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The Scope of Antitrust Jurisdiction Abroad: A Classic Conflicts-of-Law Problem

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Abstract

This term, the Supreme Court is set to address an issue of profound importance to the regulation of the global economy that has sharply divided the lower courts over the past few years about the extent to which US antitrust law applies outside the US. While it has been within the US, what is less clear is the scope of that reach. What happens if foreign anticompetitive conduct affects not only the US, but also foreign economies? Are people injured abroad protected by the Sherman Act's criminal and civil provisions? Courts examining this important issue have so far looked to the Foreign Trade Antitrust Improvement Act of 1982 for answers. This Article, however, argues that the current focus on the FTAIA is a mistake, and that the correct place to look for answers is in traditional conflicts of law doctrine, with which the FTAIA is consistent and from which the case law preceding the FTAIA was drawn. Under that doctrine, the answer to the question now before the Supreme Court is that US antitrust law should be deemed exclusively to protect persons injured in US commerce, and it should not extend to protect persons injured abroad under any circumstance.

THE SCOPE OF ANTITRUST JURISDICTION ABROAD: A CLASSIC CONFLICTS-OF-LAW PROBLEM

Robert W. Trenchard, Esq.¹

This term, the Supreme Court is set to address an issue of profound importance to the regulation of the global economy that has sharply divided the lower courts over the past few years about the extent to which U.S. antitrust law applies outside the U.S. While it has been settled for many years that U.S. antitrust law reaches foreign conduct that has a sufficient effect within the U.S., what is less clear is the scope of that reach. What happens if foreign anticompetitive conduct affects not only the U.S., but also foreign economies? Are people injured abroad protected by the Sherman Act's criminal and civil provisions? Courts examining this important issue have so far looked to the Foreign Trade Antitrust Improvement Act of 1982 for answers. This Article, however, argues that the current focus on the FTAIA is a mistake, and that the correct place to look for answers is in traditional conflicts of law doctrine, with which the FTAIA is consistent and from which the case law preceding the FTAIA was drawn. Under that doctrine, the answer to the question now before the Supreme Court is that U.S. antitrust law should be deemed exclusively to protect persons injured in U.S. commerce, and it should not extend to protect persons injured abroad under any circumstances.

Table of Contents

	<u>Page</u>
Introduction	1
Part I: The History of Using Conflicts Law To Define the Foreign Reach of the Sherman Act..	5
1. <i>American Banana</i> and "Territorialist" Conflicts Law	5
2. <i>Alcoa</i>	7
3. <i>Timberlane</i>	10
Part II: Conflicts Law and the Scope of Sherman Act Jurisdiction Abroad.....	12
A. The Conflicts Law Analysis of the Scope of the Effects Test	13
1. The Territorial/First Restatement Approach.....	14
2. Policy Analysis/Second Restatement Approach.....	20
a. Needs of the International System	21
b. Relevant Policies of the U.S. and Other Countries.....	22
c. The Basic Policies Underlying Competition Law	25
d. Justified Expectations/Predictability	26
e. Ease in Determining and Applying the Law	26
B. The Constitutional Dimension: <i>Allstate</i> and <i>Shutts</i>	27
C. International Law: Why it Should Not Be the Focus	29
D. Antitrust Standing and Subject Matter Jurisdiction	33
Part III: The FTAIA	37
A. FTAIA Background and Conflicts Law Roots	38
B. Section 2 of the FTAIA	42
Conclusion	47

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Introduction

The U.S. Supreme Court recently granted *certiorari* in *Empagran v. F. Hoffman-LaRouche, et al.* (“*Empagran*”)² to resolve an issue brewing in the federal courts about the reach of U.S. antitrust law outside the U.S. Almost sixty years ago, the seminal case of *United States v. Aluminum Co. of America* (“*Alcoa*”)³ settled that the Sherman Act reaches foreign conduct that has sufficient effects in the U.S. Now the expanding global economy has raised the question of the correct role of the U.S. courts when anticompetitive conduct abroad affects the U.S. but also other countries. Does the Sherman Act redress only the injury felt in the U.S., or does it also apply to foreign injury?

At stake in the answer are potentially billions of dollars in trade and harmony among nations. As the world economy becomes ever more intertwined, the likelihood that economic activity in one place will affect the economies of more than one nation increases immeasurably. Without a smooth and sure method of determining which nation's law should control that conduct — and, by extension, whether and to what extent that conduct is illegal — economic actors will be loath to risk behavior that, while possibly deemed beneficial under one nation's laws, could arguably be deemed detrimental under another nation's laws. Moreover, such uncertainty about the scope of different nations' competition laws invites tension and disharmony among countries as they compete and argue to have their laws and fundamental economic policies respected on the international stage. So the consequences of the Supreme Court's decision in *Empagran* regarding the proper reach of the Sherman Act abroad are profound indeed.

So far, those looking for the answer under U.S. law have mistakenly focused on the Foreign Trade Antitrust Improvement Act of 1982 (the “FTAIA”), and this is how the issue has been framed for the Supreme Court.⁴ Section 1 of the FTAIA adopts a version of the *Alcoa* “effects test,” and Section 2 requires that “such effect gives rise to a claim under” the Sherman Act. Some read Section 2’s “gives rise to a claim” clause to give the Sherman Act a broad scope, protecting victims hurt in foreign commerce if others in the U.S. were also hurt by the same

² *Hoffman-LaRouche, Ltd. v. Empagran S.A.*, 124 S. Ct. 966 (2003) (granting writ of *certiorari* to review *Empagran S.A. v. F. Hoffman-LaRouche, Ltd.*, 315 F.3d 388 (D.C. Cir. 2003)).

³ 148 F.2d 416 (2d Cir. 1945).

⁴ 15 U.S.C. § 6a.

conduct.⁵ This broad reading allows foreign victims to assert private claims and to be counted for purposes of calculating government enforcement penalties under the Sherman Act, which are based in part on the number of victims hurt by the anticompetitive conduct.

This article argues to the contrary: The Sherman Act only allows persons hurt in the U.S. by foreign anticompetitive conduct to assert claims or be counted in government enforcement actions.⁶ People hurt abroad by the same conduct are limited to whatever remedy exists under foreign law. In analyzing this problem, however, the right starting point is not, contrary to the current view, the FTAIA. Instead, the right starting point is basic conflicts-of-law doctrine.

For almost a century, the key U.S. cases dealing with the reach of the Sherman Act abroad have used conflicts law principles to define the Sherman Act's "prescriptive" or "legislative" jurisdiction (that is, the reach of the statute abroad). The effects test itself — later incorporated into the FTAIA — was actually created as a conflicts law rule in *Alcoa*. So like any other conflicts law rule, the effects test should be used to define not only when the Sherman Act applies, but also when foreign law (if any) does, instead. Under that theory, the Sherman Act should apply to conduct that affects U.S. commerce; foreign law, if any, should apply to conduct that affects foreign commerce. When the same conduct affects both the U.S. and a foreign country, the location of the effect should provide the governing law, even if that results in different laws applying to the same conduct for harm suffered in different places.

⁵ See, e.g., *Empagran*, 315 F.3d 338; *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002); *Den Norske Stats Oljeselskap AS v. HeereMac Vof*, 241 F.3d 420, 431-39 (5th Cir. 2001) (Higginbotham, J., dissenting); Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 SUM-Antitrust 53 (2001); Salil K. Mehra, "A" Is For Anachronism: The FTAIA Meets the World Trading System, 107 Dick. L. Rev. 763 (2003); Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 Colum. J. Transnat'l. L. 275 (2002).

⁶ To this extent, the argument in this article is in accord with *Den Norske*, 241 F.3d 384; *Empagran*, 315 F.3d 338, 360-61 (Henderson, J., dissenting); *Empagran S.A. v. F. Hoffman-LaRouche, Ltd.*, No. Civ. 001686, 2001 WL761360 (D.D.C. June 7, 2001); *Kruman v. Christie's Int'l. PLC*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001); *Ferromin Int'l. Trade Corp. v. UCAR Intern., Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001); *In re Microsoft Corp.*, 127 F. Supp. 2d 702 (D. Md. 2001); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875 (W.D. Wis. 2000); Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 Harv. L. Rev. 2122 (2001). By way of full disclosure, the author was involved in briefing *In re Copper Antitrust Litig.*

This result is not odd or unique to the antitrust laws. The effects test in this respect is similar to the ancient conflicts law rule that the place of a wrong usually controls the law that applies (the “*lex loci delicti*” doctrine). Under that rule, when one wrong causes economic injury in more than one place, the law of each place typically controls the claims of people injured there. That rule gives effect to each interested state’s law, and thereby effectuates the conflicts law policies of accommodating different state’s interests, and enhancing fairness, predictability and judicial efficiency. In contrast, as shown below, the broad view of Sherman Act jurisdiction undermines those interests by sowing conflict between the U.S. and other countries and thwarting fairness and predictability — so much so as probably to violate the due process clause of the Fifth Amendment of the U.S. constitution, as shown below (pages 27-29).

Thus, conflicts law, not the FTAIA, is essential to answering the question now before the Supreme Court.⁷ Not that the FTAIA is irrelevant — the FTAIA as a whole, and Section 2 in particular, are consistent with conflicts law and should yield the same outcome as a conflicts law analysis under settled rules for interpreting statutes. Indeed, a virtue of conflicts law is that it makes sense out of parts of the FTAIA and its legislative history that, taken out of context, are difficult to understand and are misused by proponents of the broad reading of the Sherman Act.

In addition to putting the details of the FTAIA in context, conflicts law further addresses general arguments of policy and methodology made by those favoring the broad reading of Sherman Act jurisdiction. For instance, some argue that the U.S. interest in deterring conduct that violates the Sherman Act supports broad jurisdiction in order to maximize the number of claimants.⁸ But conflicts law makes clear that this country’s interest in deterrence is only one of several values at stake, and that deterrence alone — even if it would be enhanced by the broad reading of jurisdiction, a debatable point (see pages 24-25) — does not justify the broad reading. Further, some argue that the issue of who should be entitled to sue under the Sherman Act should be analyzed under the doctrine of antitrust standing.⁹ But that doctrine is aimed at a different

⁷ One court has noted that the FTAIA is not essential to the conclusion that the Sherman Act exclusively protects those injured in U.S. Commerce. *See Kruman*, 129 F. Supp. 2d at 626 n.20 (“[T]he result in this case would be identical even in the absence of the FTAIA.”)

⁸ *See* cases and articles *supra* note 5.

⁹ *See, e.g., Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836, 843 (7th Cir. 2003) (the author was involved in this case); William C. Holmes, *Jurisdiction and Standing in the International Arena*, 14 Loy. Consumer L. Rev. 537 (2002).

problem and thus fails to capture the essential issues at stake in a classic conflict law setting. These issues are also examined in detail below.

Finally, before turning to that analysis, it is important to be clear about what this article does not argue: It does not argue that courts should use international law to construe the reach of the Sherman Act, an argument made by others (including parties and *amici* in *Empagran*).¹⁰ That is, it is not an application of *The Schooner Charming Betsy* and the international law jurisdictional rule of reason of the Third Restatement of Foreign Relations Law.¹¹ While there is superficial overlap between conflicts law and the jurisdictional rule of reason, and the two are connected historically, they are separate bodies of law and this article treats them separately. Conflicts law is domestic common law addressed to domestic concerns. The jurisdictional rule of reason is international law addressed to international concerns. The distinction between these areas of law and its importance to interpreting the scope of Sherman Act jurisdiction is addressed further below (pages 29-33).

This article is organized as follows. Part I (pages 5-11) shows the almost century-long history of treating the extraterritorial reach of the Sherman Act as a Conflicts Law problem. Part II (pages 12-37) analyzes the scope of the Sherman Act in light of conflicts law rules, including constitutional principles, and shows why the conflicts law analysis advanced here is different from international law, and why antitrust standing rules should not be used for the purpose of defining the extraterritorial reach of the Sherman Act. Part III (pages 37-47) looks at the FTAIA in light of conflicts law, and argues that, based on that law, Section 2 should be read narrowly.

¹⁰ See, e.g., *F. Hoffman-LaRouche, Ltd., et al., Petitioners v. Empagran, S.A., et al., Respondents*, No. 03-724, 2004 WL 226391, Brief for Petitioners at 21-25 (Feb. 03, 2004); *F. Hoffman-LaRouche, Ltd., et al., Petitioners v. Empagran, S.A., et.al., Respondents*, No. 03-724, 2004 WL 226597, Brief Amicus Curiae of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands at 18-22 (Feb. 03, 2004).

¹¹ *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804); Restatement (Third) Foreign Relations Law § 403 (1986).

Part I

The History of Using Conflicts Law To Define the Foreign Reach of the Sherman Act

When it was enacted, the Sherman Act said little about how it should apply to conduct outside the U.S., if at all. It merely stated that it applied to commerce “with foreign nations.”¹² The Sherman Act’s legislative history was also silent on the issue.

Absent specific direction, the early seminal cases relied on common law conflicts principles to define the Act’s reach abroad. That they did so is not surprising in light of the indications in the legislative history that Congress expected the courts to use common law ideas to fill out the Act’s broad, general commands in application to concrete cases. “Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”¹³ Given that the common law of conflicts law addresses precisely the right issue, *i.e.*, the geographic reach of a law, it was the logical place to turn in these cases.

Three key opinions show how the courts used conflicts law to define the reach of the Sherman Act: *American Banana Co. v. United Fruit Co.* (“*American Banana*”),¹⁴ *Alcoa*,¹⁵ and, to a lesser extent, *Timberlane Lumber Co. v. Bank of American National Trust & Savings Association* (“*Timberlane*”).¹⁶

1. *American Banana and “Territorialist” Conflicts Law.* The Supreme Court first addressed the Sherman Act’s extraterritorial reach in *American Banana*, about twenty years after the Act was passed. *American Banana*

¹² 15 U.S.C. §§ 1, 2.

¹³ *National Soc’y of Prof’l Eng’rs v. U.S.*, 435 U.S. 679, 687-88 (1978); see also *Associated Gen. Contractors of California, Inc. v. California Council of Carpenters*, 459 U.S. 519, 531 (1983) (hereinafter, “*AGC*”) (“The repeated references to the common law in the debate that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background.”).

¹⁴ 213 U.S. 347 (1909).

¹⁵ 148 F.2d 416 (2d Cir. 1945).

¹⁶ 549 F.2d 597 (9th Cir 1976).

Company sued the United Fruit Company for, among other things, prompting the Costa Rican government to seize American Banana's landholdings in Costa Rica, allegedly as part of a scheme to monopolize the banana market. American Banana and United Fruit were both U.S. companies, so the land seizure arguably had an effect in the United States (although, according to a later Supreme Court case, the plaintiff had failed to prove such an effect).¹⁷ Despite the apparent effect in the U.S., the Supreme Court, per Justice Holmes, held that American Banana's claim failed because "the acts causing damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states."¹⁸

To reach that result, Justice Holmes explicitly drew upon the dominant conflicts law theory of the time, the so-called "territorialist" or "vested rights" theory in vogue from the turn of the twentieth century through the 1960s.¹⁹ That theory is most closely associated with Joseph Beale, the reporter for the First Restatement of Conflicts of Law, although Justice Holmes was a noted proponent of it, too.²⁰ In line with this theory, Justice Holmes began with the premise that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."²¹ Citing, among other things, a leading Conflicts Law treatise of the time, Dicey on Conflicts Law, Justice Holmes reasoned that "[f]or another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."²² Fleshing this out, Justice Holmes argued that "[l]aw is a statement of the circumstances, in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts."²³

¹⁷ *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288-89 (1952).

¹⁸ *American Banana*, 213 U.S. at 355.

¹⁹ See, e.g., Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum. L. Rev. 772, 802-806 (1983); Lea Brillmayer, *Rights, Fairness, and Choice of Law*, 98 Yale L.J. 1277, 1281-85 (1989).

²⁰ *Booking v. General Star Mgmt. Co.*, 254 F.3d 414, 422 n.7 (2d Cir. 2001); Brillmayer, *supra* note 19 at 1281.

²¹ *American Banana*, 213 U.S. at 356.

²² *Id.*

²³ *Id.* at 356-57.

Justice Holmes next asserted that this general conflicts law principle would “lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”²⁴ According to Justice Holmes, the Sherman Act was just such a statute: “Words having universal scope, such as ‘every contract in restraint of trade . . . ,’ will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch.”²⁵ Put differently, Justice Holmes used existing common law notions of conflicts law to fill in the gaps Congress had left in defining the Sherman Act’s prescriptive jurisdiction. That same methodology was picked up in the next key case in this area, the seminal *Alcoa* opinion.

2. *Alcoa*. *Alcoa* was a government civil enforcement case seeking, among other things, to apply the Sherman Act to “Limited,” a Canadian affiliate of Alcoa’s, for alleged membership in an international price-fixing cartel in the aluminum market (the “Alliance”). The Alliance had recruited Limited via two formal agreements made outside the U.S., which allegedly obliged Limited to restrict aluminum output, including aluminum for import into the U.S. The government argued that Limited’s participation in these agreements placed its conduct within the reach of the Sherman Act.

The district court had held that the Alliance was outside the Sherman Act’s reach, however, since it was located outside the U.S. On appeal, the Second Circuit, sitting as the court of last resort because the Supreme Court lacked a quorum of non-conflicted justices, reversed.²⁶

Judge Learned Hand wrote for the Court. Like Justice Holmes before him, Judge Hand’s instinct was to turn to conflicts law to define the reach of the Sherman Act. “[W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; *limitations which generally correspond to those fixed by the ‘Conflict of Laws.’*”²⁷ This was so even though the court’s reach did “not depend upon whether we shall recognize as a source of liability a liability imposed by another state because as a court of the United States, we cannot look beyond our own law.” Rather, “the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it

²⁴ *Id.*

²⁵ *Id.*

²⁶ 148 F.2d 416.

²⁷ *Id.* at 443 (emphasis added).

to do so,” or, in other words, “we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it.”²⁸

Why did Judge Hand feel compelled to explain that the only issue was Congressional intent and not whether the Court should apply foreign law? Because after *Erie Railroad Co. v. Tompkins* in 1938,²⁹ federal courts generally cannot enforce other nation’s laws absent an independent basis of subject matter jurisdiction (see below, pages 35-37).³⁰ In contrast, common law courts, unlike federal courts, *can* and *do* enforce other state’s laws when conflicts law dictates.³¹ But, to Judge Hand, just because the federal court typically cannot take the final step of the typical common law conflicts law analysis and enforce another state’s law when appropriate did not mean that conflicts law principles were irrelevant in guiding the reach of the Sherman Act. According to Judge Hand, those principles continued to guide the extraterritorial reach of “general words, such as those in [the Sherman Act],” through the fiction of presumption that conflicts law reflected Congressional intent in the absence of express direction. In other words, conflicts law still applied to federal law, except to the extent it pointed to non-U.S. law to resolve a particular controversy. In that case, limitations on the federal courts’ subject matter jurisdiction prevented such an application of foreign law. (As shown below, this unique aspect of federal court practice prompted courts to dismiss cases beyond the reach of the Sherman Act under conflicts law rules for lack of subject matter jurisdiction.)

Having thus explained why conflicts law was still pertinent despite the limits on federal court jurisdiction, Judge Hand analyzed the merits of the case. He began with the settled “territorialist” conflicts law rule from Section 65 of the Restatement (First) of Conflict of Laws (1934):³² In Judge Hand’s words, “[a]ny state may impose liabilities, even upon persons not within its allegiance, for

²⁸ *Id.*

²⁹ 304 U.S. 64 (1938).

³⁰ *Erie* severely curtailed federal common law and thus the ability of courts to use federal common law conflicts law principles to apply foreign law. See Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 Iowa L. Rev. 165 (1988). The fact that *Erie* was decided almost thirty years after *American Banana* presumably explains why Justice Holmes, unlike judge Hand, did not feel compelled to make this jurisdictional point.

³¹ See, e.g., Restatement (Second) of Conflict-of-Law § 2 (1971).

³² Section 65 states: “If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof.”

conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.”³³ The issue was whether the Sherman Act did so.

In *American Banana*, Justice Holmes at least implicitly had concluded that the Sherman Act did not reach conduct outside the U.S., notwithstanding an apparent effect from that conduct in the U.S. (A later Supreme Court opinion held that, in fact, no U.S. effect had been shown in *American Banana*, but that is not obvious from the opinion itself.)³⁴ But things had changed in the almost forty years between *American Banana* and *Alcoa*. To begin with, antitrust law had developed in a way that focused heavily on anticompetitive effects. For some types of conduct, such an effect was presumed; for others, it was an element of proof; but in all instances, it had become the fundamental element of antitrust law.³⁵ Moreover, reflecting this trend in the substantive law, some Supreme Court cases had signaled that U.S. effects from foreign conduct could in fact support a Sherman Act case.³⁶ Judge Hand relied on these cases to conclude that conduct outside the U.S. in fact could be reached under the Sherman Act so long as it had a sufficient effect in the U.S. The next issue was what sort of effect was sufficient — unintentional, intended but ineffectual, or both intended and effectual.

Judge Hand’s answer was that the conduct had to be both intentional and effectual to fall within the Sherman Act, since “when one considers the international complications likely to arise from an effort in this country to treat [any other conduct] as unlawful, it is safe to assume that Congress certainly did

³³ *Alcoa*, 148 F.2d at 443.

³⁴ *Steele*, 344 U.S. at 288-89.

³⁵ Significantly, this change occurred in opposition to Justice Holmes’s own views, at least implicitly reflected in *American Banana*, that the Sherman Act was *not* concerned with anticompetitive effects in the sense of higher prices. See 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application*, Ch. 1A, ¶ 104 (5th ed. 2000) (hereinafter “Areeda & Hovenkamp”). The clearest expression of the shift to a focus on anticompetitive effects between *American Banana* and *Alcoa* is in *Board of Trade of Chicago v. U.S.*, 246 U.S. 231, 244 (1918) (“The true test of legality is whether the restraint imposed in such a remedy regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”). See also, e.g., *U.S. v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (focusing on threat of anticompetitive effects as touchstone for liability for price fixing agreements); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (anticompetitive effect presumed in price fixing agreements).

³⁶ 148 F.2d at 444 (citing *U.S. v. Pacific & Artic Ry. & Navigation Co.*, 228 U.S. 87 (1913); *Thomsen v. Cayser*, 243 U.S. 66 (1917); *U.S. v. Sisal Sales Corp.*, 274 U.S. 268 (1927)).

not intend the Act to cover them.”³⁷ Applying this theory to the facts, Judge Hand decided that the Alliance was intentionally engaging in conduct that had an effect in the U.S. when it restricted imports of aluminum into the U.S., and Limited was therefore liable under the Act.³⁸

After *Alcoa*, the effects test became the black-letter law for prescriptive jurisdiction under the Sherman Act. Most courts faced with questions about the reach of the Sherman Act abroad relied solely on the *Alcoa* rule, and did not take the extra step of analyzing the underlying conflicts law principles that provide the basis for that rule. However, the Ninth Circuit in the key *Timberlane* case again turned to more general conflicts law principles to resolve what that court viewed as a unique set of circumstances.

3. *Timberlane*. In *Timberlane*, plaintiff Timberlane Lumber accused Bank of America and others in the Honduran government of conspiring to deny Timberlane access to milled lumber in Honduras for export to the United States. The conspiracy allegedly sought to maintain control of the Honduran lumber industry by a few companies financed by Bank of America.³⁹ The district court had dismissed the case under the act of state doctrine and for lack of jurisdiction under *Alcoa*. On appeal, the Ninth Circuit reversed.

In addressing jurisdiction, the Ninth Circuit started with the assertion that “it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction,” but “[w]hat that point is or how it is determined is not defined by international law. Nor does the Sherman Act limit itself.” In looking at the post-*Alcoa* cases, the Court summarized that courts have “fallen back on a . . . construction of congressional intent, such as expressed in Judge Learned Hand’s oft-cited opinion in *Alcoa*,” referring to the passage in *Alcoa* defining the Sherman Act’s reach as “fixed by the ‘Conflict of Laws.’”⁴⁰

³⁷ 148 F.2d at 443.

³⁸ *Id.* at 444. The Court in *Alcoa* did not have occasion to address directly whether people injured outside the U.S. might also be protected by the Act (the issue presented in *Empagran*), but the remedy ordered by the Court is probative of the issue. The Court enjoined Limited from participating in the Alliance *to the extent it “cover[ed] imports into the United States . . .”* *Id.* at 447 (emphasis added). The Court did not bar Limited from the Alliance to the extent it operated entirely outside the U.S. Although the Court did not say why its order was limited in this manner, the logical inference is that the Court felt that U.S. power reached so far as necessary to protect U.S. interests, and no further.

³⁹ 549 F.2d at 600.

⁴⁰ *Id.* at 609-10.

In applying the effects test to the facts presented, the *Timberlane* Court asserted that the line dividing cases within and without Sherman Act jurisdiction was still evolving and struggled with how much of an effect was necessary for a court to assert jurisdiction. The Court believed that, however defined, “[t]he effects test by itself is incomplete because it fails to consider other nations’ interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country.”⁴¹ In looking for an answer to this crucial question, the Court went back to the conflicts law principles that formed the basis of the *American Banana* and *Alcoa* decisions: “We believe that the field of conflict of laws presents the proper approach, as was suggested . . . in *Alcoa* in expressing the basic limitation on application of American laws”⁴²

Taken together, *American Banana*, *Alcoa* and *Timberlane* can fairly be characterized as the leading cases on the extraterritorial reach of the Sherman Act. They all rely on conflicts law principles. It follows that courts should continue to view questions as to the extra territorial reach of the Sherman Act in this light both because of precedent and because conflicts law most effectively addresses the questions at issue in applying the Sherman Act outside the U.S.⁴³

⁴¹ *Id.* at 610-11.

⁴² *Id.* at n. 29 (citing, among other things, Donald T. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 Ohio St. L.J. 586 (1961)). After this endorsement of conflicts law, however, the opinion then takes an odd turn. The Court did not rely, as had Judge Hand in *Alcoa*, on a Restatement of Conflicts of Law, or, as had Justice Holmes in *American Banana*, on a Conflicts Law treatise. Although the Court previously had said that the Sherman Act’s reach was “not defined by international law,” it nonetheless turned to Section 40 of the Second Restatement of Foreign Relations Law, which it labeled the “jurisdictional rule of reason.” *Id.* at 613-614. The Court did not explain the inconsistency in its reasoning, and *Timberlane* has generally become known as a case premised on notions of international comity rather than conflicts law.

Perhaps the Court ignored the distinction between the jurisdictional rule of reason and conflicts law because of their superficial similarity or their historical connection. Under the jurisdictional rule of reason, states are not supposed to expand the jurisdiction of their laws unreasonably. What is “reasonable” is defined by a list of “connecting” factors between the case and the relevant state. (The principle today is embodied in Section 403 of the Third Restatement of Foreign Relations Law.) A list of similar (though not identical) factors guides domestic Conflicts Law analysis under Section 6 of the Second Restatement of Conflicts of Law. In spite of their superficial similarity, however, they are in fact different doctrines and should be kept separate in this context, as shown below (*see infra*, pages 27-30).

⁴³ Courts construing the FTAIA have consistently looked to the history of the effects test for help in reading the statute. (*See cases cited supra* notes 5 and 6). This article agrees with that general approach, although not with many of the lessons that the cases have drawn from that history. For instance, the Second Circuit in *Kruman* argued that the *Alcoa* effects

Part II

Conflicts Law and the Scope of Sherman Act Jurisdiction Abroad

This section considers in light of conflicts law the issue now before the Supreme Court in *Empagran*: Are persons hurt outside the U.S. by conduct that also affects U.S. commerce protected by the Sherman Act?

At the outset, it is useful to define some scenarios when the scope of the effects test — in terms of who is protected by the Act — would likely arise.

1. *Empagran* presents a classic fact pattern much like those presented in the other appellate decisions in point. In these cases, U.S. and foreign companies allegedly conspire to fix prices or reduce output, a model *per se* illegal horizontal price fixing cartel. Consumers of the product — in *Empagran*, vitamins; in other appellate cases, heavy-lift barge services⁴⁴ and art items auctioned by Sotheby's or Christies⁴⁵ — then buy it all over the world, in and outside the U.S. The illegal cartel could also arise in reverse. U.S. and foreign *sellers* might be hurt by an illegal agreement among *buyers* (an exercise of “monopsony” power), such as a group boycott, seeking to drive prices down. Together, such so-called “horizontal agreements” (that is, agreements among natural competitors to restrain trade) typically give rise to “vertical” claims by either buyers or sellers, as the case may be, and such restraints are also the most common subject of government criminal antitrust cases. While the U.S. victims of such illegal agreements would clearly be protected by the Sherman Act under *Alcoa*, the issue in *Empagran* is whether the foreign victims would be protected as well.

test on its face, as construed by the Second Circuit in cases decided before the FTAIA was passed, answered the question whether the Sherman Act protected those injured in foreign commerce. *Kruman*, 284 F.3d at 399. According to the Second Circuit, the effects test as formulated in prior cases merely required an effect in the U.S. to support jurisdiction. So jurisdiction existed when such an effect exists. But the Second Circuit's assertion was misguided. No prior effects test case directly addressed the scope of the test, that is, whether it permitted foreign plaintiffs to sue based on conduct that also gave rise to injury in the U.S. Accordingly, relying on the effects test as stated in earlier cases as the supposed answer to the question presented was, in truth, a dodge of the real issue. The Second Circuit failed to come to grips with this fact, and thus failed to look to the more general principles of conflicts law on which the effects test was based.

⁴⁴ *Den Norske*, 241 F.3d 384.

⁴⁵ *Kruman*, 284 F.3d 384.

2. Another common scenario in antitrust cases could arise in “horizontal” litigation between competitors, usually about “vertical” conduct like exclusive dealing, tying, or monopolization. For instance, a company may contract with a large share of the available customers to foreclose a competitor from selling to those customers (called “exclusive dealing”)⁴⁶; or, a company with a monopoly in one product could condition the sale of that product on the purchase of another product for which it faces competition, making it more difficult for competitors to compete with the second product (called “tying”).⁴⁷ In these situations, antitrust law often allows the injured competitor to assert a claim, or the government to pursue (usually civil) charges. But what if there are foreign competitors injured by the same conduct? How do the foreign competitors figure into the mix? As it turns out, the answer, discussed below, may depend on where the customers buying the product are.⁴⁸

With these scenarios in mind, the remainder of this section is organized in four parts to demonstrate why a narrow interpretation of the scope of the Sherman Act is appropriate and necessary. First, Section A (pages 13-27) looks at the scope of the effects test using Conflicts Law principles and cases. Second, Section B (pages 27-29) shows why the broad reading of the effects test may well be unconstitutional under Supreme Court conflicts law cases, especially *Phillips Petroleum Co. v. Shutts* (“*Shutts*”).⁴⁹ Third, Section C (pages 29-33) explores how conflicts law is different from the international law jurisdictional rule of reason approach of the Third Restatement of Foreign Relations Law, and why the distinction matters here. Fourth, Section D (pages 33-37) shows why conflicts law rather than the doctrine of “antitrust standing” should define the reach of the Sherman Act abroad.

A. The Conflicts Law Analysis of the Scope of the Effects Test.

The first issue to deal with is what conflicts law to use. As described above, historically the effects test in *Alcoa* came from the territorialist theory of the First Restatement. Although that theory of conflicts law continues to be used by

⁴⁶ 11 Areeda & Hovenkamp ¶ 1800.

⁴⁷ 9 Areeda & Hovenkamp ¶ 1700a.

⁴⁸ Other scenarios are possible — for instance, a customer or supplier may assert an exclusive dealing or monopolization claim (or defense) arising out of a “vertical” contract with, respectively, a supplier or customer. But the two types of scenarios sketched above should suffice for present purposes.

⁴⁹ 472 U.S. 797 (1984).

several states,⁵⁰ today federal courts typically rely on the Second Restatement.⁵¹ Unlike the First Restatement, the Second Restatement adopts the interest balancing theory that arose in the 1960s, which requires courts to weigh “connecting factors” in deciding which state has the greatest interest in a case, and then to apply that state’s law.⁵²

This article looks to both Restatements for guidance. Since Judge Hand relied on the First Restatement in *Alcoa*, analysis here will begin with the First Restatement. Under that approach, the rule is simple: the state where an effect is felt should supply the law governing that effect. Next, the analysis turns to the Second Restatement, which lists the policies at issue in the framework of a conflicts law question. That list helps to put in perspective the policy arguments made in favor of both the broad and narrow readings of Sherman Act jurisdiction. In the end, however, both Restatements lead to the same place — the site of the effect should supply the governing law.

1. The Territorial/First Restatement Approach.

Under the First Restatement, the controlling law is that of the place where the last act necessary for liability occurs, the “*lex loci delicti*” rule.⁵³ Accordingly, substantive law looms large in the conflicts law analysis under the First Restatement, since that is the law that defines what acts create “liability.”

The *Alcoa* effects test fits nicely in the *lex loci delicti* tradition, as the effects test is in fact a version of the last act rule. Sherman Act liability depends on (a) anticompetitive conduct (b) having an actual or threatened anticompetitive

⁵⁰ See, e.g., *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987) (Indiana law); *Sherrod v. Achir*, 817 A.2d 951 (Md. App. 2003) (Maryland law).

⁵¹ *Flores v. American Seafoods Co.*, 335 F.3d 904 (9th Cir. 2003) (“Federal common law follows the approach of the Restatement (Second) Conflict of Laws.”); *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1296 n.19 (11th Cir. 1999) (federal common law choice of law rules derived from Restatement (Second) Conflict of Laws); *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (“In the absence of Congressional guidance, we have from time to time consulted the Restatement (Second) of Conflicts of Laws” to resolve federal common law conflicts questions, and “[o]ther circuits have also consulted the Restatement.”)(collecting cases); *Al-Kurdi v. U.S.*, 25 Cl. Ct. 599, 602 (1992) (using Restatement (Second) Conflict of Laws as federal common law choice of law source); cf. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 106 (1991) (relying on Restatement (Second) Conflicts of Law); see also *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (using “connecting factors” choice of law approach similar to Second Restatement’s).

⁵² See *supra* note 19 for articles about the history of conflicts law theory.

⁵³ Restatement (First) of Conflict of Laws § 377 (1934).

effect.⁵⁴ Since the last step in Sherman Act liability is an anticompetitive effect, it follows under *lex loci delicti* that the site of the effect should determine what law controls. (Of course, some conduct is so obviously wrongful under the Sherman Act that it is deemed *per se* illegal, without the need to show an actual effect; however, that is merely because such an effect is presumed to flow from such conduct, and an anticompetitive effect — threatened or real, presumed or actual — remains the *sine qua non* of Sherman Act liability.)⁵⁵

It follows that the definition of what the law deems “anticompetitive” — and, conversely, what it deems proper “competition” — is key to determining whom the Sherman Act protects. Today, “competition” has a very specific meaning in antitrust law: a marketplace that benefits consumers.⁵⁶ Consumers’ interests in lower prices and higher output are deemed a higher priority than suppliers’ interests in a larger number of suppliers when those interests conflict. That is what is meant when it is said that the Sherman Act protects “competition, not competitors.”⁵⁷ So, for example, if a potential monopolist uses efficient practices to reduce prices and increase output beyond the ability of smaller companies to match, those companies cannot sue even though they may go out of business and thereby give the potential monopolist even greater economic strength. The small competitors’ demise is deemed the natural result of “competition.” The monopolist’s added strength is deemed the reward for building a better mousetrap.⁵⁸

To refine the focus on consumers further, the Supreme Court established in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*⁵⁹ that the Sherman Act is concerned with only consumers *in the U.S.* In that case, U.S. television manufacturers alleged that Japanese television manufacturers artificially fixed high prices in Japan — injuring Japanese consumers — in order to finance artificially low prices for televisions sold in the U.S. The Supreme Court held that this theory failed to state a claim (absent evidence of predatory pricing in

⁵⁴ See, e.g., *Board of Trade of Chicago*, 246 U.S. at 244.

⁵⁵ See *supra* note 35.

⁵⁶ This was not always so. Courts used to equate “competition” at least in part with the number of competitors in the marketplace. This view has atrophied in recent decades in the face of sustained economic criticism. 1 Areeda & Hovenkamp ¶ 112. See, e.g., *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 336 (1990).

⁵⁷ *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962); 2 Areeda & Hovenkamp ¶ 337.

⁵⁸ *Id.*

⁵⁹ 475 U.S. 574 (1986).

the U.S.) because the Sherman Act is not concerned with the “competitive conditions of other nations’ economies.”⁶⁰

Although consumers are the focus of the Sherman Act, competitors are not left out in the cold entirely. They are protected from abusive practices so long as such protection is not inconsistent with consumers’ interests,⁶¹ and it is those interests that again define whether a practice is “abusive.” That is, abusive practices are those that hurt competitors other than through the merits of the competing products, *i.e.*, other than by decreasing prices or increasing output. Necessarily, such practices are likely to injure consumers in the short or long run.

In light of these basic elements of antitrust liability, an “anticompetitive effect” under *Alcoa* amounts to actual or threatened higher prices or decreased output harming U.S. consumers or (if not inconsistent with consumers’ interests) competitors/suppliers. For conflicts law purposes, this makes the places where consumers or competitors are hurt the key fact(s) in deciding what law controls. Precisely how these facts are likely to play out will vary depending on the particular type of case. But as will be seen, in all cases the Sherman Act should apply only to certain types of injury “in” the U.S. (although defining when harm is “in” the U.S. will often be a close question, as discussed below).

1. Vertical consumer antitrust cases are the most straightforward. Such cases typically arise when suppliers raise prices or reduce output to consumers, thereby violating the core interest of the Sherman Act. The result is similar to the economic injury underlying many consumer tort claims, in which the plaintiffs claim that they were overcharged for the product in question for one reason or another. Conflicts law opinions in such cases are therefore helpful by analogy in analyzing how to handle similar claims under the antitrust laws that arise out of economic effects felt in more than one place. (One of the virtues of using conflicts law to define Sherman Act jurisdiction is that it opens up such state law learning for application to the Sherman Act. Conflicts law opinions decided under the *lex loci delicti* doctrine are most helpful, in light of the history of the effects test as an outgrowth of that doctrine, but they are not the only source of helpful learning.)

In economic torts, the last act necessary for liability under *lex loci delicti* is an economic impact, and *lex loci delicti* cases uniformly hold that when one tort

⁶⁰ *Id.* at 582.

⁶¹ *Supra* note 56.

causes economic injuries in many states, the separate laws of each state should control the claims of victims who purchased in that state. For instance, in *In re Bridgestone/Firestone Inc.*,⁶² plaintiffs asserted product liability and other claims for economic losses from the purchase of faulty tires on Ford SUVs. Plaintiffs argued that the law of the forum — Indiana, the location of defendants' headquarters — should apply to the claims of a proposed nationwide class. Applying Indiana's *lex loci delicti* rule, Judge Easterbrook disagreed, finding that an economic loss "was suffered in the places where the vehicles and tires were purchased at excessive prices or resold at depressed prices." Those injuries occurred in all 50 states, the District of Columbia, Puerto Rico, and U.S. territories such as Guam. The *lex loci delicti* principle points to the places of these injuries, not the defendants' corporate headquarters, as the source of law.⁶³ Different states' laws thus governed the various plaintiffs' claims and, in consequence, class certification was denied.

The Fifth Circuit reached a similar conclusion in *Spence v. Glock* applying the looser approach of the Second Restatement in a product liability action alleging economic loss from sales of defective pistols.⁶⁴ Plaintiffs argued that Georgia law should apply to the claims of a proposed nationwide class, but the Fifth Circuit held that "the economic injury occurred when and where plaintiffs bought the guns," and that factor was highly significant to the conflicts law analysis of the Second Restatement. Other state-law cases reach similar conclusions.⁶⁵

From a conflicts law perspective, the facts of *Bridgestone* (and related business tort cases) and *Empagran* (and related vertical consumer antitrust cases) could hardly be more alike. Consumers in both cases bought products and allegedly paid too much in multiple places. They should therefore have the same result: the place of purchase should provide the rule of decision in cases based on those purchases. In other words, in a vertical consumer antitrust case, the effects test dictates that U.S. law controls U.S. purchases, and foreign law controls foreign purchases. The same is true in reverse for vertical seller cases — the law of the place of sale (or lost sale) would be the rule of decision.

⁶² 288 F.3d 1012 (7th Cir. 2002).

⁶³ *Id.* at 1016.

⁶⁴ 227 F.3d 308 (5th Cir. 2000).

⁶⁵ See, e.g., *Henry Schein, Inc. v. Stromboe*, 102 S.W. 3d 675, 698 n.91&92 (Tex. 2002) (collecting cases).

This still leaves open an important issue. When is a cross-border purchase or sale “in” the U.S.? In a shrinking world of cross-border transactions over telephones, fax machines, and the internet, the answer is often not obvious. Is an order by a foreign buyer with a U.S. firm “in” the U.S.? Or is an order by a U.S. buyer with a foreign firm? The answer is “maybe” to both questions, depending on a case-by-case analysis of the particular facts in light of conflicts law rules. Relevant questions should include, among others: Which party made the offer? The acceptance? Where is the product being shipped? Where were the contract negotiations conducted? Was there a choice of law clause in the contract? Was the agreement a contract of adhesion? Was the sale made directly or through a foreign subsidiary?, et cetera. Again, one of the virtues of the conflicts law approach is that it opens up the storehouse of state-law learning on such questions, be it under the First Restatement, Second Restatement or other sources. (Most useful to this analysis presumably would be the conflicts law rules for contracts. Whichever rules apply, there would undoubtedly be many instances in which cross-border transactions could fairly be deemed both in the U.S. and in another country and thus subject to concurrent jurisdiction. Forum law presumably would control such cases.) How questions like this are answered will, of course, have significant impact on the foreign reach of the Sherman Act. These matters are discussed generally again below in relation to the FTAIA (pages 41-42), which Congress enacted in part to clarify some of these issues.

2. The next class of cases involves when competitor(s) engage in conduct that prevents other competitor(s) from selling in the U.S. That is, the plaintiff (or government) claims that the defendant’s tactics have improperly cost the victim-competitor the chance to make sales to customers in a particular place. These cases present a different conflicts law challenge than vertical claims by consumers or sellers. In vertical consumer cases, the location of the plaintiff carries great weight for the same reasons as the location of the purchaser in other economic torts does, as shown above. In horizontal competitor cases, however, basing the application of the Sherman Act on the location of the plaintiff would seem to be inconsistent with the pro-consumer goals of the Sherman Act in many cases.

For instance, if one French company enters exclusive dealing contracts with U.S. consumers that frustrate another French company’s ability to compete for those U.S. consumers, it is the U.S. consumers who will be threatened with higher prices down the road. Given the Sherman Act’s goal of protecting consumers, in this case the “effect” on the U.S. triggering the Sherman Act should be the threat of higher prices to U.S. consumers. To prevent that result,

the injured French company should be deemed protected by the Sherman Act and entitled to assert a claim against the offending French company.

Again, however, as in the consumer conflicts law cases like *Bridgestone*, such protection should extend only so far as consumers in the U.S. are threatened with higher prices. If the French plaintiff alleges that it also lost sales to customers in Germany from the same conduct, those lost sales should not be included in the Sherman Act case. French or German law would control those claims, because the “violation” at issue is not complete under *lex loci delicti* until there is an “anticompetitive effect,” *i.e.*, actual or threatened higher prices to consumers. If those consumers are outside the U.S. and the competitor plaintiff is foreign, too, then the law governing such a claim should probably be the law of the place where the consumers would have bought the product. That is the place where, under *lex loci delicti*, the violation is complete.

This still leaves open the question of how to decide when a lost sale would have been “in” the U.S., the same problem described above in relation to vertical consumer antitrust claims. A U.S. resident, for example, could travel to France to buy the product and then return home with it. That transaction would probably not be included as a lost “U.S.” sale. A U.S. resident ordering the same product over the internet would present a closer question. As in the consumer context, conflicts law should be used to answer what was and was not a lost U.S. sale, although the factual inquiry would of course be more difficult in the absence of actual sales.

3. The final category of cases addressed here are horizontal competitor cases where a U.S. company is excluded from selling abroad by U.S. or foreign competitors. For this category, unlike the scenarios discussed in the prior section, actual or lost sales to consumers “in” the U.S. may not be the best touchstone for measuring the reach of the Sherman Act.

For instance, assume that local foreign companies collude to block a U.S. company from opening a foreign office, such as by frustrating local financing or instigating government obstruction. The U.S. company’s lost sales would not be deemed “in” the U.S. under any fair view of the relevant conflicts principles, because sales by a foreign office to buyers located abroad are not in the U.S. but are in the foreign country. Whether the Sherman Act nonetheless still may apply is a close question. On the one hand, the consumers affected by the exclusionary conduct are outside the U.S. and thus outside the core interest of the Sherman Act. On the other hand, recall that the Act still protects competitors/producers to the extent not inconsistent with the interests of U.S.

consumers. Since U.S. consumers are not affected here, the effect on the U.S. company could arguably be deemed enough of an effect in the U.S. to come within the Sherman Act. In any event, however the question is resolved, a foreign company injured by the same conduct would certainly have no claim of protection under the First Restatement regardless of whether the U.S. company could maintain a claim.

2. *Policy Analysis/Second Restatement Approach.*

In response to the approach outlined above, which excludes a great deal of non-U.S. injury from the ambit of the Sherman Act (although not all such injury, as in the example of the French company), champions of broad Sherman Act jurisdiction would likely argue that the common law conflicts law approach above was not meant to apply to antitrust cases. Antitrust law, they would argue, is a uniquely important “charter of freedom” that is almost constitutional in nature.⁶⁶ It embodies the bedrock free market economic policies of the U.S. For that reason, the argument would go, it is especially important to deter the conduct made illegal under the Sherman Act by maximizing the number of people protected under the Sherman Act once the prerequisite of a sufficient U.S. effect is met. Recent cases and commentary have made precisely that argument.⁶⁷

But the deterrence argument is myopic. While undeniably relevant, many other conflicts law values are ignored by an exclusive focus on deterrence. Once again, a virtue of the conflicts law reading of the scope of the Sherman Act is that it brings into focus precisely the values that are at stake.

This is where the Second Restatement is helpful. In particular, Section 6 lists the policies typically at issue in a conflicts law question. These policies, which are prioritized differently in different circumstances, include:

- (a) the needs of the interstate and international systems;
- (b) the relevant policies of the forum;
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
- (d) the protection of justified expectations;
- (e) the basic policies underlying the particular field of law;

⁶⁶ *Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344, 359-60 (1933).

⁶⁷ See *supra* note 5.

- (f) certainty, predictability and uniformity of result; and
- (g) ease in the determination and application of the law to be applied.⁶⁸

“Deterrence” fits neatly only into category “(b).” Focusing on it alone ignores six other areas of concern. Taken together, these other policies put deterrence in perspective as only one of many concerns and show the virtue of limiting the Sherman Act to protecting only U.S. commerce. The following discussion probes the most relevant Second Restatement factors and puts them in context. Because, other than the U.S., the European Union (“EU”) has the most developed body of competition law, EU law will be used herein wherever a model of foreign law is necessary to elaborate on an idea.

a. *Needs of the International System.* This Second Restatement factor reflects an interest in encouraging other states to adopt the same conflicts rules as those of the forum state, in order to enhance predictability and certainty of result.⁶⁹ Put differently, if the Sherman Act were read broadly to cover anticompetitive effects outside the U.S., then certainly other countries would be prompted to read their competition laws the same way and thus regulate U.S. sales. If they did, the European Union could take account of effects in the U.S. in enforcing EU competition law if the same conduct affected the EU, too. Overlapping and possibly inconsistent regulation of that sort would not serve the needs of the international system, for at least two reasons.

First, multiple liability for the same conduct would be likely. An accepted rule of international and U.S. law is that liability to one sovereign does not discharge liability to a different sovereign for the same conduct, assuming both have prescriptive jurisdiction.⁷⁰ It follows that if more than one sovereign can take account of and seek to remedy or administer punishment for injuries to the same people (*e.g.*, the U.S. under U.S. law for U.S. and EU consumers, and the EU under EU law for EU and U.S. consumers), multiple liability would result. In the U.S., for example, penalties are based in part on the volume of relevant

⁶⁸ Restatement (Second) of Conflict of Laws § 6 (1971).

⁶⁹ *Id.* cmt. d.

⁷⁰ Restatement (Second) of Foreign Relations Law of the United States § 37 (1965); Restatement (Third) Foreign Relations Law of the United States § 403 cmt. e (1980); *Laker Airways, Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984).

commerce affected by the defendants' conduct,⁷¹ and this would be a logical way for the EU to assess penalties, too. To the extent "relevant commerce" overlaps, multiple liability exposure is a probable yet unwarranted outcome. Over-deterrence — in the sense of liability exposure out of proportion to the potential harm of the conduct — would be unavoidable.

The detrimental economic consequences of over-deterrence are well documented and need not be explored here.⁷² Suffice it to say that in the face of potentially devastating liability, companies would be loath to experiment with sensible and wealth producing practices. In other words, the economy would be deprived of potential advances in the efficient distribution of resources by fears of catastrophic liability — exactly the opposite of the result the Sherman Act was intended to produce.

Second, overlapping regulation would bring into conflict the different competition policies of different states. No international agreement exists on the proper scope and function of competition laws, and that brings the next issue under the Second Restatement to the fore.

b. Relevant Policies of the U.S. and Other Countries. The U.S. and EU systems conflict in multiple ways. To begin with, while both legal systems outlaw cartels and other similar "hard-core" anticompetitive agreements, they do not do so uniformly. Under U.S. law, cartel members are subject to private treble damages actions; under EU law, they are not. Also, under U.S. law, defendants are subject to procedural burdens unknown in most of the rest of the world, including class actions, expansive discovery and lawyer-driven contingency fee cases.⁷³

Moreover, U.S. and EU law differ even more outside the area of hard-core cartels. For instance, the two bodies of law prioritize small business and

⁷¹ See United States Sentencing Guidelines §2R1.1(d)(1) (To establish a baseline in a Sherman Act prosecution, start with "20 percent of the volume of affected commerce"). It is the policy of the DOJ to use only U.S. commerce as the benchmark. See Gary R. Spratling, *Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases* 14-15 (Mar. 4, 1999) (speech by Deputy Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice), available at (<http://www.usdoj.gov/atr/public/speeches/2275.htm>).

⁷² Richard A. Posner, *Economic Analysis of Law* 224-229 (5th ed. 1998).

⁷³ See Diane P. Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare?*, 3 Chi. J. Int'l L. 391 (2002); Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. Chi. Legal F. 277 (1992).

consumer interests differently.⁷⁴ As detailed above, U.S. law protects consumers over competitors. The EU does not have the same priorities. To the contrary, the EU places greater importance on the protection of small businesses vis a vis consumers than the U.S.⁷⁵

These different priorities would certainly clash even more than they already do if the broad view of jurisdiction were to be adopted by all nations. The result would be inefficient and indeed strange, with U.S. law regulating sales by EU companies to EU consumers, and, assuming the same rule were adopted abroad, EU law regulating sales by U.S. companies to U.S. consumers. From the European perspective, European defendants and, quite possibly, their governments would be particularly upset, since they would be subject to treble-damage suits under U.S. law by EU consumers or competitors against EU producers for sales entirely in the EU. This exposure to procedurally burdensome (from their perspective) treble damage suits could chill use of the EU's amnesty program, thwarting EU competition policy goals. (Under that program, competition law violators are encouraged to confess to EU authorities by policies limiting their liability upon confession.)⁷⁶ In addition, the potential reward of treble damages in the U.S. would draw potential plaintiffs away from EU courts, depriving those courts of the chance to develop their own law.

From the U.S. perspective, overlapping regulation could threaten the very goals of the Sherman Act. Conduct deemed efficient and proper in the U.S. — and thus beneficial to consumers — could be attacked under EU law if that conduct also affected the EU. This could effectively outlaw in the U.S. conduct that is not only legal but also beneficial to the U.S. economy in the sense important under the Sherman Act, that is, conduct resulting in lower prices or increased output. The EU rejection of the merger of General Electric and Honeywell shows the potential consequences. U.S. regulators had approved the deal as efficiency-enhancing (likely to increase output and/or reduce prices), after which EU regulators discounted the efficiency gains in and blocked the deal for fear of its effect on EU competitors.⁷⁷ The odds of similar conflicts would

⁷⁴ *Id.*

⁷⁵ See articles by Diane Wood, *supra* note 73.

⁷⁶ See, e.g., *F. Hoffman-LaRouche, Ltd., et. al., Petitioners v. Empagran, S.A., et. al., Respondents*, No. 03-724, 2004 WL 226597, Brief Amicus Curiae of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands at 9-13 (Feb. 03, 2004).

⁷⁷ See, e.g., Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. Pa. J. Int'l Econ. L. 475 (2002).

increase if the U.S. and EU were held to have the authority to regulate sales in each other's territory. So, the overzealous pursuit of "deterrence" could come back to haunt the U.S. if other countries used the same principle to read their own competition laws expansively.

Finally, putting aside the potential for conflict between U.S. and EU law, and focusing solely on U.S. interests, the premise that the broad reading of the Sherman Act would increase deterrence is open to question. Deterrence is a function not only of the size of an expected penalty, but also of the likelihood of enforcement (*i.e.*, getting caught).⁷⁸ While higher penalties would likely result from the broad view of Sherman Act jurisdiction, effective international enforcement could easily decrease. Even if it did not, the U.S. Department of Justice's chances of catching violators could also decline.

The past decade has shown that antitrust enforcement is furthered by international cooperation.⁷⁹ But to the extent that the broad reading of the effects test impinges on foreign sovereignty (as it surely does), then offended nations may well retaliate by reducing cooperation with U.S. authorities. In that regard, a large number of foreign countries have submitted *amicus* briefs in the *Empagran* case against the broad reading of jurisdiction.⁸⁰ This development itself is testament to the risks involved – the brief the United

⁷⁸ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

⁷⁹ *F. Hoffman-LaRouche, Ltd., et. al., Petitioners v. Empagran, S.A., et.al., Respondents*, No. 03-724, 2004 WL 226597, Brief Amicus Curiae of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands at 8-9 (collating authorities) (Feb. 03, 2004).

⁸⁰ *F. Hoffman-LaRouche, Ltd., et. al., Petitioners v. Empagran, S.A., et.al., Respondents*, No. 03-724, 2004 WL 226488, Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners (Feb. 03, 2004); *F. Hoffman-LaRouche, Ltd., et. al., Petitioners v. Empagran, S.A., et.al., Respondents*, No. 03-724, 2004 WL 226389, Brief for the Government of Canada as Amicus Curiae Supporting Reversal (Feb. 03, 2004); *F. Hoffman-LaRouche, Ltd., et. al., Petitioners v. Empagran, S.A., et.al., Respondents*, No. 03-724, 2004 WL 226390, Brief of the Government of Japan as Amicus Curiae in Support of Petitioners (Feb. 03, 2004); *F. Hoffman-LaRouche, Ltd., et. al., Petitioners v. Empagran, S.A., et.al., Respondents*, No. 03-724, 2004 WL 234124, Brief Amicus Curiae of European Banks in Support of Petitioners (Feb. 03, 2004); *F. Hoffman-LaRouche, Ltd., et. al., Petitioners v. Empagran, S.A., et.al., Respondents*, No. 03-724, 2004 WL 226597, Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners (Feb. 03, 2004); *F. Hoffman-LaRouche, Ltd., et. al., Petitioners v. Empagran, S.A., et.al., Respondents*, No. 03-724, 2004 WL 234124, Brief Amicus Curiae of European Banks in Support of Petitioners (Feb. 03, 2004).

Kingdom in particular makes clear the importance of cooperation in this context, and the threat to such cooperation from a broad reading of jurisdiction.⁸¹ In addition, as the DOJ has argued in *Empagran*, expanding the scope of liability would create significant disincentives for antitrust violators to take advantage of the DOJ's amnesty program, too.⁸² Simply put, too heavy a hand by the U.S. risks undermining enforcement, and thus undercutting deterrence.

c. The Basic Policies Underlying Competition Law. This Second Restatement factor focuses on whether a conflict between laws is serious enough for concern, because inconsequential differences between potentially conflicting laws are usually deemed insufficient to preclude a court from applying forum law.⁸³ Here, the conflict between U.S. and EU law (and, for that matter, other competition laws around the world) is significant. While the U.S. and EU agree on cartel regulation generally – and thus the conflict between the laws in this area is somewhat lessened, although it is still palpable due to the existence of treble damages and certain procedural devices in the U.S. not available in Europe – the basic policies outside that area are not agreed upon. And, since the effects test is not merely for hard-core cartel cases, the different policies outside that area cannot be ignored. The conflicts between U.S. and EU law are thus not illusory.

On this point, it is important for the courts to be sensitive to the broader implications of the issue presented in *Empagran* beyond the factual circumstances of that case. Unfortunately, all of the appellate cases that deal with the scope of Sherman Act jurisdiction involve alleged international horizontal price fixing cartels, the most egregious form of antitrust violation. Such cases provide the greatest temptation to read the Sherman Act broadly given the universal condemnation of such conduct. But the effects test for Sherman Act jurisdiction is not made solely for one area of antitrust law. So the courts should be sensitive to how the rules regarding Sherman Act jurisdiction will play out not only in the cartel context, but also in the context of other less egregious conduct the illegality of which is not as clear-cut.

d. Justified Expectations/Predictability. This Second Restatement factor captures the notion that “it would be unfair and improper to

⁸¹ *Supra* note 80.

⁸² *F. Hoffman-LaRouche, Ltd., et al., Petitioners v. Empagran, S.A., et. al., Respondents*, No. 03-724, 2004 WL 234125, Brief for the United States as Amicus Curiae Supporting Petitioner at 19-20 (Feb. 3, 2004).

⁸³ Restatement (Second) of Conflicts of Law § 6 cmt. h (1971).

hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.”⁸⁴ It is important that companies be able to know what state’s law will apply to their business activities, and it is reasonable for foreign companies to assume that foreign law governs sales outside the U.S., even if U.S. law governs similar sales in the U.S. That is the usual rule in commercial cases,⁸⁵ and it allows companies to mold their conduct to the law of the place where a sale is made.

There would be serious unfairness to changing the rules in antitrust cases alone,⁸⁶ especially because Sherman Act jurisdiction applies equally to clear-cut cases of anticompetitive behavior, such as hard-core cartels, and to more ambiguous conduct that would fall in a gray area in the law. It would be especially unfair to apply U.S. law (and its private treble damages) to conduct falling in the gray area not only with respect to sales in the U.S., but to all similar sales executed outside the U.S. Indeed, these concerns are so serious that they render the broad reading of Sherman Act jurisdiction arguably unconstitutional, as shown below (pages 27-29).

e. Ease in Determining and Applying the Law. Although at first blush it may appear that it would be easier to apply the broad interpretation of Sherman Act jurisdiction, since less analysis would be needed to determine whether there is jurisdiction, this is not in fact true. Efficiency actually favors the narrow reading for the following reasons:

i. The broad reading of Sherman Act jurisdiction would create a magnet for foreign private plaintiffs to bring treble-damages claims in U.S. courts, because such damages are unavailable outside the U.S. While foreign plaintiffs would still have to allege a sufficient U.S. effect to support jurisdiction, such an allegation often would not be difficult to manufacture in an increasingly interdependent global economy. U.S. courts would thus be burdened with more cases under the broad reading, and that additional burden on the U.S. courts would be borne principally for the benefit of non-U.S. citizens, an odd result.

⁸⁴ *Id.* cmt. g.

⁸⁵ *See, e.g., id.* § 188.

⁸⁶ All the more so because there is serious doubt that parties can contract out of Sherman Act liability with a choice of law clause in a contract. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985); *but see Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993).

ii. Litigating extraterritorial claims is likely to be less efficient here than abroad. In many of these cases, foreign courts would have better access to evidence than the U.S. courts (especially evidence in the hands of non parties), and would also be fluent in the relevant language. Put differently, many of the same factors relevant under a *forum non conveniens* analysis weigh in favor of the narrow reading of Sherman Act jurisdiction, in order to channel cases best decided overseas to the proper court in the first instance.⁸⁷

iii. A private Sherman Act claim asserted by a foreign plaintiff under the broad reading of jurisdiction would significantly compound the complexity of the pretrial and trial stages of a case. The plaintiff would first have to take discovery of evidence related to whether he suffered an anticompetitive effect in a foreign market, and then present that evidence to the finder of fact. Next, the plaintiff would also have to take discovery of evidence related to whether the defendants' conduct had a sufficient effect in the U.S. to support jurisdiction, and then present that evidence to the finder of fact, too. Showing such an effect on people in the U.S. who are not in the case would be a complex task requiring speculation about harm to people not actually before the Court, who often would not be pursuing claims on their own. In contrast, the narrow reading of jurisdiction would make only one showing necessary — an effect on the U.S. Therefore, under the narrow reading, the same proof required to show that the plaintiff was hurt would resolve the jurisdiction question as well.

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In sum, the Second Restatement factors show that deterrence — the main policy argument of those favoring the broad reading of Sherman Act jurisdiction — is not the only policy in play. Fairness, efficiency and comity all have their part, and they all point to the conclusion that the Sherman Act should be read narrowly. Under the First and Second Restatement, therefore, conflicts law weighs in favor of a limit on Sherman Act cases to those arising out of an effect on U.S. commerce.

B. The Constitutional Dimension: *Allstate* and *Shutts*.

As noted, another benefit of using conflicts law to define Sherman Act jurisdiction is that it brings the constitutional issues at stake into focus. Constitutional due process guarantees have been deemed to limit conflicts law in important ways for decades. While the relevant Supreme Court cases have dealt

⁸⁷ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947), for *forum non conveniens* factors.

only with interstate conflicts under the Fourteenth Amendment, the due process clause of the Fifth Amendment is likely to yield the same results under federal law in the international context. Given that the Supreme Court prefers to avoid such constitutional questions if it can do so by interpreting a statute narrowly,⁸⁸ this provides yet more reason to limit the reach of the Sherman Act.

The key modern Supreme Court conflicts law cases are *Allstate Ins. Co. v. Hague* (“*Allstate*”)⁸⁹ and *Shutts*.⁹⁰ *Allstate* established the basic due process standard. “In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”⁹¹ That is, the Court’s due process cases “stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.”⁹² Depending on the facts of any case, it is possible that more than one state’s law could be constitutionally applied in many cases.

In *Shutts*, the Court applied *Allstate* to facts relevant here. *Shutts* was a purported class action alleging breaches of leases to natural gas wells in several Western states, including Kansas, Texas and Oklahoma. Plaintiffs were located in several states but all chose to file suit in Kansas. The Kansas court relied on its own law for the whole class, wherever located. On appeal, the Supreme Court reversed, holding that the Kansas court’s approach violated due process. “Kansas must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of Kansas law is not arbitrary or unfair.”⁹³ Put differently, even when a single wrong affects litigants in many states, due process requires that the claim of each allegedly injured person be evaluated separately for conflicts law purposes to determine what law governs that claim. “When considering fairness in this context, an important element is the expectation of the parties,”⁹⁴ and the parties to the leases in *Shutts* had no

⁸⁸ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936).

⁸⁹ 449 U.S. 302 (1981).

⁹⁰ 472 U.S. 797 (1984).

⁹¹ *Allstate*, 449 U.S. 309 & 312-13.

⁹² *Id.*

⁹³ *Shutts*, 472 U.S. at 821-22 (emphasis added).

⁹⁴ *Shutts*, 472 U.S. at 822.

expectation that Kansas law would apply when their leases were executed entirely outside Kansas.

Shutts's resemblance to *Empagran* and related cases is manifest. In both, a single wrong had multi-state effects. A plaintiff in such circumstances will often forum shop in the hope of gaining the advantages of a particular state's law even though that state has little if any connection to the transaction at issue. *Shutts* held that this strategy violates due process because fundamental fairness dictates the law of a state where *both* parties have some contact be used to resolve the case. Assuming *Shutts* applies internationally, this rule should guide the Court in *Empagran* in rejecting the broad reading of jurisdiction.

Does *Shutts* apply internationally? Maybe. No case has squarely decided it, although, in a different context, the Fifth and Ninth Circuits split on a related question.⁹⁵ The issue is whether *Shutts's* Fourteenth Amendment analysis, which applies to the states, applies to the due process clause of the Fifth Amendment, which applies to the federal government. There is a good reason to think it does. Both due process clauses are read the same way in the related personal jurisdiction context, where a similar "grouping of contacts" is required before personal jurisdiction is deemed proper. For that reason, among others, scholars argue that the two due process clauses should be read the same way for conflicts law purposes.⁹⁶ (One scholar has in fact noted that the argument may apply to the Sherman Act.)⁹⁷ The only way to avoid this constitutional question as it relates to the Sherman Act is to adopt the narrow reading of jurisdiction advocated by the defendants in *Empagran*.

C. International Law: Why it Should Not Be the Focus.

As noted in the Introduction above, conflicts law as used in this article is *not* international law. It is domestic law addressed to domestic concerns. So the analysis here should not be confused with the long-running debate over the effect of the international law jurisdictional rule of reason on the scope of the

⁹⁵ *U.S. v. Kahn*, 35 F.3d 426 (9th Cir. 1994) (due process applies to international reach of U.S. law); *U.S. v. Suerte*, 291 F.3d 366 (5th Cir. 2002) (due process does not apply).

⁹⁶ Lea Brillmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217 (1992); *but see* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 Colum. J. Transnat'l L. 379 (1997).

⁹⁷ 1A Areeda & Hovenkamp at ¶ 273 n.25 (2003 Supp.).

Sherman Act.⁹⁸ Litigants in the pending *Empagran* case have made arguments based on the rule of reason,⁹⁹ and the line between conflicts law and the rule of reason has been blurred before. For example, the dissent in the *Hartford Fire* case — which addressed the relationship between the rule of reason and the Sherman Act — said that the rule of reason was a part of general conflicts law theory.¹⁰⁰ Whatever the limits on the Sherman Act imposed by the jurisdictional rule of reason are, the conflicts law analysis here is not about them. Conflicts law guides when a state's law *should* apply in light of domestic priorities; the rule of reason defines the outer bounds of when a state should *not* apply its own law in light of the interests of other states.¹⁰¹

That is not to say that the two areas of law are unrelated. The rule of reason is customary international law, meaning that it purports to define outer limits customarily observed by nations on the reach of their laws. Questions about those limits often arise through cases decided under domestic conflicts law. In addition, notions of “comity,” defined as mutual respect among dependent nations,¹⁰² have significance in both contexts. So there is a relationship between the two areas of law. Nonetheless, although related, they are distinct, and, in particular, the following differences between the two areas of law are material in this context:

a. The jurisdictional rule of reason depends on many factors to measure whether a nation's law reasonably may reach certain conduct, similar (though not identical, as shown below) to the factors listed in the Second Restatement of Conflicts of Law. These factors include the location of the

⁹⁸ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); Andrews F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 Am. J. Of Int'l Law 42 (1995); Phillip R. Trimble, *The Supreme Court and Interventional Law: The Demise of Restatement Section 403*, 89 Am. J. Of Int'l Law 53 (1995); Benjamin B. Ferencz, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 Am. J. Int'l Law 750 (1995).

⁹⁹ See *supra* note 80.

¹⁰⁰ 509 U.S. at 86.

¹⁰¹ See Restatement (Second) of Foreign Relations Law of the United States § 37 cmt. a (1965) (“In most situations international law does not provide rules for a choice among the different bases of jurisdiction that international law recognizes.”); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (1984) (“Because two or more states may have legitimate interests in prescribing governing law over a particular controversy. ... both states may potentially have jurisdiction to prescribe governing law.”)

¹⁰² *Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895).

conduct, the nationality of the parties, the importance of the regulation in question, et cetera.¹⁰³ The effects test, however, is based on the territorialist philosophy of the First Restatement of Conflicts of Law. It requires no weighing of multiple factors to decide jurisdiction. A practical effect of this distinction is that conflicts law cases under *lex loci delicti* are helpful precedent on the reach of the Sherman Act, whereas under the jurisdictional rule of reason such cases are less relevant. In addition, the bright-line nature of the effects test is more compatible with its use as a rule defining subject matter jurisdiction, which courts prefer to decide early in a case using simple criteria that is as simple as possible (*see below*, pages 34-35).

b. As a rule of international law, the jurisdictional rule of reason purports to apply to all organs of a state — executive, legislative and judicial. In the U.S., foreign policy is committed first and foremost to the executive branch, secondly to Congress and only last to the judiciary.¹⁰⁴ So, if the executive pursues a case based on foreign conduct, then the courts arguably should defer to the executive's implicit decision that the rule of reason is not a barrier. The Department of Justice has in fact taken this position for some time. Its international enforcement guidelines state that courts should defer to its evaluation of comity concerns under the rule of reason in enforcement cases (although the court should evaluate the issue itself in private cases).¹⁰⁵ The theory is that the executive branch is able to poll foreign governments to see if there is consensus on international law as it applies to a particular case, whereas the courts cannot. Also, treading close to the rule of reason can lead foreign states to retaliate in some wholly unrelated way, and only the executive branch is positioned to make the tradeoffs that might be called for and to coordinate this country's actions with the foreign country in question. Courts, for example, are thought not well suited to weigh whether it is worth risking military basing rights by pursuing antitrust violators located abroad.

Conflicts law, a classic subject for the courts, avoids the potential conflict with the executive branch and ensures that the executive's judgment about the reach of the Sherman Act abroad is subject to a limited check by the other branches of government. Viewing the matter as one of conflicts law puts the

¹⁰³ Restatement (Third) of Foreign Relations Law of the United States § 403 (1986).

¹⁰⁴ *First Nat'l City Bank v. Banca Nacional de Cuba*, 406 U.S. 759, 765-66 (1972); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

¹⁰⁵ Joint FTC/DOJ International Antitrust Guidelines (Apr. 5, 1995) ("The Department does not believe that it is the role of the courts to 'second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.'")

courts and Congress (through the fiction of using conflicts law as a measure of Congressional intent) back into the equation in a specific and limited way. Conflicts law does not require the courts to make the large foreign policy decisions that seem to be called for by the jurisdictional rule of reason.

c. The factors listed in the Third Restatement of Foreign Relations Law have a different focus than the factors listed in the Second Restatement of Conflicts of Law, and thus capture different policy concerns. As customary international law, the rule of reason focuses on standards generally accepted around the world to define concepts like “reasonableness,” “fairness” and “justified expectations.” “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁰⁶ Domestic conflicts law, by contrast, uses domestic traditions to define these terms, which will not necessarily be the same as international standards (they could be better, worse or just different).

This means that reviewing Sherman Act jurisdiction as a matter of domestic conflicts law is more appropriate as well as easier and more efficient for U.S. courts than applying the rule of reason. In fact, the rule of reason analysis completely ignores judicial efficiency as a relevant concern, which is an important consideration under the conflicts law analysis.¹⁰⁷ As customary international law, what is “reasonable” is likely to be constantly changing and a proper analysis could depend on a far-ranging group of resources and cases from all over the world in different languages. As the Third Restatement of Foreign Relations Law states, “[e]vidence of [i]nternational [l]aw” includes “judgments and opinions of international judicial and arbitral tribunals”; “judgments and opinions of national judicial tribunals”; “the writings of scholars”; and “pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.”¹⁰⁸ In contrast, domestic conflicts law relies entirely on a body of case law and scholarly works in English, right here and familiar to the courts already.

This point could have future significance as well. As posited above, many questions remain unanswered about the reach of the Sherman Act abroad (most significantly, in view of technological advances and the increasing globalization of the economy, is when a transaction considered “in” the U.S.). These crucial issues concerning the reach of U.S. law are much better addressed by U.S. courts

¹⁰⁶ Restatement (Third) of Foreign Relations Law of the United States § 102 (1986).

¹⁰⁷ See *supra* pages 24-25.

¹⁰⁸ Restatement (Third) of Foreign Relations Law of the United States § 103 (1986).

relying on U.S. conflicts law, rather than being decided by evolving and changing notions of customary international law.

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Simply stated, while the international law jurisdictional rule of reason may still be relevant in some cases, the vast majority of cases can and should be decided under domestic conflicts law.

D. Antitrust Standing and Subject Matter Jurisdiction.

Another area of law that some have turned to in analyzing the reach of the Sherman Act is the doctrine of “antitrust standing,” rather than conflicts law.¹⁰⁹ This approach appears driven in part by an aversion to dealing with the conflict law issue as one of subject matter jurisdiction, which the *Alcoa* effects test has come to define. Relying on antitrust standing for this purpose is a mistake, however. Antitrust standing doctrine is not addressed to conflicts law questions. Moreover, it is entirely proper and beneficial to deal with conflicts law questions as going to subject matter jurisdiction; but, even if it were not, then conflicts law should be used at the merits phase to define the reach of the Act, rather than using antitrust standing doctrine for that purpose.

Antitrust standing is the term courts use for a group of rules defining causation and damages in private antitrust cases under Section 4 of the Clayton Act. “Antitrust standing” is thus analogous to “proximate cause” in torts. The Supreme Court’s leading antitrust standing case makes this analogy perfectly clear.¹¹⁰ Among other things, antitrust standing rules require (1) a “but for” causal link between the act[s] being challenged and the plaintiff’s injury; (2) injury “of a type that Congress sought to redress in providing a remedy for violations of the antitrust laws,” *i.e.*, *anticompetitive* injury (in the sense defined above); (3) injury that is sufficiently “direct” from a causation point of view; (4) the existence, or lack thereof, of plaintiffs better situated to “vindicate the public interest in antitrust enforcement”; and (5) injury that is not unduly

¹⁰⁹ *Metallgesellschaft AG*, 325 F.3d at 843; *Kruman*, 284 F.3d at 397-398; *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d at 716-17; *Transnor (Bermuda) Ltd. v. BP N. A. Petroleum*, 738 F. Supp. 1472, 1476 (S.D.N.Y. 1990); *de Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 516 (S.D.N.Y. 1985); William C. Holmes, *Jurisdiction and Standing in the International Arena*, 14 Loy. Consumer L. Rev. 537 (2002).

¹¹⁰ See *AGC*, 459 U.S. at 535-36.

speculative.¹¹¹ Conflicts law policies and considerations have no role in antitrust standing doctrine as currently understood.

Antitrust standing thus has little to do with the geographic reach of the Sherman Act. Indeed, antitrust standing rules do not apply at all in government enforcement cases, which nonetheless present the same questions about the geographic reach of the Sherman Act as civil cases. (Recall that *Alcoa* itself was a government enforcement action.) Although antitrust standing doctrine is thus irrelevant in determining the extraterritorial reach of the Sherman Act, some people have mistakenly taken broad statements about how antitrust standing doctrine defines “who may sue” to mean that the antitrust standing doctrine *must* define who may sue *for all purposes*. In context, however, those statements about antitrust standing merely seek to convey that antitrust claims can be brought only by the most direct victims of anticompetitive injury, and cannot be based on injuries arising from the competitive process itself (see above pages 13-14). These statements have nothing to do with the Sherman Act’s geographic reach. Relying on antitrust standing for present purposes thus merely confuses the relevant issues. It also threatens to expand the reach of the Sherman Act too far by inviting courts to apply the Act so long as causation and injury requirements are met. There will be many cases where causation and injury requirements may easily met (at least at the pleading stage) but the case nonetheless should not be within the purview of the Act, such as in *Empagran* itself.

So, why do courts try to squeeze the square peg of prescriptive jurisdiction into the round hole of antitrust standing? The answer appears to be courts’ reluctance to decide the geographic scope of the Sherman Act on subject matter jurisdiction grounds, and instead to address the issue under a traditional “merits” doctrine such as antitrust standing. By way of background, the effects test, though originally a test of *prescriptive* jurisdiction, has come to be viewed as a test of *subject matter* jurisdiction. “Subject matter jurisdiction” concerns the authority or “competence” of a court to decide a particular category of case.¹¹² Unlike traditional common law courts, federal courts have limited subject matter jurisdiction; that is, they have limited authority to decide only certain types of cases.¹¹³ Most common are cases based on the presence of a federal question or diversity jurisdiction cases.¹¹⁴

¹¹¹ See *AGC*, 459 U.S. at 538-45.

¹¹² Restatement (Second) Judgments § 11 (1982).

¹¹³ *Id.* cmt. a. (“All courts and tribunals in the federal system are of restricted jurisdiction, in that they have subject matter jurisdiction only of such proceedings as are expressly or

Federal courts prefer to decide subject matter jurisdiction early in a case because the power of the court to decide a matter should be clear before the court issues any substantive rulings that are not in its power to make. Otherwise, the court runs the risk of violating the federalism and separation of power concerns that underlie subject matter jurisdiction rules, and wasting its own resources in the process. To facilitate early resolution, the courts also prefer the determination to be a simple one not bogged down in complicated factual analysis.¹¹⁵

The transformation of the effects test into a limit on subject matter jurisdiction is, in the view of some, inconsistent with the courts' preference for simple bright line rules for determining subject matter jurisdiction. (How the effects test became a measure of subject matter jurisdiction is unclear. Justice Scalia believes it was a mistake in confusing different uses of the word "jurisdiction," prescriptive versus subject matter.)¹¹⁶ Measuring the extent and nature of an effect in the U.S. will often be a complicated and fact-intensive inquiry. And if the effects test is defined narrowly, an additional inquiry is necessary to weed out proper from improper claimants/victims under the Sherman Act. To avoid this complex inquiry at the threshold stage of a case, some people advocate deferring the issue to the "merits" stage,¹¹⁷ and they thus reach for a "merits" doctrine, antitrust standing.

There are two primary reasons why the objection to the use of the effects test as a limitation on subject matter jurisdiction is not a valid reason to ignore conflicts law in favor of antitrust standing doctrine in distinguishing proper from improper victims under the Sherman Act. First, even if courts ultimately decide to address the geographic scope of the Sherman Act at the merits stage of litigation, they should do so using conflicts law principles, not antitrust standing principles. This is the practice in federal law admiralty cases and, in certain

impliedly consigned to them. . . . In contrast, the principal trial court in state court systems is a court of general jurisdiction, i.e., it has authority to adjudicate any justifiable controversy that is not exclusively consigned to some other tribunal.")

¹¹⁴ 28 U.S.C. §§ 1331, 1332.

¹¹⁵ *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 956-57 (7th Cir. 2003) (Wood, *J.*, dissenting) ("There is an important institutional interest in resolving jurisdictional questions quickly and simply.")

¹¹⁶ *Hartford Fire*, 509 U.S. at 812-13.

¹¹⁷ See *United Phosphorus*, 322 F.3d at 956 (Wood, *J.*, dissenting); *Metallgesellschaft AG*, 325 F.3d at 843 (opinion by Wood, *J.*).

respects, patents.¹¹⁸ Whatever the procedural stage of the case at which the issue is addressed, conflicts law and not antitrust standing provides the right framework with which to analyze the question.

Second, it is in any event sensible to look at the conflicts law issue as going to subject matter jurisdiction under the Sherman Act. While Justice Scalia may be partly right that the transformation of the effects test into a subject matter jurisdiction test was the result of imprecision in the use of the word “jurisdiction,” there are good institutional reasons for using it in this manner nonetheless. That presumably is why the issue of the extraterritorial reach of U.S. law has come to be viewed as going to subject matter jurisdiction in areas of law other than antitrust, such as in securities law.¹¹⁹

The key distinction between the areas of federal law where conflicts law is viewed as a “merits” issue and where it is viewed as a subject matter jurisdiction issue seems to be whether the federal court has the authority to apply foreign law in that area. In admiralty cases — which historically have dealt with the issue as a “merits” question and are the cases upon which advocates for that treatment in the context of antitrust rely — federal courts are akin to common law courts and, by statute, have the authority to apply foreign law if conflicts law says they should.¹²⁰ Federal courts are similarly empowered to apply foreign law in the area of patents, at least to a limited extent, if a conflicts law analysis determines that foreign law is the appropriate law.¹²¹

In contrast, courts have not been given the authority by Congress to interpret foreign law in antitrust and securities cases when foreign law should control. In those cases, Congress and the courts leave to the foreign courts the responsibility of enforcing foreign law, just as Congress has assigned exclusive responsibility to the federal courts for enforcing the Sherman Act and most of the federal securities laws.¹²² Therefore, such claims are indeed beyond the federal courts’ subject matter jurisdiction, and are left to the jurisdiction of the foreign courts responsible for enforcing those laws.

¹¹⁸ See, e.g., *Warn v. M/Y Maridome*, 169 F.3d 625 (9th Cir. 1999) (choice of law in admiralty case goes to merits of claim); *Pfizer, Inc. v. Elan Pharm. Rsrch. Corp.*, 812 F. Supp. 1352 (D. Del. 1993) (choice of law in patent case goes to merits).

¹¹⁹ *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987-88 (1975).

¹²⁰ *Warn*, 169 F.3d 625.

¹²¹ *Pfizer, Inc.*, 812 F. Supp. 1352.

¹²² See *Finkielstain v. Seidel*, 857 F.2d 893, 896 (2d Cir. 1988) (exclusive federal jurisdiction for claims under Section 10(b) of Securities and Exchange Act).

In this regard, the use of subject matter jurisdiction doctrines to limit the reach of U.S. law in matters touching on foreign relations is not unprecedented. For example, the Foreign Sovereign Immunities Act (the “FSIA”) explicitly places suits against foreign governments outside the subject matter jurisdiction of the U.S. courts, except in limited circumstances.¹²³ Significantly, litigating the exceptions under the FSIA, especially the “commercial activity” exception, can entail substantial factual inquiry by the court.¹²⁴ There is thus a solid basis on which the courts should view conflicts law as a matter of subject matter jurisdiction under the Sherman Act. Indeed, in the FTAIA Congress explicitly intended that result, as a recent *en banc* decision from the Seventh Circuit held in *United Phosphorous, et al. v. Angus Chemical, et al.* (over an admittedly vigorous dissent).¹²⁵ That opinion also expounds upon the procedural benefits of treating the effects test as one of subject matter jurisdiction.

In summary, conflicts law, rather than antitrust standing, is the proper doctrine to use in analyzing the extraterritorial reach of the Sherman Act. Although deciding the conflicts law question is best resolved as a question of subject matter jurisdiction at the earliest stage of any given case, even if the issue is treated as a merits question, conflicts law should still apply.

Part III

The FTAIA

The focus thus far in *Empagran* has been on the interpretation of the FTAIA. The FTAIA is generally consistent with — indeed, incorporates — conflicts law, other than in a very narrow, discrete respect regarding exporters. Therefore, the statute makes the most sense when read in light of conflicts law, and it is clear that Congress did not intend in the FTAIA to expand the reach of the Sherman Act to cover sales by foreign sellers to foreign buyers, even if related to similar sales in the U.S. To the contrary, the record is solid that Congress viewed such sales as outside the reach of U.S. law. In any event, any doubts on that score should be resolved by the rule of statutory construction that a statute should be read consistently with the case law existing when it was passed.¹²⁶ In this

¹²³ See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 484-85 (1983).

¹²⁴ 28 U.S.C. § 1605(a)(2). Significantly, this provision of the FSIA contains a “direct effect” requirement akin to the FTAIA’s.

¹²⁵ See *supra* note 117.

¹²⁶ See *infra*, note 139.

instance, the dominant cases at the time the FTAIA was passed held that conflicts law controlled the reach of the Sherman Act, as shown above.

This section first examines the FTAIA's legislative history and its conflict law roots, and then explores the jurisdictional dictates of the FTAIA found in Section 2, the focus of the recent cases, including *Empagran*.

A. FTAIA Background and Conflicts Law Roots.

Congress felt compelled to address and attempt to clarify the scope of Sherman Act jurisdiction in the early 1980s for two reasons. First, the balance of trade deficit in the late 1970s and early 1980s made U.S. export performance a political priority. Exporters argued that doubts about Sherman Act jurisdiction hindered exports by deterring export-oriented joint ventures. Exporters feared that small U.S. companies banding together to export U.S. goods through joint ventures might be exposed to Sherman Act liability, apparently because the joint ventures might be seen as horizontal restraints under U.S. law. They felt that the chilling of such joint ventures hurt small firms' abilities to sell goods abroad, thereby increasing the trade deficit, so they asked Congress to make clear that the Sherman Act did not cover such arrangements.¹²⁷

Exporters' concerns in this regard were not irrational. For instance, if the export joint ventures set prices or allocated countries for the products exported, those arrangements may have been interpreted as illegal price fixing or market allocation agreements. Moreover, the risk that the Sherman Act would be deemed to cover sales through such joint ventures was real. As shown above, under the effects test, sales "in" the U.S. are within the Sherman Act's reach and cross-border sales by U.S. exporters may well have been properly deemed "in" the U.S. under the relevant conflicts law principles (pages 16-18).

Second, Congress took the opportunity presented by the export issue to deal with another issue, namely, ambiguity in the cases interpreting the *Alcoa* effects test about just how much and what kind of an effect was necessary for jurisdiction to attach. As was noted in *Timberlane* (see above at page 11), cases since *Alcoa* had differed over what magnitude of effect would support jurisdiction — "direct," more than "*de minimis*," "substantial," or something else. In addition, during the Congressional hearings on the FTAIA, it was suggested that

¹²⁷ H.R. Rep. No. 97-686, 97th Cong., 2d Sess. at 3 (the "House Report"), reprinted in 1982 U.S.C.C.A.N. 2487.

Congress make clear that only an anticompetitive effect in the U.S. — rather than a procompetitive or neutral effect — would support jurisdiction.¹²⁸

To address these concerns, Congress passed the FTAIA amending the Sherman Act by purporting to clarify the *Alcoa* effects test:

[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 Sherman Act], other than this section.

If [the Sherman Act] appl[ies] to such conduct only because of the operation of paragraph (1)(B), then [the Sherman Act] shall apply to such conduct only for injury to export business in the United States.¹²⁹

Nothing in the FTAIA's language or history shows an intent to expand the reach of the Sherman Act beyond the limits set forth by conflicts law. To the contrary, the FTAIA adopted a version of the *Alcoa* effects test, requiring a

¹²⁸ House Report at 5. The distinction between anti and pro competitive effects appears drawn from antitrust standing law. Both sorts of effects may "injure" someone in the U.S., for instance, a U.S. company might lose sales either because a foreign competitor is more efficient and sells at lower prices (a procompetitive effect), or because a foreign competitor is engaging in illegal exclusive dealing (an anticompetitive effect). It follows that while antitrust standing doctrine is not the right framework to use in analyzing the reach of the Sherman Act abroad, certain antitrust standing cases elaborating on the distinction between pro and anticompetitive effects could still prove useful analogies in certain circumstances under the FTAIA.

¹²⁹ 15 U.S.C. § 6a.

“direct, substantial, and reasonably foreseeable” effect to trigger jurisdiction. The legislative history of the FTAIA indeed cited *Alcoa* as the source for this test.¹³⁰ *Alcoa* of course relied on conflicts law in formulating the effects test in the first place, as shown above. So, historically, the foundation of the FTAIA was conflicts law — in particular, the territorialist conflicts law theory of the First Restatement.

The conflicts law context of the FTAIA was made explicit by William F. Baxter, then the head of the DOJ’s Antitrust Division, in his testimony before the Senate regarding the Senate’s companion bill to what ultimately become the FTAIA:

The basic, underlying difficulty in the area about which we are talking is not, as is often suggested, a problem about some nations applying their laws extraterritorially, but rather involves a question as to which nation’s laws will apply to what transactions. Our trading partners are not so much suggesting that our laws should not apply as that theirs should, and there can be no question that they have a claim as good as ours, probably reciprocal to ours, for the application of their laws.¹³¹

Baxter went on to analogize this problem explicitly to the conflicts law problems commonly presented in the U.S. among the fifty states.¹³² Indeed, in his written comments Baxter made clear that the DOJ’s view “is that, because of the basic nature of the problem, conflict-of-laws analysis and principles of comity should be brought to bear in cases where jurisdiction is claimed over acts occurring abroad.”¹³³

Consistent with Baxter’s view and the history of the issue, Congress implicitly made use of classic conflicts law methods to solve classic conflicts law problems in the FTAIA. For instance, in adopting the effects test, Congress endorsed a specific conflicts law method — the territorialist method (advocated in the First Restatement and relied upon by Judge Hand in *Alcoa*) — and

¹³⁰ House Report at 5.

¹³¹ Hearing before Senate Judiciary Cmte. on S.432, 97th Cong. (December. 3, 1981) at 35.

¹³² *Id.* 35-36

¹³³ *Id.*, Written statement of William F. Baxter at 48.

rejected the interest balancing method that relied on connecting factors, such as the location of the parties or the place where the conduct occurs (*e.g.*, where conspiratorial meetings happen).¹³⁴ Moreover, by seeking to make a uniform and clear formulation of the effects test, Congress sought to vindicate the conflicts law interest in predictability and certainty. And, in the House Report on the FTAIA, Congress attempted to fit Sherman Act jurisdiction into the international system by encouraging other countries to define the reach of their own laws in the same way as the U.S.¹³⁵

As further evidence that Congress, at least implicitly, was adopting a conflicts law view, it was decided that only sales “in” the U.S. should be within the scope of the Sherman Act. In Section 1(B) of the FTAIA, for example, jurisdiction over exports is limited to cases arising from an effect on “a person engaged in such trade or commerce *in* the U.S.”¹³⁶ This section makes an important distinction between, on the one hand, U.S. trade and, on the other hand, sales abroad, and purposefully excludes non-U.S. sales from the Sherman Act’s reach. Congress further made clear in the House Report that whether specific sales are within the Act should not depend on whether the buyer was abroad or where the buyer took title, but rather where the anticompetitive effect was felt. This is the same distinction naturally drawn by the conflicts law of the issue, as shown above. (Congress significantly did not define when a sale would be deemed “in” the U.S. under Section 1(B). Conflicts law should fill in that gap, too, in the manner discussed above.)

It was in this regard that Congress approvingly cited in the House Report the Supreme Court’s decision in *Pfizer, Inc. v. Government of India*.¹³⁷ In *Pfizer*, the defendant was accused of illegal practices in selling drugs in the U.S. and for export. Foreign governments that had purchased the drugs asserted Sherman Act claims, and the defendant maintained that foreign governments would not redeemed “persons” entitled to assert claims under the Sherman and Clayton Acts. The Supreme Court disagreed and held that the foreign governments could assert such claims in part to ensure that companies would be properly deterred from engaging in anticompetitive conduct by being required to pay damages to all injured parties. Congress agreed with this reasoning and made

¹³⁴ See, *e.g.*, House Report at 5, 10 (rejecting factors such as domicile of plaintiff or place of conduct as factors relevant to jurisdiction).

¹³⁵ House Report at 14 (“Indeed, the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets.”).

¹³⁶ 15 U.S.C. § 6a(1)(B).

¹³⁷ House Report at 10 (citing *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978)).

clear that the location of the sale — whether it is “in” the U.S. — was the touchstone of Sherman Act jurisdiction, not the place where the buyer resides or takes title.¹³⁸

The only material deviation from conflicts law in the FTAIA was Congress’s answer to the exporters who sought protection for export joint ventures. To assist the exporters, Congress made a narrow exception to Section 1(B) and conflicts law in the proviso at the end of the FTAIA, which states that so long as “only” exports are involved, the Sherman Act would protect only U.S. exporters from harm and not the buyers of their products outside the U.S. This in essence created a safe harbor for export joint ventures that otherwise might violate the Sherman Act. Such ventures necessarily would only harm foreign buyers, who, under the proviso, would not be protected.

But the safe harbor is narrow. It does not apply at all if the exporters at issue also sell in the U.S. That is, if U.S. companies enter a prohibited agreement not only to export but also to sell in the U.S., they would face claims by all buyers “in” the U.S., located here or abroad. (This was the situation presented in *Pfizer*.) The proviso would not apply at all in such cases.

In sum, the language and history of the FTAIA are not merely consistent with conflicts law, but are drawn from it and best explained by it. The FTAIA should thus be read consistently with conflicts law, except to the extent specifically altered with the proviso applying to exporters. Not only is this common sense, but it is also in accord with rules of statutory construction, including that the Supreme Court “presumes that Congress expects its statutes to be read in conformity with th[e] [Supreme] Court’s precedents,”¹³⁹ and with “precedents from . . . other federal courts.”¹⁴⁰ In this instance, that presumption is grounded solidly in history.

B. Section 2 of the FTAIA.

Section 2, the focus of recent cases, including *Empagran*, is in accord with conflicts law and reflects the view that Sherman Act jurisdiction should be based solely on injury to the U.S. economy. To the extent there is any doubt on that point, then broader conflicts law principles yield the same result.

¹³⁸ House Report at 10, 12.

¹³⁹ *Porter v. Nussle*, 534 U.S. 516, 528 (2002)(quoting *United States v. Wells*, 519 U.S. 482, 495 (1997)).

¹⁴⁰ *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979).

Section 2's history is a bit murky. It was not in the draft of the FTAIA reported by the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law.¹⁴¹ Those early drafts merely codified the *Alcoa* standard that there be a sufficient effect in the U.S. before the Sherman Act applies. The original draft did not state what kind of an effect in the U.S. was required.

That original omission prompted the American Bar Association's International Law Section to warn that the FTAIA "could have been read as ignoring whether conduct had an *adverse* effect on competition." Congress understood the concern and quoted the ABA's report on this point in full in the House Report:

This result not only departs from the weight of scholarly opinion, but [also] would produce perverse results. Under such an interpretation, conduct which has an anticompetitive effect which [sic] impinges only on defendants [sic — should be "plaintiffs"] located in foreign nations and which has a neutral or procompetitive domestic effect would be subject to the antitrust laws.

The House Report further states that "[t]he Committee did not believe that the bill reported by the subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language . . . to require that the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." Accordingly, the House Committee drafted a clause that the U.S. effect supporting jurisdiction must be "the basis of the violation alleged" ¹⁴²

But the Committee cautioned 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. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic import commerce of the United States or, in the case of conduct lacking such an impact,

¹⁴¹ House Report at 11.

¹⁴² House Report at 11-12.

on an export opportunity of a person doing business in the United States.”¹⁴³ In other words, the requirement that the effect in the U.S. be “the basis of the violation alleged . . .” still left open the question of whether a given sale is “in” the U.S. If a cross-border sale were deemed in the U.S., the mere fact that one of the plaintiffs was outside the U.S. — and thus felt the anticompetitive “impact” there — was irrelevant.

The Committee did not explain how a nexus between the U.S. effect and the Sherman Act case would ensure that only cases involving anticompetitive effects in the U.S. would be brought under the Sherman Act. Presumably, the theory was that to state a claim under the Sherman Act one must show that the conduct being challenged had or threatens to have an anticompetitive effect.¹⁴⁴ (As discussed, an “anticompetitive effect” in this regard means actual or threatened higher prices or reduced output.) So by requiring that the U.S. effect is the only one being challenged under the Sherman Act, it guarantees that only cases involving anticompetitive effects in the U.S. will be brought.

However, this arguably was not the only way to accomplish the Committee’s goal. As the advocates of the broader reading of Sherman Act jurisdiction have argued, the Committee instead could have taken a broad view of jurisdiction and merely required that someone in the U.S. be affected in a manner prohibited by the Sherman Act, even if that person was not a plaintiff or criminal complainant. But this is not what Congress did.

In any event, the Committee’s proposed language was eventually replaced by language proposed by Congressman Rodino, which was the language that ultimately ended up in Section 2. Chairman Rodino “believe[d] that it is possible to improve upon the language of the Committee’s version [that *the* ‘effect’ providing the jurisdictional nexus must also be *the* basis for *the* injury alleged under the antitrust laws] by substituting the phrase ‘such effect gives rise to a claim’ The substituted language accomplishes the same result as the Committee version and is better, in [Rodino’s] view, because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation.”¹⁴⁵ The language that Congressman Rodino proposed is the language that ultimately ended up in Section 2.

¹⁴³ House Report at 12.

¹⁴⁴ See *supra* note 35.

¹⁴⁵ House Report at 18.

In proposing that language, Congressman Rodino was seemingly concerned that the Committee's proposed language could undermine the *per se* rule in international antitrust cases. As noted earlier, under the *per se* rule, an anticompetitive effect is conclusively presumed for certain type of conduct. No proof of such an effect as a factual matter is required. But the draft of the FTAIA reported by the Committee arguably implied that the *per se* rule was not applicable in the foreign trade context because it required that the U.S. effect giving rise to jurisdiction be "the basis of the violation alleged," *i.e.*, that proof of the effect in the U.S. is the "basis" of the violation. Congressman Rodino therefore substituted the phrase "such effect gives rise to a claim," presumably to preserve the *per se* rule but still achieve the Committee's goal of ensuring that the cases under the Act be limited to those arising from the U.S. effect that creates jurisdiction. (Despite Congressman Rodino's efforts, the Ninth Circuit has held that the *per se* rule is not applicable in the foreign trade context, albeit without analyzing the FTAIA.)¹⁴⁶

Section 2's purpose therefore was to limit Sherman Act jurisdiction to those cases where the illegal activity arose out of an effect on U.S. commerce. This result is entirely consistent with the result called for by conflicts law, which, in addition, provides reasons beyond those identified by Congress in the House Report for the narrow reading of Sherman Act jurisdiction.

Nonetheless, advocates of the broad reading of Sherman Act jurisdiction mistakenly assert that selective parts of the FTAIA and its legislative history support their position. In particular:

a. Some argue that the export proviso supports the broad reading of jurisdiction because it explicitly limits export-only cases solely to those that protect exporters in the U.S., and thus protects U.S. exporters from suit for conduct directed solely at the export market. They say that if Congress had similarly wanted to limit other claims to U.S.-only injury, then they could have done so more explicitly. Moreover, so the argument goes, if Section 2 were to limit Sherman Act cases to those arising out of an effect in the U.S., then that would render the proviso superfluous.¹⁴⁷

This reading misinterprets the proviso. It confuses the domicile of the injured person with the location of the alleged injury, which occurs at the place

¹⁴⁶ *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996).

¹⁴⁷ *Kruman*, 284 F.3d at 396; *Den Norske*, 241 F.3d at 432 n.5, 438 n.36 (Higginbotham, *J.*, dissenting).

of the purchase at issue. The proviso is the only part of the FTAIA addressed to the location (or domicile) of a specific person. Under it, exporters in the U.S. are exempt from the Sherman Act in limited circumstances. But the entire rest of the FTAIA — including Section 2 — is addressed to the place of sales or lost sales affected by the conduct being challenged, not the location of specific people. When these sales are “in” the U.S., the Sherman Act applies, wherever the parties to the sales are located. As shown above, in cross-border transactions, whether a sale is “in” the U.S. is itself a question of conflicts law.

There is thus no tension between the proviso and Section 2. The proviso protects specific *persons* located in the U.S. Section 2 and the remainder of the FTAIA are addressed to *sales* in the U.S. For that reason, too, Section 2 does not render the proviso superfluous. Under Section 2, the Sherman Act protects those outside the U.S. who purchase a product in the U.S. (as defined by conflicts law). Under the proviso, however, the foreign buyers would not have claims if the sale were affected by conduct limited exclusively to export commerce. Section 2 and the proviso thus work together to accomplish the goals of Congress.

b. Some also argue that the House Report repeated statements that the place where the “impact” of conduct is felt is irrelevant to jurisdiction means that plaintiffs anywhere in the world can sue.¹⁴⁸ This argument again confuses the location of the plaintiff with the location of the sale. Financial “impact” is felt where the buyer lives or keeps its accounts; the “effect” that is the subject of the effects test is felt where the sale occurs.

c. Finally, some argue that Section 2’s requirement that the effect in the U.S. give rise to “a” claim means that, so long as anyone in the U.S. was harmed (and thus has “a” claim), then all persons harmed by the same conduct, wherever located, are protected by the Act. The argument continues that if Congress wanted the U.S. effects giving rise to jurisdiction to be the only effects that could be sued upon, Congress would have said “such effect gives rise to *the* claim”¹⁴⁹

This point ignores the historical underpinnings of Section 2. Use of “the claim” instead of “a claim” would have thwarted Congressman Rodino’s goal of preserving the *per se* rule in foreign cases (above, pages 44-45). Phrasing the

¹⁴⁸ *Empagran*, 315 F.3d at 352-53; *Den Norske*, 241 F.3d at 435-36 (Higginsbotham, *J.*, dissenting).

¹⁴⁹ *Kruman*, 284 F.3d at 400-01; *Den Norske*, 241 F.3d at 432.

statute such that the U.S. effect must give rise to “the” claim would have recreated the very ambiguity that Congressman Rodino sought to avoid, by suggesting that only cases predicated or proof of an offer (not required by *per se* rule) would be viable.

Conclusion

If there were any doubts about the proper reading of Section 2 (and the disagreement among courts and commentators suggests that there is), then conflicts law should resolve them. Nothing in the FTAIA suggests that Congress intended to expand the jurisdiction of the Sherman Act beyond the bounds of conflicts law. To the contrary, the FTAIA relied on conflicts law principles and almost a century of cases applying them to constrict the jurisdiction of the Sherman Act, especially in export cases. Therefore, conflicts law principles, cases and the FTAIA all support the narrow reading of jurisdiction.

By using conflicts law, as modified by the FTAIA, to control and shape the extraterritorial reach of the Sherman Act, the Courts will avoid many of the potential pitfalls eluded to at the beginning of this Article. Better knowledge of the reach and limits of the Sherman Act will facilitate trade and avoid international disharmony over each nation's efforts to implement competition policy within its borders. The Supreme Court should resolve *Empagran* with these conflicts law values firmly in mind.

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