IN THE SUPREME COURT OF THE UNITED STATES

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F. HOFFMANN-LaROCHE, LTD., :

ET AL., :

Petitioners :

v. : No. 03-724

EMPAGRAN S.A., ET AL. :

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Washington, D.C.

Monday, April 26, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

STEPHEN M. SHAPIRO, ESQ., Chicago, Illinois; on behalfof the Petitioners.

R. HEWITT PATE, ESQ., Assistant Attorney General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Petitioners.

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 03-724, Hoffman-LaRoche v. Empagran S.A.

Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONERS

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

The United States, joined by seven other nations, has concluded that the decision in this case is an error and should be reversed. The reason is that the plaintiffs here are foreign claimants which allege that they paid too much for vitamins outside of U.S. commerce. Trying these claims in our courts would conflict with the principle that the Sherman Act does not regulate the competitive conditions of other nations' economies, and stretching the antitrust laws to include such claims is a recipe for international discord and for heavy new burdens on our Federal district courts.

Now, when Congress passed the FTAIA in 1982, it did not expand the domain of the antitrust laws, but rather clarified limitations. It required both an effect on U.S. commerce and the claim arising from that same effect. As the Government explains, this is language that

refers most naturally to a claim of the plaintiff before the court, and not a claim of some other person. The court of appeals, of course, believed that it was enough for somebody else to have a claim arising from a U.S. effect.

QUESTION: Did -- did the court of appeals explain how that issue would be litigated or decided whether someone else had a claim?

MR. SHAPIRO: It really had -- had no explanation of that, Your Honor, and it's quite an extraordinary assumption that you would inquire into the bona fides of some unknown person whether they have a claim or not, and indeed, there is a case pending before this Court, the Sniado case, where the litigants have no idea whether there's another person who has such a claim in the United States, and yet discovery has to take place on that -- that issue.

QUESTION: The -- the respondent says in -- in its brief without much detail, just makes the allegation, well, it's the single market, this is the nation, this is a global market, so there's nothing you can do. It -- it does seem to me that there would be difficulties in -- in defining what is the foreign commerce affecting the United States and what is foreign commerce that does not. How is this resolved in your -- best resolved in your view?

MR. SHAPIRO: Well, in our opinion, the characterization of the market and the scope of the conspiracy is irrelevant to the reach of the antitrust laws. Their -- their domain is defined in terms of the commerce of the United States. Both the Sherman Act explicitly says commerce within the United States, among our states, and with foreign nations. The FTAIA refers to our commerce too. There was no indication that Congress was attempting to regulate commerce in other nations or between other nations with this extraordinary remedy of treble damages.

QUESTION: I -- I guess my point is, is it -- is it all that clear in the real world that these are discrete concepts?

MR. SHAPIRO: Yes, Congress had in mind that -- that this would be a bright line test whether or not our commerce was injured, defined as commerce that's domestic or import or export, and it distinguished that from wholly foreign transactions, wholly foreign commerce, and it wanted to draw that line so that these cases would be allocated to the correct judicial system in the world community and they would not all be --

QUESTION: The -- the claim here is that because of the -- because of the worldwide nature of the market, our foreign commerce is necessarily injured, because the

market being worldwide, if a lower charge had been assessed in the United States, which would have been the case absent the alleged violations of the antitrust laws, there would have been arbitrage, and we would have exported some of these drugs abroad by reason of the fact that they had been purchased at lower prices in the United States. Why -- why doesn't that make out an injury to foreign commerce?

MR. SHAPIRO: It -- it makes out an injury to wholly foreign commerce. The overcharge took place in Australia, Ecuador, Panama, and the Ukraine, and it isn't enough to say there's some interrelationship among these prices. The Fifth Circuit correctly rejected that claim as a matter of law.

QUESTION: No, but there -- there was an overcharge in the United States. You're -- you're not --

MR. SHAPIRO: Right.

QUESTION: -- contesting that -- that --

MR. SHAPIRO: At all --

QUESTION: -- that the conspiracy included the United States?

MR. SHAPIRO: All of the people who were overcharged in the United States have been compensated in the settlement and our fines here have been geared to the

overcharge --

QUESTION: Yes, but I'm talking about the effect on foreign commerce. If there had not been the overcharge in the United States, if realistic market-based prices had been charged in the United States, we would have re-exported a lot of these drugs to foreign countries that were still being overcharged, wouldn't we?

MR. SHAPIRO: Well, Your Honor, if -- if the FTAIA was interpreted to permit that argument, the consequences, all of the foreign claimants could come to our courts, our courts would be flooded, other nations would be antagonized, because they believe that they should be able to apply their law to those foreign transactions. It isn't enough to speculate about relationships among prices in these two systems, because the statute requires a line to be drawn between effect in the United States --

QUESTION: Mr. Shapiro, can I ask you a question --

MR. SHAPIRO: -- and effects, purely foreign commerce.

QUESTION: -- about your theory, about your theory? What if the plaintiff is engaged in business in both the United States and in a foreign market and suffers injuries in both? May he recover for both injuries or

only the injury in the United States in your view?

MR. SHAPIRO: Only for injury in the United States, and the House report talks about that, companies that are involved in jurisdictions --

QUESTION: And it -- would that have been the case before this statute was passed, do you think?

MR. SHAPIRO: Yes, I -- I do, because the -- the Clayton Act limits the private treble damage action to injuries stemming from a restraint on U.S. commerce, commerce among the states, and with foreign nations, not commerce that is wholly in foreign nations or between foreign nations. The injury has to flow from that which makes the conduct illegal, which is the U.S. restraint.

QUESTION: No. The injury in the -- under the statutory language, they has to -- the plaintiff has to suffer an injury to his business or property, but you say that does not include the business or property that's conducted abroad?

MR. SHAPIRO: That's correct, because if -- if the -- if the United States claimant has participated overseas in purely foreign commerce, Congress expected that that plaintiff would invoke the laws of the other nation. To the extent that it participated in U.S. commerce, Congress expected that the plaintiff would come to our courts. It was a division of judicial labors among

the sovereign nations to try to encourage other nations to adopt their own antitrust laws and to avoid the kind of antagonism that we see with these amicus briefs from other countries.

QUESTION: Do you think that -- do you think maintaining that position is necessary for you to prevail in this case?

MR. SHAPIRO: Well -- well, of course not, Your Honor, because the plaintiffs here -- we're talking about the Winddridge Pig Farm in -- in -- as one of the plaintiffs in Australia that's claiming it paid too much for vitamins in Australia, and the other countries wonder why -- why are they complaining about the price of vitamins in the United States court? It's a purely foreign transaction --

QUESTION: Suppose they -- suppose these foreign buyers had alleged, well, they heard that the United States is a good place to buy things and they tried to buy the vitamins in the United States and found the same rigged prices?

MR. SHAPIRO: Well, Your Honor, first, the complaint does not allege any attempt to deal in the United States.

QUESTION: I'm asking you if that would do under your theory. They said, we really wanted to make these

purchases in the United States.

MR. SHAPIRO: There -- there is one case that I would refer Your Honor to. It's the Amex v. Montreal Trading case, 1981 decision from the Tenth Circuit that says it's not enough to say we might have done something different, we could have done something different, we wish we had done something different. There has to be a trading pattern.

QUESTION: Suppose they show that they in fact attempted to buy drugs here and they found -- vitamins here -- and they found that the price was the same.

MR. SHAPIRO: Well, the Tenth Circuit held that there had to be an interrupted course of trading before a plaintiff could make that allegation, and that's very similar to what this Court held in Holmes v. SIPC --

QUESTION: Mr. Shapiro, I --

MR. SHAPIRO: -- that you have to have an actual transaction that's been interrupted.

QUESTION: I would think your defense against that is -- is -- is not to assert that there's no effect on -- on foreign commerce, on our exports, because I think -- I think there is. I -- I would -- I would think your defense is -- is in -- in Section 2 of the Foreign Trade Antitrust Improvements Act, which requires that this effect on commerce, on export commerce, gives rise to a

claim under the provisions of Sections 1 to 7, and -- and the only way it gives rise to a claim on the part of these people is a claim as second purchasers, and Illinois Brick would have excluded their claim, I assume, if they are re-buying from the -- the -- from people in the United States. Wouldn't that be the case?

MR. SHAPIRO: Well, yes, we do rely on the second prong of the FTAIA, which requires that the particular claim derive from an anti-competitive effect in the U.S. And here it doesn't, it derives from an effect overseas, and of course, these plaintiffs don't allege that they purchased some export coming from the United States.

QUESTION: No, they -- they're alleging that they would have purchased from -- from Americans. That would have been down the stream, it seems to me.

MR. SHAPIRO: It certainly would be, and it would be extremely speculative, and it's the sort of claim this Court has always rejected under Holmes against SIPC, under Blue Chip Stamps, in the securities context, which has been followed in the antitrust case law. It's not enough to say we might have done something different. That does not make them into participants in U.S. commerce, and Congress wanted the treble damage remedy to be available to protect our commerce. It expected other countries to adopt their own laws to deal with overcharges within their

own territories, and other nations, of course, have done just that. They've passed over 100 different pieces of legislation all around the world, from Albania to Zambia, we see new antitrust laws that have been passed, and it would discourage that process if the U.S. courts attempted to subsume all of these foreign overcharge disputes into our court system.

QUESTION: Let's -- let's assume that -- that we find the textual argument in -- in effect a -- a draw. One way to go your way would be to accept a comity analysis, but I take it comity was never raised.

MR. SHAPIRO: Well, there is a kind of comity that Justice Scalia referred to in the Hartford case that we think is raised here, and that is comity bearing -- comity among nations, not judicial comity where the judges weigh various and sundry factors, but it's a rule of interpretation that -- that discourages interpretations of laws, where you have two interpretations that are available, you pick the interpretation that is most consistent with international law and which avoids antagonizing our allies and our trading partners. And that concept is very much before the Court here, and I think it argues very much in favor of the narrower interpretation, particularly because Congress was expecting that wholly foreign transactions, that's the

term used in the House report, would be litigated in foreign nations, and -- and our -- our allies and trading partners --

QUESTION: Well, if we -- if we accept that and textually the statute is a draw, we -- we wouldn't have to get to this interpretative principle. I mean, one reason for getting to the interpretative principle that you now suggest is -- is simply the submissions of -- of foreign countries as well as the United States in this particular case.

MR. SHAPIRO: Well, yes, we -- we think the literal language and the structure of the statute are sufficient to reverse here. But to the extent that the Court's endowed, it's very appropriate to use these traditional tools of interpretation that go all the way back to the Charming Betsy case that the Court, faced with a choice between two readings of a statute, picks the interpretation that is compatible with international law and which avoids antagonizing our allies.

QUESTION: Well, how -- but how -- how do we know those two factors? How do we know what's consistent with international law? How do we know what's consistent with not antagonizing our allies?

MR. SHAPIRO: Well, on the latter, we have amicus briefs from seven of our -- our most significant trading

partners, of allies --

QUESTION: But surely there -- there are other partners who have not been heard from.

MR. SHAPIRO: That's true, but all of the foreign nations that have spoken up here agree with the United States that this is contrary to their ability to regulate commerce in their own nations. No nation --

QUESTION: These are nations with -- with fairly effective antitrust laws and antitrust enforcement.

MR. SHAPIRO: Absolutely.

QUESTION: What about the majority of nations in the world that don't have effective antitrust enforcement, if indeed they have any antitrust laws? Might they not be eager to have us do the job for them?

MR. SHAPIRO: Well, there are 100 nations now that do have aggressive antitrust enforcement programs, and Congress' view in 1982 was that we should draw back in our attempt to police the world because we want all these other nations to adopt these rules. That won't happen if the United States takes all of these cases into its jurisdiction. Other nations won't go the route that they -- that they were encouraged to do by Congress.

And I think it's also important to consider the burden on our judicial system that the interpretation advocated by my friends would impose.

QUESTION: Well, their argument is that these cases simply come together anyway, these cases will piggyback their way in or at least come hand in hand with the domestic cases.

MR. SHAPIRO: Well, Your Honor, it -- these cases are difficult to administer under the best of circumstances, but consider global plaintiffs from 192 countries coming to the United States and asking a single district court judge to decide how much they've been overcharged, how much competition there was locally, what trade barriers there were that might have prevented competition, calculate the damages for every man, woman, and child on the face of the Earth that perhaps is -- has an antitrust claim.

QUESTION: Of course, I suppose that's the penalty for engaging in worldwide conspiracy.

MR. SHAPIRO: But that penalty is imposed on our district court judges. They would -- would be forced to untangle these incredibly difficult procedural problems, and how are they going to give notice to people around the globe in 192 languages with different dialects? How could we even accomplish that and how could we make sure people are actually protected in this global forum that's being advocated? U.S. courts are not world courts equipped to do this.

QUESTION: Could you just deny class action certification if that's -- if you have that kind of problem, but no -- nobody, none of these plaintiffs are trying to sue on behalf of the whole world.

MR. SHAPIRO: Well, the plaintiffs here are -- are alleging a class action of all the purchasers around the world outside of the United States, and every one of the cases that's been filed under this theory has been a class action, so that's -- that's what we're seeing. And of course, in -- in a broad array of future cases, not just price-fixing cases, but all Sherman Act cases are subject to this FTAIA regime --

QUESTION: Has any Federal court ever certified a class that size, that all purchases around the globe?

MR. SHAPIRO: I don't think the class issue has been reached in any of these cases, but they -- they are being filed. I -- I saw one just a month ago in the district court in Connecticut. It was a suit by an Indian dealership alleging it had been wrongfully terminated in India. He wanted to litigate in our courts over the propriety of that termination, claiming that dealers in the United States maybe were affected by the same thing. Well, there are lots of dealerships around the world in 192 countries, and the lure of treble damages is a powerful lure that's going to bring them to our country if

these claims are accepted.

With the Court's permission, we would reserve the balance of our time.

QUESTION: Very well, Mr. Shapiro. Mr. Pate, we'll hear from you.

ORAL ARGUMENT OF R. HEWITT PATE

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE PETITIONERS

MR. PATE: Thank you, Mr. Chief Justice, and may it please the Court:

Given the key role of deterrence, both in the opinion below and in the respondents' arguments here, the United States thinks it important to offer the Court an accurate understanding of how international cartel enforcement really works. It's only in the past 8 years that we've begun to see dramatic success in detecting and punishing international cartels, and that has come about only by international cooperation with other enforcement agencies and through the use of amnesty programs.

There's nothing in the FTAIA, much less any clear congressional statement, in a statute that after all was jurisdiction-limiting in intent, that would require jeopardizing our progress in those enforcement efforts through a dramatic extraterritorial application of U.S. treble damages litigation. Even if there were,

established principles of standing under Section 4 of the Clayton Act would nonetheless preclude that result.

QUESTION: Can you tell us how -- how it would jeopardize your -- your efforts? Suppose we rule for the respondent here, wouldn't that make foreign conspirators and -- and American companies all the more eager to come to you, because then they could get immunity both for U.S. actions and -- and the global effects?

MR. PATE: The -- the important point, Justice Kennedy, is that under these amnesty programs, there is no amnesty given for civil liability. So it is our experience that when a company finds that its employees have been engaged in wrongdoing, it balances the potential for freedom from criminal liability against the certainty that civil treble damages will follow. And to make the type of sea change in the law that's advocated by respondents here to provide for unquantifiable, potentially unknowable worldwide liability will in our judgment lead to the risk that companies who discover this type of conduct will instead hunker down and simply hope not to be detected.

The -- the effect will be even more dramatic with respect to the amnesty programs of some of our trading partners, such as the countries who have filed briefs here, because in those systems, treble damages are

simply unknown. So while we fear a marginal decrease in the effectiveness of our program, there would be a dramatic impact on foreign amnesty programs --

QUESTION: Mr. Pate, do you agree with Mr. Shapiro's answer to my question about a plaintiff, an American plaintiff who has business both in this country and abroad and suffers -- and both are hurt by the conspiracy?

MR. PATE: Yes, Justice Stevens, I do, because under Section 4 of the Clayton Act, the plaintiff must show that his own injury is, by reason of --

QUESTION: Well, in my hypothetical it is his injury, he does business both in the United States and in Europe.

MR. PATE: Exactly. But with respect to the foreign incurred injuries, he must show injury by reason of that which makes the conduct illegal, and since Alcoa in 1954, and certainly under Hartford, it is the effect on U.S. commerce that makes the conduct the concern of the Sherman Act in the first place so that he cannot show that he's been injured by reason of that which makes the conduct illegal.

QUESTION: I don't follow the --

QUESTION: I -- I thought Hartford left that question open.

MR. PATE: Hartford --

QUESTION: I mean, Hartford specifically addressed the export, but it -- it -- my recollection is, in the footnote, it expressly left any -- any further effect of the statute in open question.

MR. PATE: That's correct, Justice Souter. The Court did not address the statute. I was simply pointing out that in foreign commerce cases, it is the effect on U.S. commerce rather than the conduct itself that causes that conduct to be the concern of U.S. antitrust laws. Absent the effect on U.S. commerce, there would be no application of the U.S. antitrust laws. That's true under Alcoa and true under Hartford.

Now, with respect to the FTAIA, we think the most natural reading of the statute is simply that the Court look at the party bringing the claim before the Court in construing section (a)(2).

QUESTION: The FTAIA was passed in 1982, is that right?

MR. PATE: That's correct, Justice Breyer.

QUESTION: The division keeps track, I guess, but is there any instance, or what instances are there, I'd like to write them down unless there are dozens, in which a foreign cartel injures the United States and also separately injures people abroad. What instances were

there in which the people in Uruguay or wherever could sue the perpetrators in Holland in an American court prior to 1982?

MR. PATE: We're aware of no instance of such a case and it --

QUESTION: No such instance. I'll ask the other side the same question.

MR. PATE: It was clear and it is accepted as a commonplace that a plaintiff who did not participate in U.S. commerce, in trading in U.S. commerce, simply would not have had the same --

QUESTION: So you've looked it up and you can find nothing in your opinion that counts as such an instance?

MR. PATE: We're aware of no such case. The respondents have attempted to cite district court cases, but if you look at each of those, you will find an effect on U.S. commerce, and with respect to the Industria Siciliana case mentioned in their brief, you'll find that that was a case that was expressly disapproved by the Congress when it passed the FTAIA, even if it could be read that way, so that under the FTAIA, we think the natural reading is simply to ask the court to look at the claim before it and to ask whether the U.S. effect gives rise to a claim on behalf of the party in court.

Where the United States is bringing a claim, any time we can meet the direct, the effects test of Hartford and Alcoa, we will always have a claim that has arisen from a U.S. effect, so that there is no danger here to U.S. enforcement, which continues under the application of the FTAIA without any burden. But as to a private plaintiff, the private plaintiff must show that its own claim is one that has been given rise to by a U.S. effect.

Turning to standing, we think even if the FTAIA did not apply, that the proper result here would nonetheless be reached under the Clayton Act, not only for the -- by reason of rationale that Justice Stevens mentioned in his question, but also because the plaintiffs are not within the zone of interests that are protected by the antitrust laws under this Court's opinion in Matsushita and elsewhere, which makes clear that our Sherman Act is not intended to set the competitive conditions for other nations' economies.

And finally, if the Court simply were to apply the remoteness or proximate cause rationale that's also very prevalent in the Court's antitrust standing cases, which excludes injuries, for example, to shareholders, to employees, that the case also would not be proper under a remoteness rationale, because these plaintiffs do not in fact allege that they were the victims of an overcharge in

U.S. commerce. They do not even allege, Justice Ginsburg, that they made any attempt to purchase in U.S. commerce, but would rather seek to use speculative transactions that never occurred to make an end run around the FTAIA by defining a so-called one-world market or one big conspiracy theory.

To do that would certainly again be completely contrary to this Court's holding in Matsushita, where the Japanese aspects of a conspiracy were sought to be put together with American aspects into one big claim. The Court plainly rejected that. Indeed, if we were to proceed on that theory, why would not the claim here be equally seen to have been given rise to by effects in France, effects in Great Britain, Russia, or elsewhere. There is simply no limiting principle.

And as Mr. Shapiro suggests, to pursue this path would embroil the district courts around the country in all forms of satellite litigation, and it's very important to recognize that this is not a test that would apply only to a notorious worldwide criminal conspiracy, such as was at issue here, but would apply to rule of reason cases, joint venture cases, could apply even to Section 2 cases under the Sherman Act any time a plaintiff was able to allege that some other plaintiff somewhere suffered from a U.S. effect that was related to that conduct. And the

cases that Mr. Shapiro mentioned are good indications of that.

So in our judgment, the Court should pay attention to the practical realities of enforcement and avoid doing damage to them, avoid creating friction with our trading partners in a situation where whatever else can be said, there is no clear congressional statement that the FTAIA should be read to expand jurisdiction. In fact, the statute cannot on its terms expand jurisdiction by reason of its language, which begins with a statement that the antitrust laws shall not apply, and then puts the plaintiff back where it was prior to the FTAIA if certain conditions are met. In no case can the statute operate to give additional causes of action or create additional standing on behalf of parties who didn't have it prior to the FTAIA.

In short, all the Court need do is evaluate respondents' own claim rather than the hypothetical claims of others, and doing so will require dismissal. If the Court has no further questions, thank you, Mr. Chief Justice.

QUESTION: Thank you, Mr. Pate.

Mr. Goldstein, we'll hear from you.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE RESPONDENTS

MR. GOLDSTEIN: Thank you, Mr. Chief Justice, and may it please the Court:

Justice Breyer, I will come to your question in just a moment. The petitioners are more than 20 U.S. companies and their foreign affiliates who were caught red-handed perpetrating the most damaging anti-competitive conspiracy in the history of --

QUESTION: Mr. Goldstein, do you agree with the position of your opponents that the FTAIA was a limiting statute and that if there was no claim before FTAIA, that there certainly is none afterwards for your case?

MR. GOLDSTEIN: Yes, Mr. Chief Justice, but not because the FTAIA applies. We have to prove that we would have had a claim before the Sherman Act, before the '82 Act was adopted, and we intend to do so. I do know -- do, however, think that the '82 Act is illuminating because it eliminated claims of other people and not ours, and that would be the victims of a U.S. export cartel.

Now, the reason our position is critical is the one identified by Justice Kennedy, and that is that the conspirators' cartel encompassed a worldwide market for bulk vitamins and the worldwide market is relevant because geographic boundaries don't have any meaning here. A conspiracy limited to U.S. commerce would have collapsed as U.S. purchasers bought abroad, as Justice Scalia has

said, and there is a critical fact about the nature of the worldwide market and how the United States enforces the antitrust laws that has not been touched on in the first half hour, and that is that U.S. antitrust law -- and Mr. Chief Justice, this is prior to the 1982 Act -- deems their conspiracy -- Justice Breyer, it's not the individual transactions, it's the entire conspiracy -- illegal, lock, stock, and barrel.

The U.S. Government in this case prosecuted the petitioners not for price fixing in the United States and not for market allocation in the United States, but price fixing and market allocation in the United States and abroad. If the petitioners are right about what the Sherman Act means, including after the 1982 Act, then it will be the prosecutions of the United States that fall along with our position.

QUESTION: No, no, I mean, their argument I take it is simply, of course, there -- the quinine cartel, which I had heard of, I'd not heard, the quinine cartel sets in Holland and raises the price of quinine that's sold all over the world, and of course it violates our law and we're out there and they're lobbing these shells at us in a sense, and so of course we can bring a claim against them, it hurts us. But other countries have different laws, and as far as they're concerned, those laws -- what

they are doing in Holland is fine. And so what business do we have telling Uruguay, which thinks depression cartels, or Japan, which thinks oppression cartels are the greatest thing, and they may be, and so does Holland think that. And what business do we have saying that a citizen of Japan who's hurt by something that the Japanese think is just fine and the Dutch think is just fine come to our court and enforce our law against those other countries where it doesn't affect us? That's their claim. It's a kind of like we're engaged in legal imperialism. If we think our law is better, convince them. Don't apply our law to them against their consent.

Now, that, I take it, is the argument, not what the prosecution says. So I'd be interested in your response.

MR. GOLDSTEIN: Justice Breyer, I'm going to answer it in three parts that will explain why it is that you can't separate the civil and the criminal liability. As you know much better than me, what's good for goose is good for the gander. Section 4 of the Clayton Act says if it's illegal and it can be prosecuted, then there's a civil right of action for it.

So here are my three parts. The first is the case law. American Tobacco, National Lead, Timken Roller Bearing, these are the three principal cartel cases that

are discussed in our brief. Those cases do not say that the quinine cartel was illegal insofar as it hurt us. It's --

QUESTION: It says it's illegal, period.

MR. GOLDSTEIN: It's illegal, including the sales in Ecuador and in Holland. Justice Breyer, I -- I urge you to go to the indictment in this case, which is at the rollover between pages 1 and 2 of our red brief. In this case, the Federal Government prosecuted Mr. Shapiro's clients for price fixing and market allocation in the United States and abroad. That is, we don't care that Ecuador likes price fixing. I will come to the fact that they don't, but it doesn't matter. The Section 1 of the Sherman Act reaches the conspiracy and this Court's precedents reach every bit, as I said, lock, stock, and barrel.

Now, let me give you the reason why. That was your question. Okay, assume -- you wanted to know why Congress made that choice, and it made that choice because, as Justice Scalia explained, we can't separate what happens in Ecuador from what happens in U.S. commerce. It doesn't make, in terms of protecting our consumers and our economy, it makes no difference at all whether the sale was between Holland and Holland, New Jersey, or instead Holland and Ecuador, because the cartel

gets sustained, and that's also the point of Pfizer. So Congress recognized that and it made the cartel --

QUESTION: Well, but Pfizer was doing business in this country.

MR. GOLDSTEIN: Mr. Chief Justice, we accept that as correct, but --

QUESTION: Well, you have -- you not only accept it, it's a fact, so you're --

(Laughter.)

MR. GOLDSTEIN: And it -- and we accept it.

(Laughter.)

MR. GOLDSTEIN: With good reason, I think. Mr. Chief Justice, our point is that the rationale -- I don't want to --

QUESTION: But I -- if you're on a -- it sounds to me like you're a verbal point, which I'm not against. Of course we say it is illegal what they do in Holland. It's illegal when they hurt us, it's illegal when we hurt them, we think it's illegal plain and simple. I accept that. But what I don't see follows from that is that we give a claim for damages by a -- to person in Uruguay for activity that takes place in Holland, which we think is illegal, but the Dutch and the Uruguayans don't. And so I can't get mileage for you unless I'm wrong in thinking that out of words in indictments that say American

Tobacco, what they did was illegal everywhere. I like -- I think the antitrust laws are a marvelous policy, okay, so I'm tempted to say, yes, it's illegal everywhere. But that isn't where I'm having the problem. I'm having the problem about finding -- I -- I'd be repeating myself, so have you taken it in?

MR. GOLDSTEIN: Yes.

QUESTION: Okay, what's the answer?

MR. GOLDSTEIN: The answer is that the -- let me take you to the text of Section 4 of the Clayton Act, which I know you know, but it can't hurt to come to it, and that's at the page 1a of the red brief. The Section 4 of the Clayton Act says, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws has the cause of action, and that's what Congress said.

It's not, Justice Breyer, merely that we say, we think you shouldn't do this in Ecuador. It is, you may not do it in Ecuador in order to defeat the cartel on the whole.

QUESTION: Correct. And if we had that alone, that would be strong support, and the problem is we have another sentence, which is the first sentence in the FTAIA, whatever it is, and then you get to the second.

MR. GOLDSTEIN: Okay, but --

QUESTION: I'm -- I'm not -- I got off the train even earlier. I'm not -- I'm not sure that -- that when an indictment describes an international conspiracy as an international conspiracy, it amounts to saying that that portion of the international conspiracy which does not affect this country in any way is illegal. I don't think that -- I think you're bound in your indictment to describe the -- the actual conspiracy, and if it indeed is one that covered the whole world, you're -- are you supposed to describe it as one that only applied to the United States? Of course not. You describe the actual conspiracy. That does not prove that the portion of it which does not affect the United States is in any sense illegal under United States law. I don't think it is illegal.

MR. GOLDSTEIN: Justice Scalia, let me tell you why I think that is contrary to settled precedents, and Mr. Chief Justice, these are precedents just like Rose v. Lundy that Congress would have had in mind in the 1982 act. So I want to talk, Justice Scalia, about pre-1982 law on whether or not the Sherman Act actually made the transactions, if we were to focus on them, illegal. And then, Justice Breyer, I want to come to whether or not the '82 act changes that.

Justice Scalia, the decree in National Lead

affirmed by this Court, which is at pages 330 to 331 of the Court's opinion, cancelled contracts that were in purely foreign commerce. To read from the opinion that -- that established the decree, several agreements relating to manufacture and trade, we deem the European markets are but some of the links in the chain which was designed to enthrall the entire commerce in titanium. Timken Roller Bearing did the exact same thing, and the Solicitor General argued in Timken that acts would have -- that those acts would have violated the Sherman Act even if they had related solely to the commerce of the foreign nations.

Those precedents, Justice Scalia, if you look at them, do say that the underlying activities that are in the overt acts, if you will, in furtherance of the conspiracy, are illegal under U.S. law, and that's for a good reason. That is, if we don't go after them, the conspiracy itself will be sustained. You have to attack the conspiracy and what the conspirators are actually doing.

QUESTION: But all of that is true and it does not necessarily follow that we do or should permit a cause of action.

MR. GOLDSTEIN: Absolutely, Justice Souter. I have to take this -- there are -- there are three parts to

the equation, and let me just, at each stage, because it can get very complicated, talk about where we are in the logic. There is the question, does the Sherman Act apply? There is the second question, okay, is there a private right of action? And, Justice Souter, you identified the third part to it. What does comity have to say about it? What do we do, assuming even if nominally the statute applies and they can sue, but it nonetheless would bring us into conflict with our trading partners.

So I was answering, Justice Scalia, on the first. Justice Breyer and you have taken me to the second, and that is, is there a private right of action, particularly after the 1982 Act? Two facts about the 1982 Act. First, it has nothing to do with this case. Its purpose, and it's reflected in the introductory clause, and let me take you to --

QUESTION: You're -- you're talking about FTAIA?

MR. GOLDSTEIN: Yes, Mr. Chief Justice.

QUESTION: Well, but the court of appeals relied very heavily on the act.

MR. GOLDSTEIN: It did in the sense of saying --

QUESTION: Well, it just did. I mean, not did --

MR. GOLDSTEIN: It did in a particular sense,

yes. I'm not trying to quibble. It said that the --

QUESTION: Good to know.

(Laughter.)

MR. GOLDSTEIN: It said that the FTAIA, the '82 Act didn't bar our claim. We think that's right for two reasons, the first it doesn't apply at all, and the second is that clause 2, which is what gave rise to the split in the circuits, doesn't require that the person's injury, that the person's injury arise from an effect on U.S. commerce. It accepted the second of those propositions, and so I'll start with it, and Mr. Chief Justice, the text is at page 1a of the red brief. I think it's helpful to go there.

This is a limit, by the way, of course, on both private rights of actions and the actions by the Government, and so what happens to us is going to happen to Federal prosecutors. It says, it's the second statute listed, Sections 1 to 7 of this title, that is the Sherman Act, shall not apply to conduct. It's focusing there on the conspiracy, all agree here that the conduct covered by the FTAIA is the illegal conspiracy. So conduct involving trade or commerce other than import trade or import commerce with foreign national unless two conditions are satisfied. The one is the substantial effect on U.S. commerce, and they admit they sold billions of dollars of

vitamins in the United States as part of the worldwide market. And second, such effect -- and so the effect here is the effect of the conspiracy on U.S. commerce -- gives rise to a claim under provision -- under the provisions of Sections 1 to 7 of this title, i.e, under the Sherman Act.

What that statute does is determines whether the conspiracy itself falls within the Sherman Act. It is not -- and as its structure indicates, it's not about whether a particular individual's claim comes within it. Remember the structure is, this conduct, the conspiracy, is illegal or not depending on whether or not these two criteria are met. Now, this is -- our reading of it is the one that was adopted by the United States when the act was adopted, by every single antitrust treatise, every single article interpreting the FTAIA at the time. They all recognized that what clause 2 does is requires that the effect required by clause 1, that is, the effect on U.S. commerce, be an anti-competitive effect.

QUESTION: But the -- I -- the court of appeals, I thought, said the language, give rise to a claim, meant that you didn't have to show the claim of any particular person. Do -- do you agree with the court of appeals there?

MR. GOLDSTEIN: We do, Mr. Chief Justice, in its bottom line. You asked a question in the first minute,

how in the world are we going to tell if some other person has a claim, and that -- we agree with you, that is not what Congress had in mind. As between the two sort of reticulated versions of clause 2, the Second Circuit is the -- is the reading of the statute. It comes out the exact same way, but it's the analysis of the Second Circuit that's right.

The Second Circuit said, before the 1982 Act was adopted there was a split. We didn't know if in order to trigger the Sherman Act, the effect that was required on U.S. commerce had to be pro-competitive or anti-competitive. There was a rule of the Second Circuit in a case called National Bank of Canada that says, look, it's not good enough to bring in the Sherman Act if there's an increase in exports or more jobs. No, no, no, no, no. It has to be anti-competitive here.

And so that -- the ABA submitted comments on the original version of the 1982 bill, and it said, look, in order for the Sherman Act to apply, there's got to be a problem in our country, and so they added clause 2, and that's, as I said, the United States said so in 1982, in 1983, every treatise did, every antitrust commentator. So that's what clause 2 does. It says, look, we are concerned when our economy is being hurt, and that's a limit on us, and in the antitrust guidelines, the

Government says that's a limit on them too.

QUESTION: I -- I just want -- don't want you to lose part 3, and let -- let you focus on that, the comity.

MR. GOLDSTEIN: Yes.

QUESTION: One possibility floating through my mind is that there are international quinine or maybe this, international vitamin cartels, where it's pure price fixing, and in such instances, prices in one country may be interdependent on another, and in such instances if you lose this case here, now, you may still have a claim, because it flows in part, the injury, from effects in the United States. But there are many other parts of the antitrust law which are highly controversial. To name a few, information sharing, vertical restrictions of different kinds.

And if you win here, not only do you not have to show this interdependent thing, but anybody could come in under all those under provisions too, which many other countries don't like at all, and bring lawsuits and there's no way to prevent our law from becoming generally imperialistic in this sense that I've been talking about. That's a way of focusing you back on the comity question, and you can answer mine, the comity, whatever you like.

MR. GOLDSTEIN: Thank you. Let me put us in the analytical framework again, and that is, we understand,

let's -- we're assuming the Sherman Act applies and that there is a right to sue in theory. Now, are there other limitations? Let me be very clear on the fact that these are three separate issues and then apply the third prong. This was settled in Hartford Fire. Mr. Shapiro is relying on the dissent in Hartford Fire for the proposition that comity concerns are built into the definition in the Sherman Act. That is the position that the majority rejected. And although he says the issue is nonetheless here, his page -- page 41, note 16 of their brief in the court of appeals expressly acknowledged that the question is different from the question of comity presented in Hartford Fire. So that --

QUESTION: But how -- how is it, in -- in the hypothetical that Justice Breyer posed, that comity is built in? If they -- simply because someone says it doesn't mean that it is. I -- I just don't see how it is.

MR. GOLDSTEIN: I understand. Justice Kennedy, the courts of appeals leading up to Hartford Fire were unanimous and then Hartford Fire cites with approval, for example, a case called Mannington Mills, and that is that the courts of appeals had always understood up to the point of Hartford Fire, and then Hartford Fire applied the same analysis, that comity is a restriction on the exercise of the jurisdiction conferred by the Sherman Act,

and so Hartford Fire endorses it.

And then subsequent to Hartford Fire -- and Justice Breyer, I am coming back to the substance of the comity analysis -- but let me just say that subsequent to Hartford Fire, the courts of appeals have applied comity robustly. Let me just cite two cases for you, Metro Industries, which is 82 F.3d 839, and Nippon Paper, 109 F.3d 1. They have continued to look at all of the different considerations.

And so, just to return to structure and then to substance, the district court and the court of appeals had no cause to consider whether or not this case would interfere with international relations. Now, that analysis in the case of monopolization or unfair trade practices would preclude the exercise of U.S. antitrust jurisdictions for several reasons. The first is, here in our case we have an international norm. Everybody hates price fixing. Our brief details --

QUESTION: Mr. Goldstein, may I stop you there, because you are dividing the universe up in to claims that everybody agrees and more controversial applications of U.S. antitrust law, but one of the principal objections, as I understand it, from other nations is to the treble damages feature. They say, for their consumers, the way they regulate antitrust, there are no treble damages.

MR. GOLDSTEIN: Yes. So Justice Breyer, I'm going to put on the table for a second whether or not our law applies at all. In detour, Justice Ginsburg, if we were to agree with that, if we were to say that our choice of treble damages and their choice of single damages represented a true conflict, and that is we were undercutting a policy judgment by them, the solution would not be to eliminate the jurisdiction that Congress conferred in the Sherman Act. It would be to say you can't get greater damages here than single damages, because that's the norm. That would be the solution. If the position is that comity, Congress intended comity to carve back, what you would say is that Congress would have intended in this instance not to allow the foreigners to get treble damages.

QUESTION: What about a forum non conveniens policy that says, you're a foreign purchaser, you purchased abroad, you have a nice forum abroad to go to, don't burden the U.S. courts.

MR. GOLDSTEIN: Absolutely. There's no question that -- I just cannot remind you enough times that the petitioners are attempting to seriously jump the gun. There was no forum non conveniens argument below, there was no comity argument below, there was no conflict of laws argument. All of those -- for example, if there is a

legit -- and in fact I can give you an illustration. There is a private class action ongoing in Australia. We have already had one of our claimants drop out of the case and go to Australia, because everyone recognizes that's where your remedy is at.

We have, however, a dilemma that Congress recognized, and that is, as Justice Scalia said, with respect to the great majority of the world, and we cite in our brief the OECD's formal report on cartels, the seminal report to the Attorney General on international antitrust, a source after source after source that says there is grave under enforcement of cartels, and I can illustrate it here with two facts. The first is, with respect to more than half of the volume of commerce in bulk vitamins, more than half of it, they are going to get away with it.

And that leads to the second fact, because there's no enforcement, public or private, that leads to the second fact, and that is, if they win here, they will net from activities that are per se illegal under the Sherman Act, net, net, net, $13 billion. That is not a message of deterrence.

So, Justice Ginsburg, that's quite right. There are mechanisms for dealing with the fact that there are other remedies. I would just put back on the table the one that says, look Congress would not have intended --

QUESTION: I don't really see what it's doing on the table. I mean, it didn't require a Nobel Prize winner to make me figure out that in fact the worse you treat the people who make the cartel, the less likely they are to do it. But I mean, fine, you're right, if we hung and quartered them or whatever, they'd do it even less. But what -- what is that to do with the price of fish, so to speak?

MR. GOLDSTEIN: It -- it's the judgment that Congress made, Justice Breyer, in the worldwide markets that Justice Kennedy referenced in the first half hour, and that is that we will be hurt, unless we go after them. But it doesn't mean, Justice Breyer, that we go after them for every Section 1 or every Section 2 violation.

So let me come all the way back to your original question, and that is, okay, why is the comity analysis different here and there? Justice Ginsburg pointed to one argument that I was making, that's this is per se illegal. It is -- the second point is that there are disagreements, it's related, there are disagreements about whether the primary conduct is illegal in that instance. They don't think a monopoly is a bad thing. But what we do know is that everyone agrees that price fixing is bad. It is not an infringement on their ability to regulate primary conduct.

If, for example, there was a country that said, we love price fixing, I mean, we just think it's so much better if things are expensive, well, then that might be a different case and there might be a forum non motion, but there are no such countries. So it is a very, very, very different --

QUESTION: But -- but I'm -- I'm not sure that the rule you're advocating -- you say that don't -- don't worry about the other case, because your case is okay. But we are worried about the other case.

MR. GOLDSTEIN: Yes, Justice Kennedy, I -- I think that's right. I think that it is not sufficient for me just to say, look, there'll be a comity analysis later in the day. But I would say that we are articulating a rule, and it is a rule that is limited to --

QUESTION: And I'm waiting for that rule.

MR. GOLDSTEIN: Okay.

QUESTION: It's still on the table.

MR. GOLDSTEIN: The rule, Justice Kennedy, is that the Sherman Act applies, but unless there is a worldwide market, so that we can say that the injury to the person abroad is inextricably intertwined with the injury to the person here, that claim lacks antitrust standing because it will not directly advance U.S. interests. It is not necessary to advance the protection

of U.S. --

QUESTION: So you have flushed them all out that way. Now, the ones you have left, which is yours which you like, why can't you bring -- fit right within the language here that where this worldwide market is in fact such that its price in Bolivia is never going to hold up unless the price in the United States holds up if you've got the necessary causal relationship to effects in the United States. That's the second half which you said we should remand. I mean, maybe that's a good half. What's wrong with that?

MR. GOLDSTEIN: No, we're -- Justice Kennedy, let me relate this to your question. That is, Justice Breyer is saying, look, the first argument in the red brief is this, this is a case in which the effects in the United States -- and I will come to your Illinois Brick objection, Justice Scalia -- the -- the effects in the United States did give rise to our claims. He says, accept what they say, accept the Fifth Circuit's rule. Look, if the cartel had not operated in this country, it would have collapsed, he doesn't need a Nobel Prize, we have one in case you did, and that means that our people were injured. We accept that. It's the first argument in our brief. It means that the -- it limits out all of the cases that you were worried about, Justice Breyer, because

in a monopolization case that won't be true, unfair trade practices, that won't be true.

And then, Justice Ginsburg, notwithstanding that we have a narrow field of cartel cases, there are only six that have been filed, there are still other options on the table for limiting the claim in the instance that there is an available foreign remedy. So that's how it would work. We would accept their argument, we would say there's a narrow class of cases that, Justice Kennedy, are a true worldwide market where Congress recognized that, in cases like American Tobacco that it had in mind in the 1982 Act, and then we say, look, that's it, that's the full ball of wax, we don't become an imperial source of law for the world. That's how we would analyze the case.

Now, we think that that too addresses any concerns about manageability --

QUESTION: If you think that the forum non conveniens point would work, let's say, for our trading partners who have told us they don't like treble damages in any case, so are we going to make a distinction then and accept the complaint of customers, purchasers of vitamins in countries that don't have any antitrust laws, but we would reject claims coming from, say, the U.K. or Canada?

MR. GOLDSTEIN: We would reject claims from

places like Australia and Canada and the like, that's right. If they have any sort of regime that they have decided to build up, if they've enacted into law, and it's a viable regime for vindicating interests, so that the client being here isn't necessary --

QUESTION: Well, but that -- that in itself is a rather elaborate inquiry that you find nowhere in the statute.

MR. GOLDSTEIN: Well, Justice -- Mr. Chief Justice, the reason is that forum non conveniens is a principle that's generally applicable to the law and --

QUESTION: Yeah, but forum non conveniens is ordinarily not that you have different law, but there are other factors that make it inconvenient to try the case.

MR. GOLDSTEIN: Mr. Chief Justice, that's right. I think Justice Ginsburg's view is that where we have --

QUESTION: Well, she's perfectly capable of speaking her own view. If you'd just answer your -- my question.

MR. GOLDSTEIN: Mr. Chief Justice, those factors are relevant. I think that a principle factor in the forum non analysis would be, could you go somewhere else and vindicate your claim? I think maybe that should be a very important part of the analysis.

QUESTION: But -- but the people from Canada

cannot go somewhere else and vindicate their claim because the Canadian law is different.

MR. GOLDSTEIN: Mr. Chief Justice, they do have a competition law. They've filed a brief in this case, as have a limited number of nations. Justice Scalia points out that most don't, and that's, I think, an important manageability --

QUESTION: But I -- I thought your answer was that the ones that don't can sue here, and the ones that do can't sue here.

MR. GOLDSTEIN: Yes, Mr. Chief Justice.

QUESTION: But then you said a moment ago, I thought, that the Canadians could sue here, but I -- now you're saying they'd be turned away.

MR. GOLDSTEIN: I then misspoke, Mr. Chief Justice.

QUESTION: Well, you sure did.

MR. GOLDSTEIN: Yes. I then misspoke. If you -- I think there's an extremely strong argument that if you can go somewhere else, if there's some substantial remedy available in another country, then you can go somewhere else. But they didn't file that motion because they're trying to get rid of the case with respect to the majority of bulk vitamins commerce and with respect to most of the commerce in these worldwide markets for which there is no

remedy. That's just a fact.

QUESTION: But would you get to my Illinois Brick question before your time runs out.

MR. GOLDSTEIN: Yes.

QUESTION: And just so I put the question as -- as clearly as possible, it seems extraordinary to me that if this -- if a foreign company had been injured by buying drugs from an American company that bought them from the conspirators at an excessively high price, that foreign company would not have a cause of action. But you're saying that a foreign company has a cause of action by reason of the fact that had the American company not purchased at the artificially high conspiratorial price, but at a lower price, they might have purchased from that -- from that intermediate person, and -- whereas Illinois Brick would clearly bar the first suit, you're saying it doesn't bar the second suit as a rationale for allowing them to sue here, and that strikes me as very strange.

MR. GOLDSTEIN: There are three answers, Justice Scalia. The first two relate to the technical requirements of Illinois Brick and the third explains why you shouldn't read Illinois Brick to bar such claims. The first is that we're not merely talking about arbitragers. We're talking about, there are companies in the United States that made vitamins and they would have sold to our clients absent

the cartel. The intermediary isn't a necessary part of the picture.

The second is that even though you buy from an intermediary, under Illinois Brick you still have a claim, and that is you have a right to bring an action for an injunction.

The third is that, look, our reading, the one that says, and that Justice Breyer has hypothesized, accept what they're saying and allow the claim only if the injury is tied into a worldwide market. That's a reading that protects U.S. interests. To say that Congress set up the structure, whereas -- that would allow you to look at the foreigners through clause 2, but eliminate all of their claims on Illinois Brick grounds, would render the statute and its -- its provisions against cartels ineffectual.

QUESTION: As far as your first point is concerned, I understand the other side to concede that if you could demonstrate that you would have bought from one of these American companies that manufactured in connection with this conspiracy and sold at the conspiratorial price, you would -- you would have a cause of action. That clearly would have -- would -- would be -- affect the export commerce from the United States.

MR. GOLDSTEIN: Two answers, Justice Scalia. The

first is, I disagree. They do not concede that. They regard that as a hypothetical purchase, to use Mr. Shapiro's words, it didn't happen. And the second is, and this goes back, Justice Ginsburg, to a question you asked in the first half hour, the reason we don't have -- thank you.

QUESTION: Thank you, Mr. Goldstein.

Now, Mr. Shapiro, you have four minutes remaining.

REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONERS

MR. SHAPIRO: Thank you, Mr. Chief Justice. The court of appeals and Mr. Goldstein have relied on the deterrence concept here, but it's important to remember that the Government, supported by seven of our allies and trading partners, has said that this position is going to undermine deterrence. Why? Because it's going to reduce the detection of international price-fixing cartels, and you get zero deterrence if you don't have actual detection of overseas cartel behavior.

The key to getting the detection is the amnesty program and international cooperation with our allies, and right now, our allies are shrinking away from the United States, information-sharing agreements that are needed here to investigate and prosecute cartels. The Justice

Department officials have been giving speeches about that bad effect, so there's a very serious danger of undermining deterrence here if this position is accepted.

Now, on comity of nations, that is not a judicial balancing of one factor and another equitable factor. That's a rule of statutory interpretation that this Court has applied ever since the Charming Betsy case 200 years ago, and what it means is that if a particular alternative is presented that broadly construes our laws to intrude into the affairs of other nations and cause friction, that interpretation is going to be rejected, and that was certainly not rejected in the Hartford case.

Professor Areta, in his treatise, pointed out that our antitrust laws do not rule the entire commercial world, and that's a concept that's written right into Section 1 of the Sherman Act. It applies to -- its domain is commerce among the states and commerce with foreign nations, not commerce within foreign nations, not commerce between foreign nations.

And the reason the FTAIA drew the sharp lines that it did is the reason that Justice Breyer was driving at. Other nations have their own policies. They disapproved treble damages. They have their own procedures for dealing with antitrust issues instead of

per se rules and rules of reason, they have prohibitions and then a series of exemptions applied by expert administrators. So if our courts take these issues over and apply treble damage remedies, they override procedure, they override the -- the substance of these laws, and -- and they are certainly going to override policies against treble damages, which have provoked huge international discord in the form of claw-back statutes, blocking statutes. Our closest allies have responded to overreaching that way, and Congress wanted to minimize that problem with passage of the statute.

Now, the Timken case that counsel referred to was a case where the Government was going after contracts overseas that injured our commerce. The Government was not going after practices overseas that had effects overseas and not here. Counsel referred to the weight of scholarship. I read all those articles. There's only one of them that suggests that everybody in the world can come trooping into our courts if some person here has an antitrust claim from two private practitioners who had no background in the Government. They simply asserted that without any analysis. I don't think that constitutes weighty scholarship.

Now, the National Bank of Canada case that counsel referred to, if in fact that's the case that

Congress meant to approve, that means they're out of court, because that's a case where the complaint was dismissed because the injury was felt in Canada and was not felt in the United States, and the Second Circuit dismissed that claim as a matter of law.

Now, on this worldwide market point, the -- the statutes here hinge jurisdiction on commerce. Lawyers can always draw a global conspiracy. Economists can always say there's a global market, and these issues would be enormous quagmires for the district courts if that's what our courts' jurisdiction turned on. Congress did not intend that. It intended a clear jurisdictional benchmark by focusing on our commerce. There has to be an injury to our commerce and the plaintiff before the court has to be alleging treble damages based on that particular injury.

In -- in light of these considerations, the Justice Department's position, the position of our allies, who have submitted amicus briefs, we submit that this decision is an error and it should be reversed and I thank the Court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shapiro. The case is submitted.

(Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.)