# NOTE

# Dependent Injury Based Claims: The Next Step in American Regulation of Antitrust

*Jodi Stanfield*[*]

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[*] Executive Symposium Editor, U.C. Davis Law Review. J.D. Candidate 2006, UC Davis School of Law; B.A. Business/Marketing 2002, San Jose State University. I would like to thank Jonathan, Debbie, and Joe for their feedback and support and for turning my blood, sweat, and tears into something copacetic. I would also like to thank Professor Robert Mikos for being so accessible and for helping me make some sense of antitrust law. Finally and most importantly, I would like to thank my parents, Don and Barbara, for working so hard to give me the opportunities that they never had.

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## INTRODUCTION

What "is" is?[1] In August of 1998, former President Clinton caused uproar by challenging the definition of a seemingly obvious word.[2] While nonlawyers rolled their eyes at Clinton's semantic game, lawyers understood that legal interpretation requires questioning the ostensibly clear.[3]

Similarly, the Courts of Appeals, and most recently the U.S. Supreme Court, have argued over the meaning of "a claim."[4] This argument stems from the courts' attempt to interpret the Domestic Injury Exception ("Domestic Exception") to the Foreign Trade Antitrust Improvement Act ("FTAIA").[5] The Domestic Exception states that the Sherman Antitrust Act ("Sherman Act") will apply to foreign trade if the alleged anticompetitive conduct meets two requirements.[6] First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce.[7] Second, the conduct's effect must give

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[1] Former President Clinton asked this question while providing his deposition before the grand jury in connection with his impeachment proceedings. *See* John F. Harris, *The Last Chance Presidency; He's Outlasted Friends and Enemies Alike*, WASH. POST, Sept. 10, 2000, at W10 (referencing Clinton's "what 'is' is" question, and noting its impact on Clinton's political credibility).

[2] *See* Nancy B. Rapoport, *Presidential Ethics: Should a LawDegree Make a Difference?*, 14 GEO. J. LEGAL ETHICS 725, 725-26 (2001) (noting jokes that followed Clinton's "what 'is' is" question); Jeremy Manier, *What, Exactly, Does He Mean by That?*, CHI. TRIB., Jan. 24, 1999, at C1 (discussing multiple interpretations of word "is"); *see also* JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 840 (Justin Kaplan ed., 17th ed. 2002) (referencing three of Clinton's famous quotes, including "what 'is' is?").

[3] *See* Pseudonymous, *In the Arena* (Aug. 2, 2000), www.modernhumorist.com/mh/0007/conventions/arena2.cfm (making light of fact that many Republicans really do not know meaning of word "is"). *See generally* Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585 (1996) (discussing various theories for interpreting statutes).

[4] *See generally* Hoffman La Roche v. Empagran, 542 U.S. 155 (2004) (holding that "a claim" requires Sherman Act violation with domestic effect that is not independent of American injury); Kruman v. Christie's Int'l, 284 F.3d 384 (2d Cir. 2002) (holding that "a claim" requires only Sherman Act violation and resonate domestic effect); Den Norske Stats Oljeselskap v. HeereMac, 241 F.3d 420 (5th Cir. 2001) (holding that "a claim" must derive from particular plaintiffs' connection to domestic injury caused by Sherman Act violation).

[5] Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a(1)-(2) (2000); *see* Salil K. Mehra, *"A" Is for Anachronism: The FTAIA Meets the World Trading System*, 107 DICK. L. REV. 763, 766 (2003) (arguing that interpretative debate turns on whether Sherman Act claim must belong to particular plaintiff or may be actual claim belonging to someone other than plaintiff); *infra* notes 10-11 and accompanying text (discussing different courts' interpretations of "a claim").

[6] Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

[7] Foreign Trade Antitrust Improvement Act § 6a(1).

rise to "a claim" under the Sherman Act.[8] Thus, Sherman Act regulations and protections may apply to foreign conduct, but only if the plaintiff can show the Domestic Exception applies.

The interpretative dispute turns on how to define "a claim" as stated in the second prong of the Domestic Exception.[9] Some courts have found that "a claim" exists if the Sherman Act generally prohibited the conduct in question.[10] Other courts have held that the particular plaintiff must have a Sherman Act claim based on an American injury.[11] Thus, one interpretation rests on the nature of the harmful conduct, and the other depends on the location that the injury occurred.[12]

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[8] *Id.*

[9] *Hoffman*, 542 U.S. at 165-68 (questioning whether "a claim" arises under Sherman Act when independent foreign injury is basis of foreign plaintiff's claim, and concluding that it does not); Deborah J. Bushwell, *Foreign Trade Antitrust Improvements Act: A Three Ring Circus — Three Circuits, Three Interpretations*, 28 DEL. J. CORP. L. 979, 985 (2003) (noting that some circuits have interpreted "gives rise to a claim" language literally, while others have interpreted language to mean that effects must give rise to "the" claim that is subject of suit); Mehra, *supra* note 5, at 765-66 (noting that main dispute thus far stems from second prong of FTAIA).

[10] Empagran v. Hoffman La Roche, 315 F.3d 338, 341 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004) ("The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on [domestic] commerce must give rise to 'a claim' by someone, even if not the . . . plaintiff who is before the court."); Kruman v. Christie's Int'l, 284 F.3d 384, 399-400 (2d Cir. 2002) ("The language 'gives rise to a claim' only requires that the 'effect' on domestic commerce violate the substantive provisions of the Sherman Act."); *see also* David A. Katz et al., *PLI's Fourth Annual Institute on Securities Regulation in Europe: A Contrast of EU & U.S. Provisions*, *in* SELECTED MEMORANDA 2004, at 603, 620 (PLI Corp. Law & Practice, Course Handbook Series No. 3166, 2004) (noting district court in *Hoffman* interpreted domestic injury exception as requiring only that conduct's harmful effect on U.S. commerce give rise to "a claim" by plaintiff, even if that plaintiff is not foreign plaintiff before court).

[11] *Hoffman*, 542 U.S. at 172-75 (holding that plaintiffs before court must have "a claim" under Sherman Act); Den Norske Stats Oljeselskap v. HeereMac, 241 F.3d 420, 428-29 (5th Cir. 2001) ("[A] foreign plaintiff injured in a foreign marketplace must show that a substantial domestic effect on United States commerce 'gives rise' to *its* antitrust claim." (emphasis added)); Empagran v. Hoffman La Roche, No. 00-1686, 2001 U.S. Dist. LEXIS 20910, at *13 (D.D.C. June 7, 2001), *rev'd*, 315 F.3d 338 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004) (dismissing foreign plaintiffs' claim despite Sherman Act violation resulting in domestic harm because plaintiffs' particular injury was based on foreign transactions); *In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 715 (D. Md. 2001) (holding that, under FTAIA, foreign consumers who have not participated in U.S. markets have no right to bring Sherman Act claim); Metallgesellschaft v. Sumitomo Corp., 117 F. Supp. 2d 875, 877 (W.D. Wis. 2000) ("[A] plaintiff cannot sue under [the Sherman Act] for injuries incurred as a result of international transactions that have an anticompetitive effect on a United States market if the domestic anticompetitive effect is not the same one that gives rise to the plaintiff's injury.").

[12] Turicentro v. Am. Airlines, Inc., 303 F.3d 293, 301 (3d Cir. 2002) (noting that first inquiry focuses on defendants' conduct, while second inquiry focuses on geographical effect of that conduct); Mehra, *supra* note 5, at 767-70 (noting that some courts looked at

Consider the following hypothetical situation.[13] Foreign and American vintners form a cartel and agree to fix wine prices in France above the market rate. Because of this cartel and its price-fixing schemes, prices for wine rise in both France and the United States. French consumers sue the cartel in U.S. federal court, alleging violation of the Sherman Act's price-fixing provisions.[14] They choose U.S. courts because most of the vintners' assets are in the United States. Thus, the consumers believe their chances of enforcing any judgment will be better here than in France. Further, the French consumers hope to achieve the treble damages allowable under U.S. antitrust law.

Generally, the FTAIA would bar a claim founded on foreign trade.[15] Consequently, the French consumers must invoke the Domestic Exception for their claim to survive.[16] The French consumers can easily show that the alleged anticompetitive conduct caused domestic effects because the price-fixing activities resulted in increased American prices.[17] The challenge for the French consumers will be proving that the defendants' price-fixing was sufficient to establish "a claim" under the Sherman Act.

To determine whether the French consumers' claim survives, the court must resolve this interpretive debate.[18] If the district court decides that conduct prohibited by the Sherman Act creates "a claim," the French consumers' suit will endure. The Sherman Act prohibits price-fixing.[19]

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foreign plaintiffs' relationship to domestic injury and others looked at whether alleged conduct violated Sherman Act); *supra* notes 9-10 and accompanying text.

[13] This hypothetical is loosely based on the facts of *Hoffman*, 542 U.S. at 155-73.

[14] *Id.* at 163-68. The American plaintiffs clearly have a viable claim in this situation. *Id.* Although foreign trade is the basis of the claim, the American plaintiffs can apply the Domestic Exception. *Id.* Because prices rose in America, the American plaintiffs can show domestic effects. *Id.* Further, because prices increased in America, the American plaintiffs have "a claim" based on the domestic effects of the anticompetitive conduct. *Id.*

[15] *See* Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a (2000) ("[The Sherman Act] shall not apply to conduct involving trade or commerce with . . . foreign nations."). In the French consumer hypothetical, foreign conduct is the basis of the French plaintiffs' claim. *Supra* text accompanying notes 13-14.

[16] *See* Foreign Trade Antitrust Improvement Act § 6a(1)-(2) (stating that Sherman Act will apply to foreign conduct if both prongs of FTAIA's Domestic Exception are satisfied).

[17] *See* H.R. REP. NO. 97-686, at 11 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2496 (defining "domestic effects" as negative impact of anticompetitive conduct on trade or commerce in United States).

[18] *See* E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1627 (2001) (suggesting that Rehnquist Court is less inclined to judicial activism than previous courts and, thus, is less likely to adopt expansive interpretative positions).

[19] Sherman Antitrust Act, 15 U.S.C. § 1 (deeming price-fixing illegal because it acts as restraint on trade).

Therefore, "a claim" exists under this expansive interpretation, and the Domestic Exception applies.[20]

Conversely, the French consumers' claim is less likely to survive if the court determines that the domestic effect must give rise to the plaintiffs' claim.[21] This interpretation requires that the Sherman Act claim belong specifically to the French consumers.[22] As such, the plaintiffs must show more than the defendants' violation of the Sherman Act.[23] The French consumers must show price-fixing and consequent price increases in America.[24] Further, the French consumers must show that they are entitled to a Sherman Act claim based on their relation to the injury that occurred in the United States.[25] Thus, under this narrow interpretation, the French consumers must demonstrate that their foreign injury is a byproduct of a domestic injury for their claim to survive.[26]

The interpretation the court chooses does more than determine whether the foreign plaintiffs' claim continues. Each interpretation also supports different policy objectives. The broad interpretation emphasizes the interest of American courts in deterring certain types of anticompetitive conduct.[27] This broad interpretation supports jurisdiction in the United States over foreign conduct when the plaintiff can show a Sherman Act transgression resulting in American harm.[28]

The narrow interpretation, however, suggests that U.S. courts need to factor interests other than antitrust deterrence into their decisions.[29]

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[20] *Id.*; Foreign Trade Antitrust Improvement Act § 6a(1)-(2).

[21] *See* Hoffman La Roche v. Empagran, 542 U.S. 155, 174 (2004) (dismissing foreign plaintiffs' claim because it was not based on domestic effect of anticompetitive conduct); Den Norske Stats Oljeselskap v. HeereMac, 241 F.3d 420, 427 (5th Cir. 2001) (dismissing foreign plaintiffs claim because foreign injury was not related to domestic injury).

[22] *Den Norske*, 241 F.3d at 426 (asserting that Congress intended to require that domestic effect give rise to particular injury claimed by plaintiff in suit).

[23] *See, e.g.*, *Hoffman*, 542 U.S. at 163-65 (noting that Defendants violated Sherman Act and caused American harm, but holding that Plaintiffs could not proceed).

[24] Foreign Trade Antitrust Improvement Act § 6a(1).

[25] *See, e.g.*, *Hoffman*, 542 U.S. at 174 (dismissing foreign plaintiffs' claim because foreign injury was too remote from domestic injury to justify exercise of American jurisdiction).

[26] *Id.*; Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976) (insisting that foreign conduct's domestic effect be "sufficiently large" to create cognizable injury to plaintiffs before court).

[27] Empagran v. Hoffman La Roche, 315 F.3d 338, 355 (D.C. Cir. 2002), *vacated*, 542 U.S. at 155 (2004) (citing deterrence of anticompetitive conduct as justification for broad interpretation of "a claim"); *Den Norske*, 241 F.3d at 435 (Higginbotham, J., dissenting) (asserting that exclusion of foreign plaintiffs' claims lessens deterrent effect of American antitrust remedies).

[28] *Supra* note 10 and accompanying text.

[29] *Hoffman*, 542 U.S. at 165-66 (noting that courts must consider principles of comity

These courts claim that America's adjudication interest is weak unless the nexus between the foreign and domestic injury is significant.[30] Thus, a court's ruling on the meaning of "a claim" will also signal that court's position on the extraterritorial application of U.S. antitrust law.[31]

Recently, the U.S. Supreme Court supplied its definition of "a claim" in *Hoffman La Roche v. Empagran*.[32] In *Hoffman*, the Court examined the scope of the FTAIA and the Domestic Exception.[33] The Court concluded that "a claim" requires more than foreign conduct resulting in a Sherman Act violation with resonant domestic effects.[34] Thus, the *Hoffman* Court adopted the narrow interpretation of "a claim" as law.

In addition, the *Hoffman* Court established that "a claim" based on foreign conduct should not exist if the foreign and domestic injuries were independent.[35] The Court did not rule that the Domestic Exception would never apply to claims based on foreign conduct. Nor did it establish that dependent injuries would be sufficient to justify jurisdiction in the United States.[36] Rather, the Court halted its analysis after determining that the Domestic Exception did not apply to the *Hoffman* plaintiffs.[37] Thus, following *Hoffman*, it is still unclear what showing a foreign plaintiff must make in order for a claim based on foreign conduct to survive.[38]

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when applying American antitrust law to foreign conduct); *see also* Hannah L. Buxbaum, *Foreign Plaintiffs in U.S. Courts: Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 365, 368 (2004) (noting that shortcoming of expansive interpretation is that it fails to consider other nations' comity interests).

[30] *Hoffman*, 542 U.S. at 165-66 (holding that it is unreasonable for America to exercise jurisdiction over foreign conduct when foreign injury is unrelated to domestic harm); *Timberlane*, 549 F.2d at 613 (asserting that application of American jurisdiction requires that magnitude of domestic effect be great enough to override litigation interests of other nations); Buxbaum, *supra* note 29, at 368 (recognizing that valid U.S. interest in regulating certain conduct is not same thing as conclusion that U.S. laws in fact reach such conduct).

[31] *Supra* notes 10-11 and accompanying text.

[32] *Hoffman*, 542 U.S. at 167-75.

[33] Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a(1)-(2) (2000).

[34] *Hoffman*, 542 U.S. at 174-75; *Timberlane*, 549 F.2d at 615 (holding domestic effect alone is not sufficient basis to determine whether American authority should be asserted in given case).

[35] *Hoffman*, 542 U.S. at 174-75.

[36] *Id.* (holding that dismissal of Plaintiffs' claim was predicated on foreign injury being independent of domestic injury, and remanding issue of dependent injury to district court).

[37] *Id.*

[38] *See* Neal R. Stoll & Shepard Goldfein, *U.S. Antitrust Laws: Who Can Sue Whom?*, 231 N.Y. L.J. 3, 3 (2004) (stating that *Hoffman* does not answer question of who may sue whom under U.S. antitrust law).

This Note picks up where the Supreme Court left off. It argues that the *Hoffman* decision was correct as applied to the facts presented. However, the significance of the *Hoffman* decision lies more in the question raised than in the rule yielded.

As such, this Note argues that foreign plaintiffs' antitrust claims should proceed when predicated upon dependent injury.[39] Part I reviews the Sherman Act generally and discusses U.S. courts' historical treatment of the Domestic Exception to the FTAIA. Part II summarizes the current state of the law as expressed by the *Hoffman* court. *Hoffman* held that when a foreign plaintiff's claim arises from a foreign injury that is unrelated to a domestic injury, the plaintiff does not have U.S. jurisdiction. Finally, Part III argues that allowing dependent injury claims will further the policy considerations underlying the *Hoffman* decision by allowing foreign plaintiffs access to U.S. courts under limited circumstances.[40] Thus, dependent injury-based jurisdiction is the best present solution for dealing with Sherman Act claims based on foreign injuries.[41]

## I. BACKGROUND

To understand the interpretive debate and the *Hoffman* holding, it is necessary to understand generally the statutes underlying the debate. The following briefly describes American antitrust legislation and its application both domestically and abroad. The statutes most relevant to the interpretive debate and *Hoffman* are the Sherman Antitrust Act and the Foreign Trade Antitrust Improvement Act.

### *A. The Sherman Antitrust Act and Development of Effects-Based Jurisdiction*

Title 15 of the *United States Code* regulates trade and embodies the Sherman Act.[42] Congress adopted the Sherman Act (the "Act") in 1890.[43]

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[39] *Infra* notes 192-200 and accompanying text.

[40] *See* Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 314-15, 319-20 (1978) (asserting that affording foreign nations protection under U.S. antitrust law does not always encroach on foreign adjudication interests).

[41] *Hoffman*, 542 U.S. at 170-75. Unlike claims based on independent injuries, some precedent exists for basing jurisdiction upon dependent injuries. *Id.*; *see* Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680, 688 (S.D.N.Y. 1979) (considering dependent nature of plaintiffs' injury, and allowing claim based on foreign conduct to proceed in American court); Industria Siciliana Asfalti, Bitumi v. Exxon Research & Eng'g Co., No. 75 Civ. 5828-CHS, 1977 WL 1353, at *11 (S.D.N.Y. Jan. 18, 1977) (allowing foreign plaintiff's claim to proceed because foreign injury was "bound up" in domestic injury).

[42] Sherman Antitrust Act, 15 U.S.C §§ 1-7 (2000).

From its inception, the Act has been the most influential piece of American antitrust legislation.[44]

Initially, U.S. courts were extremely hesitant to apply domestic antitrust laws to conduct that did not occur within the country.[45] Courts held that if the conduct occurred on foreign soil, foreign law must determine the conduct's illegality.[46] Thus, U.S. courts initially denied foreign antitrust claims because they adhered to the principals of territorial-based jurisdiction.[47]

The United States's interest in regulating overseas activities increased, however, with the growth of the global marketplace.[48] In the mid 1970s,

[43] *Id.* Congress initially created the Act to curb the monopolistic tendencies of Industrial Revolution era manufacturers. *See generally* Standard Oil Co. N.J. v. United States, 221 U.S. 1 (1911) (applying Sherman Act to prevent monopolies in oil industry). The Act's drafters, heavily influenced by Adam Smith's invisible-hand economics theory, believed competition would foster the long-term success of the American economy. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Methuen and Co., Ltd. 1904) (1776) (describing benefits of market economy that operates without artificial trade controls); 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 46 (1996) (stating that Sherman Act seeks to prohibit trade that deprives market participants advantages derived from free market system). Only conduct that the legislators intended to prevent unduly restricts or unduly obstructs the course of trade. *Id.* However, certain types of violations, including price-fixing and bid rigging, are illegal per se. *See* Kruman v. Christie's Int'l, 284 F.3d 384, 398 (2d Cir. 2002) (noting that Sherman Act strictly prohibits price-fixing).

[44] *Kruman*, 284 F.3d at 398; *see* VLADIMIR PAVIC, EXTRATERRITORIALITY IN THE MATTERS OF ANTITRUST 45 (2001) (claiming Sherman Antitrust Act is single most influential antitrust statute in America).

[45] *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 359 (1909) (holding that illegality of anticompetitive conduct must be determined by country in which conduct occurs); *see also* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interest in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 227 (2001) (noting general presumption against extraterritorial application of American antitrust law in early cases); Seung Wha Chang, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States*, 14 DUKE J. COMP. & INT'L L. 1, 9 (2004) (same).

[46] *See, e.g., United Fruit Co.*, 213 U.S. at 359; *see also* PAVIC, *supra* note 44, at 48 ("[T]he governing presumption at the time of enactment of the Sherman Act was that laws of the U.S. are to be applied territorially and that the extension of their application would constitute the violation of international law."); Chang, *supra* note 45, at 9 (discussing U.S. citizen's perception of antitrust law as domestic law).

[47] *See, e.g.*, *United Fruit Co.*, 213 U.S. at 359 (denying American jurisdiction because anticompetitive conduct occurred on foreign soil); *see also* Buxbaum, *supra* note 45, at 228 (maintaining early antitrust decisions applied Sherman Act only to conduct taking place in United States).

[48] *See* PHILIP AREEDA ET AL., ANTITRUST ANALYSIS 101 (6th ed. 2004) (noting that because of "ever-expanding globalization," national authorities have developed rudimentary cooperation systems); SIMON J. EVENETT ET AL., ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 1 (2000) ("That competition policy has acquired a prominent place in discussions on international economic policy is in large part due to the growing interdependence among national economies during the closing decades

the United States suffered from trade deficits that it attributed in part to the wrongful conduct of foreign exporters within foreign territories.[49] Consequently, U.S. antitrust authorities became more aggressive in enforcing trade regulations against foreigners to halt these harmful export practices.[50]

By the mid 1900s, the courts adopted an effects-based jurisdictional test that greatly expanded the extraterritorial reach of American antitrust law.[51] The effects test rejected the traditional approach of basing jurisdiction on territory.[52] Rather, the effects test focused on where the effects of the unlawful conduct manifested.[53] The primary consequence of the effects-based test was that foreign conduct was eligible for prosecution under American law if the conduct affected the U.S. economy.[54]

At first, U.S. application of the effects test did not consider the comity interest of the foreign countries involved.[55] In response to foreign

of the twentieth century.").

[49] Chang, *supra* note 45, at 9.

[50] *Id.*

[51] *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 442 (2d Cir. 1945) (holding agreement between foreign aluminum producers was illegal under sections one and two of Sherman Act because agreement inflated aluminum prices in United States). Effects-based jurisdiction allows a country to apply its laws to certain conduct if that conduct causes injury in that country. The analysis turns on where the effects of the conduct emanate, not on where the conduct physically occurs. *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) 13, 107 (Apr. 5, 1995) (noting that no distinction is made among conspiracies based on citizenship of actors).

[52] Judge Learned Hand first articulated the effects test in *Aluminum Co. of America*, 148 F.2d at 443 ("[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize . . . ."); *see also* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1393-1435 (Robert C. Clark ed., 2004) (comparing territorial jurisdiction with effects-based jurisdiction). *See generally* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (basing jurisdiction on harmful effects of defendant's conduct in America).

[53] *Supra* note 51 and accompanying text.

[54] *See Hartford Fire*, 509 U.S. at 769-70 (holding that Sherman Act could apply to conduct that occurred in London). Early cases invoking the effects test revealed that U.S. courts were likely to review conduct that also fell under the purview of foreign laws. *Id.* at 769 (holding that conflict of law did not result from legal foreign conduct violating U.S. law). Such extraterritorial application of U.S. law resulted in protest by foreign countries. *See* PAVIC, *supra* note 44, at 62-63 (noting that other nations protested by passing "blocking statutes" that prevented companies within their borders from complying with American court orders, and noting that legal commentators of era spoke about resentment that America's application of effects doctrine created).

[55] *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 610 (1976) (noting that

discontent over this fact, the United States changed the effects test in the mid 1970s.[56] The new effects test considered the interest of the United States in adjudicating foreign-based claims against the comity and sovereignty interests of the foreign nation.[57] The U.S. courts used this test, or some form of it, to determine jurisdiction until codification of the Foreign Trade Antitrust Improvement Act in 1982.[58]

### *B. Foreign Trade Antitrust Improvement Act*

Congress created the Foreign Trade Antitrust Improvement Act with a 1982 amendment to the Sherman Act.[59] The FTAIA's purpose was to define the extraterritorial scope of the Sherman Act and set jurisdictional standards over foreign trade matters.[60] The FTAIA general rule is that Sherman Act protections do not apply to conduct involving foreign trade or commerce.[61]

However, the FTAIA carves out an exception to the general rule in the Domestic Injury Exception. The Domestic Exception states that the Sherman Act will apply to foreign trade if the foreign conduct resulted in

many commentators view *Aluminum Co. of America* as conflicting with international law, comity, and good judgment); *see also* Buxbaum, *supra* note 44, at 228 (discussing shift from territorial-based jurisdiction to effects-based jurisdiction); Thomas E. Kauper, *The Report of the Attorney General's National Committee to Study the Antitrust Laws: A Retrospective*, 100 MICH. L. REV. 1867, 1891 (2002) (noting that legal scholars did not consider comity interest when evaluating applications of effects test).

[56] *See* AREEDA ET AL., *supra* note 48, at 101 (noting foreign nations' paradoxical concern for undue interference from extraterritorial application of antitrust law in addition to concern for outside anticompetitive activity causing harmful effects within); Kauper, *supra* note 55, at 1890 ("Foreign governments reacted angrily when their own nationals were subject to the jurisdiction of American courts, a jurisdiction asserted in an increasing number of cases.").

[57] The new approach mirrored the *Restatement*. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 40 (1965). Factors to consider in the exercise of U.S. jurisdiction as defined by the *Restatement* included: (a) vital national interest, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose on the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state. *Id.*

[58] Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a (2000); *see also* Kauper, *supra* note 55, at 1891 (asserting that FTAIA was created, in part, to respond to conflict created by American assertions of extraterritorial jurisdiction).

[59] Foreign Trade Antitrust Improvement Act § 6a.

[60] *See* H.R. REP. NO. 97-686, at 10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (articulating definition of Sherman Act's jurisdictional scope as one of purposes for enacting FTAIA).

[61] Foreign Trade Antitrust Improvement Act § 6a.

an American injury.[62] The Domestic Exception requires the plaintiff to show that the alleged conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. trade and that the effect gave rise to "a claim" under the Sherman Act.[63]

The language of the Domestic Exception is vague, and judicial decisions have interpreted the scope of the law differently.[64] Without further amendments to the *United States Code*, the courts continue to flesh out the scope of the Domestic Exception via judicial decision.[65] The Supreme Court in *Hoffman* was merely the latest court to chisel away at the meaning of the Domestic Exception.

## II. *HOFFMAN LA ROCHE V. EMPAGRAN*: NARROW INTERPRETATION ADOPTED

In *Hoffman La Roche v. Empagran*, the foreign plaintiffs' claim required U.S. federal courts to examine the scope of the Domestic Exception.[66] Plaintiffs were vitamin consumers from the Ukraine, Australia, Ecuador, and Panama.[67] They claimed that price-fixing schemes contrived by Defendants caused prices to rise in American as well as in foreign markets.[68] They filed a class action suit on behalf of both foreign and domestic purchasers of vitamins, claiming various Sherman Act

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[62] *Id.*

[63] *Id.*

[64] *See* LOUIS ALTMAN, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 27:30 (4th ed. 2004) ("The [FTAIA] is couched in dense and opaque terms."); Spencer Weber Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transactional Litigation*, 14 LOY. CONSUMER L. REV. 523, 524 (2002) (commenting on poor draftsmanship used to construct FTAIA); *see also* Bushwell, *supra* note 9, at 988-91 (commenting on Second Circuit's expansive interpretation, Fifth Circuit's restrictive interpretation, and D.C. Circuit's middle position).

[65] *See* United States v. Time Warner Inc., Misc. Action No. 94-338, 1997 U.S. Dist. LEXIS 2752, at *13-*14 (D.D.C. Jan. 22, 1997) (noting that parameters of FTAIA are uncertain); H.R. REP. NO. 94-1343, at 11 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2596 (expressing that scope of many antitrust exemptions is not precisely clear, but that this should not halt discovery); *see, e.g.*, United States v. LSL Biotechnologies, Inc., 379 F.3d 672, 678-82 (9th Cir. 2004) (questioning meaning of "direct" as written in FTAIA).

[66] Hoffman La Roche v. Empagran, 542 U.S. 155, 159 (2004).

[67] *Id.* at 158-61.

[68] *Id.*; *see* Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 712 (2001) (asserting that *Hoffman* vitamin cartel was most economically damaging cartel ever prosecuted under U.S. antitrust law); Ronald W. Davis, Empagran *and International Cartels — A Comity of Errors*, ANTITRUST, Fall 2004, at 58 (noting that Justice Breyer in *Hoffman* thought FTAIA language alone was unclear on whether "a claim" meant claim by anyone, or claim by particular plaintiffs before court).

violations.[69] Because foreign conduct was the basis of Plaintiffs' claim, however, Defendants argued that the FTAIA general rule denied Plaintiffs' standing.[70]

Before reaching the Supreme Court, the district and appellate courts addressed the issue of the foreign plaintiffs' standing under the Domestic Exception.[71] These courts could not agree, however, on whether Plaintiffs' claim should survive.[72] The district court held that foreign conduct resulting in an independent foreign harm did not constitute "a claim."[73] It reasoned that the nexus between the foreign injury and the domestic harm was not strong enough to justify application of U.S. law.[74] The appellate court, in contrast, held that a showing of a Sherman Act violation and consequent domestic effect established "a claim."[75] As such, the appellate court reversed the district court's decision and held that the foreign plaintiffs' claim should proceed.[76]

Thus, the U.S. Supreme Court became the final arbiter on the issue of a foreign plaintiff's ability to exercise American jurisdiction. Plaintiffs

[69] *Hoffman*, 542 U.S. at 158. Plaintiffs claimed that Defendants' price-fixing schemes violated section one of the Sherman Act (deeming contracts that restrain trade illegal) and sued under sections four and sixteen of the Clayton Act (discussing district court jurisdiction and injunctive relief, respectively). *See* Sherman Antitrust Act, 15 U.S.C. § 1 (2000) (enacted 1890); Clayton Act, 15 U.S.C. §§ 4, 16 (enacted 1914).

[70] *Hoffman*, 542 U.S. at 160.

[71] Empagran v. Hoffman La Roche, 315 F.3d 338, 357 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004) (addressing issue of standing, but reaching different result than district court); Empagran v. Hoffman La Roche, No. 00-1686, 2001 U.S. Dist. LEXIS 20910, at *14 (D.D.C. June 7, 2001), *rev'd*, 315 F.3d 338, *vacated*, 542 U.S. 155 (addressing question of foreign plaintiff standing).

[72] *Empagran*, 315 F.3d at 338 (reversing decision of district court).

[73] *Empagran*, 2001 LEXIS 20910, at *13. The *Hoffman* district court largely based its rationale on the Fifth Circuit's narrow interpretation of "a claim." *See* Den Norske Stats Oljeselskap v. HeereMac, 241 F.3d 420, 428 (5th Cir. 2001) (arguing that FTAIA drafters did not want foreign plaintiffs to achieve jurisdiction if their claims were based on independent, foreign injuries).

[74] *Empagran*, 2001 LEXIS 20910, at *7 ("[T]he effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws.").

[75] *Empagran*, 315 F.3d at 341 ("We hold that where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce."). The *Hoffman* appellate court agreed with the Second Circuit result in *Kruman. See* Kruman v. Christie's Int'l, 284 F.3d 384, 400 (2d Cir. 2002) (arguing that FTAIA drafters would have said "the claim" rather than "a claim" if they expected domestic harm to be foundation for foreign plaintiffs' claim). It is important to note that the *Hoffman* appellate court agreed with the outcome in *Kruman*, but not completely with the Second Circuit's rationale. *See Empagran*, 315 F.3d at 341 (agreeing more with holding in *Kruman* than holding in *Den Norske*).

[76] *Supra* note 68 and accompanying text.

argued that they had standing in *Hoffman* because they satisfied both prongs of the Domestic Exception.[77] The price-fixing schemes caused drug prices to rise in the United States, which constituted a direct, substantial, and reasonably foreseeable effect.[78] Further, price-fixing is an activity that gives rise to a Sherman Act claim.[79] Thus, Plaintiffs asked the court to adopt the expansive interpretation of the FTAIA and affirm the appellate court decision.[80]

Defendants, Hoffman and other foreign and domestic vitamin manufacturers and distributors, argued that Plaintiffs did not qualify for the Domestic Exception.[81] They posited that Plaintiffs' purchase of vitamins in foreign countries constituted trade or commerce with foreign nations.[82] Thus, Defendants argued that the general rule of the FTAIA barred Plaintiffs' claim.[83]

Defendants further contended that the Domestic Exception was inapplicable because Plaintiffs did not have a Sherman Act claim based on the increased drug prices in the United States.[84] Although Plaintiffs could show domestic effects, Defendants argued that the second prong of the Domestic Exception test failed.[85] Thus, Defendants asked the Court to agree with the narrow interpretation of "a claim" and reinstate the district court's ruling.[86] Consequently, when the Supreme Court granted certiorari in *Hoffman*, it chose to resolve a split that divided both the circuit courts and the lower courts.[87]

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[77] *Empagran*, 315 F.3d at 340-41. Before addressing the scope of the FTAIA, the Court first addressed Empagran's claim that the price-fixing at issue fell outside of the FTAIA because the general exclusionary rule only applied to exports. Hoffman La Roche v. Empagran, 542 U.S. 155, 162 (2004). By the language of the rule, the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Foreign Trade Antitrust Improvement Act, 15 U.S.C § 6a (2000). The Court, however, found that the FTAIA does apply to imports. *Hoffman*, 542 U.S. at 165-67.

[78] *See Hoffman*, 542 U.S. at 158. The court did not deny that the foreign conduct had an effect on the American economy. It recognized that the price-fixing caused drug prices to rise in both America and the foreign countries. *Id.*

[79] Sherman Antitrust Act, 15 U.S.C. § 1 (declaring unreasonable contracts in restraint of trade as illegal).

[80] *Hoffman*, 542 U.S. at 160-63.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 160.

[84] *Id.*

[85] *Id.* at 172-73 (noting that "gives rise to a claim" language in FTAIA really means "gives rise to the claim at issue," which precludes foreign plaintiffs).

[86] *Id.* at 160.

[87] *Id.* ("We granted certiorari to resolve a split among the Courts of Appeals about the

The Supreme Court began its analysis by reviewing the language of the FTAIA general rule and the Domestic Exception.[88] The Court established that the FTAIA's general rule applies where the anticompetitive conduct is foreign.[89] Thus, the general rule applied in *Hoffman* because some of the defendants involved in the price-fixing schemes were foreign.[90]

Next, the Court compared the facts in *Hoffman* against the Domestic Exception to the general rule.[91] It determined that the price-fixing directly affected consumers both in the United States and abroad.[92] Thus, Plaintiffs demonstrated a domestic effect and satisfied the first prong of the Domestic Exception.[93]

This domestic effect, however, was insufficient to create a cause of action because the adverse foreign effect was independent of any adverse domestic effect.[94] Thus, Plaintiffs did not have "a claim" arising out of the increased prices in the United States. Ultimately, the Court agreed with the narrow interpretation of "a claim" and found in favor of Defendants.[95]

The Court based its unanimous decision upon two primary justifications.[96] First, the Court found that Congress intended for the FTAIA to supplement rather than expand the scope of the Sherman Act.[97] The Court determined that Congress did not intend to create any new

exception's application."); Hoffman La Roche v. Empagran, 540 U.S. 1088, 1088 (2003) (granting petitioner's writ for certiorari); Appellate Filing, Petition for Writ of Certiorari at 8, Hoffman La Roche v. Empagran, 542 U.S. 155 (2004) (No. 03-724) (stating court should hear case to resolve division between lower courts). The Seventh Circuit noted this same split in *Metallgesellchaft AG v. Sumitomo Corp. of America*, 325 F.3d 836, 839 (7th Cir. 2003) (discussing Fifth Circuit's broad interpretation of FTAIA, favored in *Den Norske*, and narrow interpretation favored by D.C. Circuit and Second Circuit in *Hoffman* and *Kruman*, respectively), and in a Third Circuit decision, *Turicentro v. American Airlines Inc.*, 303 F.3d 293, 306 (3d Cir. 2002) ("[T]he meaning of [the FTAIA] has split two of our sister circuits.").

[88] *Hoffman*, 542 U.S. at 160-63.

[89] *Id.* at 163-64.

[90] *Id.*

[91] *Id.* at 163-73.

[92] *Id.* at 163.

[93] *Id.*

[94] *Id.* at 167-68, 174-75; *see also* Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 289 (2002) ("[The Sherman Act applies to] conduct [that] has sufficient effects on U.S. import or domestic trade, or on the U.S. activities of a U.S. based exporter.").

[95] *Hoffman*, 542 U.S. at 160.

[96] *Id.* at 163-70 (discussing two justifications underlying decision).

[97] *Id.* at 169-72. *But cf.* Kruman v. Christie's Int'l, 284 F.3d 384, 399-401 (2d Cir. 2002) (citing H.R. REP. NO. 97-686, at 11-12 (1982), and holding that Congress intended for jurisdiction to exist when domestic effects alone were shown).

Sherman Act causes of action through the FTAIA.[98]

As such, FTAIA claims require a showing of accepted precedent to survive.[99] Such precedent could emanate in supporting congressional language or case law.[100] To recognize a cause of action without such precedent would expand the scope of the FTAIA beyond the drafters' intent.[101] Plaintiffs were unable to present precedent that the Court considered authoritative.[102] Consequently, the Court held that allowing U.S. jurisdiction would unjustifiably expand the Sherman Act's purview.[103]

Second, the Court found that international law requires U.S. courts to interpret ambiguous statutes, such as the FTAIA, in a manner that respects sovereignty.[104] Such respect does not preclude courts from applying U.S. law to foreign conduct.[105] It does require, however, that the plaintiffs demonstrate a strong U.S. interest in adjudicating their claims.[106] To satisfy this showing, the plaintiffs must show that the injury-causing conduct was the target of U.S. law.[107] If the conduct is wholly foreign and causes independent foreign harm, the plaintiffs necessarily fail in this showing.[108]

To review, the U.S. Supreme Court held that the FTAIA applied to the alleged conduct in *Hoffman.*[109] The Court dismissed Plaintiffs' claim

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[98] *Hoffman*, 542 U.S. at 172-73.

[99] *Id.* at 169-73. Plaintiffs cited *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), *United States v. National Lead Co.*, 332 U.S. 319 (1947), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). The Court distinguished these cases because the plaintiff was the United States government. *Hoffman*, 542 U.S. at 170-72. Plaintiffs also cited *Industria Siciliana Asfalti, Bitumi v. Exxon Research, and Engineering Co.*, No. 75 Civ. 5828, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), which the Court distinguished as dealing with dependent rather than independent injuries. *Hoffman*, 542 U.S. at 170-72. Finally, Plaintiffs cited *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680 (S.D.N.Y 1979), and *Hunt v. Mobile Oil Corp.*, 550 F.2d 68 (5th Cir. 1977), but the Court found that these cases did not deal with the issue of independent injuries. *Hoffman*, 542 U.S. at 170-75.

[100] *Hoffman*, 542 U.S. at 169-72.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*; *see also* EVENETT ET AL., *supra* note 48, at 1 (2000) ("The 'globalization' of antitrust therefore raises questions about the erosion of national sovereignty, about the potential for intergovernmental trade wars, and about the effects of antitrust actions that 'spill over' borders.").

[105] *Hoffman*, 542 U.S. at 169-72.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 155-56 (stating that FTAIA's general exclusionary rule applies, but that Domestic Exception does not).

because the Domestic Exception to the FTAIA was inapplicable.[110] The Court held that it could not apply the Domestic Exception because Plaintiffs failed to demonstrate adequate authority supporting exercise of U.S. jurisdiction.[111] Further, the Court held that exercising jurisdiction over Plaintiffs would interfere with the sovereignty interest of the foreign nations involved.[112] *Hoffman* adopted the narrow interpretation of "a claim."[113] According to the Court, independent foreign injury is inadequate to establish a Sherman Act claim.[114]

## III. ANALYSIS

Although part of the Court's rationale was dubious, its holding was ultimately correct. Case history and the Court's desire to preserve the comity interests of other nations substantiate the holding.[115] Additionally, the holding supports judicial economy by precluding foreign plaintiffs from litigating in American courts when their claims do not arise from domestic injuries.[116] Thus, the Court correctly balanced

[110] *Id.* at 174-75.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 163-67 (asserting that Plaintiff's case should be dismissed to preserve comity interest of other nations and to comport with case history surrounding interpretation of FTAIA); *see also* Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity*, 50 CATH. U. L. REV. 591, 634 (2001) (asserting that comity is important interest and that respect for comity will facilitate more efficient, more cordial, and more harmonious decisions); Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT' L. & ECON. 1, 12 (1996) (arguing that disrespect for comity in antitrust cases results in loss of respect from domestic, foreign, and international communities).

[116] Judicial economy is the promotion of efficiency in the court system. *See* Angela J. Moffitt, *Special Project on Landlord-Tenant Law in the District of Columbia Court of Appeals: A Tenant's Right to Counterclaim for a Period Predating Landlord's Claim*, 29 HOW. L.J. 41, 44 n.25 (1986) (expressing idea that judicial economy is court's propensity to maximize results and minimize resource depletion). Judicial economy is an accepted factor that judges may weigh in reaching their decisions. There is some question, however, as to the amount of influence preservation of judicial resources may have over the holding. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 315-18 (1996) (expressing opinion that judges should consider judicial economy in cases involving jurisdiction and procedure). *But cf.* United States v. Allen, 984 F.2d 940, 942 (8th Cir. 1993) ("[C]onsiderations of judicial economy cannot support a finding of manifest necessity. . . ."); United States v. Crotwell, 896 F.2d 437, 440 (10th Cir. 1990) ("The interest in conserving judicial resources does not outweigh Crotwell's 'valued right' to have his trial completed by the first jury that was empanelled and sworn." (citation omitted)).

the competing interests involved to reach the right result.[117]

Some who disagree with *Hoffman* argue that the Court should not treat foreign plaintiffs differently than domestic plaintiffs.[118] Further, some argue that the United States should adjudicate independent injury-based claims as a means of deterring anticompetitive activities.[119] While each of these arguments does have some merit, the following section argues neither justifies an alternative finding.

Although correct, the *Hoffman* holding will have limited impact.[120] The holding only applies to a discrete factual setting and a narrow class of plaintiffs.[121] The *Hoffman* holding is significant, however, because it raises the question of whether dependent injuries will be enough to establish "a claim" under the Sherman Act. Once future litigation answers this question, foreign litigants will know what showing is necessary to gain access to U.S. courts.[122]

### *A. The Drafters' Intent Is Unclear, but Case History Suggests* Hoffman *Was Correct*

The *Hoffman* Court declared that Plaintiffs' claim was inconsistent with the intent of FTAIA drafters.[123] To support this assertion, the Court cited

[117] *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *overruled in part by* 82 F.3d 839 (9th Cir. 1996) (noting that claims based on international conduct are unique and require special balancing test that weighs adjudication interests of different countries involved). The *Hoffman* Court conducted such a balancing test and concluded that America's adjudication interest was not strong enough to warrant application of American jurisdiction. *Hoffman*, 542 U.S. at 174-75.

[118] Brief of Amici Curiae Law Professors Ralf Michaels et al. in Support of Respondents at 11, Hoffman La Roche v. Empagran, 542 U.S. 155 (2004) (No. 03-724) (arguing that nature of conduct rather than location of plaintiff should determine whether effects-based jurisdiction applies); Brief of Amici Curiae Legal Scholars in Support of Respondents at 1, *Hoffman*, 542 U.S. 155 (No. 03-724) (asserting that FTAIA does not designate who can sue under Sherman Act); PAVIC, *supra* note 44, at 94 (noting unfairness in subjecting foreigners to punitive powers of Sherman Act, but not allowing them protections of Sherman Act).

[119] *See infra* note 172 and accompanying text.

[120] *Hoffman*, 542 U.S. at 163-65 (confirming that holding only applies if specific factual elements are demonstrated, namely, that plaintiffs are foreign and that their injury is independent); *The Supreme Court, 2003 Term Leading Cases*, 118 HARV. L. REV. 476, 484 (2004) (noting that Supreme Court holding will be limited to two primary effects).

[121] *Hoffman*, 542 U.S. at 175. Justice Breyer said that the Court premised its decision on Plaintiffs' injury being independent of the American injury. *Id.*

[122] *See* Stoll & Goldfein, *supra* note 38, at 3 (stating that further clarification of FTAIA is necessary). Either dependent injury will serve as an adequate basis for jurisdiction or foreign plaintiffs will be precluded from invoking the Domestic Exception. *Id.* Regardless, application of the Domestic Exception will be more predictable. *Id.*

[123] *Hoffman*, 542 U.S. at 174-75 ("The considerations . . . of comity and history make clear that [Plaintiffs] reading is not consistent with the FTAIA's basic intent.").

*House Report No. 97-686* ("*House Report*"), which discusses the formation of the FTAIA.[124] The *House Report* preceded passage of the FTAIA and includes the commentary of legal scholars as well as some of the FTAIA's drafters.[125]

While this document is probably the best record of the drafters' intent, the Court did not bother to cite any of its relevant text.[126] Rather, the Court made a general and somewhat circular statement that considerations of comity and history rendered Plaintiffs' claim contrary to the FTAIA's basic intent.[127] Had the Court cited the *House Report*'s text, it would have had to deal with conflicting statements on the definition of "a claim."[128]

The Court would have found some support for its definition of "a claim" in the text of the *House Report*.[129] The *House Report* states that the jurisdictional nexus must also be the basis for the injury alleged under the Sherman Act.[130] This implies that a foreign plaintiff's claim must arise from its connection to an American injury.[131] It follows then that a foreign injury that is independent of a domestic injury will not establish "a claim."

Conversely, the *House Report* also includes a statement that seems to open U.S. courts to foreign plaintiffs.[132] It states that the injured party does not have to experience the impact of the illegal conduct within the

[124] *See generally* H.R. REP. NO. 97-686 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487 (discussing historical background of antitrust legislation and FTAIA, as well as objectives that FTAIA drafters wanted to achieve through enactment of FTAIA).

[125] *Id.*

[126] *Hoffman*, 542 U.S. at 163-65. Courts adjudicating FTAIA issues consistently cite the *House Report*. *See, e.g.*, Empagran v. Hoffman La Roche, 315 F.3d 338, 352 (D.C. Cir. 2003), *vacated*, 542 U.S. 155; Kruman v. Christie's Int'l, 284 F.3d 384, 400-02 (2d Cir. 2002).

[127] *Hoffman*, 542 U.S. at 174-75.

[128] Mehra, *supra* note 94, at 306 ("[W]hether Congress actually intended the recovery-based or deterrence based reading of the 'claim arising' prong is unclear from the FTAIA's text and legislative history.").

[129] H.R. REP. NO. 97-686, at 12.

[130] *Id.*

[131] *See* Den Norske Stats Oljeselskap v. HeereMac, 241 F.3d 420, 427 (5th Cir. 2001) (using *House Report* language to support conclusion that foreign plaintiff's injury must be based on domestic effects); Copper Antitrust Litig. v. Sumitomo Corp., 117 F. Supp. 2d 875, 887 (W.D. Wis. 2000) ("The logical interpretation of the language of the [FTAIA] is that Congress extends domestic jurisdiction to extraterritorial conduct only when the plaintiffs have been injured by the effects on the domestic market."); Brief for the United States as Amicus Curiae Supporting Petitioners at 18-19, *Hoffman*, 542 U.S. 155 (No. 03-724) (citing same language from *House Report* concluding that "passage unambiguously contemplates that the plaintiff's claim must be based on injury resulting from the domestic effect of the defendant's conduct in violation of the Sherman Act").

[132] H.R. REP. NO. 97-686, at 12.

United States.[133] This suggests that the drafters intended U.S. courts to hear foreign claims based on foreign injury.[134] The *House Report* is silent, however, on whether the foreign and domestic injuries must be related.[135] Consequently, the *House Report* does not clearly manifest the drafters' intentions for how to define "a claim."

The Court provided a disservice by not citing the *House Report*'s text because other courts have used the same document to support a contrary conclusion.[136] As such, the Court needed to explain why its reading of the *House Report* was different and more correct than the readings by these other courts. The Court provided no explanation for how the *House Report* supported the Court's definition of "a claim."[137] Rather, the Court cited the document generally after making its own conclusions.[138] Thus, the Court should not have relied on the *House Report* for support of its interpretation of "a claim."

Alternatively, the Court argued that FTAIA drafters did not intend to expand the scope of the Sherman Act.[139] The *House Report* states: "[P]assage of the [FTAIA] will not be a panacea for the many problems that may be affecting American export trade."[140] It further asserts that the purpose of the FTAIA is to clarify application of the Sherman Act to foreign conduct.[141] Together, these statements suggest that Congress did not intend for the FTAIA to alter the existing scope of the Sherman Act. Therefore, the *House Report* legitimated the Court's conclusion that the FTAIA drafters did not intend to establish new Sherman Act causes of action.[142]

Since Congress intended the FTAIA to clarify rather than expand the Sherman Act, the Court was correct to require pre-1982 precedent supporting independent injury jurisdiction.[143] Neither the Court nor

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[133] *Id.*

[134] *See* Kruman v. Christie's Int'l, 284 F.3d 384, 400 (2d Cir. 2002) (citing *House Report*, and arguing that document supports independent injury jurisdiction).

[135] *Id.* (noting that *House Report* does not speak to issue of whether particular plaintiff bringing suit must have suffered injury caused by domestic anticompetitive effects).

[136] *Id.*

[137] Hoffman La Roche v. Empagran, 542 U.S. 155, 172-75 (2004).

[138] *Id.*

[139] *Id.* at 174-75.

[140] H.R. REP. NO. 97-686, at 2 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2487.

[141] *Id.* at 1.

[142] *See* Univ. Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 770 (1981) (arguing that creation of new causes of action expands law, which is legislator's job); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979) (same); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-77 (1979) (same).

[143] *See* H.R. REP. NO. 97-686, at 1.

Plaintiffs were able to find a pre-FTAIA case supporting jurisdiction predicated upon independent injuries.[144] As such, the Court would have expanded the scope of the Sherman Act had it recognized independent injury jurisdiction.[145] The Court would have applied the Sherman Act to conduct that U.S. courts did not recognize before the FTAIA.[146] Consequently, case history, or the lack thereof, supports the holding in *Hoffman*.[147]

### *B. It Is Important to Protect Sovereignty and Comity Interests*

The general definition of "sovereignty" is a nation's right to govern its territory, free of unwanted external interference.[148] "Comity" is a related concept that refers to one nation respecting the laws created by other nations.[149] As globalization of the world increases, sovereignty and comity interests are changing to reflect international relationships.[150]

While nations have become increasingly interdependent, they have not lost their right to exercise individual autonomy and authority.[151] As noted by the *Hoffman* Court, recognizing sovereignty interests of other nations helps the conflicting laws of those nations work in harmony.[152] Concern for comity does not preclude the United States from applying its antitrust laws extraterritorially.[153] It merely requires that America

[144] *Hoffman*, 542 U.S. at 169 (noting lack of evidence that case law supporting claim that independent injury jurisdiction existed before FTAIA).

[145] *Id.*

[146] *Id.*

[147] *Id.* at 172-73.

[148] Patrice H. Kunesh, *Tribal Sovereignty in the 21st Century: Governing Economic Activities in Indian Country*, *in* 2 ASS'N OF TRIAL LAWYERS OF AM., ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1861, 1861 (2001) (defining sovereignty as power to make, and be governed by, one's own laws); Diane P. Wood, *American Law Institute Annual Proceedings 80th Annual Meeting*, A.L.I. PROC. 3 (2003) (stating that sovereignty is about power, specifically, power to govern).

[149] *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (stating that comity is neither matter of absolute obligation nor matter of mere courtesy); BLACK'S LAW DICTIONARY 284 (8th ed. 2004) ("[Comity is] [a] practice among political entities . . . involving . . . mutual recognition of legislative, executive, and judicial acts.").

[150] *See* Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 284 (2004) (noting certain transgressions have global consequences). Modern notions of sovereignty acknowledge the interdependence of nations and focus on international rights rather than solely on domestic rights. *Id.* at 284.

[151] E.C. Stowell, *Courtesy to Our Neighbors*, 36 AM. J. INT'L L. 99, 101 (1942) ("[A] generally recognized principle of international law [is] that the . . . sovereign of a foreign state should not be insulted or treated with disrespect.").

[152] *Hoffman*, 542 U.S. 163-65.

[153] *Id.* at 165-66 (noting that American courts have long held that application of

have a strong domestic interest underlying the adjudication of a claim based on foreign conduct.[154]

Plaintiffs in *Hoffman* argued that the United States was justified in adjudicating the foreign claim because price-fixing laws are roughly the same everywhere in the world.[155] Consequently, the United States would not be discrediting a foreign country's laws by applying U.S. law to a foreign-based claim.[156] The Court pointed out, however, that uniformity of law is not a reality.[157] Unless and until a world authority establishes universal anticompetitive laws, extraterritorial application of U.S. law will necessarily raise sovereignty and comity concerns.[158]

To conclude, comity is a nation's right to execute its laws without interference from other countries.[159] Because each nation regulates anticompetitive conduct differently and because the global marketplace is increasingly interdependent, the risk of a conflict in antitrust law is high.[160] To protect the cooperative environment that underlies the global marketplace, market participants must respect the laws developed by other nations.[161] Thus, *Hoffman* correctly held that U.S. courts must consider the comity interests of other nations before granting jurisdiction over antitrust claims based on foreign conduct.

domestic antitrust laws to foreign anticompetitive conduct is reasonable).

[154] *Id.* (stating that justification for extraterritorial application of U.S. antitrust law is insubstantial when both conduct and injury are foreign).

[155] *Id.* at 167-68.

[156] *Id.*

[157] *Id.*; *see also* Emeka Maduewesi, *Antitrust: Who Will Rescue Developing Countries?*, http://www.nigerianlawsite.citymaker.com/page/page/1109112.htm (last visited Feb. 5, 2006) (noting that many countries have developed antitrust laws and that these laws promote different policies).

[158] Several world institutions, including the World Trade Organization, are currently working on proposing such international antitrust laws. *See* Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 207-08 (2003) (noting World Trade Organization as possible institution to create and enforce global antitrust laws); Slaughter, *supra* note 150, at 295 (noting that U.S. antitrust authorities have pushed "transgovernmental" network approach to global antitrust regulation).

[159] S*upra* note 146 and accompanying text.

[160] S*upra* notes 147-48, 154 and accompanying text.

[161] *See Hoffman*, 542 U.S. at 163-64 (noting harmonization that occurs when nations demonstrate reciprocal respect for one another's laws).

### *C. The "Floodgate" Concern Justifies Limited Jurisdiction*

In addition to protecting comity interests, American courts have a legitimate interest in preserving judicial resources.[162] The courts would almost certainly experience a great influx of foreign-based claims if they followed the expansive interpretation of the FTAIA.[163] The Sherman Act encourages foreign plaintiffs to consume American judicial resources because Sherman Act violations warrant treble damages.[164] Thus, adjudicating in America is potentially more lucrative than adjudicating in other countries.

The floodgate concern and the desire to preserve the comity interests of other nations are inseparable.[165] By allowing independent injury jurisdiction, U.S. courts would not only assert U.S. law extraterritorially, but also encourage foreign plaintiffs to forum shop.[166] Foreign plaintiffs would be drawn to U.S. forums simply because they offer a higher pay-off.[167] The United States has a longstanding history of trying to prevent

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[162] *See* POSNER, *supra* note 116, at 11.

[163] *See* Smith Kline & French Labs, Ltd. v. Bloch, [1983] 2 All E.R. 72, 74 (1982) (Eng.) ("As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."); Brief of Petitioners at 11, *Hoffman*, 542 U.S. 155 (No. 03-724) ("There is every reason to expect that foreign claimants will attempt to assert claims under U.S. law in federal court to obtain treble damages, liberal discovery rules, jury trials and class action procedures not available in many of their own jurisdictions."). *But cf.* Brief Amici Curiae of Professors Darren Bush et al. in Support of Respondents, *Hoffman*, 542 U.S. 155 (No. 03-724) (asserting independent injury claims will not flood U.S. courts with foreign litigants).

[164] *See* Clayton Act, 15 U.S.C. §§ 12-27 (2000). Congress passed the Clayton Act in an attempt to impose heavier fines on antitrust violations. *Id.* The Clayton Act provides private parties with civil causes of action to recover treble damages from violators. *Id.*

[165] *See* Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism*, 60 NOTRE DAME L. REV. 833, 841 (1985) (noting that preclusion principles are justifiable in terms of judicial economy as well as comity); Kevin J. Christensen, *Of Comity: Aerospatiale As Lex Maritima,* 2 LOY. MAR. L. J. 1, 23-24 (2003) (noting nexus between preservation of comity and preservation of judicial resources); Lauren D. Rosenthal, Note, *Rule 10B-5 and Transnational Bankruptcies: Whose Law Should Apply?*, 61 FORDHAM L. REV. S321, S335 (1993) (noting that comity and judicial economy interests often conflict when courts rule on whether to apply American jurisdiction).

[166] *See* Brief of the Chamber of Commerce of the United States and the Organization for International Investment as Amici Curiae in Support of Petitioner at 4, *Hoffman*, 542 U.S. 155 (No. 03-724) [hereinafter Brief of the Chamber of Commerce of the United States] (warning independent injury jurisdiction will result in forum shopping because litigating in America is lucrative compared to litigating in other countries).

[167] *See id.*; Fritz Blumer, *Jurisdiction and Recognition in Transatlantic Patent Litigation*, 9 TEX. INTELL. PROP. L.J. 329, 398 (2001) (noting plaintiff will shop for forum offering highest damage award); Peter Waxman, *Enforcing American Private Antitrust Decisions in Japan: Is Comity Real?*, 44 DEPAUL L. REV. 1119, 1126-27 (1995) (noting American forums as attractive to Japanese litigants).

forum shopping when local forums offer the opportunity to litigate.[168] Thus, allowing independent injury jurisdiction would conflict with America's goals of preserving comity and preventing forum shopping.

Further, the U.S. judicial system is reputed to be fair and timely in comparison to the courts in other countries.[169] As such, many foreign plaintiffs would be willing to incur the costs of litigating in the United States.[170] Foreign plaintiffs would incur these costs merely to enjoy the procedural conveniences of U.S. courts.[171]

A particular U.S. procedure that foreign plaintiffs could take advantage of is America's lax summary judgment standard.[172] This standard would enable foreign plaintiffs' claims to proceed as long as they present some evidence in support of their claim.[173] Consequently, the *Hoffman* Court's fear that wholly foreign and tenuous claims would reach U.S. courts could actualize.[174] Since jurisdiction serves as a

[168] *See* Blondin v. Dubois, 189 F.3d 240, 248-49 (2d Cir. 1999) (noting Hague Convention discourages international forum shopping in matters pertaining to child custody); Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996) (holding that prevention of forum shopping is legitimate interest of American courts). *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (establishing prevention of forum shopping as legitimate interest for judges to consider).

[169] *See* Ethan S. Burger, *Addressing the Problem of Corruption in the Judiciary in an Era of Globalization*, http://sartraccc.sgap.ru/Pub/Court%20Corruption%20June%205%202003.htm (last visited Feb. 5, 2006) (noting that American businessmen view corrupt judicial systems of other countries as barrier to trade); *see also* Ann-Marie Slaughter & David Bosco, *Uncivil Action*, FOREIGN AFF., Sept./Oct. 2000, *available at* http://www.foreignaffairs.org/20000901faessay79/anne-marie-slaughter-david-bosco/plaintiff-s-diplomacy.html (noting U.S. courts have become venue of choice for foreign plaintiffs because U.S. courts offer procedural mechanisms unavailable elsewhere).

[170] ELLIOTT J. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 132 (1984) (noting that Japanese courts experience fewer private antitrust cases because they do not offer treble damages like American courts do); Stoll & Goldfein, *supra* note 38, at 3 (noting that United States is only country in world that awards treble damages for antitrust violations); Waxman, *supra* note 167, at 1126-27 (discussing reasons why Japanese litigant would try to bring suit in America rather than Japan).

[171] Waxman, *supra* note 167, at 1126-27.

[172] *See generally* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (stating claim will survive summary judgment unless claim is so one-sided that one party must prevail as matter of law).

[173] *Id.*; *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2532 (1995).

[174] Hoffman La Roche v. Empagran, 542 U.S. 155, 166 (2004) ("[Allowing independent injury jurisdiction] would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for private antitrust enforcement . . . ."); Thomas Koster & H. Harrison Wheeler, *Appellate Courts Split on the Interpretation of the Foreign Trade Antitrust Improvements Act: Should the Floodgates Be Opened?*, 14 IND. INT'L & COMP. L. REV. 717, 717 (2004) ("Put another way, as long as at least one party in the United States suffers an injury as a result of the

screening mechanism for unsubstantiated claims, the *Hoffman* Court protected U.S. judicial resources by denying Plaintiffs' claim.

In summation, legislative history and intent alone cannot support the Court's holding. However, the Court's conclusion is convincing when congressional objectives are considered in tandem with preservation of comity and judicial resources.[175] Thus, the Court's holding balances the conflicting interests involved and reaches the optimal result. Although dissenters argue that the Court should have prioritized the competing interests involved in *Hoffman* differently, none of their arguments justify a different result.[176]

### *D. Equality Is Not a Primary Concern with Respect to U.S. Antitrust Law*

Some who disagree with the *Hoffman* holding argue that it treats foreign plaintiffs differently than it treats domestic plaintiffs.[177] In *Hoffman*, the American plaintiffs proceeded with the same claim that the district court dismissed for the foreign plaintiffs.[178] This unequal application of the law is superficially unfair to foreign consumers seeking Sherman Act protections.

Foreign consumers may have no means of remedy if their country's laws do not offer consumer protections.[179] This dynamic also makes it possible for U.S. businesses to take advantage of foreign markets.[180] Perceptive domestic firms can engage in anticompetitive conduct with impunity if they can isolate the effects of their actions to foreign lands.[181]

With respect to foreign trade, equal treatment is not the primary concern of U.S. courts.[182] Congress created antitrust laws for the protection of U.S. businesses and consumers, not for the protection of

global price-fixing, foreign purchasers can bring their claims before the U.S. Federal courts.").

[175] H.R. REP. NO. 97-686, at 13 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2498 ("[The FTAIA] would have no effect on the Court's ability to employ notions of comity.").

[176] Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 355-59 (suggesting that system based on cooperation is optimal because it decreases transaction costs and local biases associated with international business transactions).

[177] Maduewesi, *supra* note 157 (arguing that *Hoffman* holding enables United States to protect domestic consumers, but leaves millions of foreign consumers without representation or remedy).

[178] *Hoffman*, 542 U.S. at 160-61.

[179] Maduewesi, *supra* note 157.

[180] *Id.*

[181] *Id.*

[182] *Hoffman*, 542 U.S. at 174-75 (noting that who files suit can influence whether statute applies to prohibited conduct).

foreigners.[183] Foreign local governments can implement their own anticompetitive rules.[184] If U.S. businesses wish to do business in these nations, they must comply with the foreign laws.[185] Thus, consumers seeking protection should petition their own governments, not U.S. courts.[186]

It is true that U.S. businesses can take advantage of nations with weak or nonexistent anticompetitive rules, but that is a problem for those nations to solve.[187] In fact, U.S. trade restrictions may ultimately encourage those nations to implement or improve their antitrust laws.[188] Finally, the United States may create advantages for itself domestically through the development of its laws.[189] Thus, it is perfectly acceptable for U.S. antitrust law to advantage Americans.

### *E. Prevention of Anticompetitive Conduct Is Not Enough to Support U.S. Jurisdiction*

Others who disagree with the *Hoffman* holding argue that the purpose of the Sherman Act is to deter anticompetitive practices that harm the United States.[190] They argue that the origin of the injury should be inconsequential as long as a plaintiff can demonstrate a Sherman Act

[183] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) ("[A]merican antitrust laws do not regulate the competitive conditions of other nations' economies."); Kruman v. Christie's Int'l, 284 F.3d 384, 393 (2d Cir. 2002) ("[A]ntitrust laws strive to foster competition in our domestic markets."); H.R. REP. NO. 97-686, at 7 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2491 (noting Congress's fundamental commitment to competitive domestic marketplace).

[184] Maduewesi, *supra* note 157 (noting that over 100 countries have antitrust laws as part of their domestic legislation). *But cf.* Lawrence Preuss, *International Responsibility for Hostile Propaganda Against Foreign States*, 28 AM. J. INT'L L. 649, 650 (1934) (concluding that weaker states enact statutes favoring foreign dignities because they fear retribution from dominant nations).

[185] H.R. REP. NO. 97-686, at 10 (asserting American businesses are obligated to follow foreign law when they are operating abroad).

[186] *Id.*

[187] *Id.*

[188] *Id.* ("Indeed, the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets.").

[189] *Id.* For example, tariffs may protect local industries from foreign industries. *Id.*

[190] *See* Kruman v. Christie's Int'l, 284 F.3d 384, 402 (2d Cir. 2002); Michael D. Hausfeld, *Five Principles of Common Sense Why Foreign Plaintiffs Should Be Allowed to Sue Under U.S. Antitrust Laws*, 16 LOY. CONSUMER L. REV. 361, 363 (2004) (asserting that since private enforcement is mechanism for public regulation, foreign-based Sherman Act claims will deter anticompetitive activity in America's public market); *The Supreme Court, 2003 Term Leading Cases*, *supra* note 61, at 484 (noting Supreme Court's decision in *Hoffman* undermines deterrence rationale present in most other effects-based jurisdiction cases).

violation and consequent domestic effect.[191] A plain meaning reading of the FTAIA supports this argument.[192]

However, this argument also sublimates sovereignty and comity interests of other nations without justification.[193] While the United States does have a strong interest in regulating trade, this interest is not stronger than other nations' desires to protect their individuality.[194] Thus, the United States needs to show a sufficient nexus between the wrongful conduct and the domestic effect before enforcing U.S. law against another nation's citizen.[195]

### *F. Impact of the Decision Is Limited to a Narrow Factual Setting*

In isolation, the *Hoffman* holding has limited impact. It applies only to foreign plaintiffs who bring Sherman Act claims.[196] Further, the holding applies only to claims based on a foreign harm that is independent of a domestic harm.[197] Consequently, the *Hoffman* holding becomes relevant only after many factual preconditions are satisfied.[198]

The most significant consequence of the *Hoffman* holding is that it puts foreign consumers on notice that U.S. courts will not adjudicate independent injury claims.[199] The *Hoffman* Court also resolved a

[191] *Kruman*, 284 F.3d at 401; *see also* Brief of Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents at 2, Hoffman La Roche v. Empagran, 542 U.S. 155 (2004) (No. 03-724) (arguing independent injury jurisdiction would "further the economic and policy goals that lie at the heart of U.S. antitrust law").

[192] *Hoffman*, 542 U.S.174-75; *Kruman*, 284 F.3d at 400.

[193] *See* Karl M. Meessen, *Does International Law Matter?*, 98 AM. SOC'Y INT'L L. PROC. 321, 322 (2004) (asserting that if *Hoffman* Court had determined that Defendants had cause of action, international law would have been violated).

[194] Brief of the Chamber of Commerce of the United States, *supra* note 166, at 9-12, (noting international discontent over America's inappropriate interference with other nation's antitrust laws); Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 6-8, *Hoffman*, 542 U.S. 155 (No. 03-724) [hereinafter Brief of the Governments of Germany and Belgium] (arguing independent injury jurisdiction is illegal under both American and international law).

[195] Brief of the Governments of Germany and Belgium, *supra* note 194, at 5 (arguing that even if America has right to assert jurisdiction under effects test, it must first consider sovereignty rights of other nations affected); *supra* note 84 and accompanying text.

[196] *Supra* note 14. The holding does not apply to domestic plaintiffs because domestic plaintiffs would have "a claim" based on the domestic effects of the anticompetitive conduct. *Hoffman*, 542 U.S. at 163-68.

[197] *Hoffman*, 542 U.S. at 174-75 (admitting that Court predicated its holding on conditions that Plaintiffs are foreign and that they experienced independent injury).

[198] *Supra* notes 109-10, 183 and accompanying text.

[199] *Hoffman*, 542 U.S. at 159 (asserting that domestic plaintiffs could bring Sherman Act claim based on domestic injury, but foreign plaintiffs could not); Stoll & Goldfein, *supra* note 38, at 3 (stating that after *Hoffman*, only way for foreign plaintiff's antitrust claim to

disagreement that existed between the circuit courts.[200] Thus, the Court established as law that independent foreign injury is insufficient to give rise to a Sherman Act claim.[201]

While the *Hoffman* decision announced minor advancements in the evolution of U.S. antitrust law, greater advancements are on the horizon.[202] *Hoffman* raised, but did not answer, the question of whether dependent injury will support U.S. jurisdiction.[203] Once a court resolves the unanswered question, foreign consumers will know whether Sherman Act protections are available to them as plaintiffs.[204]

### *G. Allowing Dependent Injury Jurisdiction Would Further the Policy Objectives Addressed in* Hoffman

Although the Court was correct to deny independent injury jurisdiction, it should grant U.S. jurisdiction based on dependent injuries. First, the *House Report* clearly manifests Congress's intent for Sherman Act protections to apply to foreigners in some situations.[205] If U.S. courts do not establish dependent injury jurisdiction, the Domestic Exception will be completely unavailable to foreign plaintiffs.[206]

Further, there is pre-FTAIA case precedent supporting dependent injury jurisdiction.[207] Thus, recognition of dependent injury jurisdiction would not expand the scope of the Sherman Act by creating a post-1982 cause of action.[208] Establishment of dependent injury jurisdiction,

survive is to show that foreign plaintiff's injury was not independent of harmful effect in America).

[200] *Hoffman*, 542 U.S. at 174-75.

[201] *Id.*

[202] *Id.* (stating that Supreme Court will remand issue of dependent injury jurisdiction to lower court to determine if Plaintiffs' claim may proceed on dependent injury theory).

[203] *Id.*

[204] Stoll & Goldfein, *supra* note 38, at 3. Resolving whether dependent injury-based claims substantiate American jurisdiction will necessarily add clarity to the scope of the FTAIA. *Id.* If dependent injuries are an inadequate basis for jurisdiction, then the Domestic Exception does not apply to foreigners with claims based on foreign conduct. *Id.* If dependent injuries do substantiate jurisdiction, then foreign consumers will know what standard they must meet to invoke the Domestic Exception. *Id.*

[205] H.R. REP. NO. 97-686, at 10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 ("This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States."); *supra* note 38 and accompanying text.

[206] *Supra* notes 37, 191 and accompanying text.

[207] *See, e.g.*, Dominicus Americana Bohio v. Gulf & W. Indus., Inc. 473 F. Supp. 680, 688 (S.D.N.Y. 1979) (considering fact that injuries were dependent, and holding foreign plaintiffs had jurisdiction to adjudicate their claim based on foreign conduct).

[208] *Id.*

therefore, would comply with legislative history and intent.[209]

In addition to adhering to congressional intent, dependent injury jurisdiction would preserve comity. Since a plaintiff would have to show that the foreign harm was caused by a domestic injury, dependent injury jurisdiction would be more difficult to achieve.[210] As such, the courts' restricted application of U.S. antitrust law would protect against undue infringement on other nations' comity interests.[211]

Further, the limited number of plaintiffs eligible under the dependent injury test could facilitate case-by-case court analysis.[212] As Plaintiffs in *Hoffman* contended, case-by-case evaluation enables the adjudicative body to tailor its decisions according to the specific interest involved.[213] Consequently, U.S. courts could evaluate each case individually to determine whether America's adjudication interests outweigh the particular comity and sovereignty interests of the plaintiff's nation.

Thus, U.S. courts should legitimate dependent injury jurisdiction because it would further the policy goals expressed in *Hoffman.* Dependent injury jurisdiction would adhere to congressional intent and case history.[214] Further, dependent injury jurisdiction would preserve the comity interests of other nations.[215]

## CONCLUSION

The *Hoffman* holding did little to define the scope of the Domestic Exception to the FTAIA.[216] It did open the door, however, for establishing jurisdiction over Sherman Act claims brought by foreign

[209] H.R. REP. NO. 97-686, at 1-2 (asserting Congress's intent to clarify but not to expand Sherman Act).

[210] Plaintiffs in *Hoffman* made an alternative argument that their injury was dependent on the increased prices in America. Hoffman La Roche v. Empagran, 542 U.S. 155, 174-75 (2004). Plaintiffs claimed their injury was dependent because vitamins are readily transportable and Defendants would not have been able to maintain their price-fixing schemes unless the foreign and domestic price were interdependent. *Id.*

[211] Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 9, *Hoffman*, 542 U.S. 155 (No. 03-724) (suggesting U.S. adjudication interests would increase if injury was dependent because nexus between plaintiff and domestic effect would be stronger).

[212] The *Hoffman* Court did not dispute that a case-by-case analysis is preferable. *Hoffman*, 542 U.S at 167-68. Rather, the Court held that a case-by-case balancing of interests would be administratively impossible. *Id.*

[213] *Id.* (advocating that Court should adopt case-by-case approach to determine jurisdiction).

[214] *Supra* notes 201-05 and accompanying text.

[215] *Supra* notes 206-09 and accompanying text.

[216] S*upra* note 37.

plaintiffs and based on foreign conduct.[217] While independent injury claims do not justify usurping foreign countries' sovereignty and comity interests, dependent injury claims might.[218]

Allowing dependent injury claims would offer certain advantages. It would preserve the intent of the FTAIA drafters.[219] Additionally, dependent injury jurisdiction could enable courts to balance competing interest on a case-by-case basis, protecting the comity interests of other nations involved.[220] Thus, establishing dependent injury jurisdiction is the next best step in U.S. antitrust adjudication.

[217] *Hoffman*, 542 U.S. at 174-75 (raising question of whether dependent injury is sufficient to establish subject matter jurisdiction).

[218] *Supra* notes 191-98 and accompanying text.

[219] Brief of Amici Curiae Legal Scholars in Support of Respondents, *supra* note 118, at 15, (asserting that removal of Sherman Act protections from foreign plaintiffs would be inconsistent with America's role in deterring international cartels); *supra* notes 191-95 and accompanying text.

[220] *See* Mitsubishi Motors Corp. v. Soelr Chrysler-Plymouth Inc., 473 U.S. 614, 629 (1986) (asserting that party's choice of forum should be weighed against "concerns of international comity, respect for capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes"); 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 at 9-10, *Hoffman*, 542 U.S. 155 (No. 03-724) (arguing that U.S. courts should consider degree of conflict with foreign law, national allegiance of parties, and location of principal place of business in deciding whether to assert jurisdiction).