" be an anticompetitive one of the type that usually subjects conduct to scrutiny under the antitrust laws. *See* Kruman v. Christie's Int'l PLC,

Second, if a similar test is adopted in other jurisdictions that have private rights of actions, then jurisdiction over private claims would be apportioned to the nation within whose borders the effects that gave rise to the injury could be said to be located. As a result, reciprocal adoption of this test could eliminate overlap, and eliminate competition of antitrust law regimes, with respect to private rights of action.

C. *Can We Just Protect the "United States Marketplace"?*

Cases that have adopted the narrower reading of the FTAIA have placed significant emphasis on a plaintiff's participation in a notional "United States marketplace."[49] Partly this is due to a line in the statute's legislative history that mentions the term "domestic marketplace," although not with any specific reference to the "gives rise to a claim" language or any general reference to limiting a class of plaintiffs' standing.[50] But partly this is because a court that decides to try to limit jurisdiction based on which of many effects can be said to give rise to the plaintiff's claim has to create some guiding principle by which to distinguish a "domestic" effect from a "foreign" one.

The United States marketplace concept has some superficial appeal. A court might weigh the level of a plaintiff's participation in that marketplace, and the nexus between that participation and its antitrust claim. This inquiry could theoretically evolve into something like an antitrust version of the "contacts" approach to personal jurisdiction.[51]

But there are several ways in which the United States marketplace approach is difficult to reconcile with a global trading system. First, it requires definition of the extent of the marketplace: does it just involve participation in commerce in American territory, or does the United States marketplace extend to, for example, sales abroad for expected

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284 F.3d 384, 403 (2d Cir. 2002). *But see* United Phosphorous, Ltd. v. Angus Chem. Co., 322 F.3d 942, 965 (7th Cir. 2003) (Wood, J., dissenting) (asserting that, due to the court's en banc conclusion that FTAIA should be treated as question of subject matter jurisdiction, "[t]he [federal] government will not want to conduct criminal antitrust investigations in the Seventh Circuit").

49. Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 429 n.28 (5th Cir. 2001) (stating that the majority "hold[s] . . . that a foreign plaintiff show that its injuries arise from a United States market"), *cert. denied sub nom.* Statoil ASA v. HeereMac v.o.f., 534 U.S. 1127 (2002); *see also In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 715-716 (D. Md. 2001) (adopting a "United States marketplace" participation test together with the less plaintiff-friendly reading of the FTAIA's second prong).

50. *See* H.R. REP. 97-686, at 10 (1982) (stating that "foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do").

51. *See United Phosphorus*, 322 F.3d 942 (discussing the defendant's American activities in a manner that resembles contact analysis).

United States imports? By what notion, other than territorial jurisdiction, would this judicially created test exclude the latter? Second, and relatedly, it requires courts to set up a discrete American marketplace jurisdictional zone within a world trade regime that is supposed to form an integrated whole. There is an inherent conceptual tension in this effort. Then, some notion of participation in that zone must be defined, including the question of whether only active participation (for example, sales) would count—as opposed to passive participation (for example, an agreement of competitors not to sell into the zone).[52] Finally, by doing so, it creates an incentive for violators to structure their enterprises to take advantage of the areas outside the "walls" of the patrolled United States marketplace. This conflicts with United States caselaw that has recognized this danger previously.[53]

IV. Conclusion

Courts have been handling this statutory question in the way they know best: looking first to textual language and legislative history, and only sparingly to policy matters. However, where the former point in multiple directions, it would appear reasonable to look to policy in a more in-depth fashion. This is particularly true here, where the same policy issues are critical to how international antitrust will evolve in the world trading system. It remains to be seen whether the importance of these issues will be recognized as this standing issue is resolved.

52. Note that the claim of the plaintiffs in *Hartford Fire* could be described as arising from the effect of a foreign agreement *not* to export a particular type of insurance coverage to the United States. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

53. *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997) (noting potential strategic use of "territorial firewalls" if effects test is narrowed in criminal antitrust cases); *see also* Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 314-15 (1978) (observing that if, foreign plaintiffs cannot seek a remedy for their antitrust injuries, "persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home").