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STUDENT ARTICLES

Act Locally, Apply Globally: Protecting Consumers from International Cartels by Applying Domestic Antitrust Law Globally

Ryan A. Haas*

The globalization of commerce and communication, of economic production and finance, of the spread of technology and weapons . . . poses problems that can no longer be solved within the framework of nation-states or by the traditional method of agreements of sovereign states. If current trends continue, the progressive undermining of national sovereignty will necessitate the founding and expansion of political institutions on the supranational level, a process whose beginnings can already be observed.¹

Jürgen Habermas

I. Introduction

Beyond the new and promising opportunities it offers, globalization often creates difficult problems that defy solution by traditional mechanisms.² International price-fixing, or output-reducing, cartels formed by transnational companies expose a “seamy

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¹ JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 106 (1999).

² *Id.* at 107.

side” to globalization.³ These cartels often escape prosecution under international trade law and traditional domestic law.⁴ Clearly, their anticompetitive activity harms consumers worldwide.⁵ International cartels have raised the price of gasoline, vitamins, and soft drinks.⁶ They have made it more expensive for individuals and museums to purchase artwork and artifacts at auctions around the world.⁷ Moreover, there is evidence that private anticompetitive agreements between transnational corporations are forming a new barrier to a truly open and fair global marketplace.⁸ Preventing such conduct may require new supranational mechanisms, as philosopher Habermas suggested.⁹

A trend has recently developed in several countries, however, to enforce domestic anticompetition laws over extraterritorial conduct that has a harmful effect on domestic commerce.¹⁰ In fact, the United States judiciary recently addressed the issue of whether U.S. antitrust laws apply to cases involving injuries sustained as a result of foreign anticompetitive conduct when that conduct also has a direct and substantial effect on commerce in the United States.¹¹ Interpreting the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”),¹² federal district courts have generally refused to apply U.S. antitrust law to such conduct, dismissing such cases for lack of subject matter

³ See Stephen Labaton, *The World Gets Tough on Fixing Prices*, N.Y. TIMES, June 3, 2001, § 3, at 1.

⁴ See 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, 346 (2002).

⁵ See Labaton, *supra* note 3, at 1.

⁶ *Id.*

⁷ *Id.*

⁸ Epstein, *supra* note 4, at 345.

⁹ See *id.* at 364-68. Epstein provides a discussion of how supranational mechanisms, such as the WTO, could address the problem of anticompetitive cartels that transcend state boundaries. *Id.*

¹⁰ See Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT’L L. 563, 574 (2000).

¹¹ Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 ANTITRUST 53, 53 (2001).

¹² Foreign Trade Antitrust Improvements Act of 1982 § 402, 15 U.S.C. § 6a (2000).

jurisdiction.¹³ Yet, at the appellate level, two circuits recently split on the issue. The Fifth Circuit held that the FTAIA precludes U.S. courts from asserting jurisdiction over anticompetitive conduct that occurs abroad when the plaintiff is injured abroad.¹⁴ The Second Circuit, however, held that the FTAIA allows antitrust laws to regulate such conduct when it has a direct and substantial effect on the U.S. market.¹⁵ While the Fifth Circuit expressed concern over opening the floodgates to global litigation,¹⁶ the Second Circuit stressed the importance of deterring anticompetitive conduct that has harmful effects in the United States.¹⁷

This Comment will examine the circuit split. Part II will present a background to the extraterritorial application of antitrust law in the United States. Part III will discuss the cases illustrating this split: *Den Norske Stats Oljeselskap As v. Herremac v.o.f.*, in the Fifth Circuit; and *Kruman v. Christie's International Plc*, in the Second Circuit. Part IV of this Comment will analyze both opinions, arguing that the Second Circuit's holding provides a more precise interpretation of the plain meaning of the FTAIA, offers a less-selective reading of the FTAIA's legislative history, presents a more effective integration of relevant case law, protects the important policy of deterrence, and offers a solution to the problem of international cartels without violating international law. Based on this analysis, Part IV will propose that the Second Circuit's approach be adopted as a way to better deter the formation of foreign cartels and to better protect consumers.

II. Background

This section will first survey early interpretations of the extraterritorial application of antitrust law leading to the development of the "effects test" and its modification through considerations of international comity and the interest-balancing approach. Next, this section will discuss the FTAIA and its effect on the extraterritorial application of U.S. antitrust law. Finally, it will discuss recent federal

¹³ Davis, *supra* note 11, at 54.

¹⁴ *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F.3d 420, 431 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

¹⁵ *Kruman v. Christie's Int'l Plc*, 284 F.3d 384, 401-02 (2d Cir. 2002).

¹⁶ *See Den Norske*, 241 F.3d at 431.

¹⁷ *See Kruman*, 284 F.3d at 401-02; *see also Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 306-07 (3d Cir. 2002) (discussing this split).

district court decisions that have interpreted the FTAIA to bar claims for antitrust injuries sustained outside the United States, even when those injuries are caused by conduct that has a substantial effect on commerce within the United States.

A. Early Interpretations of Extraterritoriality and Antitrust Law: The Effects Test and Comity

The Sherman Act and the Clayton Act provide the foundation of U.S. antitrust law.¹⁸ The Sherman Act deals primarily with defendants by prohibiting certain types of anticompetitive activity.¹⁹ The Clayton Act deals primarily with plaintiffs by requiring that a private plaintiff suffer an injury, or be threatened with an injury, caused by a violation of the Sherman Act, in order to bring a civil suit.²⁰ In order to sue specifically for damages, however, the plaintiff must suffer an actual injury.²¹ Whether a private plaintiff has been injured or not, the Sherman Act also allows the Justice Department to invoke criminal proceedings for violations of antitrust laws, potentially imposing treble damages on violators.²²

Section 1 of the Sherman Act provides that every “conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal.”²³ Under § 1, it is per se illegal for two or more persons to enter into any anticompetitive agreement, such as an agreement to fix prices or reduce output.²⁴ The antitrust laws, therefore, promote competition by prohibiting anticompetitive conduct.²⁵ The dual purpose of antitrust law is to compensate persons

¹⁸ See Sherman Act, 15 U.S.C. §§ 1-7 (2000); Clayton Act, 15 U.S.C. §§ 13-15 (2000).

¹⁹ 15 U.S.C. §§ 1-2; see also *Kruman*, 284 F.3d at 397.

²⁰ 15 U.S.C. § 15; see *Kruman*, 284 F.3d at 397 (discussing the Sherman and Clayton Acts).

²¹ See *Indiana Grocery, Inc. v. Super Value Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989) (noting that a plaintiff may bring an action for injunctive relief for a threatened antitrust injury as in, for example, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969)).

²² 15 U.S.C. § 4. Treble damages are damages that “are three times the amount that the fact-finder determines is owed.” BLACK’S LAW DICTIONARY 322 (7th ed. 2000).

²³ 15 U.S.C. § 1.

²⁴ See Epstein, *supra* note 4, at 365.

²⁵ *Id.* at 360.

or companies for their injuries and to deter the formation of cartels and other anticompetitive behavior.²⁶ Consequently, U.S. antitrust laws protect consumers from the harmful effects of anticompetitive conduct.²⁷ But, how far do the laws truly reach?²⁸

In 1909, the Supreme Court first considered the extraterritorial reach of U.S. antitrust law in *American Banana Co. v. United Fruit Co.*²⁹ The Court refused to apply the Sherman Act's prohibitions on anticompetitive conduct against United Fruit, an American company that persuaded the government of Costa Rica to seize critical land needed by its competitor, American Banana, to distribute produce.³⁰ The Court noted the importance of international comity, which precludes U.S. courts from imposing judgments on the decisions of foreign governments.³¹ In 1927, the Court modified its position, holding that a plaintiff could bring a Sherman Act claim against a foreign defendant provided that some of the defendant's conduct occurred within the United States.³²

Then, in an influential decision issued in 1945, the Second Circuit developed an "effects test" to determine whether U.S. antitrust law could be applied to foreign anticompetitive conduct.³³ In *United States v. Aluminum Co. of America*, the Second Circuit held that Congress did not intend to punish violators of U.S. antitrust laws for conduct that has no effect within the United States.³⁴ "On the other hand," the court held, "any state may impose liabilities, even

²⁶ 2 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 355(b) (2d ed. 2000).

²⁷ See Labaton, *supra* note 3.

²⁸ In international law, this is a question of prescriptive jurisdiction (the power of states to make laws), as opposed to adjudicatory jurisdiction (the power of courts to render judgments) and executive jurisdiction (the power to enforce laws and judicial decisions). See MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW 715-16 (2d ed. 2001).

²⁹ *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

³⁰ *Id.* at 356.

³¹ *Id.* Comity is defined as "[c]ourtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts." BLACK'S LAW DICTIONARY 213 (7th ed. 2000).

³² See, e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927).

³³ See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-45 (2d Cir. 1945) [hereinafter *Alcoa*].

³⁴ *Id.* at 443 (citations omitted).

upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends”³⁵ Thus, under *Alcoa*, the effect of the prohibited conduct on the U.S. market, rather than the situs of the conduct, determined the extraterritorial reach of U.S. antitrust law.³⁶

Application of the effects test proved confusing, and it was eventually modified by the Ninth Circuit’s interest-balancing test in *Timberlane Lumber Co. v. Bank of America*.³⁷ In applying the interest-balancing test, the Ninth Circuit attempted to account for international comity, a factor largely ignored by the effects test.³⁸ Although the effects test seemingly expanded the application of U.S. antitrust law, international comity as a doctrine of limitation was still the “jurisdictional rule of reason.”³⁹ In *Timberlane Lumber*, the Ninth Circuit weighed principles of comity against domestic effects in determining the scope of U.S. antitrust law over foreign conduct.⁴⁰ Other circuits soon followed *Timberlane* and adopted similar comity-sensitive approaches.⁴¹

In the years after *Timberlane Lumber*, courts continued to modify the effects test from *Alcoa* in other ways.⁴² For instance, in *National Bank of Canada v. Interbank Card Ass’n*, the Second

³⁵ *Alcoa*, 148 F.2d at 443.

³⁶ *Id.* at 443-44; 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, 525 (2002).

³⁷ *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976); see Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNT’L L. 275, 285 (2002); see also *Den Norkse Stats Oljeselskap As v. HerreMac v.o.f.*, 241 F.3d 420, 424 n.12 (5th Cir. 2001) (discussing the history of the modification of the effects test).

³⁸ Mehra, *supra* note 37, at 285.

³⁹ Waller, *supra* note 10, at 564 (quoting KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958)).

⁴⁰ *Timberlane Lumber*, 549 F.2d at 613; see also Waller, *supra* note 36, at 525-26 (providing a good discussion of *Timberlane Lumber* and comity).

⁴¹ See, e.g., *Am. Rice, Inc. v. Ark. Rice Growers Co-op Ass’n*, 701 F.2d 408, 413 (5th Cir. 1983); see also Mehra, *supra* note 37, at 284-85 (discussing the interest-balancing approach).

⁴² See Davis, *supra* note 11, at 53. A modified test was applied to tourist services in the Dominican Republic, beer sales in the Bahamas, and movie distribution in South Africa. See *id.* at 55.

Circuit applied a modified version of its effects test.⁴³ It held that federal courts have jurisdiction to hear antitrust claims arising out of conduct directed at foreign markets if the conduct either: (1) reduces the competitiveness of commerce in the United States; or (2) makes anticompetitive conduct possible, which is directed at commerce in the United States.⁴⁴

B. The Foreign Trade Antitrust Improvements Act

The general disagreement over the extraterritorial reach of U.S. antitrust law and the assorted tests developed by the courts have made the case law “confusing and unsettled.”⁴⁵ Congress reacted in 1982 by amending the Sherman Act with the Foreign Trade Antitrust Improvements Act (“FTAIA”).⁴⁶ The FTAIA provides the following:

[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable effect –

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of section 1 to 7 of this title, other than this section.⁴⁷

In a House Report on the FTAIA, Congress noted, “the domestic ‘effect’ that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit.”⁴⁸

⁴³ *Nat’l Bank of Can. v. Interbank Card Ass’n*, 666 F.2d 6, 8 (2d Cir. 1981).

⁴⁴ *Id.*

⁴⁵ *Den Norkse*, 241 F.3d at 423-24; *see also* H.R. REP. NO. 97-686, at 2-3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487-88 (recognizing the uncertainty throughout U.S. courts over the reach of antitrust laws); Waller, *supra* note 10, at 568-69 (discussing this uncertainty).

⁴⁶ Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. § 6a (2000)).

⁴⁷ 15 U.S.C. § 6a (2000).

⁴⁸ H.R. REP. NO. 97-686, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487,

Although it was intended to clarify the reach of U.S. antitrust law, the FTAIA is notoriously vague and has resulted in inconsistent judicial interpretations.⁴⁹ Similarly, the legislative history of the FTAIA is open to varying interpretations.⁵⁰ For example, in the same House Report cited above, Congress noted that the FTAIA was not “intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace.”⁵¹ This “require[s] that the ‘effect’ providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws.”⁵² The Report continues, however, that this requirement does not mean that “the impact of the illegal conduct must be experienced by the injured party within the United States.”⁵³

When the Supreme Court first interpreted the FTAIA, in *Hartford Fire Ins. Co. v. California*, it significantly restricted the importance of international comity.⁵⁴ In *Hartford Fire*, the Court held that U.S. antitrust laws apply to anticompetitive conduct outside the United States as long as the conduct has a direct, substantial, and reasonably foreseeable effect on U.S. commerce.⁵⁵ More importantly, the Court held that international comity only prevents U.S. courts from asserting jurisdiction to enforce U.S. antitrust law when another nation’s law mandates the prohibited conduct.⁵⁶

With the “near death blow” dealt to international comity in *Hartford Fire*, the issue before the courts has changed.⁵⁷ Now the focus is whether a plaintiff, injured outside of the United States by conduct that would normally violate the Sherman Act but has different anticompetitive effects within the United States, still has a

2496 (citing *Nat’l Bank of Can.*, 666 F.2d at 8).

⁴⁹ Mehra, *supra* note 37, at 286-87. See also Waller, *supra* note 36, at 524 (describing the FTAIA as “badly-written”).

⁵⁰ Davis, *supra* note 11, at 56.

⁵¹ H.R. REP. NO. 97-686, at 11 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2496.

⁵² *Id.* at 12.

⁵³ *Id.*

⁵⁴ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993).

⁵⁵ *Id.* at 799.

⁵⁶ *Id.*; see Mehra, *supra* note 37, at 287; Waller, *supra* note 10, at 564 (noting that this decision dealt comity a near death blow in antitrust law application).

⁵⁷ Waller, *supra* note 10, at 564, 569.

claim under the FTAIA.⁵⁸ *In re Copper Antitrust Litigation* involved mostly foreign corporations as plaintiffs, which sued defendants for injuries allegedly caused from being “squeezed” on the London Metals Exchange when the defendants conspired to corner the copper market.⁵⁹ The plaintiffs alleged that the defendants’ conduct caused an artificial increase in U.S. copper prices.⁶⁰ The district court dismissed the claims, finding that it would be unreasonable to hold that Congress intended to provide a forum for mostly foreign plaintiffs who were injured abroad by effects felt abroad, and not in the United States, even if the wrongdoers’ conduct produced other anticompetitive effects in the United States.⁶¹

Two other district courts have recently come to the same conclusion. In *Den Norske Stats Oljeselskap As v. HerreMac v.o.f.*, the Southern District of Texas held that the plaintiff, a Norwegian oil company, could not bring an antitrust claim against an international cartel of providers of heavy-lift barge services.⁶² The defendants allegedly entered into agreements to allocate territories and rig bids, resulting in an inflated price for their services and ultimately causing

⁵⁸ 15 U.S.C. § 6a(2) (2000); see Davis, *supra* note 11, at 53-54. A corresponding issue has recently been decided in front of the Seventh Circuit involving whether the FTAIA provides a limit to the subject matter jurisdiction of federal courts, or whether it involves an element of a plaintiff’s claim. *United Phosphorus, Ltd. v. Angus Chemical Co.*, 2003 WL 910592 (7th Cir. 2003). A majority of the court held that the FTAIA’s limitation on the Sherman Act’s application to conduct affecting domestic commerce involved subject matter jurisdiction. *Id.* at *8-9. It is worth noting that both cases involved in the circuit split discussed in this Comment were appeals of motions to dismiss for lack of subject matter jurisdiction. See *Den Norske Stats Oljeselskap As v. HerreMac v.o.f.*, 241 F.3d 420, 421 (5th Cir. 2001); *Kruman v. Christie’s Int’l Plc*, 284 F.3d 384, 390 (2d Cir. 2002).

⁵⁹ *Metallgesellschaft AG v. Sumitomo Corp.*, 117 F. Supp. 2d 875, 879 (W.D. Wis. 2000) [hereinafter *In re Copper Antitrust Litig.*], *rev’d and remanded* by 2003 WL 1665352 (7th Cir. 2003). The Seventh Circuit reversed the district court’s decision without resolving the issue described in this Comment, noting that “we reserve this question for another day, because in our view the result in the case now before us would be the same no matter which side of the debate [between the Fifth and Second Circuits] we joined.” *Metallgesellschaft AG v. Sumitomo Corp.*, 2003 WL 1665352, at *5 (7th Cir. 2003).

⁶⁰ *In re Copper Antitrust Litig.*, 117 F. Supp. 2d at 879-80.

⁶¹ *Id.* at 887.

⁶² See *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F.3d 420, 423 (5th Cir. 2001) (discussing the district court’s finding).

the plaintiff to charge higher oil prices in the United States.⁶³ Despite the alleged U.S. price increase, the district court found that the FTAIA precluded subject matter jurisdiction over the claim because the plaintiff's injuries were sustained abroad.⁶⁴

Similarly, in *Kruman v. Christie's International Plc*, the Southern District of New York recently held that it lacked subject matter jurisdiction over claims against the world's two largest auction service providers, Christie's International Plc and Sotheby's International, Inc., for an alleged price fixing conspiracy were impermissible under the FTAIA.⁶⁵ The court held that because the plaintiffs' injuries were sustained at auctions held abroad, granting the plaintiffs a remedy "would be an unwarranted assertion of American power."⁶⁶ Citing *In re Copper Antitrust Litigation*, the court concluded that the FTAIA barred the plaintiffs' claims because the anticompetitive effects felt in the United States did not cause the plaintiffs' injuries.⁶⁷

III. Discussion

On appeal, *Den Norske* and *Kruman* created a circuit split when the Fifth and Second Circuits interpreted § 6a(2) of the FTAIA differently. The Circuits disagreed over whether the FTAIA barred claims when the anticompetitive effects felt in the United States did not cause a plaintiffs' injuries.⁶⁸ Accordingly, this section will discuss the Fifth Circuit's holding in *Den Norske* that such claims are not actionable under the FTAIA and the Second Circuit's contrary interpretation in *Kruman*.

A. Heavy-Lift Barge Conspiracy: *Den Norskse Stats Oljeselskap As v. HerreMac v.o.f.*

The plaintiff in *Den Norske* (hereinafter "Statoil") was a Norwegian oil company that owned and operated oil and gas drilling

⁶³ *Den Norske*, 241 F.3d at 423.

⁶⁴ *Id.*

⁶⁵ *Kruman v. Christie's Int'l Plc*, 129 F. Supp. 2d 620, 626 (S.D.N.Y. 2001).

⁶⁶ *Kruman*, 129 F. Supp. 2d at 626.

⁶⁷ *Id.* at 625 (citing *In re Copper Antitrust Litig.*, 117 F. Supp. 2d at 883).

⁶⁸ *See Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 306-07 (3d Cir. 2002) (recognizing and discussing this split).

platforms exclusively in the North Sea.⁶⁹ Statoil filed an antitrust claim against defendants, who were providers of heavy-lift barge services in the Gulf of Mexico, the North Sea, and East Asia.⁷⁰ Heavy-lift barges are capable of lifting and transporting offshore oil platforms that weigh in excess of 4,000 tons.⁷¹ Only six or seven such barges existed in the world between 1993 and 1997.⁷² They were controlled by three companies: HerreMac, a Dutch corporation; Saipem, a British corporation; and McDermott, an American corporation.⁷³ Statoil alleged that these three companies conspired to allocate customers and territories in order to inflate the price of their services.⁷⁴ Allegedly, this resulted in inflated fees for heavy-lift barge services, which forced Statoil to charge higher prices for oil it exported to the United States – an average of 400,000 barrels of oil per day.⁷⁵ Thus, Statoil filed suit for a violation of the Sherman Act.⁷⁶

The Fifth Circuit noted that the question of whether Statoil could bring its claim under U.S. law was one of first impression, thus requiring the court to interpret the FTAIA.⁷⁷ Statoil argued that the market for heavy-lift barge services is a single, unified, global market, and that because the United States is part of this worldwide market, the effect of the conspiracy, whether caused by conduct in the United States or in the North Sea, gives rise to a claim under the Sherman Act.⁷⁸ Statoil further argued that the FTAIA was not intended to preclude recovery by foreign plaintiffs based on the situs of their injury.⁷⁹

The Fifth Circuit rejected these arguments.⁸⁰ First, the court noted, that it “doubt[s] that foreign commercial transactions between

⁶⁹ *Den Norske*, 241 F.3d at 422.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 422 & n.2.

⁷⁴ *Den Norske*, 241 F.3d at 422.

⁷⁵ *Id.* at 422 & n.4.

⁷⁶ *Id.* at 422.

⁷⁷ *Id.* at 423.

⁷⁸ *Id.* at 425.

⁷⁹ *Id.*

⁸⁰ *Id.*

foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act.”⁸¹ Moreover, the court held that the plain meaning of the § 6a(2) of the FTAIA required that Statoil’s claim be based on the anticompetitive effect of the defendants’ conduct felt in the United States.⁸²

Second, the court referred to the House Report on the FTAIA, which states that the purpose of the FTAIA is to “more clearly establish when antitrust liability attaches to international business activities.”⁸³ The court inferred from the House Report that Congress intended to exclude purely foreign transactions from the scope of U.S. antitrust law.⁸⁴

Finally, the court held that its conclusion was consistent with the few district court cases that had addressed this issue.⁸⁵ The Fifth Circuit found that in every case where jurisdiction was upheld under the FTAIA, the effect on U.S. commerce was the source of the plaintiff’s injury.⁸⁶ Therefore, from the plain meaning of the FTAIA, the legislative history, and the applicable case law, the Fifth Circuit held that in order for a plaintiff to bring a claim under U.S. antitrust law, its injury must arise from the anticompetitive effect of the defendant’s conduct on U.S. commerce.⁸⁷

B. Judge Higginbotham’s Dissent

Judge Higginbotham submitted a vigorous dissent in *Den Norske*, arguing that Statoil could bring its claim under U.S. law based on the text of the FTAIA and its legislative history.⁸⁸ First, Judge Higginbotham emphasized the importance of the alleged

⁸¹ *Den Norske*, 241 F.3d at 426.

⁸² *Id.* at 427.

⁸³ *Id.* at 428 (citing H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490).

⁸⁴ *Id.* at 428.

⁸⁵ *Den Norske*, 241 F.3d at 429 (citing *S. Megga Telecom Ltd. v. Lucent Tech., Inc.*, No. 96-357-SLR, 1997 U.S. Dist. LEXIS 2312 (D. Del. Feb. 14, 1997); *Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494 (M.D.N.C. 1987)) (other citations omitted).

⁸⁶ *Id.* at 430-31 (finding that there were no cases supporting Statoil’s interpretation of the FTAIA) (citations omitted).

⁸⁷ *Id.* at 430.

⁸⁸ *Den Norske*, 241 F.3d at 431 (Higginbotham, J., dissenting).

conspiracy, which “placed United States markets at the mercy of monopoly charges in an industry vital to national security.”⁸⁹ He asserted that Congress did not intend to close the door to recovery for illegal conduct injuring a foreign company that also produces direct and substantial effects in the United States.⁹⁰

In support of his argument, Judge Higginbotham noted that § 6a(1) of the FTAIA⁹¹, requires that anticompetitive conduct affect either domestic import commerce or the export commerce of a person in the United States.⁹² Section 6a(2) requires that this effect “give rise to a claim” under the Sherman Act, not necessarily the plaintiff’s specific claim.⁹³ Judge Higginbotham maintained that “[i]f the drafters of the FTAIA had wished to say ‘the claim’ instead of ‘a claim’ they certainly would have.”⁹⁴ Although the text is “sufficiently ambiguous” to allow for either interpretation, Judge Higginbotham argued that his interpretation was more faithful to the plain meaning of the text.⁹⁵

Judge Higginbotham further argued that the statutory context and legislative history support his reading of § 6a(2).⁹⁶ First, he noted that the statutory context of the FTAIA, especially Title I of the Export Trading Company Act of 1982 under which the FTAIA was enacted, contains language expressing Congress’ intent to extend the application of antitrust law to export trade.⁹⁷ Judge Higginbotham asserted that the FTAIA was enacted to exempt export trading from antitrust law, not to limit liability of foreign cartels that have a direct and substantial effect on commerce in the United States.⁹⁸ Second, he argued that the legislative history demonstrates that Congress did not intend the FTAIA to exclude all persons injured abroad from

⁸⁹ *Id.* (Higginbotham, J., dissenting).

⁹⁰ *Id.* (Higginbotham, J., dissenting).

⁹¹ Foreign Trade Antitrust Improvements Act of 1982 § 402, 15 U.S.C. § 6a (2000).

⁹² *Den Norske*, 241 F.3d at 432 (Higginbotham, J., dissenting).

⁹³ *Id.* (Higginbotham, J., dissenting) (emphasis added).

⁹⁴ *Id.* (Higginbotham, J., dissenting).

⁹⁵ *Id.* at 433 (Higginbotham, J., dissenting).

⁹⁶ *Id.* (Higginbotham, J., dissenting).

⁹⁷ *Id.* (Higginbotham, J., dissenting).

⁹⁸ *Id.* (Higginbotham, J., dissenting).

recovering under U.S. antitrust law.⁹⁹ Therefore, because Statoil was injured by a conspiracy that had a substantial effect on U.S. commerce, Judge Higginbotham argued, federal courts do have subject matter jurisdiction to hear Statoil's claim.¹⁰⁰

C. Auction House Conspiracy: *Kruman v. Christie's International Plc*

Christie's International Plc (hereinafter "Christie's") and Sotheby's Holdings, Inc. (hereinafter "Sotheby's") are the world's first and second largest auctioneers of fine art and collectibles.¹⁰¹ Together they control roughly 97% of the world market.¹⁰² Both Christie's and Sotheby's hold auctions around the world, and they collect a commission from the seller of an item (a "seller's commission") and a fee from the purchaser (a "buyer's premium").¹⁰³ Allegedly, from late 1992 until at least February 7, 2000, Christie's and Sotheby's agreed to fix their buyer's premiums at identical levels and, beginning in 1995, they agreed to set their seller's commissions at identical levels.¹⁰⁴ They also allegedly conspired to coordinate their negotiation policies to prevent each other from setting a competitive commission fee.¹⁰⁵

After the United States Department of Justice initiated an antitrust investigation of the two auction houses, a group of purchasers who bought goods at auctions held outside the United States, filed a class action suit in the District Court for the Southern District of New York for antitrust violations.¹⁰⁶ The district court dismissed the action for lack of subject matter jurisdiction because the effect of the defendants' conduct on U.S. commerce did not cause the plaintiffs' injuries.¹⁰⁷

On appeal, the Second Circuit noted that it had modified the

⁹⁹ *Den Norske*, 241 F.3d at 436 (Higginbotham, J., dissenting).

¹⁰⁰ *Id.* at 438 (Higginbotham, J., dissenting).

¹⁰¹ *Kruman v. Christie's Int'l Plc*, 284 F.3d 384, 390 (2d Cir. 2002).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Kruman*, 284 F.3d at 390-91.

¹⁰⁶ *Id.* at 391.

¹⁰⁷ *Id.*

“effects test” in *National Bank of Canada v. Interbank Card Ass’n* to require that the anticompetitive conduct’s effect on U.S. commerce either: (1) reduce the competitiveness of the domestic market; or (2) make possible anticompetitive conduct directed at the domestic market.¹⁰⁸ The court held that the FTAIA did not alter the *National Bank of Canada* test by requiring that the domestic effect of anticompetitive conduct abroad be the basis of a plaintiff’s injury.¹⁰⁹ Rather, the court reversed the district court and concluded that federal courts have subject matter jurisdiction over a claim by a plaintiff who is injured outside the United States by anticompetitive conduct that has substantial effect on U.S. commerce.¹¹⁰

The *Kruman* court reasoned that the FTAIA was clearly enacted as an amendment to the Sherman Act, which deals primarily with defendants.¹¹¹ If Congress had intended the FTAIA to limit the kinds of injuries plaintiffs must suffer in order to bring a suit, it would have amended the Clayton Act, which deals primarily with plaintiffs.¹¹² Therefore, the court held, § 6a(2) “only requires that the domestic effect” of anticompetitive conduct abroad “violate the substantive provisions of the Sherman Act.”¹¹³ Echoing Judge Higginbotham, the court noted that requiring the domestic effect to be the cause of a plaintiff’s injury would necessitate a revision of the language of § 6a(2) from the domestic effect giving “rise to a claim” to it giving “rise to *the plaintiff’s* claim.”¹¹⁴

Furthermore, the Second Circuit found that Congress intended to follow the test from *National Bank of Canada*, which supports a broader reading of § 6a(2).¹¹⁵ Congress even cited to the case noting that “the domestic ‘effect’ that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit.”¹¹⁶ The Second Circuit concluded that the plaintiffs in

¹⁰⁸ *Id.* at 399; *see also* *Nat’l Bank of Can. v. Interbank Card Ass’n*, 666 F.2d 6, 8 (2d Cir. 1981) (discussing this modification of the effects test).

¹⁰⁹ *Kruman*, 284 F.3d at 399.

¹¹⁰ *Id.*

¹¹¹ *Id.*; *see* 15 U.S.C. § 6a (2000).

¹¹² *Kruman*, 284 F.3d at 400.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 401.

¹¹⁶ *Id.* (quoting H.R. REP. NO. 97-686, at 11 (1982) (citing *Nat’l Bank of Can.*,

Kruman could bring their claims under U.S. law against Christie's and Sotheby's because their injuries were caused by anticompetitive conduct prohibited by the Sherman Act, and that conduct had a substantial effect on commerce in the United States.¹¹⁷ The Court remanded the case for further proceedings consistent with this conclusion.¹¹⁸

IV. Analysis

The Fifth Circuit in *Den Norske* and the Second Circuit in *Kruman* relied on the same sources in their opinions: the plain language of the FTAIA, the legislative history, and the relevant case law. Each circuit, however, reached a different conclusion.¹¹⁹ This section will review both decisions and argue in favor of the Second Circuit's approach. That approach recognizes the importance of deterring anticompetitive conduct without violating of international law.¹²⁰

A. The Plain Language of the FTAIA

The FTAIA primarily concerns jurisdiction over export commerce.¹²¹ It states that non-import commerce is covered by U.S. antitrust law only when it produces anticompetitive effects in the U.S. market.¹²²

The Fifth Circuit found that, on its face, the FTAIA exempts commercial transactions between foreign entities in foreign territories from U.S. antitrust law.¹²³ Thus, a plain language reading, according to the Fifth Circuit, requires a plaintiff's injury to arise out of the

666 F.2d at 8)).

¹¹⁷ *Kruman*, 284 F.3d at 403.

¹¹⁸ *Id.*

¹¹⁹ *See Den Norske*, 241 F.3d at 425; *Kruman*, 284 F.3d at 395.

¹²⁰ *See Kruman*, 284 F.3d at 403 n.10 (discussing how its decision accords with various treaties in force in the United States).

¹²¹ *See Waller*, *supra* note 36, at 529.

¹²² 15 U.S.C. § 6a(1) (2000) (providing that U.S. antitrust law applies to export commerce with foreign nations if such commerce has a direct, substantial and reasonably foreseeable effect in the United States); *see also Mehra*, *supra* note 37, at 290.

¹²³ *Den Norske*, 241 F.3d at 426; *see also* 15 U.S.C. § 6a(2).

domestic effect of the anticompetitive conduct.¹²⁴ In responding to Judge Higginbotham's dissent, the majority argued that its reading "produces the precise result intended by Congress": that "foreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace*, just as our citizens do."¹²⁵ According to the Fifth Circuit, however, the FTAIA precludes courts from asserting jurisdiction over claims involving injuries sustained abroad as a result of foreign conduct that also has effects on commerce in the United States.¹²⁶

The Fifth Circuit's interpretation of the plain language of the FTAIA, however, is not really a "plain language" reading because it assumes that Congress intended to preclude U.S. law from applying to injuries sustained outside of the United States.¹²⁷ As Judge Higginbotham noted, the majority in *Den Norske* required the effect of anticompetitive conduct on U.S. commerce to give rise to the plaintiff's claim.¹²⁸ But, the text does not say that.¹²⁹ Rather, it says that the effect must give rise to a Sherman Act claim.¹³⁰ The plain language reading by the Second Circuit in *Kruman* reiterated Judge Higginbotham's argument that the indefinite article "a" in "gives rise to a claim" means that the anticompetitive conduct gives rise to any claim under the Sherman Act, not necessarily the plaintiff's claim.¹³¹

Moreover, the Second Circuit noted that the FTAIA makes no reference to the Clayton Act – the antitrust law that grants plaintiffs a private right of action for injuries suffered from Sherman Act violations.¹³² The text of the FTAIA does not "require that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action."¹³³ Rather, the text only requires that "the

¹²⁴ *Den Norske*, 241 F.3d at 427.

¹²⁵ *Id.* at 427 n.23 (citing H.R. REP. NO. 97-686, at 10-11 (1982)).

¹²⁶ *Den Norske*, 241 F.3d. at 427.

¹²⁷ *See id.* at 432 (Higginbotham, J., dissenting).

¹²⁸ *Id.* at 432 (Higginbotham, J., dissenting).

¹²⁹ *Id.* (Higginbotham, J., dissenting).

¹³⁰ *Id.* (Higginbotham, J., dissenting).

¹³¹ *Kruman*, 284 F.3d at 400 (finding that Congress intentionally used the indefinite article "a" instead of the definite article "the"); *see also* Davis, *supra* note 11, at 56 (asserting that the "literal text of the statute supports this conclusion").

¹³² *Kruman*, 284 F.3d at 400.

¹³³ *Id.*

domestic effect violate the substantive provisions of the Sherman Act.”¹³⁴ If Congress intended to modify the sort of claims that could be brought by private plaintiffs under the FTAIA, it would have modified the Clayton Act as well as the Sherman Act, but it did not.¹³⁵ Consequently, the Second Circuit’s interpretation of the FTAIA is a better expression of the plain meaning of the FTAIA.¹³⁶

Furthermore, while commentators have noted, and Judge Higginbotham acknowledged, that “it is not self-evident” that the plain language of the FTAIA compels either interpretation,¹³⁷ reading § 6a(2) to require that the domestic effect give rise to the plaintiff’s claim could have unintended consequences.¹³⁸ It would allow conduct that is prohibited within the United States to escape prohibition if the injury from the conduct occurs outside of the United States, even if the effect on the United States is as substantial as if the injury had occurred within the United States.¹³⁹ The Second Circuit’s reading avoids this consequence.¹⁴⁰

B. Legislative History

The Fifth Circuit and the Second Circuit relied on the same legislative history to support their interpretations of the FTAIA.¹⁴¹ The Fifth Circuit emphasized that Congress’ intent was to preclude “wholly foreign transactions as well as export transactions” from recovery under U.S. law.¹⁴² Judge Higginbotham’s criticism, however, centered on how the majority in *Den Norske* overlooked the areas of the legislative history where Congress spoke with more particularity on the specific question posed.¹⁴³ From a reading of the

¹³⁴ *Kruman*, 284 F.3d at 400.

¹³⁵ *Id.*

¹³⁶ See Davis, *supra* note 11, at 56 (recognizing this type of reading as a more literal interpretation).

¹³⁷ Mehra, *supra* note 37, at 292; see also *Den Norske*, 241 F.3d at 433 (Higginbotham, J., dissenting) (noting that “the text of the FTAIA compels neither the majority’s reading or mine . . .”).

¹³⁸ See Mehra, *supra* note 37, at 292.

¹³⁹ See *id.* at 291.

¹⁴⁰ *Kruman*, 284 F.3d at 400.

¹⁴¹ *Den Norske*, 241 F.3d at 428; *Kruman*, 284 F.3d at 395.

¹⁴² *Den Norske*, 241 F.3d at 428 (citing H.R. REP. NO. 97-686, at 10 (1982)).

¹⁴³ *Id.* at 433-34 n.11 (Higginbotham, J., dissenting).

same House Report, Judge Higginbotham noted that the FTAIA was designed to exempt certain export activity from antitrust scrutiny, not to limit the liability of transnational conspiracies affecting U.S. commerce.¹⁴⁴ The Second Circuit in *Kruman* found that the legislative history was consistent with the notion that the illegal anticompetitive conduct need not be experienced by the injured party within the United States.¹⁴⁵

While the legislative history provides support for both readings of the FTAIA, the Fifth Circuit's reading has less contextual support.¹⁴⁶ The Fifth Circuit stressed the House Report's intention that the effect of the conduct in the United States "also be the basis of the alleged injury";¹⁴⁷ however, if taken in context, the meaning becomes different.¹⁴⁸ The next sentence in the House Report states that "[t]his does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States."¹⁴⁹ This supports the Second Circuit's view of the legislative history because Congress' intent was that the injury need not be felt within the United States.¹⁵⁰ In addition, as the Second Circuit pointed out, Congress cited *National Bank of Canada* as an example of the type of test it intended under the FTAIA, which further supports the Second Circuit's broader interpretation of the FTAIA.¹⁵¹

C. Case Law and the FTAIA

The Fifth Circuit in *Den Norske* argued that its holding was consistent with the few courts that have directly addressed this

¹⁴⁴ *Id.* at 433 (Higginbotham, J., dissenting).

¹⁴⁵ *Kruman*, 284 F.3d at 400 n.8.

¹⁴⁶ See Davis, *supra* note 11, at 56 (stating that the Fifth Circuit either "downplayed the legislative history, or read it selectively.").

¹⁴⁷ *Den Norske*, 241 F.3d at 426 n.19 (citing H.R. REP. NO. 97-686, at 12 (1982)).

¹⁴⁸ See Davis, *supra* note 11, at 56 (discussing this phrase in its context in the FTAIA).

¹⁴⁹ H.R. REP. NO. 97-686, at 12 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2497.

¹⁵⁰ See Davis, *supra* note 11, at 56 (discussing the selective reading of the Fifth Circuit's opinion in *Den Norske*).

¹⁵¹ *Kruman*, 284 F.3d at 401.

issue.¹⁵² Most case law does, in fact, support the Fifth Circuit's interpretation of the FTAIA over the Second Circuit's interpretation.¹⁵³

There is one important exception, however. *National Bank of Canada* serves as the case law basis for the Second Circuit's conclusion.¹⁵⁴ In *National Bank of Canada*, the Second Circuit held that antitrust law applies to any anticompetitive conduct that either reduces the competitiveness of the U.S. market or makes such conduct directed at the domestic market possible.¹⁵⁵ The Second Circuit's reliance on *National Bank of Canada*, while its own precedent, is nevertheless persuasive because Congress cited *National Bank of Canada* in the legislative history in describing the approach it intended under the FTAIA.¹⁵⁶

The Supreme Court's holding in *Hartford Fire* also supports the Second Circuit. The Supreme Court's dissent in *Hartford Fire* conceded that "it is now well established that the Sherman Act applies extraterritorially."¹⁵⁷ In addition, although *Hartford Fire* did not address the specific issue involved here, the majority limited the importance of international comity to the point that such considerations are now rarely successful in dismissing antitrust litigation.¹⁵⁸

¹⁵² *Den Norske*, 241 F.3d at 429.

¹⁵³ *Id.* at 429-30 (citing, e.g., *S. Megga Telecomm. Ltd. v. Lucent Tech., Inc.*, 1997 WL 86413 (D. Del. 1997)) (other citations omitted). *But see* *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003) (holding an interpretation of the FTAIA that is similar to the Second Circuit's in *Kruman*); *Metallgesellschaft AG v. Sumitomo Corp.*, 2003 WL 1665352, at *5 (7th Cir. 2003) (noting that although the Seventh Circuit has not definitively adopted either interpretation of the FTAIA, case law in the circuit "appears to point in the direction of the approach taken by the D.C. and Second Circuits.").

¹⁵⁴ *Kruman*, 284 F.3d at 401.

¹⁵⁵ *Nat'l Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981).

¹⁵⁶ H.R. REP. NO. 97-686, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2496.

¹⁵⁷ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986)) (other citations omitted).

¹⁵⁸ *Hartford Fire*, 509 U.S. at 798-99; *see also* Waller, *supra* note 10, at 565 (noting that "comity as a legal doctrine has seen better days and will rarely be successful in dismissing antitrust litigation . . .").

D. Deterrence and Antitrust Policy

Private antitrust actions have been described as addressing two purposes: to provide recovery for injured plaintiffs and to deter anticompetitive conduct.¹⁵⁹ These purposes rarely seem to conflict, but, when they do, the overriding purpose of antitrust law is to deter anticompetitive conduct.¹⁶⁰ Antitrust laws provide both civil and criminal penalties to deter anticompetitive conduct.¹⁶¹ The purpose of deterrence is further supported by the award of treble damages to successful plaintiffs in antitrust actions.¹⁶² This has a recognizable deterrent effect on anticompetitive conduct.¹⁶³

If a foreign company were to ask an attorney whether it would be liable under U.S. law for participating in a foreign price fixing cartel that has substantially harmful effects on the U.S. market, under a *Den Norske* reading of the FTAIA, “a reasonably prudent counselor might tell a client that there will probably not be such liability.”¹⁶⁴ In contrast, the Second Circuit’s interpretation of U.S. antitrust laws in *Kruman* provides individual and corporate plaintiffs harmed by international cartels, as well as American consumers harmed by the effects of international cartels, with a remedy likely to deter foreign conspirators from engaging in such conduct.¹⁶⁵ This better protects American consumers from, for example, paying inflated prices for oil and gasoline caused by the anticompetitive conduct of a foreign cartel.¹⁶⁶ More importantly, it also prevents American consumers from being at the mercy of foreign cartels.¹⁶⁷

¹⁵⁹ Mehra, *supra* note 37, at 280.

¹⁶⁰ *Id.* at 278-79.

¹⁶¹ Epstein, *supra* note 4, at 345.

¹⁶² 15 U.S.C. § 15(a) (2000).

¹⁶³ See Mehra, *supra* note 37, at 278 (discussing treble damages as a deterrent).

¹⁶⁴ Davis, *supra* note 11, at 57.

¹⁶⁵ See Mehra, *supra* note 37, at 319-20 (contending that “a deterrence-based focus clearly suggests that the broader interpretation [of the FTAIA] better accords with the goal of deterring wrongful conduct.”).

¹⁶⁶ See *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F.3d 420, 434 (5th Cir. 2001) (Higginbotham, J., dissenting).

¹⁶⁷ See Davis, *supra* note 11, at 56-57.

E. International Law

Even if the Second Circuit's interpretation of the FTAIA is correct, as this article argues, the dissent in *Hartford Fire* noted that "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with the principles of international law."¹⁶⁸ Although allowing for recovery under the FTAIA is, arguably, a stretch for U.S. antitrust law, the Second Circuit's interpretation does not *prima facie* violate international law.¹⁶⁹

First, since there is little plausible basis to defend private anticompetitive conduct that fixes prices or reduces output,¹⁷⁰ there have been significant developments internationally to harmonize competition rules.¹⁷¹ For instance, since the first attempt at providing a set of international trade rules in the Havana Charter of 1948, efforts at harmonizing trade policy have been expressed in the General Agreement on Tariffs and Trade ("GATT") and the formation of the World Trade Organization ("WTO").¹⁷² While these efforts have centered on governmental trade policies, and not private anticompetitive conduct as such, the Organization for Economic Cooperation and Development ("OECD") recently attempted to address competition policy internationally.¹⁷³ Moreover, the European Union has agreements with the United States and Canada "to strengthen cooperation between competition authorities" and to promote dialogue in accordance with the OECD recommendations.¹⁷⁴

¹⁶⁸ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). In accordance with this notion, this section examines the sources of international law (*i.e.*, treaties, customs, general principles and publicists) to determine whether there would be any *prima facie* violation of international law by the Second Circuit's holding in *Kruman*. See JANIS & NOYES, *supra* note 28, at 20-22 (discussing the sources of international law).

¹⁶⁹ See *Kruman v. Christie's Int'l Plc*, 284 F.3d 384, 402 (2d Cir. 2002).

¹⁷⁰ Epstein, *supra* note 4, at 366.

¹⁷¹ *Id.* at 354.

¹⁷² Epstein, *supra* note 4, at 355.

¹⁷³ *Id.*

¹⁷⁴ See European Union Preparatory Acts, Proposal for a Council and Commission Decision Concluding the Agreement Between European Communities and the Government of Japan Concerning Cooperation on Anticompetitive Activities, COM (02) 230, at 3 (Aug. 5, 2002), Celex No. 502PC0230 (2002), available at http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0230en01.pdf.

The EU recently submitted a proposal for a similar agreement with Japan concerning cooperation on anticompetitive activities.¹⁷⁵ In addition, the United States has entered into Friendship, Commerce and Navigation treaties with a number of foreign nations granting foreign purchasers the protection of U.S. antitrust laws.¹⁷⁶

This brief survey of international agreements implies that international customs already proscribe anticompetitive conduct.¹⁷⁷ Hence, a reading of the FTAIA that allows for the antitrust laws of the United States to apply to foreign conduct would not *prima facie* violate any international agreements or international customs.¹⁷⁸

Second, several other nations' domestic laws have granted domestic organizations the authority to apply their national anticompetitive laws extraterritorially.¹⁷⁹ Indeed, globalization of economic activity has forced many governments to institute policies that strike a balance between encouraging domestic companies to compete internationally and protecting their domestic markets from transnational enterprises.¹⁸⁰ Moreover, in many developing countries, especially in Eastern Europe and Asia, new competition laws have followed the European or U.S. models.¹⁸¹

From this brief discussion of the domestic laws of foreign nations, there appear to be general principles of international law

¹⁷⁵ See *id.* at 2.

¹⁷⁶ See *Kruman*, 284 F.3d at 403 n.10.

¹⁷⁷ See Spencer Weber Waller, *The Common Law of International Antitrust*, 34 NEW ENG. L. REV. 163 (1999) (arguing that there is a customary international law against anticompetitive activity); see also Waller, *supra* note 36, at 535 (noting that there is growth in antitrust regimes worldwide and at the international level).

¹⁷⁸ See *Kruman*, 284 F.3d at 402-03 (discussing its decision in the context of international law).

¹⁷⁹ See Waller, *supra* note 10, at 574 (noting that one example is Germany); see also Spencer Weber Waller, *Bringing Meaning to Interest in Balancing in Transnational Litigation*, 23 VAND. J. TRANSNAT'L L. 925, 960-62 (1991) (discussing other examples).

¹⁸⁰ Ian A. Kerr & Michael Wood, *Globalisation and Competition Policy*, at 4 (Sept. 14, 2000), at <http://www.insead.edu/events/eamsa/papers/kerrwood.pdf>.

¹⁸¹ *Id.* at 12; see also, e.g., Arya Abhiseka, *NGO, Cement Company Face Possible Court Battle*, THE JAKARTA POST, Jan. 8, 2003, at P13 (describing a report by Indonesian based NGO, Monopoly Watch, to the Indonesian Business Competition Supervisory Council of foreign cement companies operating as a cartel).

against anticompetitive conduct.¹⁸² Thus, application of U.S. antitrust laws to anticompetitive conduct outside the United States, but with effect in the United States, would not *prima facie* violate general principles of international law.¹⁸³

V. Proposal

Private anticompetitive agreements and hybrid government-private agreements are becoming the new barriers to a truly open and competitive global marketplace.¹⁸⁴ Such agreements have adverse effects on consumers, from higher oil and gas prices to inflated commissions at auctions.¹⁸⁵ An ideal proposal would detail how an international organization, such as the WTO or the United Nations, could effectively harmonize international antitrust policy and provide effective enforcement mechanisms.¹⁸⁶

Until this ideal can be realized, however, courts should adopt the Second Circuit's approach in *Kruman* because the Second Circuit's interpretation of the FTAIA better accords with the plain meaning of the statute and its legislative history, and because its interpretation better serves the deterrence purpose of antitrust law without violating international law.¹⁸⁷ The Second Circuit's approach better deters anticompetitive conduct across the board.¹⁸⁸ It also better protects American consumers from the harmful effects of international cartels.¹⁸⁹

One of the greatest difficulties in applying the Second Circuit's approach may be the U.S. Government's potential reluctance to recognize the judgments of other nations applying their domestic laws and other nations' potential reluctance to recognize the

¹⁸² See JANIS & NOYES, *supra* note 28, at 131 (discussing EU competition law as a general principle of law).

¹⁸³ See Kerr & Wood, *supra* note 180, at 12 (noting that the number of countries allowing for private rights of action is growing and include more than just EU member states).

¹⁸⁴ Epstein, *supra* note 4, at 345-46.

¹⁸⁵ Labaton, *supra* note 3, at 1.

¹⁸⁶ See Epstein, *supra* note 4, at 365-66 (discussing just such a proposal).

¹⁸⁷ See *Kruman*, 284 F.3d at 400-01.

¹⁸⁸ Davis, *supra* note 11, at 57.

¹⁸⁹ *Kruman*, 284 F.3d at 401.

judgments of U.S. courts applying U.S. antitrust law.¹⁹⁰ Yet, since there is little justification for price-fixing or output-limiting private cartels, judgments rendered against such activities should be recognized.¹⁹¹ Moreover, with the increase in poverty rates in the United States and the drop in median household income,¹⁹² the need to protect consumers from conspiracies is even more pressing. If U.S. law cannot protect American consumers from foreign conduct that raises the prices of oil and gasoline, or perhaps even necessities, such as food or clothing, then consumers may be at the mercy of the monopolistic whim of international corporate cartels.¹⁹³

VI. Conclusion

The growth of interconnections between commerce and trade throughout the global marketplace requires fresh approaches to problems that affect consumers both in the United States and in other nations.¹⁹⁴ The importance of deterring anticompetitive conduct by applying and enforcing competition laws is vital to the protection of consumers.¹⁹⁵ The recent circuit split between the Fifth and Second Circuits reflects the difficulties in resolving the problems of which laws should apply to transnational conduct and who should enforce such laws.¹⁹⁶ Perhaps the difference in conceptions of competition laws throughout various nations is an insurmountable barrier to harmonizing competition laws.¹⁹⁷ Recent international agreements and recent applications of domestic law suggest, however, that the

¹⁹⁰ See Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 BERKELEY J. INTL' L. 44, 46 (2001).

¹⁹¹ See William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L. J. 161, 190-91 (2002) (noting that although courts do not enforce foreign criminal antitrust judgments, civil antitrust suits brought by private parties are very different and civil antitrust judgments should be recognized).

¹⁹² Steven Pearlstein, *U.S. Poverty Rate Rises, Income Drops; Increase in Ranks of Poor is First in 8 Years*, WASH. POST, Sept. 25, 2002, at A3.

¹⁹³ See *Den Norske*, 241 F.3d at 434 (Higginbotham, J., dissenting).

¹⁹⁴ See Epstein, *supra* note 4, at 365.

¹⁹⁵ See *id.* at 345-46.

¹⁹⁶ See Davis, *supra* note 11, at 56-57 (discussing the difficulties involved).

¹⁹⁷ See Epstein, *supra* note 4, at 362.

world may be ready to harmonize its competition policies.¹⁹⁸ In the meantime, consumers must be protected from the effects of such harmful and unfair activity as the formation of anticompetitive cartels. The Second Circuit currently provides the most effective method of providing such protection.

¹⁹⁸ See Waller, *supra* note 36, at 534-35.