

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 F. HOFFMANN-LaROCHE, LTD., :
4 ET AL., :
5 Petitioners :
6 v. : No. 03-724
7 EMPAGRAN S.A., ET AL. :
8 - - - - -X
9 Washington, D.C.
10 Monday, April 26, 2004
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:59 a.m.
14 APPEARANCES:
15 STEPHEN M. SHAPIRO, ESQ., Chicago, Illinois; on behalf of
16 the Petitioners.
17 R. HEWITT PATE, ESQ., Assistant Attorney General,
18 Department of Justice, Washington, D.C.; as amicus
19 curiae, supporting the Petitioners.
20 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of
21 the Respondents.
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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

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

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

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

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

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

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

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

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

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

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

15 QUESTION: No, but there -- there was an
16 overcharge in the United States. You're -- you're not --
17

18 MR. SHAPIRO: Right.

19 QUESTION: -- contesting that -- that --

20 MR. SHAPIRO: At all --

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

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

1 overcharge --

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

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

18 QUESTION: Mr. Shapiro, can I ask you a question
19 --

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

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

1 only the injury in the United States in your view?

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

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

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

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

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

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

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

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

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

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

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

1 purchases in the United States.

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

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

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

16 QUESTION: Mr. Shapiro, I --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 partners, of allies --

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

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

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

10 MR. SHAPIRO: Absolutely.

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

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

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

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

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

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

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

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

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

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

15 MR. SHAPIRO: I don't think the class issue has
16 been reached in any of these cases, but they -- they are
17 being filed. I -- I saw one just a month ago in the
18 district court in Connecticut. It was a suit by an Indian
19 dealership alleging it had been wrongfully terminated in
20 India. He wanted to litigate in our courts over the
21 propriety of that termination, claiming that dealers in
22 the United States maybe were affected by the same thing.
23 Well, there are lots of dealerships around the world in
24 192 countries, and the lure of treble damages is a
25 powerful lure that's going to bring them to our country if

1 these claims are accepted.

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

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

6 ORAL ARGUMENT OF R. HEWITT PATE
7 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
8 SUPPORTING THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

23 QUESTION: I don't follow the --

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

1 MR. PATE: Hartford --

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

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

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

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

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

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

1 there in which the people in Uruguay or wherever could sue
2 the perpetrators in Holland in an American court prior to
3 1982?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 QUESTION: Thank you, Mr. Pate.

23 Mr. Goldstein, we'll hear from you.

24 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

25 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

4 QUESTION: It says it's illegal, period.

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

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

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

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

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

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

9 (Laughter.)

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

11 (Laughter.)

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

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

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

7 MR. GOLDSTEIN: Yes.

8 QUESTION: Okay, what's the answer?

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

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

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

25 MR. GOLDSTEIN: Okay, but --

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

16 MR. GOLDSTEIN: Justice Scalia, let me tell you
17 why I think that is contrary to settled precedents, and
18 Mr. Chief Justice, these are precedents just like *Rose v.*
19 *Lundy* that Congress would have had in mind in the 1982
20 act. So I want to talk, Justice Scalia, about pre-1982
21 law on whether or not the Sherman Act actually made the
22 transactions, if we were to focus on them, illegal. And
23 then, Justice Breyer, I want to come to whether or not the
24 '82 act changes that.

25 Justice Scalia, the decree in *National Lead*

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

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

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

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

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

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

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

18 MR. GOLDSTEIN: Yes, Mr. Chief Justice.

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

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

22

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

24 -

25 MR. GOLDSTEIN: It did in a particular sense,

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

2 QUESTION: Good to know.

3 (Laughter.)

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

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

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

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

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

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

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

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

17 And so that -- the ABA submitted comments on the
18 original version of the 1982 bill, and it said, look, in
19 order for the Sherman Act to apply, there's got to be a
20 problem in our country, and so they added clause 2, and
21 that's, as I said, the United States said so in 1982, in
22 1983, every treatise did, every antitrust commentator. So
23 that's what clause 2 does. It says, look, we are
24 concerned when our economy is being hurt, and that's a
25 limit on us, and in the antitrust guidelines, the

1 Government says that's a limit on them too.

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

4 MR. GOLDSTEIN: Yes.

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

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

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

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

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

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

1 and so Hartford Fire endorses it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 QUESTION: And I'm waiting for that rule.

17 MR. GOLDSTEIN: Okay.

18 QUESTION: It's still on the table.

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

1 of U.S. --

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

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

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

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

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

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

25 MR. GOLDSTEIN: We would reject claims from

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

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

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

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

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

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

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

25 QUESTION: But -- but the people from Canada

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

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

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

11 MR. GOLDSTEIN: Yes, Mr. Chief Justice.

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

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

17 QUESTION: Well, you sure did.

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

1 remedy. That's just a fact.

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

4 MR. GOLDSTEIN: Yes.

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

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

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

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

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

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

25 MR. GOLDSTEIN: Two answers, Justice Scalia. The

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

7 QUESTION: Thank you, Mr. Goldstein.

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

10 REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO
11 ON BEHALF OF THE PETITIONERS

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

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

1 Department officials have been giving speeches about that
2 bad effect, so there's a very serious danger of
3 undermining deterrence here if this position is accepted.
4

5 Now, on comity of nations, that is not a
6 judicial balancing of one factor and another equitable
7 factor. That's a rule of statutory interpretation that
8 this Court has applied ever since the Charming Betsy case
9 200 years ago, and what it means is that if a particular
10 alternative is presented that broadly construes our laws
11 to intrude into the affairs of other nations and cause
12 friction, that interpretation is going to be rejected, and
13 that was certainly not rejected in the Hartford case.

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

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

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

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

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

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

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

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

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

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

25