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Foreign-Injured Antitrust Plaintiffs in U.S. Courts: Ends and Means

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I. Introduction

Growing international trade has focused attention on the question of who should be allowed to bring antitrust claims in U.S. courts. It has become harder to distinguish domestic trade from international trade. As a result, courts have had to consider whether they have jurisdiction over antitrust cases with foreign and domestic impact.

The Supreme Court's decision in *Hartford Fire Ins. Co. v. California*[1] raised new questions about how open U.S. courts should be to international antitrust cases. A key aspect of this controversy is access to plaintiffs whose injury is deemed to have occurred abroad. Most commentators, along with the Fifth Circuit and the U.S. Department of Justice ("DOJ"), have concluded that only private antitrust plaintiffs who are injured in the United States should be able to sue in U.S. court. This "narrow" approach would constrict subject matter jurisdiction for international antitrust plaintiffs. By contrast, in *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*,[2] the D.C. Circuit came down on the other side of this issue and joined the Second Circuit by adopting a "broad" view of jurisdiction. This broad view would make U.S. courts and U.S. antitrust lawsuits available to anyone who is injured by price fixing or other anticompetitive conduct that has direct, substantial, and reasonably foreseeable effects on U.S. commerce. By contrast, the narrow approach would layer an

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[1] 509 U.S. 764 (1993).

[2] 315 F.3d 338 (D.C. Cir. 2003).

additional test, such as "U.S. marketplace participation," that plaintiffs would need to satisfy.[3] With the Supreme Court's recent granting of *certiorari* in *Empagran*, concerning the access of foreign-injured vitamin buyers to U.S. antitrust remedies against a global cartel, this has become an issue of pressing significance.

Ultimately, the better approach will be the one that best satisfies two goals. First, the rule adopted must foster the underlying substantive goals of American antitrust. That is, potential violators should be deterred from undertaking anticompetitive conduct. The focus of this goal on fostering consumer welfare has inherent distributional consequences. Second, scarce judicial resources should be conserved. Achieving this goal is complicated by the fact that there is as of yet no international forum for antitrust cases. As a result, any particular cartel may find itself the subject of one or more cases in national court systems. This judicial efficiency concern is not inherently tied to distributional consequences at the domestic level between consumers and producers, but can have an impact on such distributional concerns, as this paper will suggest.[4]

This article suggests that to make the proper choice between standards requires an understanding of the extent to which international antitrust cases make up the case mix of U.S. courts. Even if we limit the analysis to cartel behavior, different types of cases have different implications on the consumer welfare and judicial efficiency criteria. Interestingly, the three most notable cases

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[3] *See In re* Microsoft Antitrust Litig., 127 F. Supp. 2d 702, 716 (D. Md. 2001) (holding that "a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim"); *see also Empagran*, 315 F.3d at 360 (Henderson, J., dissenting) (advocating adoption of rule where plaintiff's injury must be tied to U.S. commerce); Den Norske Stats Oljeselskap AS v. Heeremac VOF, 241 F.3d 420, 249 n.28 (5th Cir. 2001) (without authority for distinctions based on nationality in international trade, "hold [ing] that a foreign plaintiff [must] show that its injuries arise from a United States market") [hereinafter "*Statoil*"]; *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws,* 114 HARV. L. REV. 2122, 2142 (2001) (advocating ouster on standing grounds of Sherman Act claims from U.S. court of "foreign purchasers who do not participate in U.S. domestic markets"); Edward 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, 2183 (2003) ("I therefore have no difficulty in concluding that foreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim.").

[4] To the extent that nations may prefer that others bear the costs of operating the fora utilized, there may be a nation-by-nation distributional component. However, that is beyond the focus of this article, which is U.S. law regarding international antitrust cases.

on this issue that the Supreme Court is considering can be broken down into a typology that helps understand how these two approaches differ. Indeed, the typology can be looked at two ways. First, one could conclude that if cases that favor the broad approach predominate the case mix, then it is the superior standard. Alternatively, one could conclude that the broad approach makes sense in some cases within the typology, but should be restricted in others.

The first part of the article explains the broad and narrow approaches and their roots in recent case law. The second part creates a framework illustrating the kinds of cases to which the approaches may be applied. A brief conclusion follows.

II. How Do the Broad and Narrow Views Differ?

Three federal circuit courts have come to sharply varying conclusions about Congress' choice of one word in the Foreign Trade and Antitrust Improvements Act ("FTAIA"). Essentially, the FTAIA is drafted as a limitation on the Sherman Antitrust Act's ("Sherman Act") jurisdiction.[5] The FTAIA states that for the Sherman Act to apply to conduct involving foreign trade, two requirements must be fulfilled.[6] The first requirement is a version of the well-known "effects" test from *United States v. Alcoa.*[7] The conduct must have a "direct, substantial and reasonably foreseeable effect" on U.S. commerce—that is, on domestic commerce, on imports into the United States or on U.S.-engaged exporters.[8] Second, "such effect" must "give[] rise to a claim under" the Sherman Act's substantive

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[5] The FTAIA also enacted a similarly-worded cut-back to the FTC Act. 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 of merely codifies it." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.23 (1993).

[6] Other than "import" trade—which is carved out of the cut-back, creating another issue of interpretation that may create conflict in the future. *See* Dee-K Enter., 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,' *id.*—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").

[7] 148 F.2d 416 (2d Cir. 1945).

[8] 15 U.S.C.A. § 6a(1) (2004).

provisions.[9]

The meaning of the FTAIA's first requirement is now well-settled and relatively uncontroversial. American enforcement officials are not alone in applying an effects test to pursue foreign conduct with effects within their jurisdiction.[10] As a result, the narrow view of subject matter jurisdiction amounts to an attempt to exclude some private lawsuits against conduct that the effects test would empower government antitrust enforcers to pursue.[11]

By comparison, the FTAIA's second requirement has received a lot of very recent attention. 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; or (2) a claim, actual or hypothetical, by *someone other than the plaintiff* under the Sherman Act.[12] It has been assumed that anyone whose claim arises from a U.S. effect must have been injured in the United States.[13] In an Internet age, this may not be true in all cases.[14] However, this assumption has led to the conclusion that the distinction between the narrow and broad view rests on whether the plaintiff's injuries stem from U.S. markets,[15] or at least,

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[9] 15 U.S.C.A. § 6a(2) (2004).

[10] *See, e.g.*, Ahlstrom-Osakeythio v. Comm'n (Wood Pulp) 1988 E.C.R. 5193, [1998] 4 C.M.L.R. 901 (1988) (asserting jurisdiction over an agreement by non-EC firms to fix prices of product sold to EC buyers on the grounds that conduct by firms outside the European Community that 'has the object and the effect of restricting competition within' the European Community violates article 85 of the Treaty of Rome (now article 81)); Japan Fair Trade Commission, *Notification System Concerning M&As by Companies outside Japan* (Jan. 1, 1999) (essentially importing an effects doctrine into merger review), *available at* http://www2.jftc.go.jp/e-page/notification/maexp.htm (last visited Apr. 28, 2004).

[11] It should be noted that the FTAIA's text does not limit its impact to private litigants alone, although the cases involved in the current debate all involve holdings regarding private litigants.

[12] 15 U.S.C. § 6a (2004).

[13] *Id.*

[14] *See, e.g., Microsoft,* 127 F. Supp. 2d at 717 (adopting a "U.S. marketplace" participation test to address "status of purchasers who made their purchases directly from Microsoft over the Internet," including foreign purchasers).

[15] *See Statoil,* 241 F.3d at 429 n.28 (only Court of Appeals ruling for narrow view, "hold[ing] that the FTAIA requires that a foreign plaintiff show that its injuries arise from a United States market.").

whether the plaintiff has some level of "participation" in U.S. commerce.[16]

A. The Narrow View

Perhaps surprisingly, a narrow approach has been adopted by the vast majority of courts to address the issue, but by only one federal circuit.[17] The Fifth Circuit in *Den Norske Stats Oljeselskap AS* v. *Heeremac* (hereinafter "*Statoil*") concluded that "plain language" compelled the conclusion that the FTAIA requires that a plaintiff's claim arise from an injury tied to the United States.[18]

The plaintiff in *Statoil* claimed it paid for services in connection with offshore oil drilling in the North Sea.[19] The plaintiff was 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."[20] Two of the defendants had already pled guilty to a related criminal complaint filed by the DOJ; injured parties other than the plaintiff had already filed damages complaints based on these U.S. effects.[21] Thus, it was fairly clear that the same conduct had an anticompetitive

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[16] *See* Cavanagh, *supra* note 3, at 2182 (arguing that "there is a difference between a foreign purchaser who transacts business in the United States but takes title and thus suffers injury abroad and a foreign purchaser who has no involvement in the American marketplace, transacts business abroad, takes title abroad, and suffers injury abroad").

[17] *See, e.g., Statoil*, 241 F.3d at 439 (holding plaintiff must show that a substantial anticompetitive effect on U.S. commerce "gives rise" to *its* antitrust claim); Sniado v. Bank Austria AG, 174 F. Supp. 2d 159, 170 (S.D.N.Y. 2001), *vacated by* 352 F.2d 73 (2d Cir. 2003); Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc., 153 F. Supp. 2d 700 (E.D. Pa. 2001); Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001), *rev'd* 284 F.3d 384 (2d Cir. 2002), *see infra* notes 23, 27; *In re* Copper Antitrust Litig., 117 F. Supp. 875 (W.D. Wis. 2000); S. Megga Telecomm. Ltd. v. Lucent Tech., 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 Exchange, Inc., 608 F. Supp. 510 (S.D.N.Y. 1985).

[18] *See Statoil*, 241 F.3d at 428 ("we find that the plain language of the FTAIA precludes subject matter jurisdiction over claims by Foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market").

[19] *Id.* at 422.

[20] *Id.* at 422-423, 434 n.8.

[21] *Id.* at 420.

effect in the U.S. 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 U.S. commerce—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.[22] 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 that it viewed as reinforcing its conclusion.[23] 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."[24]

A focused dissent by Judge Patrick E. 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."[25] The dissent, like the majority, was able to point to legislative history in support of its reading.[26] Notably, the dissent raised a policy argument to which the majority did not respond: That private enforcement of U.S. antitrust laws supplements the efforts of the DOJ and that the dissent's reading of the FTAIA

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[22] 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.4 & 5. For that reason, presumably, the court was spared having to consider whether all or part of the plaintiff's claim could be said to arise from *that* domestic effect.

[23] *Statoil*, 241 F.3d at 425 (stating that court's holding is "controlled by the plain language" and also "find[ing] that the legislative history of the FTAIA. . .supports our determination.").

[24] *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 Elec. Indus. 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'").

[25] *Id.* at 432 (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").

[26] *Id.* at 433 n.11. 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* Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 296-99 (2002).

"ensures that parties injured by foreign aspects of the same conspiracy that harms American commerce are part of the phalanx of enforcers."[27]

B. The Broad View

In *Kruman v. Christie's International PLC*, the Second Circuit sided with the dissent in *Statoil* in concluding that the FTAIA's "language is clear," and that since "Congress used the indefinite article"—the statute says "gives rise to a claim"—"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."[28] As a result, the court concluded that, where a conspiracy to rig auctions for art, antiques, and collectibles had effects on U.S. commerce, buyers and sellers injured by the foreign effects of that conspiracy *could* maintain a Sherman Act claim.[29] The court also concluded that 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.[30]

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 of the Sherman Act" and is not actually "predicated on the existence of *an* injury to *a* plaintiff."[31] As a result, a fair reading of the Second Circuit's interpretation 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.[32]

By comparison, the D.C. Circuit in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.* adopted a slightly different version of the

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[27] *Statoil*, 241 F.3d at 439 (describing "the Clayton Act as recruit[ing] private parties [to assist] the Department of Justice").

[28] Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (2d Cir. 2002).

[29] *Id.* at 391, 403.

[30] *See id.* at 400, 403.

[31] *Id.* at 399-400 (emphasis added).

[32] *Id.* This is also how the D.C. Circuit construed *Kruman*. *See* Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338, 351 (D.C. Cir. 2003).

broad view.[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 D.C. 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.[35] But, unlike the Second Circuit, the *Empagran* court concluded that "'giv[ing] 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 U.S. effect of the defendant's violation of the Sherman Act."[36] In other words, even if the plaintiff's claim need not arise from the domestic effect, there must be a real claim that someone else *could* bring arising from that effect.[37]

III. Pieces of a Framework

As a result of the decisions in *Empagran, Kruman*, and *Statoil*, it has become clear that the distinction between the broad and narrow view turns on the narrow view's additional requirement of a nexus between the U.S. effect and the plaintiff's injury. Some courts have made clear that this rule applies to *foreign* plaintiffs, and apparently not Americans who suffer injury abroad.[38] Some courts have used the test of "U.S. marketplace participation" to adjudicate whether the necessary link exists.[39]

Whatever test may be adopted, every form of the narrow view

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[33] *Empagran*, 315 F.3d at 338.

[34] *Id.* at 340.

[35] *Id.*

[36] *Id.* at 352.

[37] It is interesting that the D.C. Circuit chose to reach the question of whether or not the claim arising from the U.S.-related effect need be a "real" one 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." *Empagran*, 315 F.3d at 352.

[38] *See, e.g., Statoil*, 241 F.3d at 249 n.28 ("hold [ing] that a foreign plaintiff [must] show that its injuries arise from a United States market").

[39] *See, e.g., Microsoft*, 127 F. Supp. 2d at 716.

would restrict some types of international antitrust cases. Such limitations are justified on several grounds. From the standpoint of policy, it is claimed that the broad view could unleash a flood of unmanageable cases with foreign parties and witnesses and that the narrow view better serves cartel members who wish to cooperate with the United States.[40] Besides these arguments about the process of antitrust case resolution, advocates of the narrow view also contend that the substantive goals of antitrust policy—such as deterrence—are not necessarily served by the broad view.[41]

Whether these arguments militate for the broad or narrow view depends on what type of international antitrust case one is discussing. Interestingly, the three cases discussed above, *Empagran, Kruman*, and *Statoil*, provide examples that suggest that the underlying case mix is important in deciding which legal rule is preferable from the standpoint of both procedure and substance.

A. *Empagran*: The International Class

The facts of *Empagran* provide an example of an international antitrust case that furthers substantive goals of American antitrust, but does so at a significant cost in judicial administration.

A worldwide class of foreign plaintiffs would pose a significant administrative challenge to a U.S. court. This may be true even in a case like *Empagran,* where the plaintiffs are not ordinary consumers, but large, and often multinational, buyers of vitamins.[42] U.S. rules presume that class members wish to fall in behind the named plaintiff, unless the court hears otherwise—a view supported by class members' rights of notice, intervention, and opt out.[43] But, in the international context, this creates problems of notice. Additionally, there is the problem of determining whether attorney

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[40] To be sure, proponents of the narrow view also make the argument that it better comports with Congress' legislative intent. While nonpolicy arguments are not the focus of this article, it must be acknowledged that these arguments about legislative history are ultimately not as clear-cut as the advocates suggest, and, even if they were clear-cut, they would be opposed to the plain meaning of the statute. *See, e.g.,* Mehra, *supra* note 26, at notes 95-106 and surrounding text.

[41] Cavanagh, *supra* note 3, at 2185 (arguing that "even if. . .allowing Foreign antitrust plaintiffs to sue would enhance deterrence in civil cases, permitting such cases [could]. . .decreas[e] overall deterrence").

[42] *Empagran*, 315 F.3d at 340.

[43] *See* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1434-1442 (2003).

representation of these clients has been adequate.[44] These issues present difficult problems of administration for American judges.

However, the case for subject matter jurisdiction over suits like that in *Empagran* rests on the way in which it furthers the substantive aims of U.S. antitrust law. As the Supreme Court explained in *Pfizer v. India*, allowing foreign victims of a global cartel to seek a U.S. remedy tends to help U.S. consumers.[45] The United States only represents part of the world market for some products. If a potential violator knew that it would only face private damage suits from American victims, the violator might still take part in the cartel, if the gains from soaking non-Americans outweighed the risk of an adverse U.S. judgment. Thus, to the extent other nations' judgments are harder for plaintiffs to win, or that their remedies are weaker than the U.S. treble damage action, potential violators are encouraged at the margin to become actual violators.[46]

Some might contend that the substantive aims of U.S. antitrust law need not be promoted solely by actions in U.S. courtrooms. Private actions could be available in other nations' courts, under their law. If plaintiffs can actually make use of private actions in other nations,[47] that would diminish the concerns expressed in *Pfizer*. However, to the extent that foreign-injured plaintiffs choose to seek U.S. remedies in U.S. courts rather than other remedies in other fora, they reveal their preference for the U.S. remedy. This, in and of itself, suggests that such plaintiffs view their alternative remedies as weaker. This is not surprising, given the uniqueness of the American treble damages remedy.[48] And, to the extent alternative remedies *are* weaker, the logic of *Pfizer* continues to have force, since even marginally weaker alternative remedies spells encouragement at the margin to antitrust conspiracies.

It might also be claimed that there may be alternative methods

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[44] *See* Brief of the Government of Japan as Amicus Curiae in Support of Petitioners at 7-8, F. Hoffman-LaRoche, Ltd. v. Empagran, S.A. (No. 03-724).

[45] 434 U.S. 308, 315 (1978) ("American consumers are benefited" by such suits).

[46] *Id.*

[47] But *see, e.g.*, Harry First, *Antitrust Enforcement in Japan*, 64 ANTITRUST L.J. 137, 147 (1995) (discussing how explicit statutory authorization for private antitrust actions in Japan is virtually unusable).

[48] Ofer Grosskopf, *Protection of Competition Rules Via the Law of Restitution*, 79 TEX. L. REV. 1981, 2000 n.61 (2001) (describing antitrust treble damages as part of a "tendency [which] seems unique to the United States").

of antitrust regulation to the private attorney general model. To be sure, some other nations have pursued other models of dealing with competition issues. But, of late there has actually been a trend abroad towards adopting and strengthening private damage actions as a compliment to government antitrust enforcement. In part, this represents the realization of the synergies that government and private enforcement create together.

B. *Kruman*: The Domestic International Class

In contrast to *Empagran,* the plaintiffs in *Kruman* were a class of foreign and American citizens who had purchased fine art and other collectibles at auctions outside the United States.[49] The auctioneers had been parties to a price-fixing agreement concerning their commissions.[50] The concept of foreign-injured Americans and fairly identifiable plaintiffs makes *Kruman* a more easily administrable case, as well as one that more directly fosters the goals of U.S. antitrust law.

Consider the class of Americans who purchased fine art at high-end auctions abroad, particularly in London. From the standpoint of administration, it should not be hard to provide notice to such a class, nor to handle certification. First, they are Americans, just as are the members of many classes in antitrust, securities, and other fields of law. In fact, they are likely to be far less numerous than many other classes that have been certified. Moreover, those who purchase fine art destined for museums or fairly rarified private collections are also likely to be identifiable. Indeed, it might not be so difficult to provide notice even to a class of foreign citizens injured abroad at high-end auctions.

Additionally, a class of foreign-injured Americans furthers the goals of U.S. antitrust law in a fairly direct way. Unlike in *Empagran,* the private action of such a class does not further the welfare of U.S. consumers in a roundabout fashion. Instead, the plaintiffs are U.S. consumers. Moreover, to deny them recovery in this scenario provides a fairly stark incentive for violators to move offshore, even when serving U.S. consumers. This possibility of an end-run has been noted in the past in justifying wider readings of the scope of U.S. antitrust.[51] As a result, a case like that of the foreign-injured

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[49] Kruman v. Christie's Int'l PLC, 284 F.3d 384, 389 (2d Cir. 2002).

[50] *Id.*

[51] *See* United States v. Nippon Paper Indus., 109 F.3d 1 (1st Cir. 1997).

Americans in *Kruman* may be an easy one to justify as proper for a U.S. court.

C. *Statoil:* The Nonclass Multinational Plaintiff

In contrast to *Empagran* and *Kruman*, *Statoil* did not involve a class, nor did it involve a global price-fixing conspiracy.[52] Instead, the plaintiff in *Statoil* had purchased services from a foreign seller abroad.[53] However, the plaintiff alleged that two foreign sellers and an American firm had effected a global market allocation.[54] As a result, what plaintiff had to pay the foreign seller—and what American buyers had to pay the American seller—was inflated by the fact that there was no direct competition across regions.[55]

From the standpoint of administrability, this scenario does not present the challenges of notice to a class, class certification, or evaluating the adequacy of attorney representation. Instead, a foreign firm appears in a U.S. court—something that is routine in the federal system, and has been for some time. From the standpoint of furthering competition goals, this scenario follows the logic of *Pfizer*: to the extent that the plaintiff has an inferior remedy in another forum, denying a plaintiff access to a U.S. remedy has the result of encouraging anticompetitive conspiracies to allocate the market. Indeed, such conspiracies directly conflict with the policy behind treaties that lower governmental barriers to international trade in goods and services.[56]

Interestingly, to the extent that cases like *Statoil* can proceed in a U.S. court, they may actually level the antitrust playing field for U.S. firms in competition with foreign ones. Putting aside the possibility of joint and several liability, in the absence of a remedy for the foreign-injured plaintiff in *Statoil,* the American conspirator in the market allocation would face treble damages suits from its U.S. victims, but its foreign competitor would face victims who could only utilize weaker private remedies. The broad view puts the foreign

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[52] *Statoil*, 241 F.3d at 422-23.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See* John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549, 553 (2003) (identifying the WTO's purpose in "eliminat[ing] tariff and other barriers to trade in goods and services" between nations).

competitor in the same leaky boat as its U.S. counterpart. Such a result is ironically in keeping with the clearest intent of the FTAIA's 1982 enactment—ugly economic nationalism.

IV. Conclusion

Any argument that more or less jurisdiction will lead to better results in antitrust policy suffers from a basic weakness. It is hard to come by good data on, for example, what cartels exist in the world, and which ones are not caught. As a result, the FTAIA debate has focused on such issues as whether there will be more or less litigation in U.S. courts depending on which view carries the day.[57]

It is worth noting that less litigation, by itself in isolation, should be a good thing. But, such a result would be unwelcome if it came at the cost of a dazzling increase in unpunished, undeterred, consumer-soaking anticompetitive behavior. Even if the harm to consumer welfare were lighter, this would be an argument against the narrow view.

Litigated cases form only a part of the universe of behavior that the antitrust laws should affect. Besides deterrence, the possibility of dispute settlement is quite important. Litigated cases may tell us about how courts handle disputes, but they do not tell us about how legal rules affect the behavior of those who are subject to them.[58] How the broad view and the narrow view of subject matter jurisdiction conform the behavior of potential litigants is crucial to understanding whether the administrative burden of having such cases in U.S. courts makes sense.

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[57] *See, e.g., Statoil*, 241 F.3d at 427-28 (conjuring up specter of "any entities, anywhere. . .flock[ing] to United States Federal court").

[58] *See* George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (stating that the information within reported cases "discloses very little about how legal rules affect the behavior of those subject to them").

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