CASE COMMENT: ROCHE V. EMPAGRAN

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A central challenge of modern antitrust law is determining the extent to which U.S. antitrust law applies to actors in foreign countries.[1] Although foreign violations of U.S. antitrust law seem beyond the proper sphere of U.S. courts' subject matter jurisdiction,[2] anticompetitive behavior in foreign countries affects consumers in the U.S.,[3] suggesting that the U.S. has an interest in adjudicating these issues. Last Term, in *Roche v. Empagran*,[4] the Supreme Court held that where antitrust violations cause similar but independent harms to domestic and international purchasers, those international purchasers cannot bring suit in U.S. courts.[5] However, the Court's assumption that the harms were independent was fallacious and thus the Court failed to establish a workable standard for determining when U.S. courts have jurisdiction over foreign antitrust violations.[6]

Roche arose out of a class action filed on behalf of both domestic and foreign vitamin purchasers against vitamin manufacturers alleging a price-fixing conspiracy designed to raise prices for vitamins both domestically and abroad.[7] The manufacturers moved to

1. For a general treatment of how antitrust law applies to foreign nations and foreign transactions, see WILBUR FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (4th ed. 1991); and SPENCER WALLER, ANTITRUST LAWS AND INTERNATIONAL COMMERCE §6.03 (1992). *See also* PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2000) (generally discussing domestic and foreign antitrust law).

2. There are also, of course, questions of personal jurisdiction, but those are not the focus of this Comment. However, since plaintiffs can generally consent to personal jurisdiction by choosing the forum and since most antitrust defendants will be multinational corporations with sufficient minimum contacts with the United States, personal jurisdiction is not as problematic an issue as subject matter jurisdiction here.

3. As marketplaces become increasingly global, competitive restraints in one area of the world will affect prices on a global scale, thereby almost always affecting U.S. businesses or consumers, although the magnitude of that effect is unclear and might be unnoticeable.

4. 124 S. Ct. 2359 (2004).

5. *Id.* at 2363.

6. Technically, the Supreme Court's decision was to remand the case to the appellate court for further consideration on whether the harms here were truly independent. Thus, the ultimate outcome of the case may not be based on this assumption. Nevertheless, *Roche* presented the Court with an opportunity to resolve important questions about the extent of U.S. antitrust jurisdiction that the Court largely ducked by relying on this independence assumption.

7. *Roche*, 124 S. Ct. at 2363.

dismiss the complaint of the foreign purchasers[8] because their vitamin purchases occurred outside the United States and thus were not part of U.S. commerce and did not fall under the ambit of U.S. antitrust law.[9] The district court agreed and dismissed the foreign claims.[10] The district court applied the Foreign Trade Antitrust Improvement Act of 1982,[11] which exempts commerce with foreign nations from U.S. antitrust jurisdiction when such actions do not injure domestic interests.[12] The court then found that none of the exceptions to the FTAIA applied and thus concluded that it lacked jurisdiction over the foreign purchasers' claims.[13] The domestic purchasers then separated their claims, leaving only the foreign purchasers to appeal.[14]

The Court of Appeals for the District of Columbia reversed.[15] The appeals court agreed with the district court that the FTAIA applied, but held that these activities affected domestic commerce, thereby bringing these activities under an exception to the FTAIA.[16] The appeals court went through a two-step analysis, first determining that the conspiracy did in fact lead to higher domestic vitamin prices and then concluding that these higher prices gave rise to an antitrust claim because a domestic consumer could bring a suit under the Sherman Act for these higher prices.[17] The court concluded that the existence of the domestic claim satisfied the requirements of the FTAIA

8. These foreign purchasers were five vitamin distributors, located in Australia, Ecuador, Panama, and Ukraine. *Id.* at 2363–64.

9. *Id.*

10. Empagran, S.A. v. Hoffman-La Roche, Ltd., No. Civ. 001686TFH, 2001 WL 761360, *1 (D.D.C., June 7, 2001).

11. 15 U.S.C. § 6a (1982) [hereinafter FTAIA].

12. Specifically, the act provides exceptions for activities that have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, imports, or American exporters. *Id.* The language and structure of the FTAIA are confusing and have been roundly criticized by courts and commentators. *See, e.g.*, United States v. Nippon Paper Indus. Co. 109 F.3d 1, 4 (1st Cir. 1997) (observing that the FTAIA is "inelegantly phrased"); WALLER, *supra* note 1, at §6.03 (stating that if Congress intended the FTAIA to "clarify the jurisdictional reach of the Sherman Act.. and promote greater certainty" that "it failed"); 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, 2167–76 (2003) (describing the FTAIA as "a drafting disaster, the worst nightmare of every legislation professor").

13. *Roche*, 2001 WL 761360 *2–4.

14. *Roche*, 124 S. Ct. at 2364.

15. Empagran, S.A. v. Hoffman-LaRoche, Ltd., 315 F.3d 338, 341 (D.C. Cir. 2003). The three-member appeals panel split on the question 2-1. The majority consisted of Judges Edwards and Rogers, with Judge Edwards writing for the majority. Judge Henderson dissented.

16. *Id.* at 348–50.

17. *Id.* at 357–59.

exception,[18] despite assuming that the effect on foreign vitamin prices was independent of the effect on domestic vitamin prices.[19] Then the court, reading the FTAIA broadly, held that the lack of a connection in the harmful effects did not matter because the FTAIA's goal was to deter price-fixing.[20] The dissent argued that for the FTAIA to apply the requisite harm must occur in the United States before U.S. antitrust law can be applied to foreign actors; the dissent would thus have affirmed the district court.[21] An en banc rehearing was denied.[22]

The Supreme Court reversed, vacating the opinion and remanding for further proceedings.[23] Writing for the Court,[24] Justice Breyer began by explaining that the FTAIA excludes all non-import activity involving foreign commerce from the ambit of U.S. antitrust laws but brings some of that conduct back under U.S. jurisdiction if it has a

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18. *Id.* The FTAIA requires that there be an antitrust claim that can be brought under the Sherman Act. Prior to the Court's decision in *Roche*, there was a circuit spilt on whether this meant that the competitive restraints must give rise to a claim generally, meaning that so long as some person somewhere, has a valid claim under the Sherman Act that others can bring their claims as well or whether it meant that they must give rise to a claim for the specific plaintiff at issue in the case. *Compare* Den Norske Stats Oljeselskap As v. Heeremac Vof, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) (holding that under the FTAIA the claim must be specific and that the plaintiff's harm must arise from an effect on domestic commerce), *with* Kruman v. Christie's International PLC, 284 F.3d 384 (2d Cir. 2002) (holding that there only must be an effect that gives rise to a claim generally and that this claim need not be the plaintiff's). For a discussion of the varying interpretations of the term "a claim", see Cavanagh, *supra* note 12, at 2167–76. *See also* Joshua P. Davis, *Supreme Court Review of the Foreign Trade Antitrust Improvements Act: A Case of a Misleading Question?*, 38 U.S.F. L. REV. 431, 432–34, 441–63 (2004) (discussing the two different circuit interpretations of claim and proposing a third, alternative interpretation that only those who are injured domestically may bring a claim but that they may bring all of their claims, be they domestic or international in origin); David V. Dzara, 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) (discussing these issues and supporting the outcome in *Den Norske*); Ryan A. Haas, *Act Locally, Apply Globally: Protecting Consumers From International Cartels by Applying Domestic Antitrust Law Globally*, 15 LOY. CONSUMER L. REV. 99, 109–14 (2003) (comparing *Den Norske* and *Kruman*); Salil K. Mehra, *"A" is for Anachronism: The FTAIA Meets the World Trading System*, 107 DICK. L. REV. 763, 766–69 (2003) (classifying the three circuit court decisions on this matter into three different categories, those that demand that the plaintiff's claim be a Sherman Act claim (*Den Norske*), those that demand that some Sherman Act claim exist, even one that can be brought by the government (*Kruman*), and those that demand that a private Sherman Act claim exist (*Empagram*)).

19. *Empagran*, 315 F.3d at 343–44. This is the crucial assumption in the case, for it is the Supreme Court's continued reliance upon it that leads to the problematic result critiqued in this Comment.

20. *Id.* at 355–57.

21. *Id.* at 360–62 (Henderson, J., dissenting).

22. *Roche*, 124 S. Ct. at 2364.

23. *Id.* at 2372–73.

24. Chief Justice Rehnquist and Justices Ginsburg, Kennedy, Souter, and Stevens joined Justice Breyer's opinion. Justice O'Connor did not participate in this case.

"direct, substantial, and reasonably foreseeable effect" on American commerce and has a harmful effect as defined by antitrust law.[25] As a preliminary matter, the Court established that the FTAIA was meant to apply not only to export activity but also to wholly foreign commerce that might affect the U.S.[26] This meant that the FTAIA's limitations on Sherman Act subject matter jurisdiction also apply to purely foreign commerce.

The Court then proceeded to the heart of the issue: whether the exception to the FTAIA's general exclusion applied in this case.[27] The Court ultimately held that where price-fixing conduct significantly affects consumers both in the United States and abroad but where the foreign effect is independent of any domestic effect, the exception to the FTAIA does not apply and U.S. courts cannot apply domestic antitrust laws when adjudicating the claims of those foreign consumers.[28] The Court based this decision on two lines of reasoning. The first was that courts should give deference to foreign laws and sovereignty when interpreting ambiguous statutes.[29] The second was based on the history and language of the FTAIA, which the Court read to mean that Congress did not intend for the FTAIA to expand antitrust jurisdiction.[30]

The Court's first reason for not applying the FTAIA exception is that doing so would interfere with the ability of foreign nations to regulate their commercial affairs.[31] While applying antitrust laws to

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25. *Roche*, 124 S. Ct. at 2364–65. For detailed explanations of when the FTAIA applies and when it does not, see Cavanagh, *supra* note 12, at 2159–72; and Davis, *supra* note 18, at 435–442.

26. *Id.* at 2365–66. This issue arose because if the bill was only intended to not apply antitrust laws against U.S. exporters then the FTAIA would be irrelevant to this case. The Court held that this was not the case because of the language of successive iterations of the bill. The original language of the bill did in fact exclude only export activity from the ambit of U.S. antitrust law. The Court therefore concluded that the different language of the passed bill, which states that the Sherman Act "shall not apply to conduct involving trade of commerce (other than import trade or import commerce) with foreign nations," must have a broader meaning and encompasses purely foreign transactions and exclude them from the reach of U.S. antitrust law. *Id. See also* Eurim-Pharm v. Pfizer, Inc., 593 F. Supp. 1102 (S.D.N.Y. 1994) (discussing the legislative history of the FTAIA); Davis, *supra* note 18, at 455-57 (same).

27. *Roche*, 124 S. Ct. at 2366.

28. *Id.*

29. *Id.*

30. *Id.* at 2369. That is, the Court found no justification in the case law prior to the enactment of the FTAIA suggesting that the Sherman Act would apply to these facts. *Id.* Thus, since Congress did not intend for the FTAIA to expand subject matter jurisdiction, these facts would still not give rise to U.S. jurisdiction. *See supra* notes 42 & 44 and accompanying text (discussing the case law plaintiffs proffered to support Sherman Act jurisdiction over these types of claims and the Court's distinguishing these cases).

31. *Id.* at 2366.

situations involving imports also interferes with foreign nations, the Court argues that this is "nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."[32] But where, as here, the foreign effect is assumed to be independent of the domestic effect, the Court found that applying antitrust law would be unreasonable.[33] Although the Court recognized that Congress does have an interest in regulating the activities of American companies abroad, it noted that the essential purpose of the FTAIA was to "release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm" and only foreign harm.[34] The Court then addressed the argument that because foreign nations have similar antitrust laws to the U.S.'s the problem of infringing upon foreign sovereignty is moot.[35] The Court observed that it had held differently in the past,[36] but that regardless the remedies and penalties for such violations differ widely between nations.[37] Because it would be unworkable for courts to compare domestic and international antitrust law in every case to make sure both bodies of law are sufficiently similar,[38] the Court chose to apply the FTAIA generally and limit U.S. antitrust jurisdiction over all activities abroad.[39]

The Court's second reason for not applying the exception to the FTAIA in this case is that Congress did not intend the FTAIA to expand the subject matter jurisdiction of U.S. antitrust law.[40] Thus, the question was whether the Sherman Act had been applied to similar facts prior to the FTAIA's passage. The Court examined six cases proffered by respondents supporting the opposite position and distinguished them. Three U.S. Supreme Court cases cited by

32. *Id.*

33. *Id.* at 2367.

34. *Id.*

35. *Id.* at 2368.

36. *Id.* As an example of when it had previously held that foreign antitrust law substantively differed from U.S. antitrust law, the Court cited *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 797–99 (1993), where conduct in the London insurance market that would have been illegal under U.S. law was assumed to be legitimate under British law. *Id.* Also, numerous foreign nations filed amicus briefs urging the Court to not permit the U.S. courts jurisdiction in these disputes, suggesting that these nations believe there to be meaningful differences between the laws of different nations. *See id.* (noting that several nations, including Germany, Canada, and Japan, had filled briefs against applying American law).

37. *Id.*

38. *Id.* at 2368–69.

39. *Id.*

40. *Id.* at 2369.

respondent involved the government as a plaintiff,[41] and the Court noted that the government has a broader legal authority than a private plaintiff because it "must seek to obtain the relief necessary to protect the public from further anticompetitive conduct."[42] The Court found that the three lower court cases cited by respondent were also inapposite[43] and concluded that there was no judicial authority prior to the FTAIA suggesting that antitrust law would apply here.[44]

The Court then disposed of various linguistic arguments respondents made, namely that the exception of the FTAIA applies whenever there is "a [domestic] claim."[45] That is, respondents argued that it does not matter who brings the claim.[46] The Court conceded that while this might be "the more natural reading," it does not compel the Court to accept this interpretation in light of the other considerations discussed above.[47] The Court then noted that, although respondent raised public policy issues, there were countervailing considerations, which it discussed later in the opinion.[48] Finally, the Court admitted that it operated from the assumption that the foreign conduct and injury was wholly independent of the domestic one, but that because the circuit court did not address whether this was in fact the case it also would not address this issue.[49] The Court noted that on remand the circuit court might consider these arguments provided that respondents properly preserved their ability to make them.[50]

Justice Scalia concurred in the judgment.[51] In his one sentence concurrence, Justice Scalia noted that the FTAIA's plain language was susceptible to being read as the Court read it[52] and emphasized the importance of giving deference to how foreign nations regulate activities in their territory.[53]

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41. *Id. See* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), United States v. National Lead Co., 332 U.S. 319 (1947), United States v. American Tobacco Co., 221 U.S. 106 (1911).

42. *Roche*, 124 S. Ct. at 2370.

43. *Id.* at 2370–71. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977);. Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680 (S.D.N.Y. 1979); Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co., 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977).

44. *Roche*, 124 S. Ct. at 2371.

45. *Id. See supra* note 18 (discussing the dispute over the meaning of "claim").

46. *Id.*

47. *Id.* at 2372.

48. *Id.*

49. *Id.*

50. *Id.* at 2372–73.

51. Justice Thomas joined in Justice Scalia's concurrence.

52. *Roche*, 124 S. Ct. at 2373.

53. *Id.* Justice Scalia's analysis is a bit too curt, since he, like the Court, fails to analyze

Although the outcome may be correct due to the strong reasons for denying the expansion of antitrust law to foreign commerce, *Roche* is problematic because the Court refused to address important questions raised by the case about the scope of the FTAIA. Instead of confronting these issues, the Court hid behind the fallacious assumption that the domestic and international injuries are independent.[54] Instead of disposing with the case by assuming that the harms are independent,[55] the Court should have taken the opportunity to better define the boundaries of antitrust jurisdiction by considering whether the impact of the foreign price-fixing was sufficient to create FTAIA jurisdiction[56] and asked whether the price-fixing activities here had a "direct, substantial, and reasonably foreseeable effect" on domestic commerce.[57]

The central theoretical difficulty with the Court's approach is that it is hard to imagine a situation where the foreign and domestic harms are entirely independent. Of course, the Court adopted this assumption because the lower courts did so, but the assumption is incorrect and should not have been given deference by the Court.

Markets are interconnected.[58] There is no such thing as wholly

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the more interesting question of whether the domestic effect in this case is sufficient to overcome this presumption of deference toward the sovereignty of foreign nation.

54. *Id.* at 2364 (noting that "the question presented assumes that the relevant transactions occurred entirely outside U.S. commerce" (internal quotation marks omitted)); *see also id.* at 2372 (discussing the assumption of independence and respondents' ability to raise this issue on remand).

55. This assumption of independence did not, of course, completely finish the case, since the Court still had to decide how generally the word "claim" in the statute should be read, but it was the underlying basis of the Court's reasoning. Under the most expansive reading of claim, foreign purchasers could still bring a claim if there is some valid Sherman Act claim somewhere that someone could have brought. *See supra* note 18 (discussing the circuit spilt on the interpretation of claim prior to *Roche*).

56. That is, the exception to the FTAIA does not countenance U.S. jurisdiction over all foreign conspiracies that have a domestic harm; instead, U.S. courts will only have jurisdiction over those conspiracies that have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. Instead of deciding the case by saying the harms were independent, the Court should have acknowledged that there was some relationship between the harms and thus evaluated whether this harm was sufficient to trigger the FTAIA exception. Under this approach the requirement that there be a claim must also still be satisfied, but this requirement diminishes in importance.

57. *See* FTAIA, *supra* note 11. Whether in fact the conduct at issue here had the requisite effect remains an open question. For a discussion on the meaning of this phrase, see Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What is "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11 (2003).

58. For another criticism of the reading of the FTAIA that relies on an imaginary "United States marketplace" instead of recognizing the existence of the global marketplace, see Mehra, *supra* note 18, at 773–74. This reading is the one adopted by courts demanding that the plaintiff's own claim be the Sherman Act claim. *See supra* note 18 (discussing the definition of claim). Mehra argues that while "[t]he United States

independent foreign and domestic markets because money and goods flow between nations. Any claim that a harm caused by price fixing is independent must be based on a notion that the market in which the price fixing occurs is independent, but since markets are not completely independent, the harm caused by foreign price fixing also can never be completely separable from harm done to the domestic economy. Thus, there will almost always be some domestic harm caused by international price fixing.

Although the harm will not always be substantial or even easily recognizable, on a microeconomic level there must be some sort of domestic harm resulting from almost every foreign antitrust violation. Therefore, the Court's analysis based on the assumption of independence is ultimately unconvincing and, in an important sense, inapplicable to real-world transactions. This is not to say that U.S. antitrust law necessarily should apply to the foreign price-fixing alleged in this case. To address this issue, the Court should have asked whether the degree of domestic harm caused by the foreign price-fixing is sufficient to make the application of U.S. antitrust law reasonable.[59]

This method of analysis is superior for three reasons.[60] First, as noted above, it is based on a correct economic understanding of the interconnectivity of markets and harms, unlike the Court's decision.[61]

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marketplace concept has some superficial appeal... [it] is difficult to reconcile with a global trading system." *Id.* at 773. Mehra identifies four reasons why the United States marketplace approach is unworkable: (1) It "requires definition of the extent of the marketplace"; (2) It "requires courts to set up a discrete American marketplace jurisdictional zone within a world trade regime that is supposed to form an integrated whole"; (3) It requires defining "some notion of participation in that zone"; and (4) it "creates an incentive for violators to structure their enterprises to take advantage of the areas" outside the defined United States marketplace. *Id.* at 773–74. These types of criticisms are what underlie this Comment's criticism that in a global marketplace the Court's independent markets assumption was an untenable basis on which to make its decision in *Roche*.

59. *See* FTAIA, *supra* note 11 (establishing the standard for when this application is justified).

60. There are also policy reasons why the outcome in *Roche* might be incorrect. *See, e.g.*, Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275 (2002) (arguing that applying U.S. antitrust laws overseas and allowing a private right of action for foreign plaintiffs best serves the antitrust goal of deterrence). However, this Comment does not focus on the substantive implications of the outcome of *Roche*. Instead, it focuses on the implications of the method of decision-making and the implications of relying on an erroneous economic assumption. The outcome of this case could very well be the same under another standard, but the point of this Comment is to argue that beyond outcome questions there are important reasons why *Roche*'s mistaken assumption is harmful to the process of adjudicating these types of cases.

61. Some of the more practical reasons why basing this decision on the correct economic standard would have been preferable are discussed in Mehra, *supra* note 18, at

Second, it comports better with the statutory language of the FTAIA, which says nothing about independence or dependence of the harms but does limit the FTAIA's exception to harm that is above a certain minimum threshold.[62] Third, it would provide a framework to analyze other antitrust actions brought against foreign commercial actors where the markets clearly are related, whereas the Court's decision does not provide such a framework.

If it had not assumed that the harms are independent, the Court would not have had to parse words to try to divine congressional intent and would not have determined jurisdiction based on dubious definitional nuance. Instead, the Court could have established a single, coherent framework that would address not only the jurisdictional questions in this case but would also provide a workable solution for future cases in the same vein. This approach would not involve ignoring Congressional intent; the Court would still be forced to apply the two-prongs of having a claim and having a "direct, substantial, and reasonably foreseeable effect" on the U.S. market before it could apply the FTAIA exception. However, it would minimize the importance of the first prong by eliminating the debate over whether a claim must be general or specific, since without independence of markets this debate is largely moot. Instead, it would focus the attentions of courts more on the merits of the claim and whether the foreign action implicates U.S. interests.

This approach would also prevent courts from getting involved in difficult comparisons of domestic and foreign antitrust laws.[63] Instead, it would focus only on the degree of harm and could be applied consistently when U.S. interests warrant. Moreover, focusing on the harm caused by the foreign actions would also resolve the Court's

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773–74. In addition to these considerations, two major motivations for deciding *Roche* on plausible economic grounds are the simple desire for intellectual consonance and so as to provide a framework for future decisions where the lower courts do not make erroneous economic determinations of the sort made here. If the Court were simply to acknowledge that there is always interconnectivity and that the true question is the degree of the connection, then parties would also be able to better focus their energies on litigating the merits of the case rather than focusing on trying to prove or disprove the general existence of an interconnected global marketplace.

62. The statutory language in the FTAIA may not demand the result the Court reached in *Roche*. *See, e.g.*, Davis, *supra* note 18, at 443–44 (stating that the "[l]iteral interpretation finds strong support in the language of the FTAIA"); Haas, *supra* note 18, at 114–16 (arguing that the decision in *Kruman* was contrary to a plain language reading). *But see* Dzara, *supra* note 18, at 438–43 (taking the opposite position on what the plain language says).

63. *See Roche* at 2368–69 (dismissing respondents' suggestion that concerns about comity require only that courts undertake a comparison between domestic and international law and calling such an approach "too complex to prove workable").

concerns about proper deference to foreign sovereignty, since Congress only authorized the application of U.S. antitrust law in cases where the harm is direct and substantial.[64] Thus, the public policy concerns cited by the Court as a reason to decide the case the way it did do not preclude this alternative approach to the FTAIA.

Ultimately, though, the most important reason the Court should have better defined the scope of the FTAIA in *Roche* rather than relying on a specious assumption to dispose of the case is that the question of U.S. antitrust subject matter jurisdiction over actions that occur in foreign countries will likely be raised again in the near future. As markets are becoming increasingly connected and companies and their operations are increasingly global in their scope and their effect, these questions will only become more pressing. In many of these cases, courts will not be able plausibly to assume that markets are independent and thus lower courts will need to follow the chain of analysis that the Supreme Court declined to go through in *Roche*, albeit with less guidance than they might have otherwise had. This will set the stage for another dispute in the Court on this topic.[65]

64. *See id.* at 2366–67 (describing the Court's concern about applying U.S. antitrust law to foreign actors).

65. Perhaps the Court did not want to address these issues because there was relatively little lower court treatment. However, this does not justify the Court's reliance on an incorrect assumption in *Roche*, since it could have remanded the case for further proceedings on the question of whether the degree of connection was sufficient to give rise to jurisdiction.