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Global Antitrust Enforcement: The Sherman Act Does Not Apply Without Any Direct Domestic Effect, But Discovery Assistance May Be Available To Aid A Foreign Tribunal, According To The U.S. Supreme Court, 38 J. Marshall L. Rev. 495 (2004)

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GLOBAL ANTITRUST ENFORCEMENT: THE
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TRIBUNAL, ACCORDING TO THE U.S.
SUPREME COURT

SUE ANN MOTA*

I. INTRODUCTION

In an increasingly global market, the issues of antitrust jurisdiction and enforcement are becoming increasingly more important. While the United States has over a century of antitrust law and enforcement,¹ antitrust enforcement is expanding in the global economy. For example, Microsoft Corporation was fined nearly \$613 million by the European Union Commission in March 2004, a record fine against an individual company by that body. This fine was assessed because Microsoft was found to have broken European Union (“EU”) laws by leveraging its near monopoly in the operating systems market into the markets for services and media players.² In addition, Microsoft was ordered to disclose to competitors the interfaces with the Windows operating systems within 120 days, and to offer a version of Windows without media players.³

Microsoft has also been involved in protracted U.S. antitrust litigation, which started initially with an investigation by the FTC in 1990,⁴ and which culminated in a consent decree in 1994.⁵ The

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1. Sherman Antitrust Act, 15 U.S.C. §§ 1-104 (2000).

2. Microsoft, Case COMP/C-3/37.792, 2004 E.C. 299 (2004).

3. *Id.* Microsoft is appealing the ruling. James Kanter, *Microsoft Challenges EU Findings: Software Firm to Argue that European Regulators Misapplied Antitrust Law*, WALL ST. J., June 9, 2004, at B5, available at 2004 WL-WSJ 56931422.

4. See generally Sue Ann Mota, *United States v. Microsoft: The Antitrust Saga Continues*, 1999 UCLA J.L. & TECH 1 (1999), available at <http://www.lawtechjournal.com/archives/b1t/i6-sam.html>.

litigation continued with a second suit filed by the Department of Justice and twenty states in 1998, which led to a bench trial and a tri-part decision in 1999 to 2000. The ruling ultimately ordered the break up of Microsoft.⁶

This break up order was vacated on appeal.⁷ The district court ordered settlement discussions,⁸ and the U.S. government and several states settled.⁹ Massachusetts and other states did not, and litigated a separate decree, which Massachusetts appealed, but on June 30, 2004, this decree was upheld on appeal, and allowed Microsoft to hide its built-in web browser.¹⁰ Thus the U.S. sanction ultimately was significantly less than the EU sanction.

Another recent example of the importance and the effect of global antitrust enforcement was the approval of the GE/Honeywell merger in the United States.¹¹ The approval was followed by the disallowance of the merger in the EU as being incompatible with the common market.¹² This was the first merger of two U.S. firms, approved in the United States, but blocked by the EU.¹³

5. *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995); *United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C. 1995).

6. *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 12 (D.D.C. 1999) (reasoning that, based upon a preponderance of the evidence, the court proved the facts set forth in the opinion); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 35 (D.D.C. 2000) (stating that Microsoft violated both sections 1 and 2 of the Sherman Act); *United States v. Microsoft Corp.* 97 F. Supp. 2d 59, 63 (D.D.C. 2000) (ordering that the entry of final judgment proposed by the plaintiffs be entered).

7. *United States v. Microsoft Corp.*, 253 F.3d 34, 119 (D.C. Cir. 2001).

8. *United States v. Microsoft Corp.*, No. 92-1232 (CKK), 2001 U.S. Dist. LEXIS 24272, at *6 (D.D.C. Sept. 28, 2001).

9. *United States v. Microsoft Corp.*, No. 92-1232 (CKK), 2002 WL 31654530, at *1 (D.D.C. Nov. 1, 2002). The final judgment sets forth a number of restrictions on Microsoft's conduct and is intended to remedy the effects of Microsoft's anticompetitive behavior. *Id.* at *1-6. The final judgment bars Microsoft from retaliating against Original Equipment Manufacturers ("OEMs"), Independent Software Vendors, and Independent Hardware Vendors. *Id.* at *1, *3. Microsoft must provide uniform licenses, within a two-tier system, to OEMs. *Id.* at *2.

10. *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1204 (D.C. Cir. 2004).

11. Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L. ECON. L. 325, 326 (2002).

12. Commission Decision 2004/134/EC, 2004 O.J. (L48/1).

13. Thomas L. Ruffner, *The Failed G.E./Honeywell Merger: The Return of the Portfolio Effects Theory?*, 52 DEPAUL L. REV. 1285, 1286 (2003). *See generally* Erin E. Holland, *Using Merger Review to Cure Prior Conduct: The European Commission's G.E./Honeywell Decision*, 103 COLUM. L. REV. 74, 74 (2003); David S. Evans & Michael Salinger, *Competition Thinking at the European Commission: Lessons from the Aborted G.E./Honeywell Merger*, 10 GEO. MASON L. REV. 489, 490 (2002); Gotz Drauz, *European Union Law:*

The U.S. Supreme Court agreed to hear two cases with global antitrust implications, and in June 2004, issued two important decisions on the issue. The first, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*¹⁴ held that the Foreign Trade Antitrust Improvements Act (FTAIA) exception,¹⁵ and thus the Sherman Act, does not apply to adverse foreign effects of price fixing conduct which is independent of any adverse domestic effect. The court resolved a split in the Federal Circuit,¹⁶ and adopted a narrow interpretation of the FTAIA.¹⁷

In June 2004, the Supreme Court also held that federal law¹⁸

Unbundling G.E./Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law, 25 *FORDHAM INT'L. L.J.* 885, 896 (2002).

14. 124 S. Ct. 2359 (2004).

15. 15 U.S.C. § 6(a) (2000) states:

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

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

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

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

(2) such effect gives rise to a claim under the provisions of this Act, other than this section. If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

See generally Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 *U. CIN. L. REV.* 779 (1986).

16. See *infra* notes 42-52 and accompanying text.

17. *F. Hoffman-LaRoche*, 124 S. Ct. at 2369.

18. 28 U.S.C. § 1782 states:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

authorizes, but does not require, federal courts to assist in the production of evidence for use in a foreign or international tribunal, in *Intel Corp. v. Advanced Micro Devices, Inc.*¹⁹ In this case Advanced Micro Devices (“AMD”) filed suit against Intel with the European Union Commission, and requested documents Intel had produced in a private antitrust suite in Alabama, after the Directorate-General for Competition (“DG-Competition”) declined AMD’s request to seek the documents.²⁰

This Article will examine and reconcile these Supreme Court decisions. It will also discuss the implications of these cases on global trade and antitrust enforcement.

A. F. Hoffman-LaRoche, Ltd. v. Empagran, S.A.

In 1999, F. Hoffman-LaRoche, a Swiss pharmaceutical company, pleaded guilty and agreed to pay a record \$500 million fine for engaging in a worldwide conspiracy from 1990 to 1999 to raise and fix prices and to allocate market shares for vitamins sold in the United States and elsewhere.²¹ In 2000, plaintiffs including Empagran, S.A. and other foreign corporations domiciled in Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia, and the Ukraine,²² as well as two U.S.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

19. 124 S. Ct. 2466 (2004). See *infra* notes 88-131 and accompanying text. In a third antitrust case this term, the Court unanimously held that an alleged breach of a duty to share a telephone network with competitors under the 1996 Telecommunications Act does not state a claim under the Sherman Act § 2. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 *passim* (2004). This is a domestic antitrust case and will not be discussed further herein.

20. *Intel v. AMD*, 124 S. Ct. at 2472.

21. U.S. Dep’t of Justice, *F. Hoffman-LaRoche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel*, at <http://www.usdoj.gov/opa/pr/1999/May/196at.htm> (May 20, 1999). BASF Aktiengesellschaft, a German firm, also pleaded guilty and agreed to pay a \$225 million fine. *Id.* Dr. Kuno Sammer, F. Hoffman-LaRoche’s former Director of Worldwide Marketing for the vitamins and Fire Chemicals Division, also agreed to plead guilty and accepted a \$100,000 fine and four-month prison term. *Id.* See Eliot Disner, *Globetrotting*, 23 L.A. LAW., 32, 34 n.3 (1999).

22. Other foreign plaintiffs included Nutricion Animal, Windridge Pig Farm, Brisbane Export Corporation Pty, Ltd., Procter & Gamble Manufactura, S. de R.L. de C.V., Procter & Gamble European Supply Company BVBA, Procter & Gamble, Ltd., Procter & Gamble Technical Centers, Ltd., P.R. Procter & Gamble Home Products Indonesia, P. T. Procter & Gamble Indonesia, and Concern Stinol. Amended Class Action Complaint at 1, *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, No. 00-1686, 2001 U.S. Dist. LEXIS 20910 (D.D.C. June 7, 2001). The plaintiffs claimed that the court had

corporations, Proctor & Gamble Manufacturing Company and the Proctor and Gamble Company, filed an antitrust suit against numerous defendants, including Hoffman-LaRoche Vitamins, Incorporated, BASF Corporation, and other defendants²³ in U.S. federal district court.²⁴ The plaintiffs sought damages and injunctive relief under U.S. antitrust laws, foreign antitrust law, and international law, alleging that the defendants conspired to fix prices,²⁵ allocated market shares, and committed often unlawful practices designed to inflate the prices of various vitamins²⁶ sold both within and outside the United States. Plaintiffs brought this action in two classes, domestic purchases and foreign purchases.²⁷

The defendants moved to dismiss, claiming that the federal district court lacked subject matter jurisdiction over the claim for several reasons. First, the injuries alleged were sustained in transactions that lacked any direct connection to U.S. commerce.

jurisdiction under 28 U.S.C. § 1350 (Alien Tort Claims Act), and 28 U.S.C. § 136.

23. See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, No. 00-1686, 2001 U.S. Dist. LEXIS 20910, at *2 n.1 (D.D.C. June 7, 2001) (listing other defendants, including: Rhone-Poulenc Animal Nutrition, Inc.; Rhone-Poulenc, Inc.; Takeda Chemical Industries, Ltd.; Takeda Vitamin & Food USA, Inc.; Daiichi Pharmaceutical Co., Ltd.; Daiichi Pharmaceutical Corporation, Inc.; Bioproducts Inc.; Degussa-Huls Corporation; EM Industries, Inc.; Mitsui & Co., Ltd.; Nepera, Inc.; Reilly Industries, Inc.; Sumitomo Chemical America, Inc.; Tanabe USA, Inc.; and UCB Chemicals Corporation). This motion has also been adopted by: Chinook Group, Ltd.; Cope Investments Ltd.; DuCoa, L.P.; DCV, Inc.; UCB S.A.; Eisai Co., Ltd.; Hoechst Marion Roussel, S.A.; Rhone-Poulenc S.A.; Sumitomo Chemical Co., Ltd.; Degussa AG; Merck KgaA; E. Merck; F. Hoffman-LaRoche, Ltd.; BASF Aktiengesellschaft; Lonza AG; Alsuisse Group Ltd.; and Lonza, Inc. *Id.*

24. *Id.* at *1.

25. According to the plaintiffs, acts in furtherance of the conspiracy included alleged horizontal agreements such as meetings and conversations allegedly to discuss and agree on prices, sales volumes, and markets for vitamins and vitamin premixes, and allocating markets and customers. Amended Class Action Complaint, Nature of This Action § 4, *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, No. 00-1686, 2001 U.S. Dist. LEXIS 20910 (D.D.C. June 7, 2001).

26. Class vitamins include vitamins A, C, E, D1, B2, B3, B5, B6, B9, B12, H beta-carotene, astaxanthin, centhavanthin, and premixes. *Id.* § 6.

27. *F. Hoffman-LaRoche*, 2001 U.S. Dist. LEXIS 20910, at *3-4. Plaintiffs brought action under section 1 of the Sherman Act, 15 U.S.C. § 1, sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 16, and foreign and international antitrust laws. Amended Class Action Complaint § 7, *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, No. 00-1686, 2001 U.S. Dist. LEXIS 20910 (D.D.C. June 7, 2001). During the class period, 1988-1999, the world market for vitamins was dominated by three companies, Roche, Rhone Poulenc, and BASF, who controlled between 70 and 95% of the world market for vitamins A, B2, and E, and over 95% of the world market for vitamins A and E. Amended Class Action Complaint at 572, *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, No. 00-1686, 2001 U.S. Dist. LEXIS 20910 (D.D.C. June 7, 2001).

Second, the plaintiffs lacked standing because they were out of the class of persons intended to be protected by the Sherman Act. Third, the claims of the domestic plaintiffs duplicated claims in the then-pending Vitamin Antitrust Litigation. Finally, the claims of violating of foreign law and customary international law do not state a claim upon which relief may be granted.²⁸

The district court first examined the Foreign Trade Antitrust Improvements Act of 1982,²⁹ which states that the Sherman Act does not apply to conduct involving trade or commerce with foreign nations unless there is a direct, substantial, and reasonably foreseeable effect on U.S. commerce. The problem for the district court was that the plaintiffs were seeking recovery for vitamins delivered outside the U.S. and did not allege the price injuries which had the requisite domestic effects.³⁰ Thus, the district court did not find jurisdiction over the foreign plaintiffs' federal antitrust allegations, but did allow the U.S. plaintiffs to proceed and file more detailed factual allegations.³¹

Because the court did not have subject matter jurisdiction over the foreign plaintiffs' claims, it did not address the standing issue concerning them.³² The court did allow the domestic plaintiffs the opportunity to provide submissions on this issue, however, since it was unclear whether they were competitors or consumers in the U.S. market.³³

The district court then found that the plaintiffs' claims in the instant case differed from the pending Multi-District Litigation, as the Vitamins Antitrust Litigation involved only domestic sales, while this claim dealt exclusively with foreign commerce.³⁴

The district court dismissed the foreign law complaints because it would be more efficient and in the best interests of comity to allow the foreign courts to adjudicate claims arising from alleged violations of their own laws.³⁵ Since the plaintiffs did not cite any case law establishing a customary international law of

28. *F. Hoffman-LaRoche*, 2001 U.S. Dist. LEXIS 20910, at *4-5.

29. Pub. L. No. 97-290, 96 Stat. 1233.

30. *F. Hoffman-LaRoche*, 2001 U.S. Dist. LEXIS 20910, at *8-10. Plaintiffs acknowledged in a court hearing that no court had ever interpreted the federal antitrust laws to reach wholly foreign transactions such as those alleged, but for fairness, the court should expand this scope. *Id.* at *13.

31. *Id.* at *13-15.

32. *Id.* at *16.

33. *Id.* at *17.

34. *Id.* at *21. In the Vitamin Antitrust Litigation, the foreign defendants stipulated that the court had personal jurisdiction over them. *In re Vitamins Antitrust Litig.*, Misc. No. 99-197, MDL No. 1285, 2001 U.S. Dist. LEXIS 25070, at *20 (D.D.C. Sept. 11, 2001). In 2004, the district court entered a final order approving four settlement agreements and a final judgment. *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 106 (D.D.C. 2004).

35. *F. Hoffman-LaRoche*, 2001 U.S. Dist. LEXIS 20910, at *26.

antitrust, this claim was dismissed as well.³⁶ Thus, all claims concerning the foreign plaintiffs were dismissed by the district court.³⁷

The domestic plaintiffs transferred their claims to pending litigation, and a final judgment was entered in that case.³⁸ The foreign plaintiffs appealed. The Court of Appeals for the District of Columbia examined the FTAIA,³⁹ and recognized a split in the circuits on its interpretation.⁴⁰ The district court followed the narrower interpretation of the FTAIA found in the Fifth Circuit's 2001 decision in *Den Norske Stats Oljeselskap As v. Heermac Vof*.⁴¹ In this case, a Norwegian oil company which conducted business solely in the North Sea sought to use U.S. antitrust laws against defendants for an allegedly anticompetitive conspiracy which, the plaintiffs contended, raised the plaintiffs operating costs in the North Sea.⁴²

The Fifth Circuit Court of Appeals held that the district court properly dismissed this case for lack of subject matter jurisdiction and for lack of standing.⁴³ Further, the Fifth Circuit stated that the plain language of the FTAIA required this result, because the plaintiffs' injury did not arise from a domestic anticompetitive effect.⁴⁴ The Fifth Circuit decision seemed to the D.C. Circuit to

36. *Id.* at *29.

37. *Id.* at *30.

38. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003).

39. The D.C. Circuit observed that the FTAIA was enacted by Congress to encourage the business community to engage in efficiency in the export of U.S. goods. *Id.* at 345 (citing H.R. REP. NO. 97-686, at 2 (1982)).

40. *Id.* at 346. The Court of Appeals for the D.C. Circuit had only applied the FTAIA once, in *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998). There was subject matter jurisdiction because the antitrust injury ultimately harmed U.S. purchasers. *Id.* See Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 AM. CRIM. L. REV. 241, 268 n.162 (2003).

41. 241 F.3d 420 (5th Cir. 2001). See generally Karen O'Brien, Notes & Comments, *Giving Rise to a Claim: Is FTAIA's Section 6A(2) an Antitrust Plaintiff's Key to the Courthouse Door?*, 9 SW. J. L. & TRADE AM. 421 (2002/2003).

42. *Oljeselskap*, 241 F.3d at 421. The defendants provided heavy-lift barge services; only six or seven such barges existed in the world at that time. *Id.* Two of the defendants had pled guilty to U.S. Department of Justice criminal charges of suppressing and eliminating competition by rigging bids for services in the United States and elsewhere, and paid fines of \$49 million and \$100,000. *Id.* at 422-23.

43. *Id.* at 421.

44. *Id.* The Fifth Circuit also examined the legislative history of FTAIA, but recognized that the court was not free to substitute legislative history for the plain language of the Act, noting that "legislative history is relegated to a secondary source." *Id.* at 428 (quoting *Boureslan v. Aramco*, 857 F.2d 1014, 1018 (5th Cir. 1988)). See generally Ryan A. Haas, *Act Locally, Apply Globally: Protecting Consumers from International Cartels by Applying*

“endorse a view of FTAIA that is overly rigid, in light of the words of the statute and relevant portions of the legislative history.”⁴⁵

The Court of Appeals for the Second Circuit took a less restrictive view of the FTAIA in *Kruman v. Christie’s International PLC* in 2002.⁴⁶ In this case, the plaintiffs who bought or sold goods in auctions outside the United States filed a class action against defendants including the two largest auction houses in the world, Christie’s and Sotheby’s, claiming that they were injured because of inflated commissions.⁴⁷ In a case of first impression in the Second Circuit, the court held that the Sherman Act did apply.⁴⁸ The Court of Appeals for the District of Columbia Circuit stated that its interpretation of the FTAIA fell somewhere between the views of the Fifth and Second Circuits, but closer to the Second’s.⁴⁹

The D.C. Circuit held that there was subject matter jurisdiction in *Empagran*, and concluded that the less restrictive view of the FTAIA was what Congress intended to achieve.⁵⁰ In addition, on an issue which the district court did not reach,⁵¹ the court of appeals ruled that the foreign plaintiffs had standing.⁵² Finally, the appellate court stated that the district court would have to consider anew whether to exercise its discretion to accept jurisdiction over the foreign plaintiffs’ foreign law claims.⁵³

A dissenter in the D.C. Circuit stated that the plain language of the FTAIA expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect required by the statute.⁵⁴ According to the dissent, a more natural reading of the statutory language is the narrower reading by the district court and the

Domestic Antitrust Law Globally, 15 LOY. CONSUMER L. REV. 99 (2003); David V. Bzara, *Den Norske Stats Oljeselskap As v. Heeremac Vof: Interpreting the Foreign Trade Antitrust Improvements Act to Determine Whether “a Claim” Means “the Claim”*, 16 TEMP. INT’L. & COMP. L.J. 411 (2002).

45. *F. Hoffman-LaRoche*, 315 F.3d at 341.

46. 284 F.3d 384 (2d Cir. 2002).

47. *Id.* at 389. The defendants had already settled with a class of plaintiffs who had purchased or sold in domestic auctions. *Id.*

48. *Id.* at 390.

49. *F. Hoffman-LaRoche*, 315 F.3d at 341.

50. *Id.* at 357.

51. *F. Hoffman-LaRoche*, 2001 U.S. Dist. LEXIS 20910, at *13-14.

52. *F. Hoffman-LaRoche*, 315 F.3d at 359. See generally Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. REV. 2151 (2003) (discussing the Sherman Act and private antitrust treble damages litigation in American courts by foreign plaintiffs).

53. *F. Hoffman-LaRoche*, 315 F.3d at 360. A rehearing en banc was denied. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, No. 01-7115, 2003 U.S. App. LEXIS 19021 (D.C. Cir. Sept. 11, 2003).

54. *F. Hoffman-LaRoche*, 315 F.3d at 361-62 (Henderson, J., dissenting).

Fifth Circuit.⁵⁵

The U.S. Supreme Court granted certiorari to resolve the split in the circuits.⁵⁶ The issue before the Court was whether significant foreign anticompetitive conduct with an adverse domestic effect and an independent foreign effect would allow the foreign plaintiff to bring a U.S. claim.⁵⁷ With five justices joining him,⁵⁸ Justice Breyer opined that where price-fixing conduct significantly affects both customers outside and inside the United States, but the adverse foreign effect is independent of any adverse domestic effect, that the FTAIA exception and thus the Sherman Act do not apply.⁵⁹

Justice Breyer summarized the FTAIA's general rule that the Sherman Act does not apply to trade or conduct with foreign nations.⁶⁰ The statutory exceptions apply when conduct significantly harms imports, domestic commerce, or American exports.⁶¹ The Court concluded that the conduct in question fell within the FTAIA's general rule excluding the Sherman Act's application, and that the domestic injury exception does not apply because the claim rests solely in the independent foreign harm.⁶² Justice Scalia's one paragraph concurrence would have ended the inquiry at this point.⁶³

Justice Breyer then examined the legislative history of the FTAIA, which sought to make clear to exporters that the Sherman Act does not prevent them from entering into business arrangements which adversely affect only foreign markets.⁶⁴ The FTAIA's general rule excludes from the Sherman Act export activity or other commercial activities taking place abroad, unless one of the exceptions applies.⁶⁵

55. *Id.* at 360. Judge Karen LeCraft Henderson, dissenting, calls the majority's reasoning a "peculiar notion." *Id.*

56. *F. Hoffman-LaRoche, Ltd., v. Empagran S.A.*, 540 U.S. 1088 (2003). See generally Deborah J. Buswell, *Foreign Trade Antitrust Improvements Act: A Three Ring Circus—Three Circuits, Three Interpretations*, 28 DEL. J. CORP. L. 979 (2003); Salil K. Mehra, "A" Is for Anachronism: *The FTAIA Meets the World Trading System*, 107 DICK. L. REV. 763 (2003).

57. *F. Hoffman-LaRoche*, 124 S. Ct. at 2363.

58. Justice Breyer was joined by Chief Justice Rehnquist, and Justices Stevens, Kennedy, Souter, and Ginsburg. Justice O'Connor took no part in the consideration or decision of the case. *Id.* at 2362.

59. *Id.* at 2363.

60. *Id.*

61. *Id.* See Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L. L.J. 11 (2003).

62. *F. Hoffman-LaRoche*, 124 S. Ct. at 2363.

63. *Id.* at 2373.

64. *Id.* at 2364 (citing H.R. REP. NO. 97-686, at 1-3, 9-10).

65. See *id.* at 2364-65. Respondents argued that the FTAIA does not apply because its general exclusionary rule applies to conduct involving exports only.

The Court then held that the FTAIA domestic injuries exception does not apply. First, under comity, the Court construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other countries.⁶⁶ Second, according to the court, the Sherman Act's legislative history demonstrated a Congressional intent for the FTAIA to clarify, but not to expand, the Sherman Act's scope concerning foreign commerce.⁶⁷ Thus the Supreme Court vacated the decision of the Court of Appeals for the

Brief for Respondent at 19, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724), available at 2004 WL 533935. The Court disagreed, stating the FTAIA as enacted applied to "trade or commerce." *F. Hoffman-LaRoche*, 124 S. Ct. at 2363.

66. *F. Hoffman-LaRoche*, 124 S. Ct. at 2366. Legislators may find it reasonable to apply U.S. antitrust laws to foreign anticompetitive conduct, when the justification is substantial. But applying U.S. antitrust law to foreign conduct can interfere with a foreign nation's ability independently to regulate its own commercial affairs. Respondents argued that many nations have adopted antitrust laws like the United States', so that the practical likelihood of interfering with the other nations is minimal. The Court stated that briefs filed by several foreign nations, including Germany, Japan, and Canada, indicated that a contrary ruling would undermine their own antitrust enforcement policies. *Id.* at 2368. Canada's brief, for example, holds that a broad interpretation of the FTAIA exception would be unreasonable, even though our laws are similar in many respects, and Canada's is one year older, concerning price-fixing cartels. Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 1, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724), available at 2004 WL 226389. Seven nations joined the United States, urging reversal of the appellate court's decision. Transcript of Oral Argument at 1, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724), available at 2004 WL 1047902. Respondents further argued that courts could look at comity issues on a case by case basis. Brief for Respondents at 48, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724), available at 2004 WL 533935. The Court, however, stated that this approach is too complex to be workable. *F. Hoffman-LaRoche*, 124 S. Ct. at 2368.

67. *F. Hoffman-LaRoche*, 124 S. Ct. at 2369. The petitioners and the solicitor general found no case in which any court applied the Sherman Act to redress solely foreign injury at the time of the FTAIA's enactment. *Id.* While the respondents cited six cases on appeal to the U.S. Supreme Court, the Court indicated that three cases involve the U.S. Government, which must seek necessary belief to redress anticompetitive harm to the public, and three cases in the lower courts were brought by private plaintiffs to redress foreign injury dependent on domestic harm. *Id.* Thus, according to the Court, no pre-FTAIA case provides sufficient authority for the broad scope of the FTAIA exception. *Id.* at 2370. Amici supporting the respondents point to policy considerations. Brief for Amici Curiae Committee to Support the Antitrust Laws and National Association of Securities and Consumer Attorneys in Support of Respondents at 2, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724), available at 2004 WL 533932. The Court couldn't say which side was correct but that the agreements don't overcome the previous considerations and change the conclusions. *F. Hoffman-LaRoche*, 124 S. Ct. at 2368.

D.C. Circuit and remanded the case.⁶⁸ Justice Scalia's concurrence, joined by Justice Thomas, further stated that this is the only interpretation consistent with the principle that statutes should be read with customary deference to foreign countries' laws in their own territories.⁶⁹

B. Intel Corp. v. Advanced Micro Devices, Inc.

The documents which AMD requested in *Intel v. AMD*⁷⁰ actually arose from prior antitrust litigation Intel was involved in, which had been brought by Intergraph Corporation. In 1997, Intergraph sued Intel, the world's largest designer, manufacturer, and supplier of high-performance microprocessors, for twenty-three counts, including state law claims, patent infringement claims, and one count alleging antitrust violations under sections 1 and 2 of the Sherman Act.⁷¹ The district court granted Intergraph a preliminary injunction,⁷² but the injunction was vacated on appeal.⁷³ Intel was granted summary judgment on its antitrust claims by the district court in 2000;⁷⁴ this was affirmed on appeal.⁷⁵ In 1998, the district court entered a protective order governing the confidentiality of all discovery in this case.⁷⁶

In 2000, AMD filed an antitrust complaint with the DG-Competition of the European Commission, alleging that Intel abused its dominant position in the EU through royalty rebates, exclusive purchasing agreements, price discrimination, and standard setting cartels, in violation of European Competition law.⁷⁷ AMD recommended that the DG-Competition seek

68. *Id.* at 2372-73.

69. *Id.* at 2373.

70. 124 S. Ct. 2466 (2004).

71. *Intergraph Corp. v. Intel Corp.*, 3 F. Supp. 2d 1255 (N.D. Ala. 1998).

72. *Id.* at 1291. The district court held that Intergraph was likely to succeed in showing that Intel was a monopolist. *Id.* at 1279.

73. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999). Intel's market power in the micro-processor market is irrelevant in this case, according to the appeals court. *Id.* at 1354.

74. *Intergraph Corp. v. Intel Corp.*, 88 F. Supp. 2d 1288, 1289 (N.D. Ala. 2000).

75. *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695 (Fed. Cir. 2001). The patent litigation continued, and in an unpublished, non-precedent-setting decision by the Federal Circuit in 2004, the appellate court vacated a judgment of infringement and remanded the patent case. *Intergraph Corp. v. Intel Corp.*, 89 Fed. Appx. 218 (Fed. Cir. 2004).

76. *Petition for Writ of Certiorari, Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004) (No. 02-572), 2002 U.S. Briefs 572, at *72.

77. *Intel v. AMD*, 124 S. Ct. at 2474-75. AMD's complaint alleged that Intel's actions violated Article 82 of the Treaty Establishing the European Commission ("EC"). *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 665-66 (9th Cir. 2002). Article 82 prohibits abuse of a dominant position within the common market. The DG-Competition is authorized to enforce Article 82 by conducting investigations, to propose curative measures in

discovery of documents from Intergraph Corporation.⁷⁸ Although the DG-Competition is empowered to gather such information on its own, it declined in this case.⁷⁹ In response, AMD then moved for an order in federal district court directing Intel to produce documents and testimony from the prior case, under 28 U.S.C. § 1782(a).⁸⁰ This federal statute states that a district court may order a person to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. While no statement of objection was issued, the district court held that the case was in the initial stage of a preliminary hearing and denied the motion.⁸¹

AMD appealed.⁸² The Ninth Circuit faced two issues on appeal. First, is the European proceeding a foreign or international tribunal? Second, must the material requested be discoverable or admissible in that tribunal? Intel argued that the EU proceeding was purely administrative and thus the federal statute did not apply.⁸³ Additionally, Intel cited cases from the First⁸⁴ and Eleventh⁸⁵ Circuits to further support its position, that even if it were a foreign tribunal, that there is a threshold requirement of discoverability in that tribunal. The Second⁸⁶ and Third⁸⁷ Circuits don't impose a threshold showing of discoverability. The remaining circuits to consider the issue, the Fourth⁸⁸ and Fifth⁸⁹ Circuits, do not impose a threshold showing of

published decisions, and to impose fines and penalties. *Id.* at 666.

78. *See supra* notes 70-75 and accompanying text.

79. *Intel v. AMD*, 124 S. Ct. at 2474-75.

80. *Id.*

81. *Advanced Micro Devices, Inc. v. Intel Corp.*, No. C-01-7033, 2002 U.S. Dist. LEXIS 11511, at *3 (N.D. Cal. Jan. 7, 2002).

82. *AMD v. Intel*, 292 F.3d at 664.

83. *Id.* at 667.

84. *In re Application of Asta Medica*, 981 F.2d 1, 21-22 (1st Cir. 1992), *overruled by Intel v. AMD*, 124 S. Ct. at 2466. In this case, the documents requested were for use in patent infringement litigation in France and England. *Id.* at 4.

85. *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *overruled by Intel v. AMD*, 124 S. Ct. at 2466. This was a case of first impression for the Eleventh Circuit. *Id.* at 1152.

86. *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 101-02 (2d Cir. 1992). A decision denying the airline's request to take discovery in the U.S. for use in a Hungarian court was reversed. *Id.* at 102. *See also* *Euromepa, S.A. v. R. Esmerian, Inc.* 154 F.3d 24, 28 (2d Cir. 1998) (affirming a denial of discovery for use in a French appeal). Intermediate courts of appeals in France may take and bear new evidence; nonetheless, this was considered by the district court as an affront to the French court. *Id.* at 26.

87. *In re Bayer AG*, 146 F.3d 188, 192 (3d Cir. 1998). Bayer sought discovery material from BetaChem, Inc., a New Jersey firm, for use in a patent infringement suit pending in Spain. The district court's denial of the request was vacated. *Id.* at 189.

88. *In re Letter of Request from Amtsgericht Ingolstadt, F.R.G.*, 82 F.3d

discoverability from a foreign tribunal, but do from a private party.

Since the Ninth Circuit had previously rejected a requirement of admissibility in a foreign tribunal,⁹⁰ it rejected the requirement with respect to discoverability.⁹¹ In a case of first impression for the Ninth Circuit concerning whether the EU proceedings qualified as a foreign or international tribunal, invoking the statute, the appellate court held that it was a quasi-judicial or judicial proceeding.⁹² Thus the district court was reversed, and the case remanded, with no requirement that AMD show that what was sought would be discoverable in the EU.⁹³

The U.S. Supreme Court granted certiorari to resolve the split in the circuits on the foreign discoverability issue.⁹⁴ Justice Ginsburg, joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, and Thomas, held that § 1782 authorizes but does not require the district court to provide discovery aid, without a foreign discoverability requirement.⁹⁵ Justice Scalia concurred in the judgment.⁹⁶ In a concurrence similar to his concurrence in *F. Hoffman-LaRoche*,⁹⁷ Justice Scalia stated that the statute itself, the only sure expression of the will of Congress, requires the result the Court reached.⁹⁸

Justice Ginsburg's majority opinion first examined the nearly 150-year history of 27 U.S.C. § 1782.⁹⁹ Congress first aided foreign tribunals through diplomatic channels in 1855.¹⁰⁰ In 1948,

590, 592-93 (4th Cir. 1996). This case involved taking a blood sample for use in a paternity suit. The order was affirmed. *Id.* at 591.

89. *In re* Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venezuela, 42 F.3d 308, 310-11 (5th Cir. 1995). The appellate court found that no discoverability requirement was necessary before honoring a letter rogatory. *Id.* at 311.

90. *In re* Request for Judicial Assistance from Seoul Dist. Criminal Court, 555 F.2d 720, 723 (9th Cir. 1997). The appellate court upheld an order to a California bank for records to be used in a Korean criminal court. *Id.* at 722.

91. *AMD v. Intel*, 292 F.3d at 668-69.

92. *Id.* at 668.

93. *Id.* at 669. On remand, a Magistrate Judge found AMD's request overbroad, and recommended that AMD submit a more specific request for only documents directly relevant to the EU case. Further proceedings were stayed. *Intel v. AMD*, 124 S. Ct. at 2476.

94. *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 531 (2003).

95. *Intel v. AMD*, 124 S. Ct. at 2472, 2476.

96. *Id.* at 2484-85.

97. *See F. Hoffman-LaRoche*, 124 S. Ct. at 2373.

98. *Intel v. AMD*, 124 S. Ct. at 2484-85. Justice Scalia considered it improper and unnecessary to seek repeated support in the legislative history. *Id.* at 2484. Similar to *F. Hoffman-LaRoche*, Justice O'Connor took no part in the consideration or decision in this case. *Id.* at 2472.

99. *Id.* at 2473. .

100. *Id.* (citing Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630). This was broadened in 1863 to authorize district courts to compel testimony here for use

Congress broadened the scope of assistance to allow district courts to designate persons to preside at depositions for use in any civil action pending in any court in a foreign country with which the United States is at peace.¹⁰¹ In 1958, Congress created the Commission on International Rules of Judicial Procedure, which six years later recommended revisions to § 1782. These revisions, which were unanimously passed by Congress, provided assistance in obtaining documentary and other tangible evidence and testimony for use in a proceeding pending in a foreign or international tribunal¹⁰² In 1996, the words, “including criminal investigations conducted before formal accusation” were also added.¹⁰³

The Court then examined the facts of this litigation¹⁰⁴ as well as the split in the federal circuits on this issue of a foreign discoverability requirement,¹⁰⁵ and then proceeded to examine how the EC enforces European competition law and regulations. The Court noted that either upon receipt of a complaint or on its own, the D-G Competition conducts a preliminary investigation.¹⁰⁶ Any complainant has procedural rights, but lacks litigant status at this stage.¹⁰⁷ The DG-Competition may take into account any information provided by any complaint, and may seek information directly from the target.¹⁰⁸ This investigation results in a formal written decision whether to pursue the complaint.¹⁰⁹ Any complainant may seek judicial review of this decision by the Court of First Instance, and then the European Court of Justice.¹¹⁰

The Court proceeded, as in all statutory construction cases, by examining the language of the statute itself. According to the

abroad in suits to recover money or property. *Id.* at 2474-75 (citing Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769).

101. *Id.* at 2473 (citing Act of June 25, 1998, ch. 646, § 1782, 62 Stat. 949). This statute also eliminated the requirement that a foreign country be a party or have an interest in the proceeding. *Id.* The next year, Congress substituted “judicial proceeding” for “civil action.” *Id.* at 2473 (citing Act of May 27, 1949, ch. 139, § 93, 63 Stat. 103).

102. *Id.* at 2474 (citing S. REP. NO. 88-1580, at 7 (1964)).

103. *Id.* (citing National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 486).

104. *Id.* at 2474-77. See *supra* notes 77-94 and accompanying text.

105. See *supra* notes 81-91 and accompanying text.

106. *Intel v. AMD*, 124 S. Ct. at 2477.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* If the DG-Competition pursues the case, it normally serves the target a formal “statement of objections.” *Id.* The target is entitled to an independent hearing, and this report is given to the DG-Competition. Upon receiving the DG-Competition’s recommendation, “the European Commission may dismiss the complaint, or issue a decision finding infringement and imposing penalties.” *Id.* The final action of the Commission is appealable to the Court of First Instance and the European Court of Justice. *Id.*

Court, this examination warranted the conclusion that a federal district court is authorized, but not required, to provide assistance to a complainant in an EC proceeding that leads to a dispositive ruling reviewable in court.¹¹¹

It was held that AMD, as complainant, was an interested person under the statute, that had a significant role in the process.¹¹² Beyond question, according to the Court, both the Court of First Instance and the European Court of Justice qualify as statutory tribunals.¹¹³ But since their review is limited to the record, and they are not proof-takers, AMD could submit evidence only in this investigative stage, so the EC is not excluded from the statute's reach.¹¹⁴ Further, even though the complaint had not progressed beyond the investigative stage, the statute does not limit judicial assistance to pending proceedings.¹¹⁵

The Court resolved the dispute and circuit split in favor of not requiring a foreign discoverability requirement.¹¹⁶ While Intel argued that comity and parity required such a limitation,¹¹⁷ the Court rejected these arguments. First, it reasoned, while a foreign nation may limit discovery for reasons relating to its own laws, culture, or tradition, this doesn't mean that the country would necessarily "take offense at its use."¹¹⁸ Second, concerns about parity provide a sound basis for the foreign discoverability rule.¹¹⁹

Concluding that a district court may offer discovery assistance in such a case, the Court then offered factors a court should consider in ruling on such a request.¹²⁰ First, since a foreign tribunal has jurisdiction over those appearing before it, and can order them to produce evidence, the need for discovery assistance is not as apparent in cases where the party from which discovery is sought is actually a participant to the foreign proceeding, as is the case herein with Intel.¹²¹ Second, "a court may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S.

111. *Id.* at 2477-78.

112. *Id.* at 2478.

113. *Id.* at 2479.

114. *Id.*

115. *Id.* at 2479-80.

116. *Id.* at 2480.

117. *Id.* at 2480-81. *See supra* notes 86 and 87 and accompanying text.

118. *Id.* at 2481. Further, when the foreign tribunal would accept such information, the court stated that having this information under a foreign discovery rule would be "senseless." *Id.* at 2481-82.

119. *Id.* at 2482. The foreign tribunal may maintain the measure of parity it deems appropriate. *Id.*

120. *Id.* at 2482-83.

121. *Id.*

assistance.”¹²² A district court could consider whether the request conceals an attempt to circumvent foreign discovery restrictions or other U.S. or foreign policies.¹²³ Similarly, a district court could deny or restrict intensive or burdensome requests.¹²⁴

Thus, the Ninth Circuit’s decision was affirmed.¹²⁵ The Court indicated that in remand, the case deserves closer scrutiny, as several aspects of this case remain unexplored.¹²⁶

Justice Breyer dissented, stating his concern that that the majority went beyond what Congress intended with the statute.¹²⁷ In addressing the question of why the statute should not be read to empower American court processes to obtain information under the circumstances authorized by the majority opinion, he pointed out that discovery-related proceedings are time-consuming and costly, and may force parties to settle.¹²⁸ Justice Breyer would institute some limits to the statute to rule out unjustified discovery.¹²⁹ Additionally, deference should be given to the EC’s own characterization that it is not a tribunal, and further, any person in the world is free to file a complaint with it.¹³⁰ Justice Breyer would thus reverse the Ninth Circuit and dismiss AMD’s complaint.¹³¹ The latter may be the ultimate result upon remand, but the majority first requires a hearing in the district court and then consideration of the above-listed factors.¹³²

122. *Id.* at 2483 (citing S. REP. NO. 88-1580, at 7).

123. *Id.* at 2484.

124. *Id.*

125. *Id.*

126. *Id.* Intel and its amici have raised concerns that if granted would disclose confidential information and encourage discovery fishing expeditions. *Id.*

127. *Id.*

128. *Id.* at 2485. Such proceedings, according to the dissent, “use up domestic judicial resources and crowd our dockets.” *Id.*

129. *Id.* at 2485-86.

130. *Id.* at 2487. The EC’s amicus curiae brief states that it is taking the highly unusual position as amicus to support reversal because affirmation could directly threaten the Commission’s enforcement of competition law and possibly interfere with the Commission’s responsibilities in regulation as well. Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal at 1, *Intel v. AMD*, 124 S. Ct. 2466 (2004) (No. 02-572), available at 2003 WL 23138389. AMD’s response is that nothing on record before the Court, the text of the statute, or the history of its application suggests any actual risk of the consequences cited by the EC. Brief for Respondent at 24, *Intel v. AMD*, 124 S. Ct. 2466 (2004) (No. 02-572), available at 2004 WL 297864. Intel states that AMD’s arguments against the EC’s policy reasons for opposing private discovery are irrelevant, unsound on the merits, and insensitive to the foreign authority “for whose use it is supposedly seeking these documents.” Reply Brief for Petitioner at 13, *Intel v. AMD*, 124 S. Ct. 2466 (2004) (No. 02-572), available at 2004 WL 577504.

131. *Intel v. AMD*, 124 S. Ct. at 2488.

132. See *supra* notes 120-123 and accompanying text.

II. CONCLUSION

As business is becoming increasingly global, antitrust issues are being raised to keep markets open and trade fair. It is not surprising that different antitrust enforcement entities with different legal systems reach different results on similar issues, such as the denial of the GE/Honeywell merger in the EU after approval in the United States,¹³³ or similar results with different sanctions, such as the Microsoft antitrust suits in the United States and the EU.¹³⁴

The U.S. Supreme Court decided two cases in June 2004 with global antitrust implications. The first, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, held that U.S. antitrust law does not apply to adverse foreign effects without any adverse domestic effect.¹³⁵ The second, *Intel v. AMD* held that federal courts may, but don't have to, assist a foreign or international tribunal by U.S. discovery.¹³⁶ The latter was an antitrust case, but has much broader implications as it can be used in differing contexts with various subject matters.¹³⁷

In *F. Hoffman-LaRoche*, the Court followed the FTIA's exception to close the doors to U.S. courts to litigants in antitrust cases without any adverse domestic effects. In this author's opinion, this decision is appropriate to insure that the United States, at taxpayer expense, does not become the forum of choice for global antitrust enforcement. Since the FTIA does allow adverse foreign antitrust effects without domestic effects, however, it is imperative that other nations enact and enforce adequate antitrust provisions to protect their consumers and their markets. It has even been proposed elsewhere that a minimal international code of competition laws should be enacted by the World Trade Organization.¹³⁸

133. See *supra* notes 11-13 and accompanying text.

134. See *supra* notes 2-10 and accompanying text.

135. See *supra* notes 56-69 and accompanying text.

136. See *supra* notes 87-127 and accompanying text.

137. In a third June 2004 decision by the Court with global implications, it held unanimously that the Federal Tort Claims Act's exception to the waiver of sovereign immunity laws "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 (2004). While this case involved the Drug Enforcement Administration approving the use of Sosa, a Mexican national, to abduct another Mexican national, this case has broad business implications because the Alien Tort Claims Act has been used about 100 times since 1980 by human rights groups and other victims of atrocities to sue multinationals in the United States. Robert S. Greenberger & Pui-Wing Tam, *Human Rights Suits Against U.S. Firms Curbed*, WALL ST. J., June 30, 2004, at A3.

138. See Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 AM. U. INT'L. L. REV. 343, 365-67 (2002).

Intel v. AMD has broader implications, since it is applicable not just to antitrust cases. The majority of the Court held that the lower courts may, but don't have to, assist in discovery, and gave the district courts factors to consideration in determining when such assistance is appropriate. In this author's opinion, the district courts (including the *Intel v. AMD* court on remand) should carefully consider the factors in the discovery requests before them, particularly, as in this case, when the foreign tribunal could have, but did not, request the discovery information.¹³⁹

Justice Breyer's concern in his dissent is well taken; the majority in *Intel v. AMD* may be undermining the comity issue of *F. Hoffman-LaRoche* which is so necessary in today's highly interdependent commercial world.¹⁴⁰ District courts are advised to consider the comity issue when considering motions to compel discovery. One is left to wonder why AMD has so vigorously pursued the discovery which the Commission declined to request. After protracted litigation, AMD has only won the right to re-request discovery from a district court which the EU antitrust enforcement agency declined to request.

In one sense, the dispute between AMD and Intel is being resolved on business rather than legal grounds. It has been reported in September 2004 that while Intel once held near-monopoly power, AMD has transformed itself into a legitimate competitor.¹⁴¹

Information on other claims beyond antitrust are also subject to discovery under the Court's *Intel v. AMD* decision. Amicus Product Liability Advisory Council, Inc. was concerned about the possibility of such a ruling because, according to the group, U.S.-based companies are already disproportionately vulnerable to foreign products liability "spin-off" suit, and foreign attorneys are becoming increasingly aware that this federal statute is a powerful weapon for the non-U.S. litigant.¹⁴² District courts should be forewarned that another influx of such suits will be forthcoming after the *Intel v. AMD* decision, and they should interpret § 1782 to ward off "global fishing expeditions." If the burden becomes too onerous on U.S. courts, as Justice Breyer fears, Congress should revisit this statute.

139. See *supra* note 79 and accompanying text.

140. See *Intel v. AMD*, 124 S. Ct. at 2487.

141. Cliff Edwards, *Suddenly It's AMD Inside*, BUS. WK., Sept. 20, 2004, at 32.

142. Brief of Product Liability Advisory Council, Inc., as Amicus Curiae in Support of Petitioner at 12, *Intel v. AMD*, 124 S. Ct. 2466 (2004) (No. 02-572), available at 2003 WL 23112943.