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International Antitrust: Supreme Court Decides the Meaning of "Gives Rise to a Claim" and "Foreign Tribunal"

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INTERNATIONAL ANTITRUST: SUPREME COURT DECIDES THE MEANING OF "GIVES RISE TO A CLAIM" AND "FOREIGN TRIBUNAL"

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I. Introduction

Since 1991, there has been tremendous growth in the number of countries that have antitrust laws and agencies.[1] In 1991, only a handful of nations had antitrust laws that were actively enforced. By 2001, more than 100 nations had such laws.[2] Perhaps, no other regulatory scheme has spread so far, so fast. Antitrust enforcement is now found throughout the world,[3] and "market principles, deregulation, and respect for competitive forces have been broadly embraced. . . ."[4]

Because business transactions are international in scope,[5] there are ongoing efforts to achieve greater substantive and procedural convergence in international antitrust policy.[6] Having antitrust laws everywhere at once is of little value if they do not work together to advance global competition. The failed Honeywell/GE merger illustrates this point.[7]

No doubt, the process of harmonizing antitrust laws on a worldwide basis will proceed incrementally for years to come.[8] For example, there remains uncertainty as to whether an existing global entity like the World Trade Organization

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1 Charles A. James, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *International Antitrust In The 21st Century: Cooperation and Convergence,* Address at the OECD Global Forum on Competition, Paris, France, October 17, 2001. U.S. Department of Justice, *Advanced Corporate Compliance Workshop 2002*, 1291 PLI/CORP 827, 860 (2002).

2 Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade And Commerce Or Runaway Regulation?*, 26-FALL FLETCHER F. WORLD AFF. 59, 60 (2002).

3 James, *supra* note 1, at 860.

4 *Id.*

5 John T. Soma & Eric K. Weingarten, *Multinational Economic Network Effects And The Need For An International Antitrust Response From The World Trade Organization:A Case Study In Broadcast-Media And News Corporation*, 21 U. PA. J. INT'L ECON. L. 41, 43 (2000); *see also*, Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 19 (1st Cir. 2004) ("In an increasingly global economy, commercial transactions involving participants from many lands have become common fare.").

6 Roger Alan Boner & William E. Kovacic, *Antitrust Policy In Ukraine*, 31 GEO. WASH. J. INT'L L. & ECON. 1, 44 (1997) ("Some antitrust scholars have recently proposed that national antitrust laws should converge into a single, consistent, international antitrust law."); James, *supra* note 1, at 857-61.

7 Matt Murray et. al., *Oceans Apart: As Honeywell Deal Goes Awry for GE, Fallout May Be Global*, WALL ST. J., June 15, 2001, at A1, *available at* Westlaw, 6/15/01 WSJ A1.

8 Spencer Weber Waller, *The Internationalization Of Antitrust Enforcement*, 77 B.U. L. REV. 343, 404 (1997) ("Harmonization in the antitrust area continues more by way of accretion than design.").

should be the focus of promulgating international competition policy or whether a new and separate international agency should be established.[9]

Nonetheless, issues involving international antitrust emerge and require resolution, as exemplified this past term when the United States Supreme Court ("Court") decided two cases involving such issues. First, in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*[10] ("Empagran"), the Court clarified the phrase, "gives rise to a claim," within the meaning of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). Second, in *Intel Corporation v. Advanced Micro Devices*[11] ("Intel"), the Court clarified whether the Directorate General of the European Union is a "foreign tribunal" within the meaning of section 1782 of the Judicial Code.[12]

This note discusses both cases. Part II focuses on *Empagran*, which involves a question of subject matter jurisdiction and stands for the proposition that "where the defendant's conduct affects both domestic and foreign commerce, but the plaintiff's injury arises only from the conduct's foreign effect and not its domestic effect, the plaintiff's injury is independent from the domestic effect and the court has no jurisdiction."[13] This rule means that a global conspiracy's effect on domestic commerce must give rise to the plaintiff's claim.[14] Part III focuses on *Intel*, which involves the discovery of documents in the United States in connection with a proceeding in a "foreign tribunal" and stands for the proposition that Section 1782 of the Judicial Code "authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals . . . in proceedings abroad."[15]

Part IV takes a closer look at cases that have been decided since the Court issued its opinions. They provide early indications of how trial courts and courts of appeal apply the rules announced in *Empagran* and *Intel*. In addition, Part IV takes a quick look at the issue of comity in these cases. Comity is a doctrine that takes into account "foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime."[16] In *Empagran*, the Court emphasized the importance of comity, but in *Intel*, the Court minimized its importance.

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[9] Andrew T. Guzman, *Antitrust And International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1143 (2001).

[10] 124 S. Ct. 2359 (2004) [hereinafter "Empagran II"].

[11] 124 S. Ct. 2466 (2004) [hereinafter "Intel II"].

[12] Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals, 28 U.S.C.A. § 1782 (1996); *see also* Intel II, 124 S. Ct. at 2473 ("Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals.").

[13] MM Global Serv. v. Dow Chem., 2004 WL 1792461, *4 (D.Conn. Aug. 11, 2004) (summarizing the rule of Empagran II).

[14] *See* Sniado v. Bank Aus. AG, 378 F.3d 210, 212 (2d Cir. 2004) (discussing Empagran II).

[15] Intel II, 124 S. Ct. at 2473.

[16] Comity Société Nationale Industrielle Aérospatiale v. District Court, 482 U.S. 522, 555 (Blackmun, J., concurring in part and dissenting in part).

Part V concludes that both *Empagran* and *Intel* will help achieve greater procedural convergence in international antitrust policy, but also cautions that "[i]t's tough to make predictions, especially about the future."[17] The ramifications of domestic antitrust decisions can be difficult to anticipate at the time they are decided,[18] and there is no reason to believe that the ramifications of these international antitrust decisions would be any less difficult to anticipate. At the very least, though, the Supreme Court in *Empagran* and *Intel*, respectively, provided more clarity regarding subject matter jurisdiction and discovery in international antitrust matters.

II. *Empagran* Clarifies "Gives Rise to a Claim"

Empagran is an antitrust case brought by foreign purchasers of vitamins products against foreign and domestic companies that distribute and sell these vitamin products around the world.[19] The plaintiff-purchasers alleged that defendant-companies engaged

> [in] an over-arching worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins; that this cartel operated on a global basis and affected virtually every market where [defendants] operated worldwide; and that [their] unlawful price-fixing conduct had adverse effects in the United States and in other nations that caused injury to appellants in connection with their foreign purchases of vitamin products.[20]

The District Court granted the defendants' motion to dismiss the case because "the injuries plaintiffs sought to redress were allegedly sustained in transactions that lack any direct connection to United States commerce."[21] The D.C. Circuit reversed,[22] holding that "FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce.[23] But, "[t]he anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect of United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court."[24] The Court granted certiorari essentially to clarify the meaning of the FTAIA phrase, "gives rise to a claim."

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[17] *See* William E. Lee, *Facts, Assumptions and American Pie*, 2000 L. REV. MICH. ST. U. DET. C.L. 239, 252 n.61 (2000) (stating that this comment is sometimes attributed to Yogi Berra).

[18] *See* Deborah A. Garza, *25 Years Later: Walking in the Footsteps of Brunswick, Illinois Brick, and Sylvania*, 17 ANTITRUST 7, 7 (2002).

[19] Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338, 340-41 (D.C. Cir. 2003), *cert. granted*, 2003 WL 22734815 (U.S. Dec. 15, 2003) (No. 03-0724) [hereinafter "Empagran I"].

[20] *Id.* at 340.

[21] *Id.*

[22] *Id.* at 360.

[23] *Id.* at 350.

[24] *Id.*

A. Foreign Trade Antitrust Improvements Act

To help U.S. companies compete more effectively in foreign markets,[25] to reduce the potential antitrust liability of U.S. companies working together to compete in foreign markets,[26] and to clarify the extraterritorial reach of the antitrust laws of the United States,[27] Congress amended the Sherman Act[28] with the FTAIA of 1982.[29] It provides in pertinent part that the Sherman Act "shall not apply to conduct involving trade or commerce (except import trade or commerce) with foreign nations" unless (1) such foreign conduct "has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and (2) the effect of such conduct on domestic conduct "gives rise to a claim" under the Sherman Act.[30]

The first prong of the two-pronged exception seen above requires a direct, substantial, and reasonably foreseeable effect on U.S. commerce. This requirement is not controversial. It is axiomatic that where there is no harm, there can be no foul. School boys in Indiana playing pick-up basketball have understood and applied this "rule of law" for generations with absolutely no guidance from the Court. Hence, the FTAIA shields a defendant who engages in anticompetitive conduct in foreign markets as long as that anticompetitive conduct does not have a direct, substantial, and reasonably foreseeable effect on U.S. commerce.[31] Conversely, the FTAIA provides an avenue of action for a U.S. plaintiff injured by a defendant engaged in anticompetitive conduct in foreign commerce that adversely affects U.S. commerce.

The origin of the requirement of an effect on U.S. commerce is found in *United States v. Aluminum Co. of America*.[32] In that case, Judge Learned Hand promulgated the so-called "effects test,"[33] thereby resolving whether Congress intended to impose liability for anticompetitive conduct outside the United States. Judge Hand announced that the Sherman Act was limited to acts intended to affect U.S. imports and did in fact affect them.[34] He pointedly rejected that the

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[25] Spencer Weber Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY.CONSUMER L. REV. 523, 529-31 (2002).

[26] *See* United Phosphorus. Ltd. v. ANGUS Chem. Co., 322 F.3d 942, 951 (7th Cir. 2003) ("[T]he legislative history shows that jurisdiction stripping is what Congress had in mind in enacting the FTAIA.").

[27] James R. Atwood & Christopher D. Oatway, *Foreign-Market Claims*, 25 NAT'L L.J. 37 (2003), *available on Westlaw at* 5/5/03 NLJ B8, (col. 1).

[28] Section One of the Sherman Act is the foundation of American antitrust law. "It proscribes any contract or conspiracy to restrain trade or commerce among the states or with foreign nations." Liam D. Scully, *Antitrust Law—Section One Of The Sherman Act Extends Criminal Liability To Conduct Committed Wholly Outside Of The United States*, 31 SUFFOLK U. L. REV. 977, 977 (1998).

[29] 15 U.S.C. § 6a (1982).

[30] *Id.*

[31] 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, 422-23 (2002-03).

[32] 148 F.2d 416 (2d Cir. 1945); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 n.24 (1993) ("Sherman Act covers foreign conduct producing a substantial intended effect in the United States. . . .").

[33] *United Phosphorus*, 322 F.3d at 946-47.

[34] *Id.*

Sherman Act applied to anticompetitive conduct that had no consequences within the United States.[35]

The second prong of the FTAIA requires that the effect of anticompetitive conduct in foreign markets on domestic commerce "gives rise to a claim" under the Sherman Act. By contrast with the first prong that involves no dispute, there was a Circuit split about the meaning of the phrase, "gives rise to a claim."[36]

B. A Split in the Circuits[37]

In *Den Norske*,[38] the Fifth Circuit held that "gives rise to a claim" refers specifically to the plaintiff's claim.[39] Consequently, only claims arising from the U.S. effect of the anti-competitive conduct are actionable. Injured consumers in U.S. commerce may state a claim that allows U.S. courts to have jurisdiction, but consumers in foreign markets may not state a claim even if they are affected by the very same anticompetitive conduct.[40]

Accordingly, the *Den Norske* court upheld the dismissal of a Norwegian oil company's claim that it paid inflated prices for heavy-lift barge services in non-U.S. waters (the North Sea), but it permitted claims of companies injured by the very same anticompetitive conduct in U.S. waters (Gulf of Mexico).[41] To the Fifth Circuit, a FTAIA claim requires that the "direct, substantial, and reasonably foreseeable effect" on U.S. commerce gives rise to "the" claim under the Sherman Act and not "a" claim unrelated to the effect on U.S. Commerce.[42]

In *Kruman*,[43] the Second Circuit reached a different conclusion. *Kruman* involved allegations of price fixing against two major auction houses, Christie's International and Sotheby's Holdings. It was a class action on behalf of persons who bought or sold items at auction outside the United States.[44] The District Court stated that "The fundamental question here is whether a transnational price fixing conspiracy that affects commerce both in the United States and in other countries inevitably gives persons injured abroad in transactions otherwise un-

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35 *Id.*

36 Ryan A. Haas, *Act Locally, Apply Globally: Protecting Consumers from International Cartels by Applying Domestic Antitrust Law Globally*, 15 LOY. CONSUMER L. REV. 99, 100-01 (2003).

37 *Id.* (discussing this circuit split succinctly and clearly).

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

39 *See* Michael D. Blechman, *Relationships Among Competitors*, 1370 PLI/CORP 121, 161-64 (2003).

40 Atwood & Oatway, *supra* note 27.

41 *Id.*

42 Salil K. Mehra, *"A" Is For Anachronism: The FTAIA Meets the World Trading System*, 107 DICK. L. REV. 763, 765-66 (2003).

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

44 *Id.* at 389; *see also* Neal R. Stoll and Shepard Goldfein, *U.S. Antitrust Laws: Who Can Sue Whom?*, New York Law Journal, July 20, 2004, *available on Westlaw at* 7/20/2004 N.Y.L.J. 3, (col. 1) (succinctly summarizing Empagran II and its background); Ved P. Nanda & David K. Pansius, *Sherman Act, Section 7*, 1 LITIGATION OF INT'L DISPUTES IN U.S. COURTS § 5:13 (2004) ("U.S. plaintiffs settled their cases leaving only the foreign plaintiffs.").

connected with the United States a remedy under our antitrust laws."[45] In granting defendants' motion to dismiss, the District Court refused to "to impute to Congress an intention to establish an antitrust regimen to cover the world."[46]

On appeal, the Second Circuit reversed, rejecting the lower court's position that "plaintiffs injured abroad by anticompetitive conduct directed at foreign markets are barred from suit under the FTAIA. . . ."[47] According to the Second Circuit, the FTAIA grants wide jurisdiction over foreign parties.[48] The plaintiff only needs to show that the effect on U.S. commerce violated the Sherman Act to satisfy the "gives rise to a claim" requirement and to give U.S. courts jurisdiction.[49] Simply stated, the Second Circuit held that "a violation of the Sherman Act is not predicated on the existence of an injury to the plaintiff,"[50] a position which the Court decidedly rejected in *Empagran*.[51]

C. Opinion of the D.C. Circuit in *Empagran*

Landing somewhere in between *Den Norske* and *Kruman*,[52] the D.C. Circuit opined that "giving rise to a claim" simply means 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."[53] Further, as long as another private party has a potential Sherman Act claim arising from an effect on domestic commerce, then the claim before the court need not arise from the domestic effect.[54] The FTAIA "allows a foreign plaintiff to bring suit in U.S. courts when a global conspiracy has effects in the United States that 'give rise' to a Sherman Act claim, even if the foreign plaintiff's injury cannot be attributed to the U.S. effect."[55] To the D.C. Circuit, "as long as someone has a claim based on the requisite effects on U.S. commerce, any injured party can sue in the United States."[56]

In her dissent, Judge Henderson of the D.C. Circuit stated that she would have adhered to the Fifth Circuit's holding in *Den Norske*, and she added that "[t]he

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45 Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 623-24 (S.D.N.Y. 2001).

46 *Id.* at 624 ("There is no basis for imputing such an intent.").

47 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, 2172-73 (2003).

48 Andrew Stanger, *Analyzing U.S. Antitrust Jurisdiction Over Foreign Parties After Empagran S.A. V. F. Hoffman-Laroche, Ltd.*, 2003 B.Y.U. L. REV. 1453, 1467 (2003).

49 *Id.*

50 Kruman v. Christie's Int'l PLC, 284 F.3d at 399.

51 *See* Empagran II, 124 S. Ct. 2359, 2366 (2004) (holding that the Sherman Act does not apply when "the adverse foreign effect is independent of any adverse domestic effects").

52 Andrews Antitrust Litig. Reporter, *Foreign Trade Antitrust Improvements Act: D.C. Cir. Reinstates Foreign Vitamin Purchasers' Antitrust Lawsuit*, 10 No. 10 ANDREWS ANTITRUST LITIG. REP. 7 (2003).

53 Empagran I, 315 F.3d at 352.

54 Atwood & Oatway, *supra* note 27.

55 Andrews Antitrust Litig. Reporter, *supra* note 52.

56 Stoll & Goldfein, *supra* note 44.

majority decides whether a court has jurisdiction over claims asserted by a plaintiff in one action by reference to a hypothetical claim another party could, perhaps, raise in some other proceeding."[57] "This," she observed, "seems a peculiar notion."[58]

The D.C. Circuit asked the Solicitor General to express the views of the United States with respect to a rehearing en banc in *Empagran*.[59] In the Solicitor General's brief in support of a rehearing, the Solicitor General disagreed with the panel's ruling in *Empagran*, stating that the "most natural reading" of the FTAIA "is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the particular plaintiff before the court."[60] However, the D.C. Circuit denied a hearing en banc in *Empagran*, leaving the matter for the U.S. Supreme Court to resolve.

D. The U.S. Supreme Court's View

Writing for a unanimous Court,[61] Mr. Justice Breyer stated that a plaintiff must allege that the conspiracy's effect on domestic commerce gave rise to the plaintiff's claim.[62] Accordingly, the Court vacated the decision of the D.C. Circuit,[63] abrogated the decision of the Second Circuit in *Kruman*,[64] and announced that the FTAIA "does not apply where the plaintiff's claim rests solely on the independent foreign harm."[65] The Court made two points in its decision.[66] First, the holding avoids unreasonable interference with the sovereign interests of other countries.[67] Second, it comports with the legislative history of the FTAIA, which the Court opined was not intended "to expand in any significant way, the Sherman Act's scope as applied to foreign commerce."[68]

1. Sovereign interests of other countries

The Court "construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[69] Because the FTAIA is ambiguous, the Court applied a traditional rule of statutory construction: "legislation of

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[57] Empagran I, 315 F.3d at 360 (Henderson, J., dissenting).

[58] *Id.*

[59] *See* Hoffman-LaRoche, Ltd. v. Empagran S.A., Petition for a Writ of Certiorari, No. 03-724 2003 WL 22762741,at *7-8 (Nov. 13, 2003).

[60] *Id.*

[61] Justice Sandra Day O'Connor did not participate.

[62] *See* Sniado v. Bank Aus. AG, 378 F.3d 210, 212 (2d Cir. 2004) (discussing Empagran II).

[63] Empagran II, 124 S. Ct. at 2372.

[64] Sniado, 378 F.3d at 212 (stating that Empagran II abrogated the Second Circuit's decision in *Kruman*).

[65] Empagran II, 124 S. Ct. at 2363

[66] Stoll & Goldfein, *supra* note 44.

[67] Empagran II, 124 S. Ct. at 2369.

[68] *Id.*

[69] *Id.* at 2366.

Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[70] This rule of construction "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."[71] To the Court, "if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."[72]

2. *Comports with the legislative history*

The Court also reviewed the legislative history of the FTAIA, concluding that "Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach."[73] Specifically, the Court could find "no significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances." Moreover, the Solicitor General who supported the petitioner could find no cases "in which any court applied the Sherman Act to redress foreign injury in such circumstances."[74]

Respondents, however, cited three cases decided by the Supreme Court and three others decided by lower courts, which the Court reviewed *seriatim*. Regarding the cases decided by the Supreme Court, the Court observed that none addressed whether "foreign private plaintiffs could have obtained foreign relief based solely upon such independently caused foreign injury."[75] As to cases decided by lower courts, the Court observed that none provided "significant authority for application of the Sherman Act in the circumstances we here assume."[76] In contrast, the Court cited "a leading contemporaneous lower court case" that emphasizes that the domestic effect of foreign conduct be "sufficiently large to present a cognizable injury to the plaintiffs."[77]

3. *Linguistic Sense*

In sum, the Court concluded that it "makes linguistic sense to read the words 'a claim' as if they refer to the 'plaintiff's claim' or 'the claim at issue.'" To the Court, this interpretation of the phrase, "a claim" is consistent with the basic

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[70] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

[71] Empagran II, 124 S. Ct. at 2366.

[72] *Id.* at 2369; *see also* Stoll & Goldfein, *supra* note 44 ("Germany, Belgium, Canada, the United Kingdom, Ireland, the Netherlands and Japan all filed briefs in support of the defendants. . . .").

[73] Empagran II, 124 S. Ct. at 2371.

[74] *Id.* at 2369.

[75] *Id.* at 2370.

[76] *Id.* at 2372.

[77] *Id.* (quoting Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976).

intent of FTAIA as understood in the context of comity and history. Where "the statute's language reasonably permits an interpretation consistent with . . . intent," the Court opined that it "should adopt it."[78]

III. *Intel* Clarifies Whether the Directorate General Is a "Foreign Tribunal"

Advanced Micro Devices Inc. ("AMD") and Intel Corporation ("Intel") compete in the microprocessor industry.[79] AMD filed a complaint with the Directorate General ("DG") in Europe, claiming that Intel was abusing its dominant market position in violation of Article 82 of the Treaty of Rome of the European Union.[80] In connection with the investigation of the DG in Belgium, AMD filed a petition in a California federal district court under 28 U.S.C. 1782[81] to obtain transcripts and other documents from an antitrust case involving Intel being conducted in an Alabama federal district court. Section 1782 governs discovery within the United States of information to be used in foreign legal proceedings.[82] Hence, the field of play is Belgium to California to Alabama, which seems like the antitrust version of "Tinker to Evans to Chance."[83] The California District Court agreed with Intel that the investigation of the DG was not a "proceeding in a foreign or international tribunal" under section 1782,[84] but the Ninth Circuit reversed[85] and the Court granted Intel's petition for certiorari.[86]

A. The European Union

The origin of the twenty-five-member European Union ("EU") can be traced to a six-nation agreement reached in 1952 to establish the European Coal and

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[78] *Id.* at 2371-72.

[79] *See* Andrews Antitrust Litig. Reporter, *Discovery: 9th Cir. Says AMD Can Pursue Discovery Request for EC Proceeding*, 10 No. 1 ANDREWS ANTITRUST LITIG. REP. 7 (2002).

[80] Katherine Birmingham Wilmore, *International Legal Developments in Review: 2002 Business Transactions & Disputes*, 37 INT'L LAW. 479, 494-95 (2003). For more information on Article 82 of the Treaty of Rome, *see* Article 82 of the EC Treaty, *available at* http://europa.eu.int/comm/competition/legislation/treaties/ec/art82_en.html (last visited Oct. 28, 2004).

[81] Originally, AMD wanted the E.C.'s directorate-general for competition to petition the U.S. courts to obtain documents, but the directorate-general declined to do so. Gregory P. Joseph, *International Discovery*, 26 NAT'L L. J. 48 (2004) *available on Westlaw at* 8/2/04 NLJ 12, (col. 1).

[82] Wilmore, *supra* note 80, at 495 ("To support its complaint, AMD applied under 28 U.S.C. § 1782, to the district court in California for access to documents and transcripts from a proceeding pending in federal court in Alabama.").

[83] Joe Tinker (SS), Johnny Evers (2B), and Frank Chance (1B) were the famous double play team of the Chicago Cubs. They were elected to the Baseball Hall of Fame as a trio in 1946. Baseball Hall of Fame, *at* http://www.baseballhalloffame.org/hofers_and_honorees/extra/tinker_evers_chance.htm (last visited May 6, 2004).

[84] Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 669 (9th Cir. 2002) [hereinafter "Intel I"] (referencing the District Court's determination that the proceeding for which AMD seeks discovery does not qualify under 28 U.S.C. § 1782).

[85] *Id.*

[86] Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664 (9th Cir. 2002), *cert. granted*, 124 S. Ct. 531 (Nov. 10, 2003) (No. 02-0572).

Steel Community ("ECSC"), which focused in part on price and output controls and competition rules. Building on this agreement, the six nations formed the European Community in 1957 with the Treaty of Rome. One long-term goal of the Treaty of Rome was the establishment of a common market. After some "alarms and excursions," European leaders eventually negotiated and signed the Treaty on European Union or the Maastricht Treaty, which went into effect November 1, 1993. One important objective of the Treaty was the creation of a timetable for economic union. To this end, the Treaty of European Union established the European Commission ("EC"), which is the EU's competition law enforcement agency and one of five major institutions intended to advance the goals of the EU.[87] The EC is like the Antitrust Division, Federal Trade Commission ("FTC"), and state attorneys general wrapped into one.[88] In the context of this case, AMD brought its complaint about Intel to the DG, which is a subunit of the EC.[89]

B. Article 82

AMD complained that Intel abused its dominant position in Europe in violation of Article 82 of the Treaty of Rome.[90] Article 82 prevents an enterprise that occupies a dominant position within the EU market from abusing its dominance. Such abuse is prohibited because it is incompatible with the objective of integrating the economies of Europe, which is one important purpose of the EU.[91] To state a claim under Article 82 (formerly Article 86), the following elements must be present: (1) a dominant position of a relevant product and in a geographic market within the common market; (2) an abusive act; and (3) a potential appreciable effect on trade between Member States.[92]

Article 82 is often compared with Section 2 of the Sherman Act, which proscribes monopolization or attempts to monopolize.[93] However, the parallel is not

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[87] This paragraph is freely adapted from Jeffrey M. Peterson, *Unrest in the European Commission: The Changing Landscape and Politics of International Mergers for United States Companies*, 24 HOUS. J. INT'L L. 377, 381-84 (2002).

[88] *But see id.* at 400 ("In many ways, EU antitrust powers are lacking when compared to those of the Department of Justice and Federal Trade Commission.").

[89] Oliver Borgers et. al., *International Antitrust Law*, 37 INT'L LAW. 305, 323-24 (2003).

[90] *Id.*

[91] *See* Mercer H. Harz, *Dominance And Duty In The European Union: A Look Through Microsoft Windows At The Essential Facilities Doctrine*, 11 EMORY INT'L L. REV. 189, 194-95 (1996)(discussing Article 86 of the Treaty of Rome which is now Article 82 of the Treaty of Rome); James Kanter & Alexei Barrionuevo, *Airbus Rescinds Challenge to EU's Microsoft Order*, WALL ST. J., Sept. 24, 2004, at B3, *avaliable on Westlaw at* 9/24/04 WSJ B3 (reporting that in a prehearing filing related to the EU's antitrust ruling against Microsoft Corp., the EU purportedly stated, "[t]he concept of abuse of a dominant position does not exist in U.S. law").

[92] James S. Venit, *EU Competition Law—Enforcement and Compliance: An Overview*, 65 ANTITRUST L.J. 81, 83-84 (1996) (discussing Article 86 which is now Article 82).

[93] *See* Thomas J. Horton & Stefan Schmitz, *The Lessons of Covisint: Regulating B2Bs Under European and American Competition Laws*, 47 WAYNE L. REV. 1231, 1237 (2001-02) (stating Article 82 is roughly parallel to Section 2 of the Sherman Act); Romano Subiotto & Filippo Amato, *The Reform Of The European Competition Policy Concerning Vertical Restraints*, 69 ANTITRUST L.J. 147, 193 n.1 (2001) (stating Article 82 roughly corresponds to Section 2 of the Sherman Act); Moritz Ferdinand

direct. Section 2 of the Sherman Act requires a monopoly, but Article 82 only requires a dominant position.[94] Hence, a monopolization forbidden by the Sherman Act differs from the abuse of dominant position forbidden by Article 82 of the Treaty of Rome.[95] Under Article 82, for example, a company may be thought to have a dominant position with a market share of 40%, but under the Sherman Act a market share of 40% would not be construed as "monopoly power."[96]

One reason for the difference between the concept of dominant position and monopoly power involves the purpose of competition policy. The purpose of U.S. policy is the maximization of consumer welfare, but the purpose of EU policy is protecting competition by protecting competitors.[97] As Mario Monti[98] of the European Commission explained, the "goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market."[99]

The proposed $40 billion merger of General Electric and Honeywell illustrates the practical implications of this difference in approach. General Electric was prevented by the EC from acquiring Honeywell even though the Antitrust Division approved this merger.[100] A merger that was not a problem in the U.S. was a problem in the EU.[101]

C. Section 1782

To advance its Article 82 complaint in Belgium, where the EC is located, AMD wanted Intel documents from a case before a federal court in Alabama. AMD petitioned a federal court in California to obtain those documents from the Alabama court so it could use them to press its Article 82 complaint in Belgium.

Scharpenseel, *Consequences of E.U. Airline Deregulation in the Context of the Global Aviation Market*, 22 NW. J. INT'L L. & BUS. 91, 114 (2001) (stating Article 82 of the EC Treaty and Section 2 of the Sherman Act are similar).

94 Stefan Schmitz, *The European Commission's Decision In GE/Honeywell And The Question of the Goals of Antitrust Law*, 23 U. PA. J. INT'L ECON. L. 539, 595 n.82 (2002).

95 Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 IND. J. GLOBAL LEGAL STUD. 433, 453-55 (2002).

96 ANDREW I. GAVIL, ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 676-77 (2002).

97 Eric S. Hochstadt, *The Brown Shoe of European Union Competition Law*, 24 CARDOZO L. REV. 287, 295-96 (2002) ("Specifically, the goal of U.S. antitrust law is the maximization of consumer welfare, while the EC protects competition by protecting competitors.").

98 EU Competition Commissioner Mario Monti handed over his job to his successor, Neelie Kroes, at the end of October 2004. James Kanter, *EU, Coke Nearing Antitrust Pact To Give Rivals More Shelf Space*, WALL ST. J., Sept. 7, 2004, at B10 *available at* 2004 WL-WSJ 56939796.

99 John Deq. Briggs & Howard T. Rosenblatt , *GE/Honeywell—Live And Let Die: A Response to Kolasky & Greenfield*, 10 GEO. MASON L. REV. 459, 467 (2002).

100 John Deq. Briggs, Howard Rosenblatt, *A Bundle of Trouble: The Aftermath of GE/Honeywell*, 16 ANTITRUST 26, 26 (2001).

101 George Melloan, *GE-Honeywell Exposes Flaws in Antitrust Policy*, WALL. ST. J., June 26, 2001, at A23, *available at* 2001 WL-WSJ 2867701 (reporting that the main complaints came from competitors and not consumers). In the end, GE decided that it would rather not do this merger if it had to satisfy EU demands to sell off chunks of Honeywell's business. Carol Hymowitz, *IN THE LEAD: Jack Welch Confronts A Difficult Final Act To a Legendary Career*, WALL ST. J., June 19, 2001, at B1, *available at* 2001 WL-WSJ 2867000.

AMD petitioned the California court under Section 1782 of the Judicial Code, which allows the court to order discovery from a person within its jurisdiction for use in a foreign proceeding.[102] Entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," section 1782 provides in pertinent part "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."[103]

Since 1855, federal law has permitted judicial assistance to foreign courts. At first such assistance was somewhat restrictive, but the 1964 amendments to section 1782 greatly liberalized U.S. procedures for obtaining documentary evidence in the United States. Drafted by the United States Commission on International Rules of Judicial Procedure, the amendments primarily (1) expanded the class of litigation by substituting the word "tribunal" for the word "court" and by adding international tribunals, (2) allowed private litigants to initiate the process, and (3) deleted the requirement that the foreign litigation actually be pending.[104]

However, the first requirement of section 1782 is that there is a "proceeding in a foreign or international tribunal." Undoubtedly, a traditional lawsuit in some court of law is a "proceeding,"[105] but there is doubt as to whether an inquiry conducted by an administrative body is a "proceeding."[106]

D. The Ninth Circuit's View

In simple terms, the District Court held that AMD's complaint before the DG was not a proceeding under section 1782. The Ninth Circuit disagreed and held that any proceeding that is "related to a quasi-judicial or judicial proceeding" qualifies under section 1782, stating that the "investigation being conducted by [EC's] Directorate is related to a quasi-judicial or judicial proceeding." Therefore, "AMD has the right to petition the EC to stop what it believes is conduct that violates the EC Treaty, to present evidence it believes support its allegations, to have the EC evaluate what it presents and to have the resulting action (or inaction) reviewed by the European courts." According to the Ninth Circuit, section 1782 is "intended to be read broadly to include quasi-judicial and administrative bodies and foreign investigating magistrates."[107]

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[102] Borgers, *supra* note 89, at 323-24.

[103] Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals 28 U.S.C. § 1782(a) (1996).

[104] *See* Application of Gianoli Aldunate, 3 F.3d 54, 57 (2d Cir. 1993).

[105] *See* John Fellas, *Obtaining Evidence Located in the U.S. for Use in Foreign Litigation: 28 USC §1782*, 688 PLI/Lit 63, 83 (2003) (stating that the word "tribunal" was substituted for "court" in the 1964 amendments in order to "make it clear that assistance is not confined to proceedings before conventional courts") (citing S. Rep. 88-1580, 1964 USCCAN at 3788.)

[106] Edward A. Klein, *Recent Court Decisions have Addressed the Uncertainties in the Federal Statute Permitting Foreign Discovery in the United States*, 26 L.A. Law. 24, 26 (2003) ("However, it is less clear whether inquiries conducted by administrative bodies and other similar proceedings fall within the terms of the statute.").

[107] *Id.* (citing In re Letters Rogatory from Tokyo Dist. Prosecutor's Office, 16 F. 3d 1016, 1019 (9th Cir. 1994)).

In its amicus brief to the Supreme Court in support of Intel,[108] the EC stated that the "Ninth Circuit's holding fundamentally misconstrues the nature of the European Commission."[109] According to the EC, "Tribunals decide the merits of one party's claim against another. The Commission . . . never adjudicates disputes between parties."[110] Furthermore, "it does not adjudicate the rights of parties, as a tribunal would do. The parties to a complaint cannot be considered 'litigants' before a 'tribunal.'"[111] The EC pointed out that "[t]he Court of First Instance exercises judicial review of Commission decisions in the field of EC competition law, subject to a right of appeal to the Court of Justice on points of law."[112]

To ensure that the United States Supreme Court would not misapprehend how strongly the EC felt about this matter, the EC used unvarnished language to state flatly: "This is a very serious matter. If the United States court's conclusion undermines the effectiveness of the Commission's proceedings, for example through chilling its Leniency Program and complicating the Commission§'s ability to assert the law enforcement privilege, this would be a breach of the principle of international comity."[113]

The amicus brief of the EC seems somewhat overstated for three related reasons. First, the Ninth Circuit carefully analyzed the case law on section 1782 to prepare a foundation for its decision. It also carefully delineated the process followed by the DG to make the case that a DG investigation, albeit preliminary, does in fact lead to quasi-judicial proceedings, and therefore, it qualifies as a "proceeding before a tribunal" within the broad interpretation of section 1782.[114] Second, in the United States, antitrust cases are heard by an impartial judge, but in the EU antitrust proceedings are administrative proceedings conducted by the EC or the antitrust authorities and they may lead to restraint orders and fines.[115] An EC decision with respect to mergers, for example, has "the power of an administrative act, as it is the decision of a national European authority."[116] Third, it has been observed that at least respect to the EU merger review the "EC's Competition Directorate and its Competition Commissioner are effectively inves-

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[108] Brief of the Commission of the European Communities as Amicus Curiae in Support of Petitioner, 2002 WL 32157391, Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664 (9th Cir. 2002), *cert. granted*, 124 S. Ct. 531 (Nov. 10, 2003) (No. 02-0572).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Intel I, 292 F.3d at 666-67.

[115] Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 IND. J. GLOBAL LEGAL STUD. 433, 453-54 (2002).

[116] Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking Of The General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON. L. 325, 352-53 (2002).

tigator, prosecutor, and judge in merger investigations and that due process checks and balances are inadequate."[117]

E. The U.S. Supreme Court's View[118]

The main holding of the Court in *Intel* is that there is no foreign discoverability requirement for section 1782 discovery.[119] Specifically, section 1782(a) "authorizes, but does not require, a federal district court to provide assistance to a complainant in a European Commission proceeding that leads to a dispositive ruling, *i.e.,* a final administrative action both responsive to the complaint and reviewable in court."[120] However, under section 1782, an applicant must show: "(1) that the person from whom discovery is sought reside (or be found) in the district of the district court to which the application is made, (2) that the discovery be for use in a proceeding before a foreign tribunal, and (3) that the application be made by a foreign or international tribunal or 'any interested person.'"[121]

In so holding, the Court in *Intel* systematically defined the limits of a court's section 1782 discretion.[122] The Court:

Rejected that an "interested person" means only litigants, foreign sovereigns, and a sovereign's designated agents,[123] stating "[t]he text of [section] 1782(a), 'upon the application of any interested person,' plainly reaches beyond the universe of persons designated 'litigant.'"[124]

Declared, contrary to the pleas of the EC,[125] that the EC is a "tribunal" within the meaning of section 1782 when it acts as a first-instance decision-maker,[126] reasoning that "AMD could 'use' evidence in the reviewing courts only by submitting it to the [EC] in the current, investigative stage."[127]

Opined that the proceeding for which discovery is sought need not be imminent or pending,[128] holding that section 1782(a) "requires only that a dispositive

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[117] Janet L. McDavid, *Proposed Reform of the EU Merger Regulation: A U.S. Perspective*, 17-FALL ANTITRUST 52, 52 (2002); Terry Calvani, *International Enforcement of Vertical Issues*, SJ075 ALI-ABA 207, 224 (2004) ("Hell would freeze over before Congress gave the FTC such powers, and they might be unconstitutional if they did.").

[118] *See* Gregory P. Joseph, *International Discovery*, 26 Nat'l L. J. 48 (2004) *available on Westlaw at* 8/2/04 NLJ 12, (col. 1) (discussing Intel II succinctly but completely).

[119] Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 84 (2d Cir. 2004).

[120] Intel II, 124 S. Ct. at 2478.

[121] In re Application of Guy, 2004 WL 1857580, at *1 (S.D.N.Y. Aug. 19, 2004) (slip opinion) (citing Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79 (2d Cir. 2004) and applying Intel II).

[122] Schmitz, 376 F.3d at 84.

[123] Wright & Miller Supplemental Service, *Foreign Discovery*, 8 FED. PRAC. & PROC. CIV.2d § 2005.1 (2004).

[124] Intel II, 124 S. Ct. at 2478.

[125] Brief of the Commission of the European Communities, *supra* note 108.

[126] Wright & Miller Supplemental Service, *supra* note 123.

[127] Intel II, 124 S. Ct. at 2479.

[128] Andrews Antitrust Litig. Reporter, *High Court Green-Lights Computer Chip Maker's Discovery Request*, 12 No. 4 ANDREWS ANTITRUST LITIG. REP. 10 (2004) [hereinafter "Andrews Antitrust Litg. Reporter, High Court"].

ruling by the Commission, reviewable by the European courts, be within reasonable contemplation."[129]

Reasoned that the information need not be discoverable under the law of the foreign jurisdiction,[130] observing that "[b]eyond shielding material safeguarded by an applicable privilege, . . . nothing in the text of [section] 1782 limits a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there."[131]

The Court also brushed aside policy arguments made by Intel involving comity and parity.[132] With reference to parity, the Court made the commonsense observation that "[w]hen information is sought by an 'interested person,' a district court could condition relief upon that person's reciprocal exchange of information."[133] With reference to comity, it merely stated that "[w]e question whether foreign governments would in fact be offended by a domestic prescription permitting, but not requiring, judicial assistance."[134] However, in his dissent Mr. Justice Breyer observed that the EC is "entitled to deference." Citing to *Empagran*,[135] he concluded that "[i]n so ignoring the [EC], the majority undermines the comity interests [section] 1782 was designed to serve and disregards the maxim that we construe statutes so as to 'hel[p] the potentially conflicting laws of different nations work together in harmony. . . .'"[136]

In conclusion, the Court reiterated that "a district court is not required to grant a [section] 1782(a) discovery application simply because it has the authority to do so."[137] In this regard, "a court presented with a [section] 1782(a) request may take into account the nature of the foreign tribunal, the character of the foreign proceedings underway, and the receptivity of the foreign government or the court or agency to U.S. federal-court judicial assistance."[138] With this, the Court decided to allow "courts below to assure an airing adequate to determine what, if any, assistance is appropriate."[139]

IV. Lower Courts Apply the Rules of *Empagran* and *Intel*

Within weeks of the Court's decisions, trial courts and courts of appeal applied the rules of *Empagran* and *Intel* to decide cases before them. There are not many

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129 Intel II, 124 S. Ct. at 2480.

130 Andrews Antitrust Litig. Reporter, High Court, *supra* note 128.

131 Intel II, 124 S. Ct. at 2480.

132 *Id.* at 2481.

133 *Id.* at 2482

134 *Id.* at 2481

135 Empagran II, 124 S. Ct. at 2366 ("[This rule of statutory construction] thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.").

136 Intel II, 124 S. Ct. at 2487 (Breyer, J., dissenting).

137 *Id.* at 2482-83.

138 *Id.* at 2483.

139 *Id.* at 2484. The court below denied AMD's application for discovery "in full." *See* Advanced Micro Devices v. Intel Corp., 2004 WL 2282320, at *2 (N.D.Cal. Oct. 4, 2004).

cases, but those cases that have been decided provide an early indication of how lower courts apply the rules of *Empagran* and *Intel* to resolve international antitrust issues. This section takes a closer look at such cases.

The Court also addressed comity in *Empagran* and *Intel*. Comity is a doctrine that takes into account "foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime."[140] In *Empagran*, the Court emphasized the importance of comity, but in *Intel*, it minimized its importance. This section also takes a closer look at comity in *Empagran* and *Intel* and concludes that neither decision modified the Court's narrow rule of comity announced in *Hartford Fire Insurance v. California* ("Hartford Fire Insurance").[141]

A. Applying the Rule of *Empagran*

The rule of *Empagran* is that "where the defendant's conduct affects both domestic and foreign commerce, but the plaintiff's injury arises only from the conduct's foreign effect and not its domestic effect, the plaintiff's injury is independent from the domestic effect and the court has no jurisdiction."[142] Three cases, thus far, apply the rule of *Empagran*. In one case, the court dismissed the complaint because the plaintiff's injury stemmed from foreign conduct. In a second case, the court remanded it to the trial court for the purpose of discovery. In a third case, the court found that the plaintiff had stated a claim because the injury was not independent of the domestic conduct.

The Second Circuit in *Sniado* affirmed the District Court's dismissal of Sniado's complaint for lack of subject matter jurisdiction.[143] His original complaint alleged an injury from excessive currency exchange fees; the injury, though, occurred in Europe and stemmed from a price-fixing conspiracy between European banks.[144] Hence, Sniado's injury arose only from the conduct's foreign effect; consequently, the District Court in this case rightly decided that it had no jurisdiction.[145]

Sniado amended his complaint, alleging that his injury in Europe was somehow dependent (not independent) of the conspiracy's effect on United States commerce,[146] thereby hoping to bring his claim within the ambit of the *Empagran* rule. The Second Circuit brushed aside this argument on the merits, stat-

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[140] Comity Société Nationale Industrielle Aérospatiale v. District Court, 482 U.S. 522, 555 (Blackmun, J., concurring in part and dissenting in part) (discussing a "tripartite" analysis).

[141] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

[142] MM Global Serv. v. Dow Chem., 329 F. Supp. 2d 337, 341-42 (D.Conn. 2004) (citing Empagran II, 124 S. Ct. at 2363).

[143] Sniado v. Bank Austria AG, 378 F.3d 210, 213 (2d Cir. 2004) (stating that "the amended complaint is facially insufficient to establish jurisdiction").

[144] *Id.* at 212.

[145] *Id.*

[146] *Id.* at 213.

ing that "such an inference, even if reasonable, is too conclusory to avert dismissal."[147] It also declined to remand the case for discovery.

In contrast, the Third Circuit did remand a case for the purpose of discovery. *BHP New Zealand* involved allegations of a conspiracy "to artificially inflate graphite electrode prices by establishing a global cartel that fixed prices."[148] The court, *inter alia*, remanded this case to the trial court to "give the parties the opportunity to present evidence as to whether the alleged anticompetitive conduct's domestic effects were linked to the alleged foreign harm."[149] To state a claim under the rule of *Empagran*, plaintiffs must make a "preliminary showing . . . that the prices they paid for graphite electrodes were linked to, and not 'independent' from, the raising of prices in the United States by defendants' alleged global price-fixing cartel."[150]

A third case following *Empagran* involved an allegation that Union Carbide and Dow compelled the plaintiffs to engage in a price maintenance conspiracy with respect to the resale of Union Carbide products in India.[151] It is a complicated antitrust case that began in Bhopal, India, when lethal gas escaped from a chemical plant affiliated with Union Carbide, causing the death of 3,800 persons and injuries to an additional 200,000.[152] The trial court stated that "jurisdiction is authorized under the FTAIA only when the plaintiff has alleged that the defendants' conduct affected U.S. commerce and that the effect gave rise to the plaintiff's injury."[153] Applying this rule of *Empagran*, the trial court found that the "complaint properly alleges that the defendants' conduct had an effect on competition in and from the United States and the plaintiffs were injured as a result of that effect."[154]

In sum, these cases illustrate that courts will now exercise jurisdiction where the domestic effects of anticompetitive conduct are linked to the foreign harm. However, the rule of *Empagran* is not explicit about when a plaintiff's injury is independent from the domestic effect and when it is not. Hence, in the years ahead, the phrase "independent from the domestic effect," may prove to be as ambiguous to the courts as was the phrase, "gives rise to a claim."[155]

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147 *Id.*

148 BHP N.Z. v. Ucar Int'l, 2004 WL 1771436, at *1 (3d Cir. Aug. 9, 2004) (slip opinion).

149 *Id.* at *2.

150 *Id.*

151 MM Global Serv. v. Dow Chem., 329 F. Supp. 2d 337, 340 (D.Conn. 2004).

152 *Id.* at 339.

153 *Id.* at 341.

154 *Id.* at 342.

155 In this regard, it should be interesting to follow developments in *MM Global Services*, *supra* note 142, because this case (1) may be more about the law of contracts than antitrust; (2) may involve conduct that FTAIA intended to shield; and (3) may involve conduct that falls within the ambit of the *Colgate Doctrine*, which provides in pertinent part that a manufacturer can announce the prices it wants its dealers to charge and then refuse to sell to dealers who fail to adhere to those prices. United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

B. Applying the Rule of *Intel*

The rule of *Intel* is that there is no foreign discoverability requirement. "[Section] 1782 (a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to 'interested person[s]' in proceedings abroad."[156] Moreover, "a court presented with a [section] 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or the agency abroad to federal-court judicial assistance."[157] Two cases, thus far, apply the rule of *Intel.* In one case, the court denied a request, in part, because the "German government was obviously unreceptive to the judicial assistance of an American federal court."[158] In another case, the court granted the request, because there was no "reason to suppose that the government of the United Kingdom would disfavor granting Applicants relief under [section] 1782."[159]

Schmitz involved a civil action in Germany.[160] The action of the petitioners in Germany alleged that the respondent Deutsche Telekom AG misled investors when it overstated the value of real estate assets. Concurrently, the Public Prosecutor in Bonn, Germany was conducting a criminal investigation of similar allegations against former Deutsche Telekom employees.[161] The District Court denied the request of petitioners for aid under section 1782(a), and the Second Circuit affirmed that decision.[162]

The District Court reasoned that "although petitioners had met the statutory requirements of [section] 1782, granting discovery in this case would run counter to the statute's aims of assisting foreign courts and litigants and encouraging foreign jurisdictions to provide reciprocal assistance to American courts."[163] Letters from the Bonn Prosecutor and the German Ministry of Justice opposed section 1782(a) aid, because "production to petitioners at this time would compromise the ongoing criminal investigation in Germany and violate the rights of potential criminal defendants there."[164] In addition, the State Secretary of the German Federal Ministry of Justice added that "[t]he Federal Government [of Germany] would respectfully like to submit that disclosure of the documents concerned may jeopardize German sovereign rights."[165]

Applying the rule of *Intel*, the Second Circuit found that the District Court had not abused its discretion in denying section 1782(a) aid. The court observed that

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156 Intel II, 124 S. Ct. at 2473.

157 *Id.* at 2483.

158 Schmitz v. Bernstein Liebhard & Lifshitz, LLP , 376 F.3d 79, 84 (2d Cir. 2004).

159 In re Application of Guy, 2004 WL 1857580, at *2 (S.D.N.Y. Aug. 19, 2004).

160 Schmitz, 376 F.3d at 81.

161 *Id.*

162 *Id.* at 85 ("Because we find no abuse of discretion, we affirm the judgment of the district court denying petitioners' request for discovery.").

163 *Id.* at 81.

164 *Id.* at 81-82.

165 *Id.* at 82 (citing a letter from State Secretary of the German Federal Ministry of Justice).

"the German government was obviously unreceptive to the judicial assistance of an American federal court."[166] In this context, the District Court concluded and the Second Circuit agreed that granting the request of petitioners would not promote the aims of section 1782. Granting such aid "would in fact encourage foreign countries to potentially disregard the sovereignty concerns of the United States and generally discourage future assistance to our courts."[167]

In contrast, the trial court in *In re application of Guy* granted section 1782(a) aid, largely on the grounds that there was no "reason to suppose that the government of the United Kingdom would disfavor granting Applicants relief under [section] 1782,"[168] and there was no "persuasive reason not to exercise its discretion in favor of allowing discovery to Applicants."[169]

In this case, applicants were residents of England and members of an accounting firm who had been appointed as administrators of the estate of a person who had died intestate.[170] The decedent had been in the antiques business that operated as a partnership and transacted business in the U.S.[171] The applicant-accounting firm simply wanted "to gather, preserve, account for, and distribute the estate of their decedent."[172] In this regard, it sought discovery aid with reference to transactions with nonparties in the U.S. Applying the rule of *Intel* the court had no difficulty granting this application, stating that "[r]espondents are not parties to the English Action, but that in no way exempts them from [section] 1782, which, the Supreme Court has pointed out, may be the only way in a foreign proceeding to obtain information from third-party witnesses in the United States."[173]

Finally, the Commission of European Communities ("Commission") argued, *inter alia*, that "characterizing the Commission as a 'tribunal' poses serious threats to its anti-cartel Leniency Program by jeopardizing the Commission's ability to maintain the confidentiality of documents submitted to it."[174] The Leniency Program involves cartel participants who confess their own wrongdoing, presumably, in exchange for lenient treatment.[175]

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166 *Id.* at 84.

167 *Id.* at 85 (citing In re Application of Schmitz, 259 F.Supp.2d 294, 300 (S.D.N.Y.2003)).

168 In re Application of Guy, 2004 WL 1857580 at *2.

169 *Id.* at *3.

170 *Id.* at *1.

171 *Id.*

172 *Id.*

173 *Id.* at *2 (citing Intel II, 124 S. Ct. at 2483).

174 Brief of the Commission of the European Communities as Amicus Curiae Supporting Reversal, 2003 WL 23138389, *4, Advanced Micro Devices, Inc. v. Intel Corporation, 292 F.3d 664 (9th Cir. 2002), *cert. granted*, 124 S. Ct. 531 (Nov. 10, 2003) (No. 02-0572) [hereinafter "Brief of the Commission of the European Communities, Reversal"].

175 "Amnesty and leniency programs are all based on creating sufficient positive incentives for the amnesty/leniency applicant to come forward and expose the cartel." Donald I. Baker, *Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?*, 16 LOY. CONSUMER L. REV. 379, 400 (2004). The European Union adopted its leniency policy in 1996. John Anthony Chavez & Harvey I. Saferstein, *International Cartels And Their Significance To Compliance Programs*, 1311 PLI/CORP 1031, 1039 (2002).

With respect to this program, the Commission opined that if the "Commission were deemed a 'tribunal' in the competition context, it could find itself no longer able to guarantee the confidentiality of those Leniency Program confessions by, *inter alia*, resort to the law enforcement privilege wherever necessary."[176] Whether the decision of the Court in *Intel* will have a chilling effect upon the Commission's Leniency Program is an empirical question, which will be answered in the fullness of time. However, the cases discussed above seem to indicate that federal courts would be attuned to the concerns of the Commission, as they consider section 1782(a) applications that may have implications for the Commission's Leniency Program.

C. Comity Is "A Blend of Courtesy and Expedience"[177]

Both *Empagran* and *Intel* reference comity. The Supreme Court provided a classic definition of comity in 1895:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[178]

In *Empagran* the Court relied on comity to support its decision, stating that "principles of prescriptive comity counsel against the Court of Appeals' interpretation of the FTAIA."[179] Conversely, in *Intel*, the Court brushed aside the argument of Intel and the Commission that considerations of comity should control the decision. The Court doubted that "foreign governments would be offended by a domestic prescription permitting, but not requiring, judicial assistance."[180] Mr. Justice Breyer—who wrote the Court's opinion in *Empagran* where he relied on comity—dissented in *Intel*, stating that the "majority undermines the comity interests [that] [section] 1782 was designed to serve," when it "disregards the Commission's opinion. . . ."[181]

Taken together, *Empagran* and *Intel* may have sent a mixed message about comity in antitrust. For at least three reasons, though, this "mixed message" (to the extent that one exists) should have no enduring implications for the Court's main rule of comity stated in *Hartford Fire Insurance*. First, the Court relied on comity in *Empagran* in connection with its application of a rule of construction

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[176] Brief of the Commission of the European Communities, Reversal, *supra* note 174, at *15.

[177] Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir.1969); *see also* In re Maxwell Communication, 93 F.3d 1036, 1048 (2d Cir. 1996) (discussing legal standard associated with international comity).

[178] Hilton v. Guyot, 159 U.S. 113, 164 (1895).

[179] Empagran II, 124 S. Ct. at 2369.

[180] Intel II, 124 S. Ct. at 2481.

[181] *Id.* at 2487 (Breyer, J., dissenting) (quoting Empagran II, 124 S. Ct. at 2366).

for ambiguous legislation.[182] That rule provides "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[183] Consistent with this rule and mindful of comity, the Court concluded that Congress did not intend to impose America's antitrust laws on the world.[184]

Second, as between the U.S. and Europe, there has been a narrowing of their consideration of international comity in antitrust matters.[185] Notwithstanding federal government guidelines providing that the Department of Justice and the FTC will consider international comity in enforcing the antitrust laws,[186] at this point, neither the U.S. nor Europe favor applying the principles of comity in antitrust law.[187]

Third, there has been a narrowing of comity consideration, in part, because the Supreme Court has actually "gutted" the doctrine of comity of "virtually all of its vitality" in its decision in *Hartford Fire Insurance*.[188] In *Hartford Fire Insurance*, the Court permitted extraterritorial extension of the Sherman Act in a case involving alleged violations of several foreign re-insurers, accused of conspiring with domestic insurers "to influence the availability of certain coverages in the American commercial insurance market."[189] In its holding, "the Supreme Court made clear . . . that no conflict exists for purposes of an international comity analysis in the courts if the person subject to regulation by two states can comply with the laws of both."[190] Hence, the "Court narrowed the comity inquiry to the sole question of whether U.S. law prohibits what foreign law requires."[191] This narrow rule necessarily limits a trial court's considerations of comity in deciding

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182 Telephone interview with Spencer Weber Waller, Professor of Law, Loyola University Chicago School of Law (Sept. 14, 2004).

183 EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

184 Empagran II, 124 S. Ct. at 2369.

185 William Sugden, *Global Antitrust And The Evolution Of An International Standard*, 35 VAND. J. TRANSNAT'L L. 989, 1015 (2002).

186 DOJ & FTC, Antitrust Enforcement Guidelines for International Operations, 3.2 Comity, April 1995, *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm.

187 Yeo Jin Chun, *The GE-Honeywell Merger Debacle: The Enforcement Of Antitrust/Competition Laws Across The Atlantic Pond*, 15 N.Y. INT'L L. REV. 61, 69 (2002) ("Both legal regimes do not favor applying the principles of comity in antitrust law."); *see also* Julian Epstein, *The Other Side Of Harmony: Can Trade And Competition Laws Work Together In The International Marketplace?*, 17 AM. U. INT'L L. REV. 343, 347-49 (2002) (discussing the history of comity).

188 Spencer Weber Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105, 134-43 (2002) (discussing the "The Gutting of Comity"); *see also* Brian Peck, *Extraterritorial Application Of Antitrust Laws And The U.S.-EU Dispute Over The Boeing And McDonnell Douglas Merger: From Comity To Conflict? An Argument For A Binding International Agreement On Antitrust Enforcement And Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1183 (1998) ("Several commentators believe that the Hartford Fire decision has "swept away" the concept of comity. . . .").

189 James S. McNeill, *Extraterritorial Antitrust Jurisdiction: Continuing The Confusion In Policy, Law, And Jurisdiction*, 28 CAL. W. INT'L L.J. 425, 426 (1998).

190 DOJ & FTC, *supra* note 186.

191 Salil K. Mehra, *Extraterritorial Antitrust Enforcement And The Myth Of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191, 193 (1999).

whether to exercise its jurisdiction.[192] Neither *Empagran* nor *Intel* has any effect on this narrow rule.

IV. Conclusion: "It's Tough to Make Predictions, Especially About the Future."[193]

The convergence of competition policy is important to foster free trade, to investigate and prosecute global cartels, to regulate companies international in scope, and to eliminate duplicate and conflicting policies and procedures.[194] The EC's decision to block the merger of General Electric Co. and Honeywell International Inc. underscores the importance of convergence.[195]

Arguably, both *Empagran* and *Intel* facilitated the convergence of competition policy. First, *Empagran* reinforced the long-standing rule that conduct must have a domestic effect.[196] Otherwise, a federal court cannot exercise jurisdiction. This sends a signal once again to the international community that the federal courts are not open to anyone who has an antitrust claim somewhere in the world. In the long run, this should encourage the international community to work together to develop more global competition policies and mechanisms to enforce those policies. Second, *Intel* established that federal courts have the discretion to facilitate the discovery process in international proceedings. In the long run, this should enhance the capacity of parties in the international arena to obtain documents and pursue antitrust claims in their own courts or in multilateral tribunals.

Although *Empagran* and *Intel* will make contributions to the convergence of international competition policy, they may also have troublesome consequences. Both decisions give trial courts tremendous discretion to answer tough questions. With respect to *Empagran*, trial courts will likely be enmeshed like a cat in yarn deciding whether the domestic effect is independent of the foreign effect. Whatever a trial court decides, the case will surely be appealed. Soon, there may be a split in the Circuits regarding the substantive meaning of "independent." The Court will then have to revisit FTAIA and explain the meaning of the *Empagran* phrase, "independent of any adverse domestic effect."[197]

Similarly, *Intel* provides trial courts wide discretion in granting section 1782(a) aid: "[t]he statute authorizes, but does not require, a federal district court to provide assistance to a complainant. . . ."[198] In reaching their decisions, trial

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[192] Robert C. Reuland, *Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United States Antitrust Laws*, 29 TEX. INT'L L.J. 159, 161 (1994).

[193] *See* William E. Lee, *Facts, Assumptions and American Pie*, 2000 L. REV. MICH. ST. U. DET. C.L. 239, 252 n.61 (2000) (quoting Yogi Berra).

[194] Anu Piilola, *Assessing Theories Of Global Governance: A Case Study Of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 225 (2003) (discussing reasons for seeking convergence).

[195] Deborah A. Garza, *Transatlantic Antitrust: Convergence Or Divergence*, 16 ANTITRUST 5, 5 (2001).

[196] *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (holding that it is "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States").

[197] Empagran II, 124 S. Ct. at 2366.

[198] Intel II, 124 S. Ct. at 2478.

courts will have to balance multiple considerations including questions of comity. Precisely how they will do this is uncertain. In the context of extraterritorial jurisdiction in antitrust cases, for example, the Court eventually rejected a balancing test[199] and announced a narrow, bright-line rule related to considerations of comity.[200] At some point, the Court may have to revisit its holding in *Intel* and narrow the discretion of trial courts to achieve more reliable, i.e. predictable, results under section 1782.

The rules of *Empagran* and *Intel* will advance long-term convergence in international antitrust. In the years ahead, they will be modified or supplemented in some way, simply because Supreme Court decisions of this type often answer some questions while simultaneously posing others. The Court, after all, is merely final, not infallible.[201] For now, however, the rules of *Empagran* and *Intel* provide lower courts conceptual tools to resolve tough questions in international antitrust, sure to come their way. How they use them should be fascinating to behold![202]

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[199] Minodora D. Vancea, *Exporting U.S. Corporate Governance Standards Through The Sarbanes-Oxley Act: Unilateralism Or Cooperation?*, 53 DUKE L.J. 833, 860 (2003).

[200] *See* Spencer Weber Waller, *The United States As Antitrust Courtroom To The World: Jurisdiction And Standing Issues In Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523, 526-28 (discussing Hartford Fire Ins. Co. v. California., 509 U.S. 764 (1993)).

[201] Brown v. Allen, 344 U.S. 443, 540 (1953) ("We are not final because we are infallible, but we are infallible only because we are final.").

[202] Waller, *supra* note 200, at 528 ("Sometimes you have the lower courts engaged in what law professors have called guerilla warfare, where you have a rule that the Supreme Court enunciates that just doesn't take for some reason.").