No. 01-7115

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPAGRAN S.A., ET AL.,
Plaintiffs-Appellants,

v.

F. HOFFMANN-LAROCHE, LTD., ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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STATEMENT OF INTEREST

This brief is submitted in response to the Court's Order of March 7, 2003, inviting the Solicitor General to express the views of the United States.

QUESTION PRESENTED

Whether the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, provides jurisdiction under the Sherman Act over the claims of a foreign plaintiff injured by a conspiracy having direct, substantial, and reasonably foreseeable anticompetitive effects on United States trade or commerce, when the foreign plaintiff's claimed injury does not arise from those domestic effects.

[1] Francisco Peiró, *Commission adopts eight new decisions imposing fines on hard-core cartels*, 1 Competition Policy Newsl. (European Comm'n), Feb. 2002, at 30-34 (over €855 million in fines), *available at* http://europa.eu.int/comm/competition/publications/cpn/cpn2002_1.pdf; Australian Competition & Consumer Comm'n, *Federal Court Imposes Record $26M Penalties Against Vitamin Suppliers* (Mar. 1, 2001), *available at* http://203.6.251.7/accc.internet/media/search/view_media.cfm?R

that "the effect providing the jurisdictional nexus . . . [was also] the basis for the injury alleged under the antitrust laws." *Id.* at *2 (citations omitted).[3]

3. A divided panel of this Court (Edwards, Henderson, and Rogers, JJ.) reversed and remanded. Pet. App. A1-A36. The court observed that "the Second and Fifth Circuits have split" on "the question whether the FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct." *Id.* at A13. The court observed (*id.* at A13-A14) that the Fifth Circuit in *Den Norske Stats Oljeselskap As* v. *HeereMac Vof*, 241 F.3d 420, 427 (2001) (*Statoil*), *cert. denied*, 534 U.S. 1127 (2002), held that the FTAIA bars claims in which the plaintiff's injury does not stem from the conspiracy's anticompetitive domestic effects. By contrast, the Second Circuit in *Kruman* v. *Christie's International PLC*, 284 F.3d 384, 400 (2002), *petition for cert. pending*, No. 02-340 (filed Sept. 3, 2002), held that the FTAIA permits suit when the plaintiff's injury does not arise from the domestic effect of the conspiracy as long as a "domestic effect violate[s] the substantive provisions of the Sherman Act."[4]

The majority adopted a "view of the statute [that] falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former." Pet. App. A19. The majority rejected the plaintiffs' argument—based on *Kruman*, 284 F.3d at 397-400—that the "FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. A20. The majority nonetheless interpreted the phrase "gives rise to

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[3] Because the district court found subject matter jurisdiction lacking, it did not reach the defendants' alternative argument that the foreign plaintiffs lacked antitrust standing. *Empagran S.A.*, 2001 WL 761360, at *5.

[4] The parties in the *Kruman* case have reportedly agreed to settle their case. Brooke Barnes, *Sotheby's, Christie's to Settle Claims by Overseas Customers*, Wall St. J., Mar. 12, 2003, at B2.

a claim" in Section 6a(2) as requiring only that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Id.* at A19.

The majority also relied on the legislative history of the FTAIA and policy considerations to support its expansive interpretation of the Act. Acknowledging that portions of the sole relevant congressional committee report, H.R. Rep. No. 686 (1982), 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487 (House Report), support the Fifth Circuit's interpretation of the FTAIA, the majority believed it "most noteworthy . . . that the presence of legislative history that is consistent with the restrictive view does not (when read in context) denigrate or exclude the less restrictive view, whereas the less restrictive view includes within it the view that plaintiffs harmed by the U.S. effects can sue." Pet. App. A23. The majority found "most

panel observed (Pet. App. A4, A13-A14), the Second Circuit in *Kruman* rejected the view that the FTAIA "require[s] that the 'effect' on domestic commerce be the basis for the alleged injury suffered by a plaintiff," and instead held that the FTAIA's "language 'gives rise to a claim' only requires that the 'effect' on domestic commerce violate the substantive provisions of the Sherman Act." 284 F.3d at 399. Moreover, the majority's decision in the present case holds that the FTAIA permits a plaintiff to sue based on foreign injury arising from foreign conduct. That decision sharply contrasts with the Fifth Circuit's decision in *rf15A'bSe9Pf c2r1(at)-4.1(t((, but.2(so di[(sus9.3(*

B. THE PANEL MAJORITY'S HOLDING IS INCONSISTENT WITH THE STATUTORY TEXT, HISTORY, AND PURPOSES

The government continues to adhere to the position set forth in its amicus brief in *Statoil* that the FTAIA bars a private suit when the plaintiff's claim does not arise from the domestic effects of the challenged anticompetitive conduct.

1. It is settled that the Sherman Act extends to foreign conduct with intended and substantial effects on United States commerce, and that the FTAIA provides for jurisdiction under the Sherman Act over a claim by a plaintiff that suffers injury arising from direct, substantial, and reasonably foreseeable anticompetitive effects of foreign conduct on United States commerce, whether the plaintiff is located in the United States or abroad. *Statoil* Br. 11. The panel has embraced the remarkable proposition, however, that the FTAIA allows a suit even when a plaintiff is injured overseas *and* the injury stems entirely from a conspiracy's effects overseas. The panel reached that result by a "literal" reading of the word "a" in Section 6a(2) to mean that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. A19. Read in context, however, the most natural reading of Section 6a(2)'s requirement that "such effect gives rise to a claim" is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court. *Statoil* Br. 12; *cf. Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (a plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties").

This interpretation is supported by principles of antitrust injury and standing embedded in the FTAIA. Section 6a(2) of the FTAIA requires that domestic effects of the conduct in question

"give[] rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2). In *Kruman*, the Second Circuit held that because the FTAIA amended the Sherman Act—not the Clayton Act—the FTAIA "only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. A20 (citing *Kruman*, 284 F.3d at 397-400). The panel majority correctly rejected that approach because "Congress referred to *both* prohibited conduct and plaintiffs' injury, importing concepts from both the Sherman and Clayton Acts, in *making* the nexus of 'conduct,' 'effect,' and 'claim' the key to FTAIA." *Id.* at A20; see also *Statoil* Br. 12-13.

The majority erred, however, in concluding that the statute requires merely that "*some* private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act," Pet. App. A22 (emphasis added), because Congress incorporated antitrust injury and standing concepts in the FTAIA. See House Report at 11 ("[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing."). To have a "claim," a plaintiff must show "antitrust injury"—"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A contrary result would "divorce[] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Id.* at 487.

The FTAIA's focus is on domestic effects of anticompetitive conduct. Its text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce. Thus, established principles of antitrust injury and standing inform a proper interpretation of the FTAIA's language and require that the plaintiff—not just someone—have a "claim" under the Sherman Act. Cf.

National Credit Union Admin. v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (describing zone-of-interest requirement for prudential standing).

2. The majority acknowledges that portions of the FTAIA's legislative history support the Fifth Circuit's interpretation of the Act, Pet. App. A23, A28, but concludes that, on the whole, the legislative history favors an expansive interpretation because nothing in the history affirmatively "denigrate[s] or exclude[s]" an expansive interpretation, *id.* at A23. The majority thus assumes that, in the absence of express legislative history to the contrary, Congress must have intended the more expansive interpretation—a dubious analytical approach to a statute that was prompted in significant part by a perceived need to clarify the limitations of the Sherman Act's reach over international transactions. House Report at 2. The salient point is that nothing in the Act's legislative history speaks to the issue of foreign purchasers whose injuries do not arise from a conspiracy's effects on domestic commerce. The majority's interpretation of what the legislative history "implicitly assumes," Pet. App. A25, is simply unavailing because there is no indication that Congress had in mind the scenario occurring here—foreign plaintiffs suing to recover for alleged overcharges paid in foreign transactions for foreign goods. See *Statoil*, 241 F.3d at 429 n.28 ("Nothing is said about protecting foreign purchasers in foreign markets.") (quoting *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001)).

The Supreme Court's decision in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978), provides the relevant context for all of the House Report passages cited by the majority. See House Report at 10 (citing *Pfizer*). *Pfizer* did not address the jurisdictional reach of the antitrust laws. Rather, it held that a foreign government that purchased goods from United States companies is a "person" "entitled to sue for treble damages under the antitrust laws to the same

extent as any other plaintiff." 434 U.S. at 320. As discussed above, there is no dispute that the FTAIA permits suits by foreign purchasers who are injured by *domestic* anticompetitive effects of illegal conduct. Those plaintiffs, however, are markedly different from foreign purchasers who "bought [goods] exclusively outside the United States" and whose injuries arise exclusively from overseas conduct. Pet. App. A9.

3. a. We further disagree with the majority's reliance (Pet. App. A30) on what it considered a "most compelling" rationale: that its expansive interpretation of the FTAIA is necessary to deter international cartels from harming United States commerce. The majority reasons that allowing foreign plaintiffs to sue for treble damages in U.S. district court for foreign injuries suffered by defendants' foreign conduct "forces the conspirator to internalize the full costs of his anticompetitive conduct." *Ibid.* The paramount purpose of the United States' antitrust laws, however, is to protect consumers, competition, and commerce in the United States. *Pfizer*, 434 U.S. at 314 ("Congress' foremost concern in passing the antitrust laws was the protection of Americans."). Although the Court in *Pfizer* observed that "suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers," *ibid.*, the Court's decision in *Pfizer*, as we have pointed out, involved foreign purchasers injured by anticompetitive *domestic* conduct and effects. The Court did not intimate that the purposes of the antitrust laws

prosecuting international cartels by focusing on domestic commerce when calculating fines under the Sentencing Guidelines. See *Statoil* Br. 8-10. Similarly, for private plaintiffs, that admonition is appropriately followed by providing a cause of action only for such plaintiffs—domestic and foreign—who suffer injury from a conspiracy's effect on domestic commerce.[6]

Moreover, policy considerations based on deterrence counsel *against* the panel's expansive interpretation of the FTAIA that permits suits for injuries sustained abroad that arise from foreign conduct. Price-fixing conspiracies are inherently difficult to detect and prosecute. Cooperation by a co-conspirator, through provision of documents or testimony, thus is often vital to law enforcement. To induce such cooperation, the Antitrust Division of the Department of Justice maintains a robust *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993), that offers strong incentives to co-conspirators who elect voluntarily to disclose their criminal conduct and cooperate with prosecutors. That policy has proven indispensable in government antitrust enforcement; it is the number one source of leads for breaking up international cartels—including the vitamins cartel that is the subject of this case—that continue to injure American consumers.

Under the policy, the first cooperating corporation (and its officers) may receive amnesty from *criminal* prosecution. 4 Trade Reg. Rep. (CCH) ¶ 13,113 at 20,649-21, 20,649-22. They remain subject, however, to private actions seeking treble damages under 15 U.S.C. 15(a). Thus, potential amnesty applicants weigh their civil liability exposure when deciding whether to avail

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[6] The majority's decision also ignores the striking change in the legal landscape since *Pfizer*. Not only has Congress enhanced the penalties available against cartels, but there has been a marked growth in foreign antitrust statutes and enforcement, particularly in the last decade. *Statoil* Br. 15-16; Reh'g Pet. 4-5.

themselves of the government's amnesty policy. Without question, "private suits provide a significant supplement . . . to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter Corp.* v. *Sonotone*, 442 U.S. 330, 344 (1979). The rule adopted by the majority, however, would effect a sea change in the number and type of private actions permitted under the Sherman Act. We are aware of no ot

determination is to be made when the party who suffered the relevant injury is not "before the court." *Ibid*. It is clear, however, that once *any* plaintiff is determined to have a claim arising from an injury sustained by the domestic anticompetitive effects of a conspiracy, the rule embraced by the panel would permit any foreign purchaser to bring suit for treble damages in the district courts of the United States, even when the purchaser is "injured solely by that [conspiracy's] effect on foreign commerce." *Id.* at A5.

We are unaware of any decision pre-dating the FTAIA that permitted such suits.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted.

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March 24, 2003

[*] The Solicitor General is recused in this case.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. app. P. 32(a)(7), Local Rule 32(a)(1), and the Court's Order of March 7, 2003 because it has been prepared in a proportionally spaced typeface using WordPerfect 10 in 12-point Times New Roman.

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Adam D. Hirsh

Dated: March 24, 2003

ADDENDUM

N . 00-1842

I S C S

STATOIL ASA, PETITIONER

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HEEREMAC V.O.F., ET AL.

A C A
D A C A A
C C

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether federal courts have jurisdiction under the Sherman Act and the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 1, 6a, over the claims of a foreign plaintiff that it has been injured by a conspiracy that has direct, substantial, and reasonably foreseeable anticompetitive effects on United States trade or commerce, if the foreign plaintiff's claimed injury does not arise from those domestic effects.

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companies are based in The Netherlands, the United Kingdom, and the United States, respectively. . at 5a n.2. In December 1997, the United States charged respondent HeereMac and one of its managing directors with participating in a conspiracy to rig bids for heavy-lift barge services in the United States and elsewhere, in violation of Section 1 of the Sherman Act. 15 U.S.C. 1. The corporation and individual pleaded guilty and agreed to pay fines of $49 million and $100,000, respectively. Pet. App. 6a, 56a, 57a.

In December 1998, petitioner, an oil company owned by the government of Norway, brought suit seeking treble damages for overcharges it allegedly paid to respondents HeereMac and Saipem for heavy-lift barge services in the Norwegian sector of the North Sea. Pet. App. 7a; Pet. 4-5. Petitioner purchased no heavy-lift barge services in the United States, nor did it purchase any such service from McDermott, the only U.S.-based respondent. Rather, its contracts with

1982 (FTAIA), 15 U.S.C. 6a(1). Pet. App. 51a.[1] The court also observed that petitioner "was allegedly injured outside the United States by [respondents'] bid rigging on jobs located in the Norwegian sector of the North Sea having no direct, substantial effect on United States commerce." . at 52a. The court accordingly held that petitioner lacked standing to bring its claim, reasoning that the "United States antitrust laws do not extend to protect foreign markets from anticompetitive effects and 'do not regulate the competitive conditions of other nations' economies.'" . (quoting . . C . v. C ., 475 U.S. 574, 582 (1986)).

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worldwide to "flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." . at 15a-16a.

b. Judge Higginbotham dissented. Pet. App. 22a-38a. In his view, Section 6a(2)'s reference to " claim," rather than the " ' claim," means that the FTAIA confers jurisdiction whenever a conspiracy's conduct has direct, substantial, and reasonably foreseeable effects on U.S. commerce, and those domestic effects give rise to claim by party, even if not the plaintiff. . at 24a-26a. Judge Higginbotham reasoned that, once jurisdiction is established over the conspiracy's conduct as a whole, a plaintiff may bring suit in federal court to redress foreign injury allegedly suffered as a result of the conspiracy's effects on foreign commerce. . at 23a, 30a.

DISCUSSION

The decision in this case is the first appellate decision to address whether a plaintiff's antitrust claim involving foreign conduct must derive from that conduct's effect on domestic commerce. Appeals that raise the same issue are pending in five other courts of appeals. Thus, even if the issue otherwise warranted this Court's review, it would not be ripe for review at this time. Nor is there any basis for concluding that the Fifth Circuit's decision will impair the United States' efforts to enforce the Sherman Act against international cartels. The court of appeals was, moreover, correct in holding that the FTAIA requires that the anticompetitive effects on United States commerce must give rise to a plaintiff's claimed injuries.

A. THE ISSUE DECIDED B THE COURT OF APPEALS IS NOT RIPE FOR THIS COURT'S REVIE

2. Although the decision below is the first appellate decision to interpret Section 6a(2), with increasing frequency foreign plaintiffs have sued to recover damages arising out of foreign purchases of conspiratorially price-fixed items, when the conspiracy's conduct also affects United States commerce. To date, no district court that has considered the application of Section 6a(2) to such facts has embraced petitioner's reading of the Act. See, . ., ' C . v. CA ', ., 153 F. Supp. 2d 700, 704 (E.D. Pa. 2001) (citing cases); see also , . v. A D G C ., No. C97-3259 FMS, 1997

B. THE COURT OF APPEALS' DECISION DOES NOT ADVERSEL AFFECT THE GOVERNMENT'S ENFORCEMENT OF THE SHERMAN ACT

Petitioner argues (Pet. 18-21) that, because the Sherman Act has the same jurisdictional reach in both civil and criminal cases, see v. . *C* ., 109 F.3d 1, 4-6 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998), this Court's review is necessary to prevent the Fifth Circuit's decision from impairing the government's ability to enforce the Sherman Act. That contention lacks merit.

1. The Fifth Circuit's holding that a plaintiff's claim must derive from the conspiracy's effect on domestic commerce does not preclude the government from prosecuting violations of the Act by global cartels. District courts have jurisdiction over illegal foreign activity that has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. 6a(1). When an international cartel's conduct as a whole has that effect, "such effect gives rise" to the United States' "claim" under the Act. 15 U.S.C. 6a(2); see also Pet. App. 21a (noting that global conspiracy that has the effect of raising prices in the United States gives rise to a government claim).

2. Petitioner also errs in suggesting (Pet. 18-20) that the Fifth Circuit's decision may inappropriately reduce the size of fines the United States can recover under the Sentencing Guidelines, which instruct courts to use "20 percent of the volume of affected commerce" in establishing a Base Fine. Sentencing Guidelines § 2R1.1(d)(1). It is the policy of the United States to

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market allocation. Other cases contain similar allegations. See, . ., , 153 F. Supp. 2d at 701-702; , 2001 WL 761360, at *2.

calculate the Base Fine by using only the domestic commerce affected by the illegal scheme, and in all but two of the dozens of international cartel cases prosecuted (see p. 10 & note 5,), fines obtained by the government were based solely on domestic commerce. Gary R. Spratling, [illegible] 14-15 (Mar. 4, 1999) (speech by Deputy Assistant Attorney General for Criminal Enforcement), <http://www.usdoj.gov/atr/public/speeches/2275. htm>. The Base Fine is then adjusted by minimum and maximum multipliers that are derived from a culpability score. Guidelines §§ 8C2.5 and 8C2.6. Using that framework, the United States has obtained very large fines against international cartels. In the last five years, fines of $10 million or more have been imposed against 35 domestic and foreign-based corporations, including six fines of $100 million or more, and one fine of $500 million, which represents the largest criminal fine ever obtained by the Department of Justice under any statute.

Moreover, and consistent with the Fifth Circuit's decision, a court may consider the foreign commerce affected by the illegal conduct when the amount of affected domestic commerce understates the seriousness of the defendant's role in the offense and, therefore, the impact of the defendant's conduct on United States consumers. In that circumstance, the court may take into account the defendant's worldwide sales affected by the conspiracy in making an upward departure in a defendant's sentence under Guideline § 5K2.0. See 18 U.S.C. 3553(b) (permitting sentence in excess of Guidelines range when court finds "that there exists an aggravating * * * circumstance of a kind, or to a

with foreign nations." 15 U.S.C. 1. Although Congress generally intends that its laws apply only within the territorial jurisdiction of the United States, *C* v. *A* *A* *C*., 499 U.S. 244, 248 (1991), "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *.C*. v. *C*, 509 U.S. 764, 796 (1993); *.* *C*. v. *C*., 475 U.S. 574, 582-583 n.6 (1986); see also v. *.C*., 109 F.3d 1, 4-6 (1st Cir. 1997) (holding that Sherman Act's criminal provisions apply to wholly foreign conduct with intended and substantial domestic effects).

In amending the Sherman Act in 1982, Congress in the FTAIA provided that the Sherman Act applies to import commerce, in a more limited way to United States export commerce, and to foreign conduct when "(1) such [foreign] conduct has a direct, substantial, and reasonably foreseeable effect * * * on [United States domestic commerce] * * * and (2) such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a. It is not disputed in this case that Section 6a confers subject matter jurisdiction over a plaintiff's claim that arises from an illegal conspiracy's anticompetitive effects on domestic commerce, whether the plaintiff is located here or abroad. Pet. App. 14a n.22 & 16a n.25; cf. , . v. , 434 U.S. 308 (1978) (holding that a foreign country may sue under the Sherman Act). The question presented in this case is whether the Sherman Act applies "where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." Pet. App. 16a. The Fifth Circuit properly answered that question in the negative.

1. a. Section 6a(1) of the FTAIA provides that the Sherman Act extends to foreign non-import conduct only when it has a sufficient effect on United States commerce. 15 U.S.C. 6a(1). Section 6a(2) further requires that "such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2).

Petitioner argues (Pet. 10-13) that, because Section 6a(2) states that the requisite effects on United States commerce must give rise to "a" claim, a plaintiff need only point to the existence of some other party's viable claim arising from the same conduct that injured the plaintiff, even though the plaintiff's claimed injury has no connection to United States commerce. Read in context, however, the most natural reading of Section 6a(2)'s requirement that "such effect gives rise to a claim," is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the [illegible] before the court. See [illegible] *D* [illegible] *D . A C C* [illegible] . v. *A*[illegible], 523 U.S. 653, 657 (1998) (noting "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used") (internal quotation marks omitted); cf. [illegible] v. [illegible], 422 U.S. 490, 499 (1975) ("[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, * * * the plaintiff * * * cannot rest his claim to relief on the legal rights or interests of third parties.").

b. The Fifth Circuit's decision also comports with principles of antitrust injury and standing that ensure that the antitrust laws redress only the type of injury that the laws were designed to prevent. By requiring that the effect on domestic commerce must "give[] rise to a claim," 15 U.S.C. 6a(2), Congress incorporated

general concepts of antitrust injury and standing into the FTAIA. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 11 (1982) ("[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing"). To establish standing to seek relief under the Sherman Act, a plaintiff must show "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *B* *C* . v. *B* - - , ., 429 U.S. 477, 489 (1977). A contrary result would "divorce antitrust recovery from the purposes of the antitrust laws without

served when the plaintiff's injuries have no nexus to United States commerce.[6]

Indeed, petitioner's interpretation of Section 6a would expand the jurisdiction of the Act in ways that Congress could not have intended. Consider, for example, an international price-fixing cartel with wholly foreign members that had annual foreign sales of $2 billion to 50 foreign customers, and annual sales in the United States of $1 million to one U.S. customer. Under petitioner's construction, because the domestic customer could sue based on the conspiracy's requisite domestic effects, all 50 foreign customers could bring treble-damages actions in federal court, "even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." Pet. App. 15a-16a.

2. Petitioner contends (amagepld theirazAthe i4Tc0.1015 Tw[(2)10.9n -1.16 T[r8

amounts exceed the maximum fine authorized under the Sherman Act. 18 U.S.C. 3571.

There also has been a marked growth in foreign antitrust statutes in the last decade. Today, approximately 90 countries have laws protecting competition. A. Douglas Melamed, *A A * 27 A C - * * A * D, * * A * * D* 5 (Oct. 19, 2000), G

* * * * *

In sum, the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. The decision will not impair the United States' ongoing efforts to enforce the Sherman Act against international cartels, and it is correct in its interpretation of the FTAIA. Moreover, because appeals raising basically the same legal question are currently pending in five other courts of appeals—whose decisions could provide further illumination—review by this Court would be premature at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on March 24, 2003, two true and correct copies of the Brief For The United States And The Federal Trade Commission As Amici Curiae In Support Of Petition For Rehearing En Banc were served, by first-class mail and by electronic mail, on:

Charles S. Duggan, Esq.