ORAL ARGUMENT SCHEDULED FOR APRIL 20, 2005

01-7115

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPAGRAN, S.A., NUTRICION ANIMAL, S.A., WINDRIDGE PIG FARM, AND CONCERN STIROL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

– against –

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORPORATION, RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., HOECHST MARION ROUSSEL S.A., RHÔNE-POULENC S.A., TAKEDA PHARMACEUTICAL COMPANY LIMITED (F/K/A TAKEDA CHEMICAL INDUSTRIES, LTD.), TAKEDA VITAMIN & FOOD USA, INC., DAIICHI PHARMACEUTICAL CO., LTD., DAIICHI PHARMA HOLDINGS, INC. (F/K/A DAIICHI PHARMACEUTICAL CORPORATION), DAIICHI FINE CHEMICALS, INC., EISAI CO., LTD., EISAI U.S.A., INC., EISAI INC., AKZO NOBEL CHEMICALS B.V., AKZO NOBEL INC., BIOPRODUCTS INCORPORATED, CHINOOK GROUP LTD., COPE INVESTMENTS LTD., DEGUSSA AG, DEGUSSA CORPORATION, DUCOA, L.P., DCV, INC., EM INDUSTRIES, INC., MERCK KGAA, E. MERCK, LONZA INC., LONZA AG, ALUSUISSE-LONZA GROUP LTD, MITSUI & CO., LTD., NEPERA, INC., REILLY CHEMICALS, S.A., REILLY INDUSTRIES, INC., SUMITOMO CHEMICAL CO., LTD., SUMITOMO CHEMICAL AMERICA, INC., TANABE U.S.A., INC., AND UCB CHEMICALS CORPORATION,

Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES
AND ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES IN RESPONSE TO THE COURT'S ORDER OF NOVEMBER 22, 2004

Robert Pitofsky
Bruce L. Montgomery
Franklin R. Liss
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000
Attorneys for Defendants-Appellees Hoffmann-La Roche Inc. and Roche Vitamins Inc.

Arthur F. Golden
Lawrence Portnoy
William J. Fenrich
Kathryn E. Kinkade
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
Attorneys for Defendant-Appellee F. Hoffmann-La Roche Ltd

Additional counsel listed on inside cover

Kenneth S. Prince
Stephen Fishbein
Richard Schwed
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000
Attorneys for Defendant-Appellee BASF AG

Tyrone C. Fahner
Stephen M. Shapiro
Andrew S. Marovitz
Jeffrey W. Sarles
MAYER, BROWN, ROWE & MAW LLP
190 South La Salle Street
Chicago, IL 60603
(312) 782-0600
Attorneys for Defendant-Appellee BASF Corporation

John M. Majoras
Daniel H. Bromberg
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939
Attorneys for Defendants-Appellees Aventis S.A. (f/k/a Rhône-Poulenc S.A.), Aventis Animal Nutrition Inc. (f/k/a Rhône-Poulenc Animal Nutrition Inc.), Aventis CropScience USA Inc. (f/k/a Rhône-Poulenc Inc.) and Hoechst Marion Roussel SA

Michael L. Denger
Miguel A. Estrada
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Defendants-Appellees Daiichi Pharmaceutical Co., Ltd., Daiichi Pharma Holdings, Inc. (f/k/a/ Daiichi Pharmaceutical Corporation) and Daiichi Fine Chemicals, Inc.

Lawrence Byrne
Joseph P. Armao
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200
Attorneys for Defendants-Appellees Takeda Pharmaceutical Company Limited (f/k/a Takeda Chemical Industries, Ltd.) and Takeda Vitamin & Food USA, Inc.

Laurence T. Sorkin
Roy L. Regozin
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000
Attorneys for Defendants-Appellees Akzo Nobel Chemicals B.V. and Akzo Nobel Inc.

D. Stuart Meiklejohn
Stacey R. Friedman
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
Attorneys for Defendants-Appellees Eisai Co., Ltd., Eisai U.S.A., Inc. and Eisai Inc.

Paul P. Eyre
Ernest E. Vargo
BAKER & HOSTETLER LLP
1900 East 9th Street
3200 National City Center
Cleveland, OH 44114-3485
(216) 621-0200
Attorneys for Defendant-Appellee Bioproducts Incorporated

Donald I. Baker
W. Todd Miller
Christine J. Sommer
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W. Suite 300
Washington, D.C. 20037
(202) 663-7820

Alice G. Glass
Special Counsel
BAKER & MILLER PLLC
River Landing Farm
261 River Road
Lyme, NH 03768
(603) 795-4609
Attorneys for Defendants-Appellees Chinook Group Limited and Cope Investments Limited

Donald C. Klawiter
Peter E. Halle
J. Clayton Everett, Jr.
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-3000
Attorneys for Defendants-Appellees Degussa AG and Degussa Corporation

Jim J. Shoemake
Kurt S. Odenwald
Mary Ann Ohms
GUILFOIL, PETZALL & SHOEMAKE, L.L.C.
100 South Fourth Street, Suite 500
St. Louis, MO 63102-1821
(314) 241-6890
Attorneys for Defendants-Appellees DuCoa, L.P. and DCV, Inc.

Kevin R. Sullivan
Grace M. Rodriguez
Peter M. Todaro
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 737-0500

Jeffrey S. Cashdan
KING & SPALDING LLP
191 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 572-4600
Attorneys for Defendant-Appellee UCB Chemicals Corporation

Thomas M. Mueller
Michael O. Ware
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
Attorneys for Defendants-Appellees Lonza Inc., Lonza AG and Alusuisse-Lonza Group Ltd (n/k/a Alcan (Switzerland) Ltd)

James R. Weiss
PRESTON, GATES & ELLIS LLP
1735 New York Avenue, N.W., Suite 500
Washington, D.C. 20006-5209
(202) 628-1700
Attorneys for Defendants-Appellees DuCoa, L.P. and DCV, Inc.

Aileen Meyer
PILLSBURY WINTHROP LLP
1133 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 775-9800

Sutton Keany
Bryan Dunlap
PILLSBURY WINTHROP LLP
1540 Broadway
New York, NY 10036
(212) 858-1000
Attorneys for Defendant-Appellee Mitsui & Co., Ltd.

David M. Balabanian
Colin C. West
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000
Attorneys for Defendant-Appellee Mitsui & Co., Ltd.

Martin Frederic Evans
Gary W. Kubek
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
Attorneys for Defendant-Appellee Nepera, Inc.

Moses Silverman
Aidan Synnott
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Attorneys for Defendants-Appellees Sumitomo Chemical Co., Ltd. and Sumitomo Chemical America, Inc.

Karen N. Walker
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 879-5000
Attorneys for Defendants-Appellees Reilly Chemicals, S.A. and Reilly Industries, Inc.

Mark Riera
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Forty-Eighth Floor, 333 South Hope Street
Los Angeles, CA 90071-1448
(213) 620-1780
Attorneys for Defendant-Appellee Tanabe U.S.A., Inc.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES REQUIRED BY CIRCUIT RULE 28(a)

Pursuant to Circuit Rule 28(a), the undersigned counsel certify as follows on behalf of all defendants-appellees:

A. PARTIES AND AMICI

Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellants:

In response to this Court's March 7, 2003 Order, the United States and the Federal Trade Commission filed a Brief as *Amici Curiae*, on March 24, 2003 in support of defendants' petition for rehearing en banc. In addition, the United States and the Federal Trade Commission filed a Brief as *Amici Curiae*, on September 9, 2004 in support of defendants' brief in response to the Court's Order of June 21, 2004, and the United States Council for International Business filed a Brief as *Amicus Curiae*, on September 15, 2004 in support of defendants.

The domestic "P&G plaintiffs" listed by plaintiffs-appellants as having "chosen not to pursue this appeal as class representatives," Br. at iii, were in fact dropped from this class of foreign plaintiffs at the district court's direction, because they were "domestic." JA2 22. Their claims were pursued separately and have since settled. JA2 at 1191.

B. RULINGS UNDER REVIEW

A reference to the ruling at issue appears in the Brief for Appellants.

C. RELATED CASES

Except for the following, references to the case on review appear in the Brief for Appellants:

The case on review was previously considered in this Court. *Empagran, S.A., et al. v. F. Hoffmann-La Roche Ltd, et al.*, 315 F.3d 338 (D.C. Cir. 2003), *vacated by* 124 S. Ct. 2359 (June 14, 2004).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the U.S. Court of Appeals for the District of Columbia Circuit, defendants-appellees state:

F. Hoffmann-La Roche Ltd is a corporation engaged in the manufacture of pharmaceuticals, diagnostic products and bulk vitamins. F. Hoffmann-La Roche Ltd is a wholly-owned subsidiary of Roche Holdings Ltd. Novartis AG, a publicly-held company, owns approximately 32.7% of the voting shares of Roche Holdings Ltd. Novartis AG has no representation on Roche Holdings Ltd's board of directors and does not in any way control Roche Holdings Ltd or any of its subsidiaries. Apart from Roche Holdings Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in F. Hoffmann-La Roche Ltd.

Hoffmann-La Roche Inc. ("HLRI"), a corporation engaged in the manufacture and sale of pharmaceuticals, and Roche Vitamins Inc. ("RVI") are indirect subsidiaries of Roche Holdings Ltd. Apart from Roche Holdings Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in HLRI or RVI.

BASF Aktiengesellschaft ("BASF AG") is a foreign corporation engaged in the production of numerous chemical products including bulk vitamins and is headquartered in Ludwigshafen, Germany. No publicly-held company has notified BASF AG under German Securities Laws that it has a 10% or greater ownership interest in BASF AG.

BASF Corporation is a corporation engaged in the sale of certain vitamin and vitamin-containing products and is an indirect subsidiary of BASF AG. Apart from BASF AG, there is no publicly-held company with a 10% or greater ownership interest in BASF Corporation.

Aventis Animal Nutrition Inc. (f/k/a Rhône-Poulenc Animal Nutrition Inc.),and Hoechst Marion Roussel SA are corporations engaged in the life sciences business, specifically in the manufacture and/or sale of pharmaceutical and nutritional products. Aventis Animal Nutrition Inc. is a wholly-owned indirect subsidiary of sanofi-aventis, a publicly traded company, which is the successor by merger to Aventis, f/k/a Rhône-Poulenc S.A. ("RPSA"). Hoechst Marion Roussel SA is a wholly-owned indirect subsidiary of Hoechst A.G. Sanofi-aventis owns substantially all of the outstanding shares of Hoechst A.G. Apart from sanofi-aventis, there is no publicly-held company with a 10% or greater ownership interest in Aventis Animal Nutrition Inc., Aventis CropScience USA Inc. or Hoechst Marion Roussel SA. Aventis CropScience USA, Inc. was sold by Aventis, Inc. and is now known as Bayer CropScience, Inc. and is no longer owned by sanofi-aventis. Sanofi-aventis, however, has retained the rights and liabilities of Aventis CropSience as they pertain to this litigation.

Takeda Pharmaceutical Company Limited (f/k/a Takeda Chemical Industries, Ltd.) ("TPC") is a corporation engaged, among other things, in the manufacture of certain vitamins. There is no publicly-held company with a 10% or greater ownership interest in TPC.

Takeda Vitamin & Food USA, Inc. ("TVFU") was a corporation engaged in the manufacture and distribution of certain vitamins and was a wholly-owned subsidiary of Takeda America, Inc., now known as Takeda America Holdings, Inc., which in turn is a subsidiary of TPC. TVFU was merged into BASF Corporation as of approximately January, 2001.

Daiichi Pharmaceutical Co., Ltd. is a corporation engaged in the manufacture and sale of pharmaceutical products and certain vitamin products. It is the direct parent of Daiichi Pharma Holdings, Inc. (f/k/a/ Daiichi Pharmaceutical Corporation) and the indirect parent of Daiichi Fine Chemicals, Inc. There is no publicly-held company with a 10% or greater ownership interest in Daiichi Pharmaceutical Co., Ltd.

Daiichi Pharma Holdings, Inc. (f/k/a/ Daiichi Pharmaceutical Corporation) is a corporation engaged in the clinical development and sale of pharmaceuticals and is a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Pharma Holdings, Inc. has no outstanding securities in the hands of the public. Daiichi Pharmaceutical Corporation was prior to October 2002 the parent of Daiichi Fine Chemicals, Inc.

Daiichi Fine Chemicals, Inc. is a corporation engaged in sales and intermediary services for fine chemicals and related products and was prior to October 2002 a direct subsidiary of Daiichi Pharmaceutical Corporation, which in turn was a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Fine Chemicals, Inc. has no outstanding securities in the hands of the public.

Eisai Co., Ltd. is a corporation engaged in the production and sale of ethical pharmaceutical and certain other products. There is no publicly-held company with a

10% or greater ownership interest in Eisai Co., Ltd. Eisai Co., Ltd. is the indirect parent of Eisai Inc. and Eisai U.S.A., Inc.

Eisai U.S.A., Inc. is a corporation that was engaged in the production and sale of bulk vitamin and certain other products. It is an indirect subsidiary of Eisai Co., Ltd.

Eisai Inc. is a corporation engaged in the production and sale of ethical pharmaceutical and certain other products. It is an indirect subsidiary of Eisai Co., Ltd.

Akzo Nobel Chemicals B.V. is a corporation engaged in the manufacture and sale of chemicals. Akzo Nobel Inc. is a holding company which does not manufacture or sell any product. Both are indirect, wholly-owned subsidiaries of Akzo Nobel N.V. Apart from Akzo Nobel N.V., there is no publicly-held company with a 10% or greater ownership interest in Akzo Nobel Chemicals B.V. or Akzo Nobel Inc.

Bioproducts Incorporated is a Delaware corporation engaged in the business of manufacturing animal grade choline chloride and is a subsidiary of Mitsui & Co. (U.S.A.), Inc. Mitsui & Co., Ltd., a publicly-held company, owns a 20% interest in Bioproducts Incorporated.

Chinook Group Limited is a corporation organized and existing under the laws of Ontario, Canada and is a wholly-owned subsidiary of Cope Investments Limited. Chinook Group Limited is engaged in the manufacturing and selling of animal-grade choline chloride. There is no publicly-held company with a 10% or greater ownership interest in Chinook Group Limited.

Cope Investments Limited is a corporation organized and existing under the laws of Ontario, Canada. As a holding company, it does not manufacture or sell any product.

There is no publicly-held company with a 10% or greater ownership interest in Cope Investments Limited.

Degussa AG (f/k/a Degussa-Hüls AG) is a corporation engaged in the manufacture of specialty chemicals and is headquartered in Dusseldorf, Germany. Two publicly-held German corporations, E.On AG and RAG AG, indirectly own more than 90% of Degussa AG's stock. There is no other publicly-held company with a 10% or greater ownership interest in Degussa AG.

Degussa Corporation (f/k/a Degussa-Hüls Corporation) is a corporation engaged in the manufacture of specialty chemicals and is a subsidiary of Degussa AG. Apart from Degussa AG, there is no publicly-held company with a 10% or greater ownership interest in Degussa Corporation.

DuCoa, L.P. is a Delaware limited partnership and formerly was engaged in the manufacture of animal grade choline chloride. There is no publicly-held company with a 10% or greater ownership interest in DuCoa, L.P.

DCV, Inc. is a Delaware corporation and is the general partner of DuCoa, L.P. DCV Holdings, Inc. is the parent company of DCV, Inc. Metropolitan Life Insurance has over a 10% interest in DCV, Inc.'s parent company.

E. Merck is a general partnership organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business.

Merck KGaA is a corporation with general partners limited by shares organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business. There is no publicly-held company with a 10% or greater ownership interest in Merck KGaA.

EM Industries, Inc., now known as EMD Chemicals Inc., is a New York corporation engaged in the specialty chemicals business. E. Merck and Merck KGaA together directly or indirectly own 100% of the shares of EM Industries, Inc.

Alusuisse-Lonza Group Ltd, a former affiliate of Lonza Inc. and Lonza AG, is a corporation with interests in various businesses including alumina and bauxite. It is now known as Alcan (Switzerland) Ltd and is a wholly-owned subsidiary of Alcan Inc.

Lonza AG is a business corporation engaged in several lines of business including the sale and manufacturing of niacin and niacinamide and is a direct, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza AG.

Lonza Inc. is a business corporation engaged in several lines of business including the sale of niacin and niacinamide. Lonza Inc. is an indirect, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza Inc.

Mitsui & Co., Ltd. is a Japanese corporation engaged in business as a trading company. There is no publicly-held company with a 10% or greater ownership interest in Mitsui & Co., Ltd. and it has no parent company.

Nepera, Inc. is a corporation engaged in the manufacture, sale and distribution of specialty chemicals, including niacinamide. It is a wholly-owned subsidiary of Cambrex Corporation.

Reilly Industries, Inc. is an Indianapolis, Indiana based corporation engaged in the business of manufacturing bulk chemicals. Reilly Industries, Inc. has no parent corporations and there is no publicly-held company with a 10% or greater ownership interest in Reilly Industries, Inc.

Reilly Chemicals, S.A. is a Belgian corporation engaged in the business of manufacturing bulk chemicals and is a subsidiary of Reilly Industries, Inc. There is no publicly-held company with a 10% or greater ownership interest in Reilly Chemicals, S.A.

Sumitomo Chemical Company, Ltd. is a Japanese publicly-traded corporation engaged in the manufacture, sale and distribution of chemicals, including biotin. There is no publicly-held company with a 10% or greater interest in Sumitomo Chemical Company, Ltd.

Sumitomo Chemical America, Inc. is a New York corporation engaged in the sale and distribution of certain chemical products in the United States, including biotin. It is a wholly-owned subsidiary of Sumitomo Chemical Company, Ltd.

Tanabe U.S.A., Inc. is a Delaware corporation that distributes and sells certain vitamins. Tanabe U.S.A., Inc. is an indirectly owned subsidiary of Tanabe Seiyaku Co., Ltd. Apart from Tanabe Seiyaku Co., Ltd., there is no publicly-held company with a 10% or greater ownership interest in Tanabe U.S.A., Inc.

UCB Service Specialties, Inc., f/k/a UCB Chemicals Corporation, a corporation doing business in the specialty chemicals and flexible films industry, is wholly-owned by UCB, Inc., which in turn is wholly-owned by UCB S.A. UCB S.A., a corporation doing business in the pharmaceutical, specialty chemicals, and flexible films industries, is aware of one publicly traded company, Financiere d'Obourg S.A., that owns more than 10% of UCB S.A.'s stock.

Respectfully submitted,

Arthur F. Golden

Arthur F. Golden
Lawrence Portnoy
William J. Fenrich
Kathryn E. Kinkade
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10010
(212) 450-4000

On Behalf of Counsel for All Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

PAGE

Cases

* Authority on which we chiefly rely is marked with an asterisk.

† Authority included in Addendum, pursuant to Cir. R. 28.

PAGE

Statutes

Foreign Cases

Foreign Statutes

PAGE

Other

GLOSSARY

Br.	Brief for Appellants, *Empagran, S.A., et al. v. F. Hoffmann-La Roche Ltd, et al.,* On Appeal from the United States District Court for the District of Columbia (Case No. 1:00 CV01686) (TFH) and On Remand from the United States Supreme Court (No. 03-724) (Jan. 10, 2005)
FTAIA	15 U.S.C. § 6a (Foreign Trade Antitrust Improvements Act of 1982)
JA2	Joint Appendix, filed Jan. 10, 2005
Reply Br.	Appellants' Reply Brief in Response to the Court's Order of June 21, 2004, *Empagran, S.A., et al. v. F. Hoffmann-La Roche Ltd, et al.*, 315 F.3d 338 (D.C. Cir. 2003) (No. 01-7115)
Tr.	Transcript of Oral Argument of April 26, 2004 in the Supreme Court of the United States, *F. Hoffmann-La Roche Ltd, et al. v. Empagran, S.A., et al.*, 124 S. Ct. 2359 (June 14, 2004) (No. 03-724)
U.S. Br.	Brief for the United States and Federal Trade Commission as *Amici Curiae* in Support of Defendants-Appellees, *Empagran, S.A., et al. v. F. Hoffman-La Roche Ltd, et al.*, on Remand from the Supreme Court of the United States (No. 01-7115) (Sept. 9, 2004)

JURISDICTIONAL STATEMENT

Jurisdiction in the district court was premised on the existence of a federal question. 28 U.S.C. § 1331. This Court's jurisdiction to review the district court's Order and Memorandum Opinion dismissing plaintiffs' federal antitrust claims was proper under 28 U.S.C. § 1291. After this Court reversed the district court, the Supreme Court granted certiorari, vacated the judgment of this Court and remanded for further proceedings. *See F. Hoffmann-La Roche Ltd, et al. v. Empagran, S.A., et al.*, 124 S. Ct. 2359 (2004). Appellate jurisdiction is again proper before this Court.

ISSUE PRESENTED FOR REVIEW

Plaintiffs are foreign entities that purchased vitamins from foreign suppliers in transactions that occurred entirely outside United States commerce. Did the district court properly conclude that U.S. antitrust law—which prohibits restraints of trade "*among* the several States and *with* foreign nations"—does not reach plaintiffs' claims for injuries sustained in purely foreign transactions?

STATEMENT OF THE CASE

Plaintiffs have never alleged that they purchased, or tried to purchase, vitamins in U.S. commerce. (In the terminology of *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 318 (1978), they have never "entered" our markets.) Nonetheless, they brought suit on behalf of a purported world-wide class of similarly situated foreign purchasers, alleging that defendants violated Section 1 of the Sherman Act by forming a cartel to fix prices and allocate markets for fourteen different kinds of vitamins and vitamin premixes in countries throughout the world.

Defendants successfully moved to dismiss the complaint for lack of subject matter jurisdiction. Plaintiffs contended that jurisdiction was proper over their foreign claims under the FTAIA so long as (1) the defendants' conduct had an effect on U.S. commerce, and (2) that U.S. effect gave rise to a Sherman Act claim by someone who had participated in U.S. commerce (*i.e.*, had "entered" our markets). The district court rejected this argument and held that the federal antitrust laws do not provide a remedy for "persons injured abroad in transactions otherwise unconnected to the United States." *Empagran, S.A., et al. v. F. Hoffmann-La Roche Ltd, et al.*, No. 00-1686, 2001 WL 761360, at *2 (D.D.C. June 7, 2001).

This Court reversed, ruling that so long as "someone, even if not the foreign plaintiff who is before the court," can bring "a claim" based on an injury arising from an effect of the defendant's conduct on U.S. commerce, then any foreign plaintiff injured by that conduct can sue as well. *Empagran,* 315 F.3d 338, 341 (D.C. Cir. 2003). The Court determined that the FTAIA had "no 'plain meaning'" that compelled this reading but concluded that "suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies." *Id.* at 356. The Court noted plaintiffs' "alternative" theory of FTAIA jurisdiction—that the U.S. domestic effect of the anticompetitive conduct could be considered a "but for" cause of their purely foreign injuries—but declined to address this "alternative" theory, stating that "[n]either the Second Circuit nor the Fifth Circuit embrace this view of FTAIA's jurisdictional reach, nor do we." *Id.* at 341. Judge Henderson dissented, concluding that the "plain language" of subsection (2) of the FTAIA "expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect" required under subsection (1). *Id.* at 361-62.

On invitation from the Court, the Solicitor General filed a brief urging rehearing en banc and reversal of the panel decision. JA2 606-650. The Solicitor General disagreed with the Court's deterrence rationale, explaining that deterrence considerations "counsel *against* the panel's expansive interpretation of the FTAIA," because of the serious harm to the Department of Justice's corporate leniency program that would result. *Id.* at 622. The petition for rehearing en banc was denied by a four to three vote.

The Supreme Court granted certiorari, and the Solicitor General, speaking on behalf of the Justice Department, the State Department and the FTC, filed an amicus brief stating that extension of the antitrust laws to encompass plaintiffs' foreign claims would exceed the jurisdictional reach of the antitrust laws, infringe the sovereign rights of other nations and seriously impede federal antitrust enforcement efforts. JA2 1309-51. In addition, seven foreign nations filed amicus briefs contending that the panel's decision was wrong and would undermine their sovereign interests and enforcement policies. *Id.* at 1245-69, 1352-83, 1403-44. Notably, no foreign nation has ever supported plaintiffs' position.

The Supreme Court vacated this Court's opinion. Crediting the views of the U.S. and foreign governments, the Supreme Court relied on 200 years of precedent rejecting statutory interpretations that interfere unreasonably with the sovereign authority of other nations and their "ability independently to regulate [their] own commercial affairs," as well as on the history and purpose of the FTAIA, which the Court concluded was "designed to clarify, perhaps to limit, but not *to expand*, in any significant way, the Sherman Act." *Empagran*, 124 S. Ct. at 2369 (emphasis in original). Accordingly, the Supreme Court held that the "direct, substantial and reasonably foreseeable effect" on U.S. commerce required by subsection (1) of the FTAIA must "give[] rise to" the plaintiff's own claim—and not merely the claim of someone else. The Court also ruled that in light of the various governments' "important experience-backed arguments based upon amnesty-seeking incentives," it could not conclude that plaintiffs' deterrence arguments were correct. *Id.* at 2372. However, because this Court had declined to address plaintiffs' alternative argument based on "linkage" of foreign and domestic harms, the Supreme Court remanded to allow this Court, in the first instance, to determine whether that argument, if preserved, was legally sufficient to establish jurisdiction. *Id.*

In initial briefing before this Court on remand, defendants explained why plaintiffs' alternative theory was legally insufficient. The Justice Department also urged this Court to affirm the order of dismissal, because to do otherwise would "conflict directly with the rationales of the Supreme Court's decision" by "harm[ing] the government's ability to break up international cartels," "undermin[ing] law enforcement relationships between the United States and its trading partners" and "creating many of the harms to international antitrust enforcement that the Court sought to avoid." JA2 940, 942.

In response, plaintiffs recharacterized their theory, contending not that it was based on "interconnectedness" of prices in a worldwide market (as they had initially done in this Court, JA2 252), or on a "but for" theory of causation (as the Supreme Court understood it, 124 S. Ct. at 2372), but rather that the U.S. effect of defendants' conduct was the "proximate cause" of plaintiffs' purely foreign injuries. Reply Br. at 4.

On November 2, 2004, without evaluating the legal merit of plaintiffs' "alternative theory," this Court held that plaintiffs had adequately preserved the theory and directed full merits briefing on whether this theory is legally sufficient to trigger the FTAIA's domestic injury exception.

STATEMENT OF FACTS

Plaintiffs, foreign companies located in Australia, Ecuador, Panama and Ukraine, assert that they purchased vitamins in their home countries from foreign sellers and claim injuries from overcharges alleged to have been imposed in those purely foreign transactions. Plaintiffs contend that conspirators in the vitamins industry agreed to fix prices and allocate markets on a worldwide basis and that they are appropriate representatives of a class consisting of all foreign purchasers (worldwide) who bought vitamins in transactions that took place in purely foreign commerce.

Defendants manufactured and/or distributed vitamins. Following investigations into cartel activity in the market for bulk vitamins, defendants have been the subject of numerous civil and criminal proceedings, both in the United States and in other nations, under U.S. federal, U.S. state and foreign laws. Since 1999, several defendants have pleaded guilty to U.S. antitrust violations for fixing the price of vitamins sold in U.S.

commerce, and criminal fines associated with these pleas have totaled roughly $900 million. Senior executives—including foreign nationals who could not be forced to submit to U.S. jurisdiction—have also pleaded guilty to felony price-fixing charges under U.S. law and have served prison terms in the United States. Outside the United States, civil penalties exceeding $1 billion have been assessed by the European Union (on behalf of its member states and three additional states belonging to the European Economic Area), Canada, Australia and Korea. In addition, over seventy-five federal civil antitrust cases, including class actions, have been filed alleging injuries sustained in U.S. commerce as a result of the alleged vitamins cartel, and these claims have settled for a total of over $2 billion.

In arguing for jurisdiction, plaintiffs now offer as "facts" a slew of assertions that were never pled, are at best hotly contested and are in most cases completely wrong. Br. 15-20. They would have a court base a threshold jurisdictional determination on extraordinarily complex and disputed factual contentions concerning the individual markets for fourteen different vitamins available in different forms (powder, liquid, mixtures) from different sellers in almost 200 different countries over a ten-year period. Further, plaintiffs now assert repeatedly that defendants raised prices in the United States for the "express purpose" of raising prices abroad, a new assertion that is legally irrelevant.

And while plaintiffs assert that the cartel's non-U.S. profits were approximately $18 billion, their only support for this figure is an amicus brief submitted to the Supreme Court by economists retained by plaintiffs, whose methodology defendants have previously challenged, and whose conclusions the Supreme Court disregarded. While resolution of these (and other) contested factual points is unnecessary to the determination of the legal issue before this Court, their mere existence underscores the impracticality and complexity of plaintiffs' jurisdictional standard, which flouts the Supreme Court's direction that the FTAIA's jurisdictional rule be applicable "simply and expeditiously." *Empagran*, 124 S. Ct. at 2369. If plaintiffs' jurisdictional approach were endorsed, each of the factual points plaintiffs have advanced would have to be tried and resolved at the outset, *before* a finding of jurisdiction, requiring international discovery and proceedings that, if fairly and carefully pursued, would take years and impose enormous costs.

SUMMARY OF ARGUMENT

The Supreme Court ruled unanimously that applying U.S. antitrust law to plaintiffs' claims would be contrary to the purpose of the FTAIA, because it would unreasonably interfere with foreign nations' sovereign authority to regulate their own commercial affairs. The Court insisted that any interpretation of the FTAIA must conform to the rule that statutes may not be construed to interfere with the laws of foreign sovereigns and must provide a workable, clear jurisdictional rule. The Court also found plaintiffs' deterrence-based policy arguments to be unavailing, and concluded, in accord with the views of the United States and seven foreign governments, that adoption of their position would undermine cooperative international antitrust enforcement efforts and cause friction with trading partners.

In their opening brief in this Court, plaintiffs seek to avoid the plain language of the Supreme Court's opinion and the principles that support it, arguing that the decision is "narrow" and based not on the allegations in this case but on some "hypothetical variant." Br. at 7.[1] Plaintiffs ignore the reasoning that animated the Supreme Court's opinion. They discount the important principle that U.S. law should be construed to avoid interference with foreign nations' regulation of their own economies and go so far as to declare that "comity is irrelevant." Br. at 53. They entirely overlook the Supreme Court's deference to the views of the United States and foreign governments (each of which opposed plaintiffs' legal and policy arguments). Plaintiffs also mischaracterize the Supreme Court's analysis of pre-FTAIA case law, which the Supreme Court found to be devoid of any authority supporting plaintiffs' claims.

Plaintiffs' alternative theory would eviscerate the Supreme Court's unanimous decision and fails for at least five fundamental reasons. First, it ignores the language, purpose and scope of the FTAIA, which precludes claims that are not based on the U.S. effect of defendants' conduct. Second, plaintiffs' position, even if it had plausible support in the statutory text, ignores 200 years of Supreme Court precedent—including the Court's decision in this case—rejecting statutory constructions that expand the extraterritorial reach of U.S. laws to interfere unreasonably with the sovereign authority of other nations to regulate their own commercial affairs. Plaintiffs not only advocate the very form of "legal imperialism" decried by the Supreme Court in this case, but also

[1] This is an unsupportable position given the Supreme Court's longstanding refusal to issue advisory opinions. *See, e.g.*, *Hayburn's Case*, 2 Dall. 409 (1792).

propose an amorphous jurisdictional test that would impose enormous administrative burdens on the federal courts, a result that the Supreme Court expressly rejected. Defendants' position on Sherman Act jurisdiction was endorsed by the Supreme Court "because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories." *Empagran,* 124 S. Ct. at 2373 (Scalia, J., concurring in judgment). Third, plaintiffs ignore the scope of the Sherman Act itself, which by its specific terms regulates only U.S. domestic and U.S. foreign commerce and recognizes only those claims that are based on the U.S. effects of anticompetitive conduct. The Sherman Act has never been deemed to regulate purely foreign commerce, *i.e.,* commerce within or among foreign nations, which is the only commerce in which plaintiffs engaged.

Fourth, plaintiffs' views on deterrence are wrong and completely ignore the views of the governmental enforcement agencies with actual responsibility for cartel detection and enforcement. They would have this Court usurp the power of Congress to set the scope, applicability and appropriate level of fines and damages for these statutorily created rights of action.[2] Finally, and independently, plaintiffs lack standing to bring their claims under the Clayton Act. Plaintiffs' attempt to avoid proper analysis of standing by contending that the issue has been determined in their favor is simply

---

[2] Plaintiffs openly invite district courts to legislate new, case specific remedies, even suggesting that district courts can eliminate governmental concerns by awarding only single damages, in total disregard of the text of the Clayton Act and established precedent. *See, infra,* at 22.

incorrect. This Court's prior ruling on standing (part of a decision the Supreme Court vacated) was premised explicitly on its prior jurisdictional ruling and now must be freshly evaluated, with due consideration of the Supreme Court's opinion. *See, infra,* at 40.

The antitrust laws of the United States do not permit foreign buyers (such as plaintiffs) to seek damages for overcharges they paid in their home countries. It makes no difference that similar overcharges were paid by others in the United States or that the overcharges here and abroad both resulted from an alleged "global" conspiracy. As the Supreme Court confirmed, Congress passed the FTAIA in 1982 to *restrict*—and *not to expand*—the extraterritorial application of the Sherman Act. Equally important, *and with the facts of this case before it,* the Court found "no significant indication" that, prior to the passage of the FTAIA in 1982, "courts would have thought the Sherman Act applicable in these circumstances." *Empagran*, 124 S. Ct. at 2369. It is now clear that the statute affords a remedy only where the conduct in question has the requisite effects on U.S. commerce and those U.S. effects give rise to the claim of the plaintiff before the court. The FTAIA was designed to preclude cases, such as this one, where a plaintiff's claim arises from an injury sustained in transactions (*i.e.,* commerce) conducted entirely within or among countries other than the United States. JA2 1065-71, 1222-37. Such injuries are governed by the laws of the "host" country and fall outside the scope of U.S. antitrust regulation, whether the participants are foreign companies (as here) or U.S. companies operating abroad.

As the United States government has repeatedly confirmed in this case, the federal antitrust laws were designed to protect American markets and American consumers and not to remedy foreign injuries arising from purely foreign transactions. Any holding to the contrary would convert the federal courts into world courts and force them to adjudicate large numbers of complex antitrust disputes of no interest to the United States. Plaintiffs' "alternative" argument—that the statute permits claims by entities that never sought to enter our markets because their injuries (overcharges sustained in purely foreign transactions) were "caused" by a conspiracy's imposition of similar overcharges on U.S. consumers in separate transactions—would, as a practical matter, nullify the Supreme Court's decision.

As of the time Congress enacted the FTAIA, no case had ever authorized private antitrust treble damage claims arising from foreign transactions occurring wholly outside U.S. commerce. And virtually all academic commentary urged that the focus of U.S. antitrust law be restricted to claims of effects of anticompetitive conduct on U.S. commerce. JA2 1070-71. Nothing in the legislative history of the Sherman Act, Clayton Act or the FTAIA itself suggests that Congress intended to depart from that consensus. Congress has always been concerned with American commerce and American consumers, and it passed the FTAIA to limit, not enlarge, the extraterritorial reach of federal antitrust law. It is inconceivable that the Congress that enacted the FTAIA would have opened U.S. courts to plaintiffs from all over the world, or authorized an unprecedented species of foreign private antitrust treble damages claims requiring a preliminary showing that the plaintiff's injuries were derivative of the effects of the defendant's conduct on commerce in a different country (*i.e.*, the United States), without clearly stating its intent to do so. Indeed, shortly after passage of the FTAIA, the former head of the Antitrust Division under President Carter, stated that "the debate" on this issue had been "resolved in favor of no jurisdiction." John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORD. CORP. L. INST. 350, 364 (1983). Any adjustment to the level of deterrence imposed by this statutorily created private action is clearly the province of Congress, which—if it chooses to do so—can raise (or lower, as it did in 2004) the scope of treble damage liability without U.S. courts opening their doors to claimants from the entire world.

ARGUMENT

I. PLAINTIFFS' CLAIMS FALL OUTSIDE THE EXTRATERRITORIAL SCOPE OF THE SHERMAN ACT BECAUSE INJURIES SUSTAINED IN PURELY FOREIGN COMMERCE GAVE RISE TO ALL THEIR CLAIMS.

A. The FTAIA Expressly Precludes Extraterritorial Application of the Sherman Act Unless an Anticompetitive Effect on U.S. Commerce Gave Rise To The Plaintiff's Claim.

The Supreme Court has unanimously confirmed that the FTAIA expressly precludes claims based on conduct in U.S. export or wholly foreign commerce unless two conditions are met: (1) the conduct has a "direct, substantial and reasonably foreseeable effect" on U.S. domestic or U.S. foreign commerce, and (2) "such effect" (*i.e.*, the U.S. effect) "gives rise to a claim" under the Sherman Act *by the plaintiff before the court*. 15 U.S.C. § 6(a); *Empagran*, 124 S. Ct. at 2372. Plaintiffs maintain that their claims satisfy this test under their "worldwide market theory." They interpret the FTAIA's "gives rise to" language in a way that would be satisfied by any attenuated causal relationship between the U.S. effect and their purely foreign injury. Br. 22-25. The FTAIA's language, structure and purpose demand more than the vague and indeterminate causation standard advocated by plaintiffs.

Plaintiffs' textual argument (Br. 22-24) rests entirely on a phrase—"arises out of"—that appears nowhere in the FTAIA. Congress did *not* grant U.S. courts jurisdiction over any claim that "arises out of" a "direct, substantial and reasonably foreseeable effect" on U.S. commerce. Rather, it employed an active construction requiring that "such effect" on U.S. commerce (as opposed to the commerce of the rest of the world) "give[] rise to"—and thereby provide the basis for—the "claim" of the particular plaintiff before the Court. Hence, there can be no jurisdiction unless "such effect" "gives rise to"—*provides the basis for*—the plaintiffs' claim, a requirement that is obviously not satisfied here. Nothing that occurred in U.S. commerce "gave rise to" plaintiffs' claims. It was purchases at inflated prices in Australia, Panama, Ecuador and the Ukraine that gave rise to their claims, while purchases at inflated prices in this country gave rise to the claims of U.S. purchasers that have all been settled.

As originally drafted, subsection (2) of the FTAIA provided that the required U.S. effect must be "*the basis of the violation alleged*" under the Sherman Act. H.R. Rep. No. 97-686, at 17-18 (JA2 1182) (emphasis added). While this language was changed to the current "gives rise to a claim" language, Chairman Rodino, who was responsible for the final language, stated that the wording was intended to have the *same meaning* as the earlier version. He explained that "the substituted language accomplishes the same result as the Committee version and is better . . . because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation." *Id.* at 18 (JA2 1182).

The plain meaning of the FTAIA's language and structure, considered in conjunction with Chairman Rodino's explanation and the clearly articulated concerns of the Supreme Court about legal imperialism, require a carefully-focused construction of "gives rise to" that fits the purposes of the FTAIA. As they did in the Supreme Court, Br. at 23-24 nn.2-4, plaintiffs rely on the meaning of "arises out of" in state long-arm statutes, arbitration clauses and insurance contracts, all of which are intended to provide an expansive scope of coverage. By contrast, the FTAIA, as the Supreme Court observed, 124 S. Ct. at 2369, was intended to *limit* the reach of the antitrust laws. Plaintiffs' cases, which were unpersuasive to the Supreme Court, are completely irrelevant to the meaning of the FTAIA.

Beyond this, as explained fully in Part II, *infra,* at 40, the Supreme Court has specifically rejected similarly expansive theories of causation and has made clear that Congress did not intend "'to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 534 (1983) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972)); *see also Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 266-70 (1992) (rejecting "but for" causation standard in RICO context and citing *Associated General* as rejecting it in antitrust context). Rather, a cognizable claim requires that a plaintiff establish, among other things, that it was *directly* injured by the anticompetitive effects of the defendant's conduct on U.S.

commerce. *Associated Gen.*, 459 U.S. at 540-43. Here, plaintiffs cannot credibly contend that their claims were directly based on the U.S. effect of defendants' conduct. Indeed, their arbitrage-based "alternative theory" is premised on the *indirectness* of their injury in relation to U.S. effects.

The only circuit to have considered such a "worldwide market theory" rejected it in a decision that the U.S. government supported and the Supreme Court declined to review. In *Den Norske Stats Oljeselskap AS v. HeereMac V.O.F.*, foreign plaintiffs—like plaintiffs here—alleged that the foreign injury they suffered arose from a "single, unified, global conspiracy" that also harmed U.S. commerce. 241 F.3d 420, 427 n.24 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac V.O.F.*, 534 U.S. 1127 (2002). The *Den Norske* plaintiffs paid supracompetitive prices outside U.S. commerce (in the North Sea), but argued that those higher foreign prices were a "necessary prerequisite to" and thus "arose from" the higher prices charged by the conspirators in U.S. commerce (in the Gulf of Mexico). *Id.* at 425. The court rejected this theory as a matter of law and held that a "mere connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea" were insufficient under the FTAIA, which "requires more than a 'close relationship' between the domestic injury and the plaintiff's claim; it demands that the domestic effect 'give[] rise' to the claim." *Id.* at 427. The court recognized Congress's desire that "foreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace*, just as our citizens do," but concluded that the "assumed existence of a single, unified, global conspiracy" did not relieve the plaintiff's burden of "alleging that its injury arose from the conspiracy's proscribed effects on United States commerce." *Id.* at 427 nn.23-24 (emphasis in original).[3]

As the Fifth Circuit recognized, *id.* at 427 n.24, this construction of the FTAIA is consistent with the Supreme Court's decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, where plaintiffs also claimed injury from price fixing in two interlinked markets. 475 U.S. 574 (1986). Evidence of price fixing by television manufacturers in Japan was deemed insufficient to infer the existence of a predatory pricing scheme by those same Japanese manufacturers in the United States. The Court noted that "whether there is one conspiracy or several—respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief," *i.e.*, one that was suffered "in the American market." 475 U.S. at 584 n.7. The allegations in *Matsushita* and *Den Norske* of international conspiracies that included price fixing in Japan and the North Sea did not provide a basis for relief because **"American antitrust laws do not regulate the competitive conditions of other nations' economies."** *Matsushita*, 475 U.S. at 582 (emphasis added). *See also Den Norske*, 241 F.3d at 428 ("Such an expansive reading of the extraterritorial application of the antitrust laws was never intended nor contemplated by Congress").

Plaintiffs' contention that a mere relation between pricing in the United States and pricing abroad is sufficient for Sherman Act jurisdiction cannot be reconciled with

[3] Plaintiffs' attempt to distinguish *Den Norske*, (Br. 30 n.7) is disingenuous. The barge services—the subject of the price fixing—were alleged to be part of a world-wide market. The North Sea oil, although local, was not the product whose prices were fixed, and is no more local than appellant Windridge Farm's pigs.

Matsushita, *Den Norske* or the Supreme Court's holding in *Empagran* that the requisite effect on U.S. commerce must "give rise to" the plaintiff's antitrust claim. Since, as their own economic experts have argued (JA2 1549-50), plaintiffs' theory is based on the premise that prices in all countries must remain elevated for the conspiracy to succeed in any country, it is as easily said that supracompetitive prices in Japan, Great Britain, France or any other country in which a cartel operates are equally necessary to prevent arbitrage and to maintain the effectiveness of a conspiracy, and thus that "effects" in all those countries "gave rise" equally to plaintiffs' claims. As discussed more fully below, *infra,* at 30-33, Congress has long been aware of the global interdependence of prices and yet has consistently enacted U.S. antitrust legislation concerned only with the protection of U.S. commerce and U.S. purchasers—*i.e.,* not with foreign, or global, markets.

Ultimately, plaintiffs can muster no authority to support their assertion that the competitive conditions of foreign nations' economies fall within the reach, and become the responsibility, of American competition law and American courts. There is no limiting principle to plaintiffs' "alternative theory," which would create Sherman Act jurisdiction over **all** claims of transnational price fixing (and a multitude of other foreign antitrust claims) and vitiate the most basic purpose of the FTAIA. This is precisely the result that the Supreme Court sought to preclude in *Empagran* and should be rejected as a matter of law to prevent plaintiffs' version of the FTAIA's domestic injury "exception" from becoming the rule.[4]

---

[4] In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2749, 2780-82 (2004), decided two weeks after *Empagran*, all of the Justices warned against the same type of analysis that plaintiffs urge

B. Established Canons Of Statutory Construction Relied Upon by the Supreme Court in This Case Preclude Plaintiffs' Claims.

1. Federal legislation should be construed to avoid unreasonable interference with the laws of other nations.

The Supreme Court's interpretation of the FTAIA was based in significant part on the principle that federal legislation should be construed to avoid unacceptable interference with the laws of other nations, or even the "possibility of international discord," if "any other possible construction remains." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (citing *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804)); *see Empagran*, 124 S. Ct. at 2366. The Supreme Court discussed this canon at length, but plaintiffs virtually ignore it, relegating their main discussion of prescriptive comity to page fifty-three of their sixty-one page brief, and dismissing it as "irrelevant." Br. at 53. The rule requires courts to presume, in the absence of affirmative, "clearly expressed" language to the contrary, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), that Congress was aware of and intended to avoid conflict with the laws of other nations. *Empagran,* 124 S. Ct. at 2366 (courts must "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws"); *see also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1352 (D.C. Cir. 2004) (Rogers, J. dissenting).

---

here (there regarding the "headquarters doctrine") that would allow an exception to "swallow" the general rule by a simple pleading tactic.

As the Supreme Court explained in *Empagran*, this rule has long been incorporated into the concept of extraterritoriality in federal antitrust law. *See Empagran*, 124 S. Ct. at 2366-67 (citing *United States v. Aluminum Company of America*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.)). "Prescriptive comity" reflects the principle that it is reasonable to apply U.S. antitrust laws to foreign anticompetitive conduct only "to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Empagran*, 124 S. Ct. at 2366-67 (citing Restatement (Third) of Foreign Relations Law of the United States §§ 403(1), 403(2) (1986)) (emphasis in original). There has never been any claim in this case that the purely foreign acts that injured plaintiffs (such as overcharges to Windridge Pig Farm in Australia) caused *any* domestic injury. Where, as here, "foreign harm alone gives rise to the plaintiff's claim," the Supreme Court stated that there is "insubstantial" justification for the "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Id.* Plaintiffs' policy arguments about deterrence, which the Supreme Court did not accept, do nothing to alter that conclusion.

Plaintiffs' limitless conception of jurisdiction—even if it were consistent with the statute's text—would impermissibly interject U.S. antitrust law into the domestic commerce of foreign sovereigns on the mere allegation of some foreseeable "linkage" between pricing in the United States and pricing abroad. Through artful pleading, they would have U.S. law "supplant[]" the determination of those foreign sovereigns as to "how best to protect [their] customers from anticompetitive conduct engaged in significant part by" foreign companies. *Empagran*, 124 S. Ct. at 2367. The Supreme

Court found that, through the FTAIA, "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm." *Id.* Whether the foreign harm is "independent" of the harmful effect on U.S. commerce (as the Court assumed for the purposes of its opinion) or indirectly brought about by a harmful effect on U.S. commerce (as plaintiffs now contend), there is equally inadequate justification for extraterritorial application of U.S. antitrust laws when, as here, the foreign harm and the transaction that gives rise to it occur *entirely* outside U.S. commerce. U.S. interests are satisfied by compensating participants in U.S. commerce (regardless of their nationality or location, *see Pfizer,* 434 U.S. at 318) and prosecuting (as the Government has done) the behavior that injured those participants in U.S. commerce.

As discussed below, *infra,* at 33-34, it has been the consistent position of the United States Department of Justice that criminal sanctions "provide the greatest and most appropriate deterrent" for cartel behavior, and that adopting plaintiffs' interpretation of the FTAIA would run the risk of "undermin[ing] international enforcement cooperation." R. Hewitt Pate, International Anti-Cartel Enforcement, Speech at the 2004 ICN Cartels Workship (Nov. 21, 2004) (transcript available at http://www.usdoj.gov/atr/public/speeches/206428.htm). The Government has explained that "[a]llegations that foreign injuries are connected to domestic injuries do nothing" to answer the question, posed by the Supreme Court: "Why should American law supplant . . . Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct[?]" U.S. Br. at

3 (citing *Empagran,* 124 S. Ct. at 2367). It is neither necessary nor reasonable to go further and trample the legislative and regulatory judgments of foreign sovereigns by regulating transactions that occur entirely outside U.S. commerce. The FTAIA evinces no "affirmative evidence" that Congress intended to do so. And in the absence of clear statutory "evidence," courts should follow two centuries of precedent and "tread carefully and err on the side of limiting statutes to domestic application if there is doubt as to Congress' intentions." *Delgado-Garcia,* 374 F.3d at 1352 (Rogers, J., dissenting).

Application of U.S. antitrust law to these foreign transactions unquestionably constitutes an unreasonable interference with foreign sovereign authority. Every country that has appeared in this case has said so. Although most countries have prohibited hard-core cartel activity, they differ in the penalties imposed for such behavior, including the damages that should be awarded to private plaintiffs. While plaintiffs downplay the varying views among nations about appropriate antitrust remedies and standards for determining liability, Br. at 56, the Supreme Court noted *in this case* that the possible availability in U.S. courts of treble damages for foreign commercial transactions has provoked significant "controversy," *Empagran*, 124 S. Ct. at 2368, and threatens the harmony of U.S. antitrust laws with those of other countries, "a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 2366. Indeed, the Court accepted the contentions of seven foreign governments in this case that applying U.S. treble damage remedies to plaintiffs' claims would "upset[] a balance of competing considerations that their own domestic antitrust laws embody" and would thereby "undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." 124 S. Ct. at 2368 (citing *amicus* briefs of Germany, Canada and Japan in this case).[5]

It is no answer, as plaintiffs incredibly suggest, for U.S. district judges "to choose, in response to comity concerns regarding the availability of treble damages, to make only single damages available." Br. at 60. Treble damages are mandated under the Clayton Act, which provides that an injured plaintiff "*shall* recover three-fold the damages sustained by him." 15 U.S.C. § 15 (emphasis added); *see also Marrese v. Am. Academy of Orthopaedic Surgeons*, 524 F. Supp. 389, 393 (N.D. Ill. Aug. 17, 1981), *rev'd on other grounds by Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) (noting that under federal law, "once any kind of antitrust violation is shown, treble damages follow as a matter of right"). Plaintiffs have not identified, nor are we aware of, any judicial power to overrule or disregard this legislative directive.

Nations possess sovereign rights to regulate their own economies as they see fit; it is not for the United States to interfere unreasonably with those efforts. Nations often choose to permit otherwise anticompetitive behavior in order to foster or support certain economic sectors. In the United States antitrust exemptions are provided for agricultural cooperatives, *see* Capper-Volstead Act, 7 U.S.C. § 291 (1922), for certain activities of

---

[5] Antitrust enforcement by other nations has increased markedly over the years. Nations accounting for almost ninety percent of the world's economy now have some form of competition regulation, Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, The Antitrust Bulletin, Spring 1998, at 109, having exercised their rights as sovereign nations to determine when, whether and how much competition law is appropriate for regulation of their economies.

industries such as insurance, *see, e.g.*, McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-15 (1994)), and even for baseball, *Flood v. Kuhn*, 407 U.S. 258 (1972). The Export Trading Act—of which the FTAIA is a part—constitutes an antitrust exemption for certain joint export trading activities. 15 U.S.C §§ 4001-21.

For its part, the European Commission has granted antitrust exemptions to protect particular industries or markets.[6] Providing a U.S. cause of action to foreign persons who suffered foreign "harm" simply because the conduct also had a U.S. effect would impinge on these sovereign rights, regardless of any relationship between the harms sustained in foreign commerce and separate injuries sustained in U.S. commerce.

These concerns cannot can be resolved merely by characterizing the U.S. and foreign harms as "linked" in a "world market." Unreasonable interference with foreign sovereign rights occurs whenever foreign persons injured in purely foreign commerce are allowed to use U.S. remedies and procedures to avoid the competition laws of their own countries. The Supreme Court concluded that Congress "would not have tried to impose" American antitrust policies on its trading partners "in an act of legal imperialism" and that the courts have no business doing so. 124 S. Ct. at 2369; *see also Sosa*, 124 S. Ct. at 2782 (Breyer, J., concurring) (citing *Empagran* and reiterating the necessity that each nation "respect the sovereign rights of other nations by limiting the reach of its laws and

[6] *See, e.g.*, Case IV/30.810, Synthetic Fibres, 1984 O.J. (L207) 17 (three-year exemption for agreement in European synthetic fibers industry aimed at coordinating reduction in production); Case IV/30.525, International Energy Agency, 1983 O.J. (L376) 30 (eleven-year exemption with respect to monthly allocation of supplies of oil).

their enforcement," which is "a matter of increasing importance in an ever more interdependent world").

2. Federal legislation should be construed to avoid unworkable or impractical results not required by the language of the statute.

The Supreme Court has consistently sought to avoid unworkable, burdensome interpretations of federal law that might pose a "risk to the efficiency of federal courts." *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000). In *Empagran* the Court reiterated these concerns, requiring that the FTAIA's jurisdictional test be capable of being applied "simply and expeditiously." 124 S. Ct. at 2369. Against the background of this case, the Court warned against "lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." *Id.* This Circuit has similarly rejected proposed statutory interpretations on the grounds that they are "unworkable." *See 3M Co. (Minnesota Min. and Mfg.) v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994).

It is hard to imagine an approach that more clearly ignores these admonitions than plaintiffs' "alternative theory." As plaintiffs' own brief makes plain, Br. at 57-60, their theory would require courts, at the outset of every case, to make complex, fact-intensive determinations whether, and to what extent, injuries to different foreign purchasers were linked to U.S. effects. Courts would have to grapple with the "enormous complexities of market definition," *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430-31 (1990), where the Supreme Court has said that "fuzziness" is "inherent," *United States v.*

Philadelphia National Bank, 374 U.S. 321, 360 n.37 (1963), simply to determine the threshold question of jurisdiction; indeed, plaintiffs seek just such proceedings here. Br. at 10. Proper consideration and resolution of such issues—which would require a court to evaluate cross-elasticities of demand for a range of vitamin products in various forms and mixtures marketed during varying time periods in nearly 200 foreign countries, each having its own economic and legal features (including trade laws, supply and demand conditions, linguistic and cultural differences and exchange rates)—cannot be accomplished in the context of a prompt, threshold jurisdictional inquiry.

Realizing the flaws in their proposal, plaintiffs suggest, Br. at 16-17, 73, that U.S. antitrust jurisdiction might be extended to reach only foreign transactions in "fungible" goods. But the line that plaintiffs would have this Court draw is without any support as a jurisdictional test and is equally at odds with the Supreme Court's insistence that the FTAIA's jurisdictional standard be categorical and readily administrable, rather than a fact-specific inquiry applied on a case-by-case basis. *See Empagran*, 124 S. Ct. at 2369. Whether a good purchased by a foreign plaintiff outside of U.S. commerce is "fungible" with (or competitive with) a similar good sold in domestic commerce is a question of degree rather than of kind. *See, e.g., E.W. French & Sons, Inc. v. General Portland, Inc.*, 885 F.2d 1392, 1404 (9th Cir. 1989) ("The concept of a single 'relevant market' is itself an abstraction. Competition is a matter of degree"). Thus, courts would be required to engage in precisely the case-by-case balancing of complex considerations that the Supreme Court rejected in *Empagran*. Even if a court were ultimately to dismiss a foreign plaintiff's claim on market definition grounds or because the goods were insufficiently "fungible" with goods sold in U.S. commerce, the sheer length and complexity of the proceedings would have further clogged the crowded dockets of American courts, and substantially compromised foreign nations' ability to develop and maintain their own antitrust enforcement systems.[7]

Indeed, plaintiffs acknowledged the amorphous nature of their proposed jurisdictional standard when they admitted at oral argument in the Supreme Court that even they would "reject claims from places like Australia [home to one of these plaintiffs] and Canada and the like . . . [i]f they have any sort of regime that they have decided to build up, if they've enacted into law, and it's a viable regime for vindicating interests, so that the client being here isn't necessary." Tr. at 41. This indefinite approach to determining jurisdiction—which plaintiffs continue to advocate by stating that district courts can "dismiss a claim on the ground that the plaintiff has another available remedy in a more appropriate forum," Br. at 60—would introduce into pre-trial proceedings an analysis of each of the antitrust regimes of almost 200 countries from which the various plaintiffs hail, to determine whether some plaintiffs must "go somewhere else and vindicate [their] claim[s]." Tr. at 42. It would empower, indeed require, each of the more than 650 federal district judges to evaluate the "sufficiency" of the continuously evolving competition laws of other countries, "balanc[e] competing interests including those of foreign governments," Br. at 60, and determine whether, at a

[7] Further, the central assumption of plaintiffs' theory is that significant volumes of vitamins could have been exported from the U.S. to their home countries. In fact, bulk vitamins generally are *not* manufactured in the United States, and in any event determining whether particular vitamins were available for export in sufficient quantities to particular countries at particular times would enmesh the district court in a jurisdictional quagmire.

particular time in a particular country, these foreign laws constitute "a viable regime for vindicating interests," Tr. at 41, of the citizens of those countries—clearly the path of judicial imperialism and a recipe for chaos guaranteed to produce inconsistent results and international discord.[8] *See Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (rejecting "judicial criticism" of other nations' laws).

Especially in large antitrust cases such as this one, the Supreme Court has emphasized the courts' "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits," *Associated Gen.*, 459 U.S. at 543, and consistently has rejected complex inquiries to maintain some semblance of manageability. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *Holmes*, 503 U.S. at 274 ("Allowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation'" which would "'not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits.'") (citing *Associated Gen.*, 459 U.S. at 545). As the Government told the Supreme Court in *Empagran*, plaintiffs' attempt to "make an end run around the FTAIA by defining a so-called one-world market or one big conspiracy theory . . . [would] embroil the district courts [in] all forms of satellite litigation." Tr. at 20-21. The Supreme Court heeded the Government's plea to

[8] It is perhaps for these reasons that, as of the date of this filing, one of the named plaintiffs in this case, Windridge Pig Farm, appears not to have opted out of a pending class action in Australia, thus choosing to participate simultaneously in both actions, in both countries. Letter from Federal Court of Australia to Maurice Blackburn Cashman & Co., Solicitors (Aug. 5, 2004).

"pay attention to the practical realities of enforcement and avoid . . . creating friction with our trading partners." *Id.* at 21. This Court should do so as well.

C. **Extraterritorial Application of the Sherman Act Has Always Been Limited to Remedying the Effects of Anticompetitive Conduct on U.S., Not Foreign, Commerce**

"American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita*, 475 U.S. at 582. On its face, the Sherman Act is concerned with the competitive conditions of U.S. commerce, including import and export commerce between the United States and foreign nations. Plaintiffs' assertion that there is "no textual foundation" for the concept that U.S. antitrust law is restricted to the governance of U.S. commerce is astounding. Br. at 28-29. Section 1 of the Sherman Act forbids any "conspiracy . . . in restraint of trade or commerce *among the several States*, or *with foreign nations*." 15 U.S.C. § 1 (emphasis added). Section 2 similarly prohibits any attempt or conspiracy to "monopolize any part of the trade or commerce *among the several States*, or *with foreign nations*." § 2 (emphasis added). Nothing in the Sherman Act suggests any purpose to regulate, or any concern over the consequences of anticompetitive conduct on, transactions occurring entirely *within* or *among* foreign countries. *See* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273a (2d ed. 2000) ("Congress did not intend American antitrust law to rule the entire commercial world"). Yet that is exactly what plaintiffs seek.

Early judicial interpretation of the Sherman Act limited its application to conduct occurring within the territorial United States. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). While modern courts have permitted foreign plaintiffs to avail themselves of U.S. antitrust laws and applied the law to foreign conduct, such suits have been permitted *only* where the harmful effects of anticompetitive conduct *on U.S. commerce* "give rise" to plaintiffs' claims. *See Aluminum Company of America*, 148 F.2d at 443. In fact, *no* court has ever permitted a claim, such as plaintiffs', when the claimant did not participate at all in U.S. commerce.

Nor does plaintiffs' plea to burden the U.S. courts with foreign antitrust litigation derive any support from this Court's ruling in *Caribbean Broadcasting System, Ltd. v. Cable & Wireless, PLC*, 148 F.3d 1080 (D.C. Cir. 1998). In that case, which involved a claim of attempted monopolization of advertising services in a geographic market that included both U.S. and foreign territory, the plaintiff had tried to enter our markets. The plaintiff's injury resulted from its exclusion (despite its efforts) from U.S. commerce and the harm to U.S. consumers who paid higher prices for advertising both within and outside U.S. territory.

This Court's decision to exercise jurisdiction in *Caribbean Broadcasting* is not surprising and hardly a mandate to reach for jurisdiction over claims by a world-wide class of plaintiffs that neither participated nor sought to participate in U.S. commerce. Indeed, this Court made clear that "a court has subject matter jurisdiction *only to the extent* that the complaint alleges that the challenged conduct had a 'direct, substantial, and reasonably foreseeable effect on domestic or import commerce, or the export opportunities of a domestic person' (as required by the FTAIA)." *Id.* at 1085 (emphasis added) (internal citation and quotation omitted). That holding is perfectly consistent with the Supreme Court's statement in this case that "a statute [*i.e.*, the FTAIA] can apply and not apply to the same conduct, depending upon other circumstances." 124 S. Ct. at 2372. The key "circumstance" here, as in *Caribbean Broadcasting*, is participation in U.S. commerce, the sole concern of the U.S. antitrust laws and a requirement plaintiffs cannot meet.[9]

Similarly, plaintiffs' attempts to tease support out of case law in existence at the time of the passage of the FTAIA, Br. at 47-52, were squarely *rejected* in *Empagran,* where the Supreme Court stated that it could find "no significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances." 124 S. Ct. at 2369. Indeed, the district court noted that "plaintiffs acknowledged at [a] hearing that no court had ever interpreted the federal antitrust laws to reach wholly foreign transactions such as those alleged in this case." JA2 21-22.[10]

Nor did Congress—in 1890, in 1982 or at any other time—contemplate the applicability of the federal antitrust laws in these circumstances. *See* JA2 1065-71, 1222-37 (analyzing legislative history). To be sure, the legislative history of the Sherman Act

[9] Likewise, *MM Global Services, Inc. v. Dow Chem. Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004), provides no support for the plaintiffs' contention that the U.S. antitrust laws provide a remedy for injuries sustained in commerce within or among foreign nations. The plaintiffs in *MM Global Services*, unlike plaintiffs here, "purchased . . . products *in the United States* and resold them to end-users in India." *Id.* at 339 (emphasis added). Thus, like the plaintiff in *Pfizer*, 434 U.S. at 318, those plaintiffs had entered our markets, and the transactions in question were part of U.S. commerce.

[10] Plaintiffs' misplaced reliance on *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979), Br. at 49-50, is particularly surprising given the harsh criticism it received in the House Report accompanying the FTAIA, JA2 1162, and the Supreme Court's distinguishing that case as having involved a restriction of what the district court found to be "a kind of 'export'." *Empagran*, 124 S. Ct. at 2371.

reflects congressional concern that, were the Act's coverage confined to wholly domestic conduct, both foreign and domestic conspirators could escape the law's consequences by entering into a conspiracy abroad to injure U.S. commerce. 21 Cong. Rec. 1765, 1766 (1890) (remarks of Sen. George). But this concern does *not* indicate that Congress thought that plaintiffs who had *not participated* in U.S. foreign or domestic commerce could avail themselves of the private treble damages remedy. To the contrary, there was discussion, *and rejection*, of the application of the Sherman Act to purely foreign transactions.

The 1890 Congress was acutely aware of the price "linkage" on which plaintiffs rely and knew as well that global markets of the late nineteenth century were highly interdependent. In debates addressing the relationship between tariffs and anticompetitive activity, Congressmen and Senators recognized that any change in the *price* charged for a product in one country would affect the price for that product in every other country. *See, e.g.,* 21 Cong. Rec. 2455, 2466 (1890) (remarks of Sen. Vest) ("[W]henever you reduce the price in any one country you reduce it all over the world, and necessarily in every other country"). Moreover, they recognized that, in the absence of protective tariffs, a trust, in order successfully to maintain anticompetitive prices in one country, would need to maintain such prices in all of that country's trading partners. *See id.*; 21 Cong. Rec. 4088, 4095 (1890) (remarks of Rep. Wilson) ("Now, England could not have a salt trust if Germany had salt; and England could not have a sugar trust, because if it had, Germany, Holland, and France could pour their sugar into England"). International arbitrage, which plaintiffs believe so important, is hardly a new concept.

The limitation of the Sherman Act to U.S. domestic and U.S. foreign commerce and the parallel limitations on the scope of private actions cannot be ascribed to ignorance or oversight. It reflects a consensus among members of the enacting Congress that, despite the recognized interdependence of world markets, and the likely "linkage" of international cartel activities, U.S. antitrust jurisdiction should not extend to private actions seeking to recover for injuries sustained outside U.S. commerce. Extension of the Act's scope to sales "within a foreign jurisdiction" would constitute an impermissible incursion into matters "subject to regulation only by a foreign power." 21 Cong. Rec. 1765, 1766 (1890) (remarks of Sen. George). Plaintiffs' theories of "linkage" of international markets (and specifically "linkage" of prices among nations in instances of international cartels) were considered by Congress in 1890, but omitted from the scope of Sherman Act jurisdiction. In fact, Senator Sherman himself condoned the foreign business activities of the trusts, stating that, as long as United States consumers were protected, "I would say let them pursue that business." 21 Cong. Rec. 2556, 2569 (1890).

As the Supreme Court recognized, the legislative history of the FTAIA (a 1982 amendment to the Sherman Act) evinces no intent on the part of Congress to *expand* the reach of the U.S. antitrust laws but rather shows instead that Congress was concerned with clarifying, or even limiting, "the Sherman Act's scope as applied to foreign commerce." *Empagran*, 124 S. Ct. at 2369; *United Phosphorus, Ltd. v. Angus Chem Co.*, 322 F.3d 942, 951 (7th Cir. 2003) (en banc) ("[T]he legislative history shows that jurisdiction stripping is what Congress had in mind in enacting FTAIA"). The House Report requires that "the 'effect' providing the jurisdictional nexus," or the "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, be itself "the basis of the injury alleged" (JA2 1173), thus clarifying that claims must derive from injuries sustained *in U.S. commerce*. *See also Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 796 n.23 (1993) ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the *United States economy*") (emphasis added). Use of "worldwide market" and "linked prices" theories to plead around this requirement and the jurisdictional scope of the Sherman Act is not a novel idea—it is a concept that Congress did not accept, in either 1890 or 1982. *See* U.S. Br. at 5 ("[T]o allow plaintiffs to proceed on their 'alternative theory'" would permit an "[expansion of] the Sherman Act's scope as applied to foreign commerce"). Nothing in the historical context of the Sherman Act or the FTAIA permits such claims, and judicial expansion of the Act would be unwise and inappropriate.

D. <u>If Accepted, Plaintiffs' Deterrence Argument Would Undermine Cartel Detection and Enforcement</u>.

Plaintiffs persist in advancing a deterrence rationale for their interpretation of the FTAIA, despite the fact that the U.S. Government department tasked with enforcing the antitrust laws has consistently and unequivocally rejected this rationale, as a matter of both statutory interpretation and policy, and has said so both orally and in writing in this case. In its briefs to this Court and to the Supreme Court, the government has consistently maintained that enforcement is best served by the detection made possible by a robust amnesty program (U.S. Br. at 4-5), which it considers to be "the cornerstone of [the United States] international anti-cartel enforcement program." R. Hewitt Pate, International Anti-Cartel Enforcement, Speech at the 2004 ICN Cartels Workship (Nov. 21, 2004) (transcript available at http://www.usdoj.gov/atr/public/speeches/206428.htm). The Government views plaintiffs' expansive theory as a threat to the efficacy of this program and a blow to the detection of cartels because "in the United States' experience, any expansion in the scope or uncertainty of cartel members' potential civil liability in U.S. courts creates a disincentive to seek criminal amnesty." U.S. Br. at 4. It warns of a comparable pernicious effect abroad which would "undermine foreign nations' own antitrust enforcement policies." *Id.* [11]

Plaintiffs are also wrong in suggesting that permitting such foreign claims is necessary to prevent cartels (or other antitrust violators) from becoming indifferent to the costs of prosecution in the United States, and that any rational person would, *ex ante*, flout U.S. antitrust prosecution and fines in the expectation that it could simply "recoup" its losses through the illegal profits it might earn abroad. In general, liability for damages, fines and costs in the United States will substantially exceed the world-wide overcharges. The United States accounts for approximately 30% of the world's economy. Kristin J. Forbes, U.S. Manufacturing: Challenges and Recommendations, Comments at NABE 2004 Washington Economic Policy Conference (Mar. 25, 2004). Plaintiffs themselves concede that the United States constitutes more than 25% of the world vitamins market. Br. at 19. As a result, the provision of treble damages to U.S.

[11] In light of what the U.S. Government has actually written and said in this case, plaintiffs' attempt in their brief to patch together governmental support for their position is pure sophistry.

private plaintiffs (*i.e.,* three times the overcharge to participants in U.S. commerce), U.S. criminal penalties (up to twice the overcharge), damages in indirect purchaser suits in *Illinois Brick* repealer states, and the costs (including plaintiffs' attorneys' fees) associated with defending such proceedings, mean that defendants face exposure to more than five times the overcharge to those who participated in U.S commerce. That amount, given the size of the U.S. economy, will generally substantially exceed the total overcharge worldwide. In addition, foreign countries provide significant deterrence of their own. The European Union and nearly twenty of its member states have laws that can each extract up to 10% of the defendant's worldwide or country-specific revenues for the most recent year.[12]

Other countries also continue to enhance their enforcement programs. The United Kingdom, which was a pioneer in enacting blocking and clawback statutes to combat the United States' imposition of treble damages, has recently criminalized horizontal price fixing, a decision that also permits, for the first time, extradition of U.K. nationals to countries, such as the U.S., that similarly outlaw the practice. *See* Enterprise Act, 2002, § 188 (Eng.) (criminalizing price fixing); Extradition Act, 2003, c.41 (Eng.) (authorizing extradition to countries with similar punishments for like crimes). Similarly, Australia, home to plaintiff Windridge Pig Farm, is in the process of transforming its competition

---

[12] *See, e.g.,* Council Regulation 1/2003, art. 23.2, 2003 O.J. (L 1) 1 (E.U.); Law No. 464-2 of 16 May 2001, J.O., 16 May 2001, p.7788 (Fr.); Act on the Prohibition of Unfair and Restrictive Market Practices, art. 78 (1996) (Hung.); Competition and Fair Trading Act, No. 287 § 15 (10 Oct. 1999) (Italy); Competition Act, §§ 56, 57 (22 May 1997) (Neth.); Art. 10 of Competition Act (B.O.E. 1989, 179) (Spain); Competition Act, Art. 27 (1993:20) (Swed.); and Competition Act, 1998, art. 36. (Eng.).

regime by criminalizing illegal cartel activity for the first time, with prison sentences up to five years and fines up to the greater of three times the illegal gain or ten percent of annual sales. *See, e.g.*, Leora Moldofsky, *Australia to Criminalise Price Fixing*, The Financial Times, Feb. 3, 2005, at 2.

For all of these reasons, calibrating the appropriate levels of economic and criminal liability (*i.e.,* damages, fines and prison sentences) to deter and foster detection of anticompetitive conduct and cultivate necessary international cooperation is clearly a function for the legislature. Congress fashioned this statutory framework and has shown ready willingness to alter it (most recently in mid-2004).[13] There is no viable reason for this Court to ignore the views of the Government and to perform radical surgery on a statutory regime that has been actively supervised by Congress for more than 100 years. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (magnitude of appropriate antitrust deterrence is a matter of "high policy within the legislative process" and thus not subject to judicial resolution).

[13] The "Antitrust Criminal Penalty Enhancement and Reform Act of 2004" (the "Act") demonstrated Congress' its ability to calibrate punishments and remedies. Pub. L. No. 108-237, 118 Stat. 665-68 (codified as amended at 15 U.S.C. §§ 1, 1 to 3 (2004)). The Act, among other things, increases available criminal penalties and jail terms (from 3 to 10 years), and limits liability of qualifying cooperating companies to actual, not treble, damages. According to the Government, the de-trebling provision will "only modestly ameliorate a disincentive to seek amnesty." U.S. Br. at 5 n.4. The Act reflects a congressional view that the threat of exposure to treble damages—even for the U.S. effects of cartel behavior—is "a major disincentive to self-reporting" that limits the effectiveness of the leniency program. *See* Cong. Rec. S3607, 3614 (daily ed. April 2, 2004) (statement of Sen. Hatch). The Government believes that "even with single damages," cartel members will avoid seeking amnesty if confronted with the "prospect of facing numerous, unprecedented class actions for foreign injuries in U.S. courts." U.S. Br. at 5 n.4.

E. **Plaintiffs' Worldwide Market Theory Seeks to Expand Jurisdiction Beyond The Limits Upheld by the Supreme Court in *Empagran*.**

In *Empagran,* the Supreme Court, in evaluating plaintiffs' jurisdictional arguments, canvassed pre-FTAIA case law and found no precedent that would have authorized the assertion of U.S. antitrust jurisdiction in the circumstances of this case. 123 S. Ct. at 2371. Although the Supreme Court declined to decide what, if any, link between U.S. effects and a plaintiff's foreign injury might suffice to trigger a domestic injury exception (if one were to be recognized), it did make clear that "price fixing conduct [that] affects both customers outside [and] within the United States" cannot be sufficient. *Id.* at 2366. In so ruling, the Court assumed the existence of a worldwide cartel, and thus necessarily assumed that the firms involved agreed to refrain from undercutting one another's prices or competing in one another's territories.

The Court's reference, *id.* at 2370, to *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.*, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), indicates that any permissible exception would be extremely limited and far different from the circumstances alleged by plaintiffs. In that case the district court exercised jurisdiction over claims brought by a foreign plaintiff against a foreign defendant "where the foreign injury was 'inextricably bound up with . . . domestic restraints of trade,' and the plaintiff 'was injured . . . by reason of an alleged restraint of our domestic trade.'" *Empagran*, 124 S. Ct. at 2370 (quoting *Industria Siciliana*, 1977 WL 1353, at *11, *12). There, the defendants' conduct, the restraint of U.S. export commerce, had simultaneously visited injury on a U.S. exporter and a foreign purchaser.[14]

Industria Siciliana involved a claim of reciprocity, in which the challenged exclusionary agreement prevented an American rival of the defendant from serving the foreign plaintiff. The exclusionary practice causes immediate injury to a rival (the firm excluded from making sales) for the purpose of charging higher prices to customers. The defendant in an exclusionary practice case does not profit at all from the injury to the rival, but only from the higher consumer prices that result when the rival is excluded. Thus it can properly be said that the injury to the rival "help[ed] to bring about" the injury to the consumers, as the Supreme Court's opinion required. *Empagran*, 124 S. Ct. at 2372; *see* 1A ANTITRUST LAW ¶ 273a, at S-13 (2d ed. 2000, Special Supp. 2005).

In addition, the *Industria* plaintiff, unlike plaintiffs in this case, was a participant in U.S. export commerce. *Industria Siciliana*, 1977 WL 1353, at *13. Indeed, the *Industria* court approved of *Raubal v. Engelhard Minerals & Chemicals Corp.*, 364 F. Supp. 1352 (S.D.N.Y. 1973), a decision that had dismissed an antitrust suit brought by a Chilean copper mine operator against a U.S. corporation and its subsidiaries, but distinguished that case on the basis that "unlike the . . . facts of the instant case, plaintiff in *Raubal* was neither an importer of goods from, or an exporter of goods to the United States; rather, its dealings were entirely outside the sphere of American business

[14] Whatever vitality this decision might otherwise have is undermined by the criticism it received in the FTAIA legislative history (JA2 1161-63) and the fact that, at least since 1984, it has been clear that the commonly owned companies involved could not have conspired with each other. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 776 (1984) (commonly owned companies are incapable of conspiring in violation of the Sherman Act).

enterprise." *Industria Siciliana*, 1977 WL 1353, at *13. And, finally, unlike plaintiffs' alleged injuries, which resulted from separate transactions that were no part of U.S. commerce, the injury in *Industria Siciliana* was directly caused by a single transaction in U.S. export commerce that simultaneously radiated harm in two directions.

The Supreme Court's focus on principles of international comity and the sovereign interests of other nations weighs heavily against reaching for a strained analogy to *Industria Siciliana* here. Indeed, citing the example of a worldwide price fixing cartel, the Court expressed disapproval of any construction of the FTAIA that would allow "[a] Malaysian customer [to] . . . maintain an action under United States law in a United States court against its own Malaysian supplier, another cartel member, simply by noting that unnamed third parties injured [in the United States] by the American [cartel member's] conduct would also have a cause of action." *Empagran,* 124 S. Ct. at 2367 (quoting ANTITRUST LAW ¶ 273, at 51–52 (2d ed. 2000, Supp. 2003)). Such a construction would result in the provision by United States courts of "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, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U.S. [other-than-export] commerce." *Id.* at 2367 (quoting ANTITRUST LAW ¶ 273, at 51–52 (Supp. 2003)). The Supreme Court agreed that Congress never intended such a result and found "no convincing justification for the extension of the Sherman Act's scope that it describes." *Empagran,* 124 S. Ct. at 2367-68.

Plaintiffs' current theory would produce exactly the same result that the Supreme Court condemned: so long as a cartel's conduct caused injury to "unnamed third parties" in the United States by facilitating higher domestic prices in substitute goods, a Malaysian (or other foreign) customer could bring an action under United States law in a United States court against its own local foreign supplier, another cartel member, by alleging that, "but for" the injury to the U.S. consumer, the cartel would have collapsed and its purely foreign injury would have been averted. The Supreme Court's concerns about respect for foreign sovereigns and the appropriate construction of U.S. statutes are in no way avoided by plaintiffs' "alternate theory." As recognized in the leading antitrust treatise, plaintiffs' theory of "linkage" is so broad that it would "undermine the entirety of the Court's opinion, which unambiguously held that foreign plaintiffs injured by a conspiracy that also injured American purchasers could not sue under the Sherman Act." 1A ANTITRUST LAW ¶ 273a (2d ed, 2000, Special Supp. 2005).

II. PLAINTIFFS DO NOT HAVE STANDING TO ADVANCE CLAIMS FOR THEIR INJURIES SUFFERED IN PURELY FOREIGN COMMERCE.

The Supreme Court's ruling requires this Court to reexamine plaintiffs' standing. The Court's decision vacated the *entirety* of this Court's prior opinion, including the conclusion that plaintiffs have standing. *O'Connor v. Donaldson,* 422 U.S. 563, 577 n.12 (1975) ("[O]ur decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case.") Moreover, this Court stated, 315 F.3d at 358, that its earlier ruling on plaintiffs' standing was premised on "the arguments that ha[d] already persuaded" the

Court that the FTAIA afforded jurisdiction over plaintiffs' claims—arguments that the Supreme Court expressly rejected.

A. Plaintiffs' Injuries Fall Outside the Well-Defined Limits of the Clayton Act Private Right of Action

Claims to recover damages for purely foreign injuries are not actionable under Section 4 of the Clayton Act, which provides that "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor . . . ." 15 U.S.C. § 15 (emphasis added). Section 1 of the Sherman Act prohibits agreements "in restraint of trade or commerce among the several States, or with foreign nations." But plaintiffs' injuries were not caused "by reason of" an agreement in restraint of commerce "among" the several states or "with" foreign nations. Rather, plaintiffs' foreign harms, even if "linked" to an effect on U.S. commerce, *directly* arose from effects on commerce within Australia, Ecuador, Panama and Ukraine (and all the other countries embraced within the class). Any overcharges resulted from commercial conditions *in those countries*. Foreign effects that do not directly result from diminished U.S. competition are not actionable under the Clayton Act. *Matsushita*, 475 U.S. at 584 n.7 (private plaintiffs challenging multinational conspiracy can seek redress only for injuries that occur "in the American market"); *see also* 15 U.S.C. § 26 (injunctive relief requires "threatened loss or damage *by* a violation of the antitrust laws") (emphasis added).

The Supreme Court has clearly stated that Congress did not intend "'to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" *Associated Gen.*, 459 U.S. at 534 (quoting *Hawaii v. Standard Oil Co.*, 405

U.S. 251, 263 n.14 (1972)). To state a claim, a plaintiff must show "antitrust injury" in order to "ensure[] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). A plaintiff's injury must be "an injury of the type the antitrust laws were designed to prevent." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986). Even "in a case involving horizontal price fixing, 'perhaps the paradigm of an unreasonable restraint of trade,' . . . plaintiffs [are] still required to 'show that the conspiracy caused them an injury for which the antitrust laws provide relief.'" *Atlantic Richfield*, 495 U.S. at 344.

The Supreme Court has made clear that not every would-be plaintiff that can "link" an injury to an antitrust harm has standing to bring a claim under the antitrust laws. *Associated Gen.*, 459 U.S. at 537; *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 884 (2004). Accordingly, the proper focus of "antitrust injury" analysis is not the nature of the defendants' conduct, but the nature of the plaintiffs' asserted injury. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), plaintiff bowling centers claimed that the defendant's acquisitions of competing bowling centers that had defaulted on payments for bowling equipment violated § 7 of the Clayton Act, and that "but for" those illegal acquisitions plaintiffs' profits would have increased. A jury returned a verdict for the plaintiffs. The Supreme Court assumed both that the antitrust laws were violated and that the acquisitions were a "but for" cause of plaintiffs' injuries. *Id.* at 484, 485, 488. But the Court nonetheless held that plaintiffs' treble damages claim should be dismissed, because compensation of every loss "causally linked" to the "presence of the violator in the market" would "divorce[] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Id.* at 486-87 (internal quotation marks omitted). Congress did not intend "to mandate damages awards for all dislocations caused by" unlawful anticompetitive conduct, *id.* at 488, but rather authorized the award of treble damages only for those dislocations of "concern to the antitrust laws." *Id.* at 487.

The Supreme Court has since amplified its ruling that the "judicial remedy" provided under the antitrust laws "cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Associated Gen.*, 459 U.S. at 536. The Court has emphasized the "strong interest 'in keeping the scope of complex antitrust trials within judicially manageable limits.'" *Verizon*, 124 S. Ct. at 884 (quoting *Associated Gen.*, 459 U.S. at 543) (Stevens, J., concurring in judgment); *see Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 14 (2d Cir. 1980) (noting need to exclude "claims based on conjectural theories of injury and attenuated economic causality that would mire the courts in intricate efforts to recreate the possible permutations in the causes and effects of a price change"). Thus, plaintiffs must establish that they were *directly* injured by the anticompetitive effects on U.S. commerce of the defendant's conduct. Here, plaintiffs cannot say that their injuries were *directly* caused by the effect on U.S. commerce of defendants' conduct. Indeed, their "alternative theory" is explicitly premised on the *indirectness* of their injury in relation to the U.S. effects.

In analogous circumstances, the Supreme Court has rejected, for want of standing, indirect claims that purport to base one plaintiff's claims upon the injury suffered by another. In *Holmes*, a broker-dealer failed under the weight of a stock manipulation scheme that certain of its members perpetrated. 503 U.S. at 262-64. All of the broker-dealer's customers lost money because the broker-dealer collapsed, whether or not they had purchased the particular securities subject to the manipulation scheme. *Id.* The Securities Investor Protection Corporation ("SIPC") sued the broker-dealer's former members under RICO's treble damages provision, which is identical to Section 4 of the Clayton Act. *Id.* at 265-66 (citing 18 U.S.C. §1964(c)). Denying SIPC's claims, the Court adopted the direct causation test of *Associated General*, according to which "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.* at 268-69. *Holmes* was explicitly decided by analogy to antitrust standing principles.

Plaintiffs ask this Court to hold that if an injury is "foreseeable," it is compensable under the Clayton Act. As the Supreme Court has said in another context (in a case that plaintiffs cite, Br. at 24-25), however, "all consequences of a negligent act, no matter how far removed in space and time, may be foreseen. Conditioning liability on foreseeability therefore is hardly a condition at all." *Conrail v. Gottshall*, 512 U.S. 532, 552-53 (1994). "Foreseeability" cannot be the standard here, because the Supreme Court has repeatedly denied antitrust standing in cases where the harm was "foreseeable." *See, e.g., Illinois Brick*, 431 U.S. at 747-48 (denying recovery to indirect purchasers despite foreseeability of their injuries); *Brunswick*, 429 U.S. at 487-90 (denying recovery although it was foreseeable that the defendants' purchases of the plaintiff's competitors would injure plaintiff). Indeed, in *Associated General*, the Supreme Court denied standing to the plaintiff union even though the harm it suffered was foreseeable and alleged to have been deliberately inflicted. 459 U.S. at 534-35. Thus it is not sufficient for the plaintiff to allege—as plaintiffs do for the first time in this brief—that the defendant injured U.S. commerce with the intent to injure the foreign plaintiff. "[A]n allegation of improper motive is not a panacea that will enable any complaint to withstand a motion to dismiss." *Id.* at 537.

B. <u>The Federal Antitrust Laws Are Not Intended to Protect Foreign Competition</u>

Running through these antitrust injury cases is the concept that the plaintiffs' claims must "fall within 'the zone of interests to be protected or regulated'" by the Sherman and Clayton Acts. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (internal citations omitted); *cf. Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975) (applying zone-of-interests analysis to antitrust laws). The antitrust laws' "zone of interests" is "protection of *American* consumers and *American* exporters, not foreign consumers or producers," 1A ANTITRUST LAW ¶ 272h (emphasis in original), and those foreign persons who "enter[] our commercial markets," *Pfizer*, 434 U.S. at 318. Quite simply, "nothing" in the antitrust statutes or their legislative history says anything "about protecting foreign purchasers in foreign markets." *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001). Consequently, injuries occurring "exclusively in foreign markets . . . are not of the type Congress intended to prevent through the

[FTAIA] or the Sherman Act." *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 307 (3d Cir. 2002) (finding lack of standing to sue). As the Solicitor General has noted, the FTAIA incorporates concepts of antitrust injury and standing by requiring that only injuries that result from an anticompetitive effect on U.S. commerce can support a claim. JA2 619.

With this in mind, numerous courts have dismissed, on standing grounds, claims brought under the theory that plaintiffs now advance. In *In re Microsoft*, foreign plaintiffs alleged that Microsoft had "engaged in worldwide monopolistic conduct that had a direct, substantial, and reasonably foreseeable effect on both domestic and export trade," and asserted that their injuries were sustained as a result of their purchases of Microsoft products in purely foreign transactions. 127 F. Supp. 2d at 714. Plaintiffs contended that the defendant's anticompetitive conduct was and had to be carried out both domestically and abroad to maintain the success of the monopolization effort. *Id.* Nonetheless, the district court dismissed the claims of these foreign plaintiffs on the ground that their purchases occurred outside of the United States. *Id.* at 715-16.

The court held that "whether the issue is resolved as one of jurisdiction or one of standing," the result is the same: "a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA." *Id.* at 716. While the court noted that the FTAIA's legislative history provides that jurisdiction will lie so long as "conduct has the requisite effects within the United States, *even if some purchasers take title abroad or suffer economic injury abroad,*" *id.* at 715 (quoting H.R. Rep. No. 97-686, at 10) (emphasis in *Microsoft*), the court explained that Congress "proceeded from the premise that wherever title is taken or economic injury is suffered, *at least some aspect of the sales transaction took place in the United States,*" *id.* (emphasis added), thus limiting protection of foreign claimants to those who participate in U.S. commerce. While recognizing that "[f]oreign purchasers should enjoy the protection of the antitrust laws *in the domestic marketplace*, just as our citizens do," *id.* at 716 (quoting H.R. Rep. No. 97-686, at 10) (emphasis added), the court ruled that purely foreign transactions do not qualify. This approach is "consistent with the statutory language, faithful to the legislative history, and respectful of the traditional reluctance of legislatures and courts to extend antitrust laws 'to protect foreign markets from anticompetitive effects.'" *Id.* at 716 (quoting *de Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 518 (S.D.N.Y. 1985)).

In *de Atucha v. Commodity Exchange, Inc.*, the district court dismissed for lack of standing the claim of a foreign plaintiff who purchased three silver contracts on the London Metal Exchange ("LME") and alleged that his purchase price was artificially inflated due to a conspiracy on U.S. commodity exchanges. 608 F. Supp. at 511-12. Like plaintiffs here, the plaintiff claimed that due to the "fungibility" of the commodity he bought (silver futures), the foreign market in which his transaction occurred and the U.S. market "function[ed] from an economic standpoint as a single market" and that his loss suffered abroad was "inextricably connected with the economic impact felt in the United States." *Id.* at 516. The plaintiff argued that he could "sue under American antitrust laws because the defendants' manipulation of the American silver markets produced his injury on the LME." *Id.* at 513.

The court denied standing because the plaintiff's foreign injury was "too remote from the antitrust violation to serve as the gravamen of a Section 4 claim." *Id.* at 514-18. The court found that the injury was not directly linked to the allegedly anticompetitive conduct, that damage calculations would be hopelessly speculative, and that plaintiff's alleged injury failed to "reflect[] Congress' core concerns in prohibiting the antitrust defendants' course of conduct" because (as set forth in *Pfizer*) "the primary purpose of the antitrust laws is to protect American consumers," and plaintiff was never a participant in U.S. commerce. *Id.* at 517.

The court rejected plaintiff's argument that if foreign plaintiffs could not bring claims for foreign injuries, foreign markets would be rigged, thereby harming American consumers, and cited the then-recently enacted FTAIA as "evidence" of "a reaffirmation of the proposition that the Sherman Act is directed to the protection of *American* trade." *Id.* (emphasis in original); *see also Turicentro*, 303 F.3d at 307 (holding that injuries occurring "exclusively in foreign markets . . . are not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act").

Similarly, in *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, the district court faced claims of a worldwide conspiracy to inflate the price of citric acid. No. C 97-3259 FMS, 1997 WL 732498, at *2 (N.D. Cal. Nov. 19, 1997). Foreign purchasers of citric acid sued for injuries suffered abroad. *Id.* The court, relying on the "spillover" effects language in the House Report, found that plaintiffs sufficiently pleaded jurisdiction under the FTAIA by merely alleging a worldwide conspiracy. *Id.* at *2-3.

However, notwithstanding this expansive interpretation of jurisdiction under the FTAIA, the court held that the plaintiffs lacked standing, explaining that "the antitrust laws do not extend to protect foreign markets from anticompetitive effects." *Id.* at *4. The court found that although the plaintiff "was injured by the elevated prices of citric acid, its injury is not covered by the antitrust laws because plaintiff was neither a competitor nor a consumer in the United States domestic market." *Id.*

These holdings—which reject, on standing grounds, theories identical to plaintiffs' alternative theory—harmonize the language, legislative history, and purpose of the FTAIA with the Sherman and Clayton Acts. Plaintiffs' foreign injuries are not within the "zone of interests" protected by the U.S. antitrust laws, as they were not directly caused by anticompetitive effects on U.S. commerce and thus do not constitute cognizable antitrust "injuries." [15]

The FTAIA grants U.S. firms a broad exemption for their activities abroad, subject to the laws of any applicable foreign sovereigns. In enacting the FTAIA, Congress expressed the hope that it would "encourage our trading partners to take more effective steps to protect competition in their own markets." *Empagran*, 124 S. Ct. at 2144 (citing

[15] It would be a bizarre result if, even though foreign customers of U.S. exporters had no U.S. antitrust claims because of the FTAIA, foreign customers of foreign sellers (more remote from U.S. commerce) could bring U.S. antitrust claims in U.S. courts. Granting standing to these foreign buyers would produce at least one other anomalous result. Courts have routinely rejected claims of U.S. buyers who were injured in U.S. commerce by purchases at cartel prices—in the United States—from nonconspiring sellers because such claims are deemed "too remote to confer antitrust standing" under *Associated Gen. See, e.g., In re Vitamins Antitrust Litig.*, No. 99-197, 2001 U.S. Dist. LEXIS 12114, at *22 (D.D.C. Jul. 2, 2001) (collecting cases). Unlike plaintiffs, who are free to sue in foreign jurisdictions, such U.S. claimants have no alternative forum for relief.

H.R. Rep. No. 97-686, at 13-14). Those actions have occurred in many countries, and are continuing. The result is an evolving, more advanced, world-wide network of competition law that—unlike plaintiffs' requested exercise of U.S. judicial imperialism—is consistent with the jurisdiction and standing concepts of the U.S. antitrust laws, and respects the sovereign interests of our trading partners.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

Robert Pitofsky/KK
Robert Pitofsky
Bruce L. Montgomery
Franklin R. Liss
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000
Attorneys for Defendants-Appellees Hoffmann-La Roche Inc. and Roche Vitamins Inc.

Arthur F. Golden
Arthur F. Golden
Lawrence Portnoy
William J. Fenrich
Kathryn E. Kinkade
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
Attorneys for Defendant-Appellee F. Hoffmann-La Roche Ltd

Kenneth S. Prince/KK

Kenneth S. Prince
Stephen Fishbein
Richard Schwed
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000
Attorneys for Defendant-Appellee BASF AG

Tyrone C. Fahner/KK

Tyrone C. Fahner
Stephen M. Shapiro
Andrew S. Marovitz
Jeffrey W. Sarles
MAYER, BROWN, ROWE & MAW LLP
190 South La Salle Street
Chicago, IL 60603
(312) 782-0600
Attorneys for Defendant-Appellee BASF Corporation

John M. Majoras/KK

John M. Majoras
Daniel H. Bromberg
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939
Attorneys for Defendants-Appellees Aventis S.A. (f/k/a Rhône-Poulenc S.A.), Aventis Animal Nutrition Inc. (f/k/a Rhône-Poulenc Animal Nutrition Inc.), Aventis CropScience USA Inc. (f/k/a Rhône-Poulenc Inc.) and Hoechst Marion Roussel SA

D. Stuart Meiklejohn/KK

D. Stuart Meiklejohn
Stacey R. Friedman
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
Attorneys for Defendants-Appellees Eisai Co., Ltd., Eisai U.S.A., Inc. and Eisai Inc.

Lawrence Byrne/KK
Lawrence Byrne
Joseph P. Armao
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200
Attorneys for Defendants-Appellees Takeda Pharmaceutical Company Limited (f/k/a Takeda Chemical Industries, Ltd.) and Takeda Vitamin & Food USA, Inc.

Laurence T. Sorkin/KK
Laurence T. Sorkin
Roy L. Regozin
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000
Attorneys for Defendants-Appellees Akzo Nobel Chemicals B.V. and Akzo Nobel Inc.
Attorneys for Defendants-Appellees

Michael L. Denger/KK
Michael L. Denger
Miguel A. Estrada
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Defendants-Appellees Daiichi Pharmaceutical Co., Ltd., Daiichi Pharma Holdings, Inc. (f/k/a/ Daiichi Pharmaceutical Corporation) and Daiichi Fine Chemicals, Inc.

Paul P. Eyre/KK
Paul P. Eyre
Ernest E. Vargo
BAKER & HOSTETLER LLP
1900 East 9th Street
3200 National City Center
Cleveland, OH 44114-3485
(216) 621-0200
Attorneys for Defendant-Appellee Bioproducts Incorporated

Donald I. Baker /KK

Donald I. Baker
W. Todd Miller
Christine J. Sommer
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20037
(202) 663-7820

Alice G. Glass
Special Counsel
BAKER & MILLER PLLC
River Landing Farm
261 River Road
Lyme, NH 03768
(603) 795-4609
Attorneys for Defendants-Appellees Chinook Group Limited and Cope Investments Limited

James R. Weiss /KK

James R. Weiss
PRESTON, GATES & ELLIS LLP
1735 New York Avenue, N.W.,
Suite 500
Washington, D.C. 20006-5209
(202) 628-1700
Attorneys for Defendants-Appellees DuCoa, L.P. and DCV, Inc.

Donald C. Klawiter /KK

Donald C. Klawiter
Peter E. Halle
J. Clayton Everett, Jr.
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-3000
Attorneys for Defendants-Appellees Degussa AG and Degussa Corporation

Thomas M. Mueller /KK

Thomas M. Mueller
Michael O. Ware
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
Attorneys for Defendants-Appellees Lonza Inc., Lonza AG and Alusuisse-Lonza Group Ltd (n/k/a Alcan (Switzerland) Ltd)

Jim J. Shoemake /KK

Jim J. Shoemake
Kurt S. Odenwald
Mary Ann Ohms
GUILFOIL, PETZALL &
SHOEMAKE, L.L.C.
100 South Fourth Street,
Suite 500
St. Louis, MO 63102-1821
(314) 241-6890
Attorneys for Defendants-Appellees DuCoa, L.P. and DCV, Inc.

Aileen Meyer /KK

Aileen Meyer
PILLSBURY WINTHROP LLP
1133 Connecticut Avenue,
N.W.
Washington, D.C. 20036
(202) 775-9800

Sutton Keany
Bryan Dunlap
PILLSBURY WINTHROP LLP
1540 Broadway
New York, NY 10036
(212) 858-1000
Attorneys for Defendant-Appellee Mitsui & Co., Ltd.

Moses Silverman /KK

Moses Silverman
Aidan Synnott
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Attorneys for Defendants-Appellees Sumitomo Chemical Co., Ltd. and Sumitomo Chemical America, Inc.

David M. Balabanian /KK

David M. Balabanian
Colin C. West
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000
Attorneys for Defendant-Appellee Mitsui & Co., Ltd.

Martin Frederic Evans/KK

Martin Frederic Evans
Gary W. Kubek
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
Attorneys for Defendant-Appellee Nepera, Inc.

Kevin R. Sullivan/KK

Kevin R. Sullivan
Grace M. Rodriguez
Peter M. Todaro
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 737-0500

Jeffrey S. Cashdan
KING & SPALDING LLP
191 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 572-4600
Attorneys for Defendant-Appellee UCB Chemicals Corporation

Karen N. Walker/KK

Karen N. Walker
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 879-5000
Attorneys for Defendants-Appellees Reilly Chemicals, S.A. and Reilly Industries, Inc.

Mark Riera/KK

Mark Riera
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Forty-Eighth Floor, 333 South Hope Street
Los Angeles, CA 90071-1448
(213) 620-1780
Attorneys for Defendant-Appellee Tanabe U.S.A., Inc.

Dated: February 9, 2005