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IN THE WAKE OF *EMPAGRAN*—LIGHTS OUT ON FOREIGN ACTIVITY FALLING UNDER SHERMAN ACT JURISDICTION? COURTS CARVE OUT A PREVAILING STANDARD

Kelly L. Tucker[♦]

One of the basic problems of any legal system has been, and still is, the question of how far any national law may be applied to and enforced against conduct committed outside its territory. Perhaps the area where this problem arises most frequently in the United States courts is in antitrust litigation. The antitrust laws in the United States proscribe “every contract, combination . . . , or conspiracy in restraint of trade or commerce among the several states or with foreign nations.”¹

Either private or government parties may bring antitrust actions in the United States. The Department of Justice may bring suit under the Sherman Act and has stated that its purpose of protecting against anticompetitive acts is to ensure open and free markets, protect consumers, and prevent conduct that impedes competition.² Congress intended private antitrust enforcement under the Sherman Act to serve the same purpose. The courts have consistently emphasized that private antitrust enforcement is designed “not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws.”³ Relief in private antitrust suits may include treble damages, attorneys’ fees, and, where appropriate, equitable relief. Because of the high legislative importance placed on competition and fair trade, foreign

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1. 15 U.S.C. § 1 (2006).

2. U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Enforcement Guidelines for International Operations § 1 (Apr. 1995) [hereinafter DOJ Guidelines]. These Guidelines provide a framework for businesses engaged in international operations for a general overview of the DOJ’s enforcement operations.

3. *Cal. v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 130-31 (1969) (internal quotations omitted)).

plaintiffs may bring actions under the Sherman Act. The Court observed that even “[t]reble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.”⁴

This Note will discuss the current state of American extraterritorial jurisdiction over privately-initiated lawsuits, filed by both foreign and domestic plaintiffs, alleging foreign anticompetitive conduct. This Note proposes that, contrary to contemporaneous commentary predicting a circuit split in the wake of *Empagran v. F. Hoffmann-LaRoche* and its progeny,⁵ a concrete standard exists under the Foreign Trade Antitrust Improvement Act (“FTAIA”)⁶ as to the permissible reach of U.S. courts’ extraterritorial jurisdiction. Section I outlines the history of the extraterritorial application of the Sherman Act to conduct abroad. Section II discusses the current state of the law. Section III proposes an extraterritorial jurisdiction causation standard has emerged post-*Empagran*, analyzes the vulnerabilities of parties involved in foreign conduct, and explores the avenues of suit still available to foreign or domestic plaintiffs for injuries suffered as a result of activities conducted abroad.

I. HISTORY OF EXTRATERRITORIAL JURISDICTION IN THE U.S. ANTITRUST ARENA

Congress enacted the Sherman Act to prohibit unreasonable restraints on trade and punish violators.⁷ This federal law extends not only to American companies, but also, under certain circumstances, to foreign companies either doing business in the United States or those that conduct anticompetitive business activities that interfere with exports of an American company.⁸ Both the U.S. Government and

4. *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 314 (1978). While Pfizer was a suit by the U.S. Government, the Court recognized the importance of private causes of action under the antitrust laws.

5. *Empagran v. F. Hoffmann-LaRoche*, 417 F.3d 1267 (D.C. Cir. 2005) (“*Empagran II*”).

6. Sherman Act, 15 U.S.C. § 6a (2006) (as it applies to extraterritorial jurisdiction under the Sherman Act).

7. *Id.* § 1 (The purpose of Section 1 of the Sherman Act is to prohibit “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.”); *Id.* § 2 (The purpose Section 2 of the Sherman Act is directed at “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize.”).

8. For a long period of time, the Government and courts adopted what some

private litigants may bring causes of action against foreign corporations alleging anticompetitive business conduct abroad.⁹ Such suits require U.S. courts to exercise extraterritorial jurisdiction over these foreign entities. These suits allow private litigants to bring actions for damages suffered as a result of violations of Sections 1 and 2 of the Sherman Act, among other federal laws.¹⁰ The Sherman Act, as originally adopted, did not define the extent to which such foreign actors or domestic actors engaging in foreign activity are subject to American antitrust jurisdiction. Instead, courts have largely been left to determine the breadth of the extraterritorial application of United States laws in the antitrust context.¹¹

The Sherman Act applies to conduct abroad under the broad language of the Commerce Clause of the Constitution, which gives Congress the power to regulate commerce with foreign nations and among the several states.¹² Many plaintiffs find American courts most favorable to private antitrust suits. Unique to American law, the Sherman Act, provides for the imposition of treble damages against the offender, as well as attorneys' fees.¹³ This attracts many foreign and

characterize as a wide-reaching approach to extraterritorial jurisdiction over foreign enterprises in the context of antitrust law. *See, e.g.*, ENFORCING ANTITRUST AGAINST FOREIGN ENTERPRISES 7 (Cornelis Canenbley ed. 1981). However, recent cases and statutes have moved away from the more flexible "rule-of-reason" approach, which takes into consideration conflicts of law principles, as well as considerations of international comity, toward the more formulaic "effects doctrine." *See id.* (characterizing the "rule-of-reason" approach); *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993) (discussing the effects doctrine). As discussed *infra*, the current state of the effects doctrine does not do away with considerations of international comity; it merely embodies such principles in its application. *See also* *F. Hoffmann-LaRoche v. Empagran S.A.*, 542 U.S. 155 (2004) (stating that applying the approach suggested by the court properly considers the economic realities of foreign markets and does not improperly interfere with foreign state antitrust laws).

9. *See generally* 15 U.S.C. §§ 1 *et seq.* (2006).

10. *Id.* §§ 16, 26.

11. MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 42-43 (3d ed. Kluwer Law Int'l 2006) (noting the confusion in the courts as to the application of extraterritorial jurisdiction).

12. U.S. CONST. art. 1, sec. 8, cl.3. "Trade with foreign nations" is generally understood to include commerce with any foreign party, not just foreign governments. JEFFREY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 6:1 (2d ed. 2006).

13. 15 U.S.C. § 15(a) (2006) ("any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . .

domestic plaintiffs with an antitrust injury to bring suit in the United States courts, where the exercise of extraterritorial jurisdiction is appropriate.¹⁴

a. An Evolving Standard—Early Cases Attempt to Establish a Standard for Extraterritorial Jurisdiction in the Antitrust Arena

American courts have long struggled with the applicability of the Sherman Act to conduct abroad. The first Supreme Court case to evaluate the extraterritorial application of United States antitrust laws was *American Banana Co. v. United Fruit Co.*¹⁵ In *American Banana*, the plaintiff company, incorporated in Alabama, sued a company, incorporated in New Jersey, for price fixing, and as a result of such price fixing, monopolizing and restraining trade.¹⁶ This was a case of first impression, as while the parties were both American companies, all of the claimed damages stemmed from anticompetitive activities *outside* of the United States and *solely within* Panama and Costa Rica.¹⁷

The Supreme Court held that American jurisdiction was improper, as by nature all laws are territorial and intended only to apply to actors within the States that enact such laws.¹⁸ Because the plaintiff presented no evidence that the acts complained of were contrary to the sovereign laws of Panama and Costa Rica, where the complained-of actions took place, the court held it was improper to extend extraterritorial jurisdiction.¹⁹ The Court found that there was very little American interest in

without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee"); S. Lynn Diamond, Note, *Empagran, the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 840 (2006) (discussing *Empagran*, and stating that the Supreme Court gave deference to comity concerns voiced by amici, including various foreign governments who expressed concern that treble damages "threatened to make the United States the forum of choice for plaintiffs around the world" and thereby undermining foreign antitrust laws (internal citations omitted)).

14. See Diamond, *supra* note 13, at 840 (discussing the attractiveness to plaintiffs of the possibility of treble damages).

15. 213 U.S. 347 (1909).

16. *Id.* at 354.

17. *Id.* at 354-55.

18. *Id.* at 357.

19. *Id.* at 356 ("For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of

the actions of the parties over the questioned activity abroad, as all of the complained-of conduct happened within Panama and Costa Rica and involved the predicate acts of a sovereign government.²⁰ The Court gave significant deference to comity concerns—particularly the fact that the laws of the foreign countries involved did not prohibit the complained-of conduct.²¹ However, in reaching this result, the Supreme Court basically held that American courts could not apply extraterritorial jurisdiction to any acts in foreign countries, regardless of the impact of said acts on the United States.²²

Other courts, confronted with antitrust claims predicated on foreign conduct that required interpretation of the *American Banana* decision, were quick to distinguish that case. Subsequent courts noted one important distinguishing factor of *American Banana*, that the Costa Rican government, a sovereign state, actually initiated the predicate conduct alleged to be anticompetitive.²³ As such, *American Banana* did not have as large of an impact as such an overarching holding would imply.²⁴

another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.”). This severely limited the application of U.S. antitrust statutes solely to conduct occurring within United States territory. However, subsequent cases, discussed *infra*, were quick to distinguish *American Banana* due to its unique factors. Subsequent court decisions chipped away, and eventually overruled, the Court’s holding. This *American Banana* holding was, at the time, particularly impactful, as few countries had antitrust laws in place at the time, and this basically immunized anticompetitive conduct abroad from suit, regardless of whether such conduct was in violation of the antitrust laws of the United States and regardless of whether the actors intended the acts to have an effect on U.S. commerce. See also Stephanie A. Casey, Comment, *Balancing Deterrence, Comity Considerations, and Judicial Efficiency: The Use of the D.C. Circuit’s Proximate Cause Standard for Determining Subject Matter Jurisdiction over Extraterritorial Antitrust Cases*, AM. U. L. REV. 585, 592 & n.30 (2005).

20. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-58 (1909).

21. *Id.* at 358-59.

22. *Id.* at 357 (stating “[w]e think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned,” in finding that the situs of the complained-of acts is the relevant inquiry).

23. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927) (distinguishing *American Banana*).

24. Subsequent courts refused to acknowledge that *American Banana* essentially prohibited all foreign conduct from falling under Sherman Act jurisdiction. Essentially, the courts relied on the serious comity concerns that would be implicated if American courts were to exercise extraterritorial jurisdiction over actions by a sovereign’s government.

The narrow approach to extraterritorial jurisdiction of *American Banana* was short lived. Less than 20 years later, in *United States v. Sisal Sales Corp.*, the Supreme Court adopted a broader approach and held conduct only partially within the United States could form the basis of an antitrust suit and justify the exercise of extraterritorial jurisdiction.²⁵ In *Sisal*, companies based in the United States conspired with Mexican firms to monopolize import of sisal, a plant used to make rope.²⁶ The Court noted the unique sovereign action at issue in *American Banana* and found that case did not control.²⁷ It distinguished the conduct in *Sisal* in finding that the United States complained of a violation of U.S. laws within U.S. territory by parties subject to Sherman Act jurisdiction, as opposed to the acts of a foreign government at the instigation of private parties.²⁸ The Court stressed that the conspiracy in question, while conducted abroad, “brought about forbidden results within the United States.”²⁹ The Court stated that instead of looking merely at locality of the complained of conduct and the laws of the country in which the conduct occurred,³⁰ the proper jurisdictional analysis requires the court to examine where the *effects* of the anticompetitive acts are felt.³¹ If the effects of the complained-of anticompetitive acts are felt within the United States, these American effects are an important factor weighing in favor of the exercise of American extraterritorial jurisdiction over activities conducted outside of the sovereign.³²

The Court’s construction of antitrust extraterritorial jurisdiction in *Sisal* was the first in a line of cases that scholars, litigators, and courts commonly referred to as the “effects doctrine.”³³ Furthermore, *Sisal*

25. 274 U.S. 268 (1927).

26. *Id.* at 271-73.

27. *Id.* at 275 (noting “[t]he substance of the complaint is that, the plantation being within the de facto jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts” (internal citations omitted)).

28. *Id.* at 276.

29. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT’L L. 1, 7 (1992).

30. These are the relevant factors enumerated in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

31. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927).

32. *Id.*

33. Michael G. Mckinnon, Comment, *Federal Judicial and Legislative Jurisdiction over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions Beyond*

greatly expanded the extraterritorial application of U.S. antitrust laws.³⁴

The trend of widening the extraterritorial application of antitrust laws continued in the seminal case, *United States v. Aluminum Co. of America* (“*Alcoa*”).³⁵ This case concerned the establishment of a quota system, devised by European companies, for the export of aluminum to the United States in order to sustain a price-fixing monopoly held by an American company.³⁶ Judge Learned Hand, in determining whether the court should exercise jurisdiction over alleged violations of the Sherman Act under the circumstances, focused not on the European situs of the acts.³⁷ Rather, Judge Hand focused where the effects of the harm were felt. In finding that the court could exercise jurisdiction, and defendants were potentially liable under the Sherman Act, the *Alcoa* court extended the effects doctrine to foreign conduct when the effects of anticompetitive foreign conduct were felt within the United States.³⁸ In so holding, the court stated:

We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States On the other hand, . . . any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends³⁹

The *Alcoa* decision widened the jurisdictional reach of the federal courts in the antitrust context,⁴⁰ repudiated *American Banana*, widened the scope of the *Sisal Sales Corp.* holding as to subject matter jurisdiction, and held the Sherman Act is applicable in all circumstances in which the effects of anticompetitive conduct—regardless of where the harm occurred—were intended to be felt in the United States and were

the Timberlane/Restatement Approach, 21 PEPPERDINE L. REV. 1219, 1259 n.194 (1994).

34. *Id.*

35. 148 F.2d 416 (2d Cir. 1945).

36. *Id.* at 423-34.

37. *Id.* at 443-44.

38. *Id.* at 445 (holding that United States courts have jurisdiction over anticompetitive conduct, regardless of situs, where the conduct was intended to, and actually did, harm the United States and U.S. interests).

39. 148 F.2d 416, 443 (2d Cir. 1945).

40. Mckinnon, *supra* note 33, at 1263-66 (discussing the impact of Judge Hand’s *Alcoa* decision).

in fact felt in the United States.⁴¹

The *Alcoa* court found the contracts in question to be subject to extraterritorial jurisdiction of the antitrust laws, as even though the parties executed the illegal conduct abroad, the defendants intended to and did, in fact, have an effect on United States imports.⁴² Because the effects were felt in the United States, the court held that the contacts with the United States were thus sufficient to establish jurisdiction over the contracts, even though they were formed extraterritorially.⁴³ Because the *Alcoa* test only looks to the effect of anticompetitive conduct, and does not consider comity concerns, subsequent courts interpreting *Alcoa* broadly and expansively applied it.⁴⁴ Post-*Alcoa* decisions paid little attention to traditional comity concerns, and instead focused on the actual effects of the alleged anticompetitive conduct.⁴⁵

*b. Foreign Responses to Dismissal of the
Comity Rule-of-Reason-Type Analysis*

The *Alcoa* decision sparked an immediate and substantial backlash in the international community.⁴⁶ Because *Alcoa* effectively did away with the comity prong of the extraterritorial jurisdiction analysis, foreign sovereigns were concerned that the United States would become a world policeman with the power to overtake global antitrust enforcement to the detriment of foreign sovereigns' ability to regulate conduct within their

41. *Alcoa*, 148 F.2d at 443, 445.

42. *Id.*

43. *Id.*

44. JEFFREY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW 238 & n.6 (Thomson West, 2d ed. 2006) (noting that *Alcoa* greatly expanded jurisdiction over suits involving foreign trade and stating through May 1973, the United States filed 249 antitrust suits involving foreign trade, and none were dismissed for lack of jurisdiction (citing WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 498-543, app. B (2d ed. 1973))); Note, *Extraterritorial Application of the Antitrust Laws*, 69 HARV. L. REV. 1452 (1956) (providing a collection of cases).

45. See, e.g., *Sabre Shipping Corp. v. Am. President Lines, Ltd.*, 285 F. Supp. 949, 953 (S.D.N.Y. 1968) (stating that the vital question in determining whether the antitrust laws apply to any actor, foreign or citizen, is whether such anticompetitive acts *affect trade and commerce* within the United States); KESSLER & WALLER, *supra* note 42, at 238 (stating that in the aftermath of *Alcoa*, "the courts paid little, if any, attention to intent").

46. KESSLER & WALLER, *supra* note 43, at 239. See generally *id.* at § 6.3.

borders.⁴⁷ While *American Banana* strongly favored international comity in holding that foreign conduct would never be subject to U.S. jurisdiction under the Sherman Act, *Alcoa* represented a marked change in United States courts' evaluation of conduct abroad.⁴⁸ It seemed American courts were no longer concerned about their potential to interfere with foreign sovereignty interests, as the *Alcoa* test merely requires the consequences of anticompetitive acts that are illegal under the Sherman Act be felt in the United States, and that such consequences are those which the state reprehends.⁴⁹

Foreign governments and scholars criticized what many saw as potentially harsh results of the *Alcoa* decision.⁵⁰ To protect the interests of their own citizens and corporations, many foreign states adopted foreign blocking statutes.⁵¹ These blocking statutes varied from country to country and covered various aspects of foreign judgments and enforcements.⁵² A representative foreign blocking statute includes the

47. Won-Ki Kim, *The Extraterritorial Application of U.S. Antitrust Law and Its Adoption in Korea*, 7 SING. J. INT'L & COMP. L. 386, 390 (2003) (noting the substantial foreign backlash)

48. JOELSON, *supra* note 11, at 38 (remarking that *Alcoa* was a landmark case and noting that after *Alcoa*, neither the nationality of the wrongdoer nor the locale of the activity are irrelevant as long as the intent and effect are demonstrable, whereas, under *American Banana*, the locale of the activity was the most important factor in determining whether to assert jurisdiction).

49. *Id.*

50. Alford, *supra* note 29, at 10.

51. For example, in 1947, the United States was conducting a Sherman Act investigation of the Canadian newsprint industry. Jim Walden & Matthew Benjamin, *Going It Alone: The Costs of Unilateral Law Enforcement*, 15(10) BUS. CRIMES BULL., June 2008. A federal court subpoenaed 50 Canadian companies to provide documents relevant to the investigation. *Id.* The Canadian government balked at this request, and after a negotiation between American and Canadian officials, the subpoenas were dropped, but the possibility of them was not forgotten. *Id.* The Province of Ontario adopted the first criminal foreign blocking statute entitled the Business Records Protection Act. *Id.* Other nations, including Great Britain, the Netherlands, Italy, and Australia, followed suit in the 1950s and 1970s during a U.S. investigation into petroleum and uranium cartels. *Id.* While initially intended to block criminal investigations of anticompetitive behavior, the effects of the blocking statutes spilled over to the civil arena, wherein defendants used them as a shield to discovery requests in civil cases. *Id.*

52. These blocking statutes typically include authority for a government minister to direct noncompliance by persons in the country who received discovery requests emanating from foreign proceedings; a declaration that United States judgments were to be deemed unenforceable; and statutory authority enabling a party who had made

imposition of civil, or even criminal, sanctions on a foreign defendant who cooperates with the discovery process in United States litigation involving the assertion of extraterritorial jurisdiction. These blocking statutes also may include language that makes it more difficult for successful plaintiffs to enforce judgments obtained in an American court abroad. The message to the American courts was clear—foreign nations with blocking statutes would not allow “perceived abuses in the application of United States antitrust laws.”⁵³ Foreign countries with blocking statutes, whose leaders felt the United States courts were overextending their jurisdiction and disregarding comity concerns, attempted to use the blocking statutes to make it very difficult for plaintiffs in the United States to obtain discovery or to enforce any judgments.⁵⁴ Without adequate discovery, it was difficult for any case that required foreign discovery to proceed beyond the pleadings stage.⁵⁵ Additionally, without being able to enforce a judgment, plaintiffs had little incentive to bring suit.

To the disappointment of foreign nations, blocking statutes remained largely ineffective. Courts generally viewed blocking statutes as “sham laws designed to afford litigants tactical weapons and bargaining chips in foreign courts.”⁵⁶ In the face of these foreign blocking statutes, American courts continued to subject foreign entities

payment under a U.S. antitrust treble damage award to sue to recover the portion of the damages which exceeded single damages (otherwise known as “clawback” provisions). JOELSON, *supra* note 11, at 70.

53. Walden & Benjamin, *supra* note 51 (internal quotations omitted).

54. *See, e.g., In re Equitable Plan Co.*, 185 F. Supp. 57, 60 (S.D.N.Y. 1960) (holding that where disclosure of information with regard to deposits and transactions of a Cuban branch of a bank by way of subpoena *duces tecum* would violate Cuban law subjecting some agents of the bank to criminal penalties in Cuba, it was improper for the U.S. court to subpoena those documents).

55. This is true because discovery is the process whereby each party to a case learns the evidence the opposing side is privy to. LARRY J. SIEGEL, *INTRODUCTION TO CRIMINAL JUSTICE* 444 (12th ed. 2008).

56. Walden & Benjamin, *supra* note 51. *See also* *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968) (holding it proper to hold a German bank in contempt where it elected to not comply with a subpoena requesting certain documents during an antitrust investigation, regardless of the fact that producing the requested documents would subject the bank to civil liability in Germany); *see generally* Donald L. Roth, Note, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal*, 37 N.Y.U. L. REV. 295 (1962) (discussing the situations in which production of documents located abroad is and is not barred through the application of foreign blocking statutes).

to court-ordered discovery, even in the face of civil or criminal sanctions for the defendants in their sovereigns.⁵⁷ While foreign states adopted elements of their foreign blocking statutes, such as barriers to judgment enforcement, which may have been initially effective in rendering foreign companies judgment proof, in today's global marketplace, many actors that are found to be in violation of antitrust laws have assets in the United States, which plaintiffs may seek to attach in satisfaction of judgments—effectively avoiding the barriers presented in the foreign blocking statutes.⁵⁸

c. Courts Respond to Criticisms of Alcoa

Perhaps in response to domestic and foreign criticism, foreign blocking statutes, or the harsh consequences of the pure effects doctrine, at least one court found the scope of *Alcoa* was limited. In *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, the Ninth Circuit Court of Appeals adopted what came to be known as the “rule-of-reason” test.⁵⁹ The *Timberlane* court revisited some of the Supreme Court's considerations in *American Banana*,⁶⁰ and took the bite off of the pure effects test in the exercise of extraterritorial jurisdiction. The rule-of-reason test takes international comity into account when determining whether to assert extraterritorial jurisdiction.

The *Timberlane* court outlined three factors that courts should consider in determinations of the proper exercise of extraterritorial jurisdiction. First, the *Timberlane* test determines whether the alleged restraint of trade has some actual or intended effect on American foreign commerce.⁶¹ Second, it asks whether that anticompetitive effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws.⁶² Third, the final prong

57. *First Nat'l City Bank*, 396 F.2d 897; Walden & Benjamin, *supra* note 51; Roth, *supra* note 56.

58. See generally David Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 L. & POL'Y INT'L BUS. 325, 329 (1987).

59. *Timberlane Lumber Co. v. Bank of Am., N.T. and S.A.*, 549 F.2d 597 (9th Cir. 1976).

60. *Id.* at 605.

61. GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 593 (3d ed. 1996). This prong integrates the “effects test” enunciated by the Second Circuit in *Alcoa*.

62. *Timberlane*, 549 F.2d at 613.

of the test requires the interest of, and links to, the United States to be sufficiently strong vis-à-vis those of other nations to justify an assertion of American extraterritorial authority.⁶³

The first prong of the test is similar to the effects doctrine enunciated in *Alcoa*. The second prong is a type of proximate cause inquiry.⁶⁴ The third prong of the *Timberlane* rule-of-reason test reconsiders international comity, trends away from the expansion of extraterritorial jurisdiction in the antitrust context, and rolls back the impact of *Alcoa*. The Court outlined specific factors that should be considered and weighed in the third prong of the test:

1. The degree of conflict with foreign law or policy;
2. The nationality, location, and principal places of business of the parties;
3. The extent to which enforcement by either state can achieve compliance;
4. The relative significance of effects on the United States as compared with those elsewhere;
5. The existence of intent to harm or affect American commerce;
6. The foreseeability of such effect; and
7. The relative importance of the conduct to the United States as compared with the conduct abroad.⁶⁵

The *Timberlane* rule-of-reason test received positive responses from scholars and placated critics of the *Alcoa* “effects doctrine.”⁶⁶ The rule-of-reason test purports to consider various factors of international comity under the third prong. Some, but not all, circuit courts adopted the Ninth Circuit’s approach.⁶⁷

In practice, in virtually every case wherein U.S. courts applied the

63. *Id.*

64. In that it requires that the harm to have caused substantial injury to the plaintiffs. It is in this way similar to the second prong of the FTAIA test which calls for proximate cause inquiry by the court to sustain a claim. *See* discussion *infra*, at Section III.

65. *Timberlane*, 549 F.2d at 614-15.

66. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 403, 415.

67. *See, e.g.,* *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (adding three additional prongs for consideration); *but see* *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Nat’l Bank of Can. v. Interbank Card Ass’n*, 666 F.2d 6 (2d Cir. 1981) (adopting a variation of the *Alcoa* test).

rule-of-reason test, the court found that if the first two prongs were satisfied, the third-prong comity analysis almost always tipped in favor of asserting jurisdiction over the foreign entity—except where the court found *no* cognizable adverse impact on U.S. competition interests whatsoever.⁶⁸ Even though it placated critics of the effects doctrine, *Timberlane* did not fully resolve conflicting views about the extent to which determinations as to the exercise of extraterritorial jurisdiction implicated comity concerns. While the Ninth Circuit and other Courts of Appeals utilized the comity analysis outlined in *Timberlane*, some Circuits continued to resist such in-depth inquiries into these comity concerns.

d. Congress Responds to Confusion and Foreign Outcry by Adopting Amendment to the Antitrust Acts

In 1982, Congress amended the Sherman Act and other antitrust statutes, in an attempt to reconcile the circuit courts' various interpretations of the extraterritorial reach of the antitrust laws. The goal was to offer American exporters clarity about their legal obligations when conducting business abroad.⁶⁹

Congress enacted the Foreign Trade Antitrust Improvements Act of 1982, known as the "FTAIA," in conjunction with the Export Trading Act of 1982.⁷⁰ The FTAIA excepted foreign commerce from the reach of the Sherman Act, absent one exception—conduct with a "direct, substantial, and reasonably foreseeable" effect on domestic commerce,

68. See, e.g., *Nat'l Bank of Can. v. Interbank Card Ass'n*, 507 F. Supp. 1113 (S.D.N.Y. 1980) (using the *Timberlane* three-prong test to find jurisdiction proper); *but see* *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864 (1981) (finding jurisdiction is improper where the plaintiff has not shown more than a speculative and insubstantial effect on United States commerce of a refusal by Canadian subsidiaries to sell Canadian potash to a Canadian company, at least a part of which was for resale to buyers in North Korea, where resale to North Korea of American products was prohibited).

69. See generally *Export Trading Act of 1982*, Pub. L. No. 97-290, 96 Stat. 1233; *A Bill to Amend the Sherman Act and the Clayton Act to Exclude from the Application of Such Certain Acts Certain Conduct Involving Exports: Hearing Before the S. Comm. on the Judiciary* (June 17, 1981). Other nations did not have as extensive antitrust laws and, to be safe from antitrust scrutiny, many American companies operated within the American antitrust guidelines, putting them at a disadvantage abroad, as foreign companies were not subject to as strict competition legislation. *Id.*

70. 15 U.S.C. § 6a (2006) (as it applies to extraterritorial jurisdiction under the Sherman Act); *Export Trading Act of 1982*, Pub. L. No. 97-290, 96 Stat. 1233.

import commerce, or a domestic firm competing in foreign trade.⁷¹ The FTAIA applies, for example, in those circumstances where a cartel of foreign enterprises or a foreign monopolist reaches the American market through any mechanism, including an intermediary, as well as where foreign vertical restrictions have an anticompetitive effect felt in the United States or by American companies engaged in international commerce.⁷²

However, the FTAIA exceptions under Section 6a were vague enough to cause considerable confusion regarding its application in the courts, culminating in the 2004 Supreme Court decision in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*⁷³ One source of confusion was the extent to which courts should consider comity in those cases where the FTAIA applies.

II. CURRENT STATE OF EXTRATERRITORIAL JURISDICTION OVER FOREIGN CONDUCT

The Ninth Circuit, which issued the influential *Timberlane* decision, revisited the issue of the comity prong of the analysis after the adoption of the FTAIA. A California district court decision, *In re Insurance Antitrust Litigation*, dismissed an antitrust challenge to an agreement among London-based insurers regarding the type and language of certain insurance coverage offered in the United States.⁷⁴ The District Court applied the *Timberlane* analysis and held that the court did not have jurisdiction. In the California insurance action, there was a significant conflict with foreign law and policy due to the highly-regulated nature of the insurance industry in Great Britain.⁷⁵ The district court, applying the reasoning of the British Government's amicus curiae brief, stated that international comity compelled the dismissal, as allowing it to proceed would substantially harm British sovereign interests, particularly Great Britain's ability to regulate its own insurance

71. *Id.*

72. *Id.* (citing the standard).

73. 542 U.S. 155 (2004).

74. *In re Insurance Antitrust Litigation*, 723 F. Supp. 464 (N.D. Cal. 1989).

75. *Id.* (also finding the location of evidence abroad, the attitude of the United Kingdom toward United States antitrust law, and the existence of a British blocking law designed to thwart the discovery, trial and execution of judgments in United States antitrust litigation).

industry.⁷⁶

On appeal, the Ninth Circuit applied the FTAIA “direct, substantial, and reasonably foreseeable test,” and reversed. The appellate court held that courts could only consider comity in an unusual case, because the FTAIA specifically outlined the factors to be considered in exercising extraterritorial jurisdiction.⁷⁷ The Ninth Circuit considered the conflict with British law and policy, but found that the other factors were more significant—specifically, the evidence of the foreign parties’ intent and the magnitude of the effects felt within the United States.⁷⁸

Perhaps as a result of the confusion surrounding the exceptions under FTAIA, the Supreme Court granted certiorari in *Hartford Fire Insurance Co. v. California*⁷⁹ to resolve the issue of what weight courts should give to comity concerns in determining whether an American court may exercise extraterritorial jurisdiction.⁸⁰ The majority of the Court took a broad view of extraterritoriality and a narrow view of when a court should decline to exercise jurisdiction on the grounds of comity. The Court stated that courts should decline to exercise jurisdiction by reason of comity only where a “true conflict” exists.⁸¹ By so holding, the Court effectively rendered the third-prong considerations in *Timberlane*

76. See, e.g., Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, *Hartford Fire Ins. Co. v. Cal.* 10-15, 509 U.S. 764 (1993) (arguing that the district court correctly held, relying on British amicus curiae that enforcement of antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy as well as European Community laws and that reason alone is sufficient to justify denial of jurisdiction under the *Timberlane* test and the FTAIA).

77. *In re Insurance Antitrust Litig.*, 938 F.3d 919, 932 (9th Cir. 1991) (“it is only in an unusual case that comity will require abstention from the exercise of jurisdiction”).

78. *Id.* at 933 (effects) & 934 (foreseeable effect on U.S. commerce).

79. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993).

80. *Id.* (stating that a court should only decline jurisdiction on the basis of comity concerns where a “true conflict” exists, that is where enforcement of U.S. antitrust laws would cause the party contesting jurisdiction to in fact violate a law of another jurisdiction wherein such law applies to the party).

81. *Id.* at 796 (holding that “it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States”). Justice Scalia authored the dissent and argued that “conflict” should be defined as in *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953), that is “to apply only to areas and transactions in which *American law would be considered operative under prevalent doctrines of international law.*” *Hartford Fire*, 509 U.S. at 816 (Scalia, J., dissenting) (internal quotations omitted, emphasis in original).

null and void.⁸²

The *Hartford Fire* test essentially repealed the *Timberlane* approach⁸³ and endorsed a version of the *Alcoa* intended effects doctrine, essentially ignoring comity outside of the “true conflict” test.⁸⁴ However, even after the Supreme Court’s *Hartford Fire*, decision, the Ninth Circuit continued to utilize the *Timberlane* multi-factor comity analysis.⁸⁵

A look at the procedures of the Department of Justice (the “DOJ”) helps to illustrate the state of the law leading up to the 2004 Supreme Court case, *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.* In 1995, the DOJ, in conjunction with the Federal Trade Commission (the “FTC”), adopted new antitrust enforcement guidelines, the Antitrust Enforcement Guidelines for International Operations, indicating the U.S. government’s intent to prosecute domestic and foreign anticompetitive conduct in the context of the *Hartford Fire* test.⁸⁶ These antitrust guidelines stated the intent of the DOJ to prosecute any anticompetitive conduct that “affects U.S. domestic or foreign commerce or that may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.”⁸⁷ The guidelines also consider comity concerns, though they make clear that no conflict exists for the purposes of the comity analysis where the person subject to regulation by two states can in fact comply with both.⁸⁸

After *Hartford Fire*, some courts failed to embrace fully the Supreme Court’s decision regarding conflict with foreign national law. Thus the Supreme Court granted certiorari in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*⁸⁹

Empagran is the Court’s most recent attempt to address the issue of

82. Compare *Timberlane Lumber Co. v. Bank of Am., N.T. and S.A.*, 549 F.2d 597 (9th Cir. 1976) (7-step comity analysis), with *Hartford Fire*, 509 U.S. 764 (“true conflict” test).

83. See *id.* at 798-99 (stating that “[n]o conflict exists, for these purposes, where a person subject to regulation by two states can comply with the laws of both”).

84. *KESSLER & WALLER*, *supra* note 12, at § 6:8.

85. See, e.g., *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996).

86. See DOJ Guidelines, *supra* note 2.

87. *Id.* at § 3.10 (noting that jurisdiction over cases involving foreign import commerce is covered under *Hartford Fire* and that the FTAIA applies to foreign conduct other than imports).

88. *Id.* at § 3.2 (thus reciting the “true conflict” definition embodied in *Hartford Fire*).

89. 542 U.S. 155 (2004).

exercise of extraterritorial jurisdiction in the antitrust context. The Court sought to address the confusion surrounding the FTAIA provisions regarding the reach of extraterritorial jurisdiction. In *Empagran*, the Court held that where foreign plaintiffs alleged a global conspiracy that resulted in wholly foreign effects, the contacts with the United States were not “direct, substantial and foreseeable,” and, therefore, the court did not have jurisdiction over the claims.⁹⁰ The specific holding was that in cases where alleged anticompetitive conduct causes independent foreign harm, and where that foreign harm alone gives rise to the plaintiff’s claim, those actors are not subject to jurisdiction under the Sherman Act.⁹¹ The Supreme Court took issue with the facts of the case under the FTAIA exclusion, as the anticompetitive conduct alleged in the one instance resulted in solely foreign injury, and, therefore, both the language of the FTAIA and comity counseled against application of the Sherman Act to those claims.⁹²

In *Empagran*, both foreign and domestic plaintiffs sued under the Sherman Act for price fixing.⁹³ The plaintiffs’ complaint alleged that as a result of the price fixing vitamin prices were elevated both in the United States and in various other countries.⁹⁴ The foreign plaintiffs did not allege that they made any purchases in the United States or were involved in United States commerce in any way—they made all purchases abroad.⁹⁵ Instead, they alleged that because there was some domestic harm as a result of the foreign conduct, the FTAIA did not exclude the plaintiffs from bringing suit in a U.S. court.⁹⁶ The D.C. Circuit, in the initial case (“*Empagran P*”), held that the plaintiffs pleaded sufficient facts for the court to establish subject matter jurisdiction over the plaintiffs’ claims.⁹⁷ The circuit court recognized the split that developed in the wake of the adoption of the FTAIA in regard to causation and statutory interpretation.⁹⁸ Nonetheless, the D.C.

90. *Id.* at 169.

91. *Id.* at 166.

92. *Id.* at 169.

93. *Id.*

94. *Id.* at 159.

95. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 160 (2004).

96. *Id.*

97. *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003) (“*Empagran P*”).

98. *Compare Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002) (citing a less restrictive interpretation of the FTAIA that does not require proximate causation), with *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001)

Circuit sided with the more flexible interpretation adopted by the Second Circuit, which did not require proximate causation, merely that “where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct’s effect on foreign commerce.”⁹⁹

The Supreme Court granted certiorari to resolve the circuit split as to whether, when the foreign harm was separate from the domestic harm, a foreign plaintiff, who only felt the foreign harm, could bring suit.¹⁰⁰ The *Empagran* Court concluded that where the foreign harm was wholly separate from the domestic harm, the court must dismiss the suit for lack of subject matter jurisdiction.¹⁰¹

The Court justified its holding on two grounds. First, the Court looked at the purpose behind the application of American antitrust laws to foreign conduct. The Court found that application of American antitrust laws to foreign conduct was reasonable and consistent with principles of prescriptive comity,¹⁰² insofar as such application is in an effort to redress domestic injury.¹⁰³ The Court further noted, however, the potential for serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.¹⁰⁴ The Court expressed concern that allowing such suits (those which involve wholly foreign harm) would open a floodgate, wherein a foreign plaintiff could sue in American courts for wholly foreign conduct by simply noting an unnamed third party in the United States who could also potentially and theoretically state a cause of action.¹⁰⁵ The Court noted the difference in damages remedies available to plaintiffs who prove anticompetitive conduct—the United States provides for treble damages in private causes of action—has caused significant controversy

(requiring proximate cause between effects felt in the United States and the injury to the plaintiffs).

99. *Empagran I*, 315 F.3d at 341; *Kruman*, 284 F.3d 384.

100. *Empagran*, 542 U.S. at 160-61.

101. *Id.* at 166.

102. Prescriptive comity means “the respect sovereign nations afford each other by limiting the reach of their laws.” *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 817 (1993).

103. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (citing *Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945)).

104. *Id.*

105. *Id.* at 166 (citing P. AREDA & H. HOVENKAMP, *ANTITRUST LAW* ¶ 273, pp. 51-52 (Supp. 2003)). This particular concern was embodied in *Empagran*, where the Court properly separated the domestic and foreign suits.

in the international community. The Court reasoned that serious comity concerns would arise if the Court were to hold that foreign plaintiffs may properly bring a claim alleging solely foreign injuries under the American antitrust laws.¹⁰⁶

Second, the Court evaluated the language and history of the FTAIA and found that both suggested that Congress designed the FTAIA to clarify, rather than expand, the contemporaneous exercise of extraterritorial jurisdiction under the Sherman Act.¹⁰⁷ The Court scrutinized several cases decided prior to the enactment of the FTAIA, which the *Empagran* plaintiffs argued indicated that the Court should find that suit should proceed under the Sherman Act, even where the harm is totally foreign. However, the Court distinguished all three cases and found that no pre-1982 (i.e., pre-FTAIA) case supported the application of the Sherman Act to the harm alleged in *Empagran*.¹⁰⁸ Additionally, the Court found significant support in *Timberlane*, which was decided pre-FTAIA, for the Ninth Circuit's insistence that the foreign conduct's domestic effect be sufficiently large to present a cognizable injury to the plaintiffs, seemingly requiring that the domestic effect must be proximately causally related to the plaintiffs' injuries.¹⁰⁹ Given both the comity concerns and the absence of evidence that Congress intended such harms to be covered under the Sherman Act, the Court found no support for the contention that subject matter jurisdiction could be established where the anticompetitive conduct independently caused foreign injury.¹¹⁰ The Court then remanded to the D.C. Circuit to make a determination on the plaintiffs' alternate argument—that the foreign injury was not independent, in that the anticompetitive conduct's domestic effects were linked to the foreign harm.¹¹¹

106. *Id.* at 169.

107. *Id.* at 169.

108. *Id.* at 171-73 (distinguishing three cases cited by respondents brought by private plaintiffs prior to the enactment of the FTAIA and rejecting respondent's argument the FTAIA was enacted under the assumption that wholly foreign harm could fall under the reach of U.S. antitrust laws and therefore did not intend to limit such suits).

109. *Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 173 (2004) (citing *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976)).

110. *Id.* at 175. It is important to note that in the *Empagran* case, the plaintiffs alleged only independent foreign harm, separate and different from the harm felt in the United States.

111. *Id.* (the plaintiffs argued that this "but-for" condition was sufficient to bring the

On remand, the District of Columbia Circuit Court of Appeals rejected the plaintiffs' alternative argument, that but for the worldwide price fixing, which required that U.S. corporations sell vitamins at elevated price to sustain the conspiracy, the foreign plaintiffs would not have suffered harm, because they would have been able to purchase the vitamins in the United States at lower prices and sell them abroad (thereby acting as arbitrageurs).¹¹² The circuit court held that "proximate cause" between the domestic effect and foreign injury must exist for such conduct to fall under the FTAIA exception.¹¹³ The court noted that plaintiffs could establish sufficient proximate causation for purposes of the exercise of extraterritorial jurisdiction if the increased prices in the United States proximately caused the foreign appellants' injuries. However, the plaintiffs failed to show that their injuries abroad were "inextricably bound up with domestic restraints of trade;" and, therefore, the case was properly dismissed.¹¹⁴

III. ANALYSIS—WHAT DOES *EMPAGRAN* MEAN FOR THE FUTURE OF EXTRATERRITORIAL JURISDICTION OVER FOREIGN ANTITRUST INJURY

The Supreme Court, in *Empagran*, indicated that there were some circumstances in which foreign plaintiffs may bring suit under the FTAIA exception for foreign harm.¹¹⁵ The Court, however, declined to hear the petition of the *Empagran* plaintiffs who unsuccessfully argued

price-fixing conduct under the scope of the FTAIA exception, however the Supreme Court did not address the issue of whether but-for causation was sufficient to fall under the exception).

112. The plaintiffs argued that because the defendants' product was fungible and globally marketed, they were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well. Plaintiffs argued that unless prices were the same worldwide, arbitrageurs would purchase vitamins in bulk and resell them internationally, thus eventually evening out the market. Therefore, the plaintiffs argued, that the super-competitive pricing in the United States gave rise to the injuries to the foreign plaintiffs (the super-competitive prices). Appellants' Brief at 15-21, *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), *on remand from* 542 U.S. 155 (2004).

113. *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1270-71 (D.C. Cir. 2005).

114. *Id.* at 1271.

115. *Empagran*, 542 U.S. at 156 (noting that it is widely accepted that jurisdiction in antitrust cases can be extended to foreign conduct "insofar as the laws reflect a legislative effort to redress domestic antitrust injury caused by foreign anticompetitive conduct").

in the Court of Appeals, on remand, that but-for causation was sufficient to establish the extraterritorial application of jurisdiction under the FTAIA exception.¹¹⁶ Several federal district courts have adopted the reasoning of the D.C. Circuit in *Empagran II*, rejecting but-for causation, when presented with substantially factually similar cases. Factual parallels include alleged global conspiracies, wherein the causation standard was that absent a global conspiracy, arbitrageurs would be able to operate in the market for a particular good or service. Few other Courts of Appeals have ruled on this alternative causation theory argument.¹¹⁷ It remains an open question as to which circumstances satisfy the requisite proximate causal relationship a foreign plaintiff must prove under the FTAIA to state a claim for relief under the Sherman Act, and in which circumstances actors engaged in foreign conduct may be susceptible to suit under the Sherman Act in U.S. courts.

*a. Jurisdictional Causation in Civil Cases, a
Prevailing Standard Post-Empagran*

Proponents of a but-for causation standard express concern regarding the possibility of under-deterrence of global cartel activity. If courts continue to require proximate cause under the FTAIA exception,¹¹⁸ they argue, courts are placing excessive emphasis on comity. Indeed, the purpose of the Sherman Act is to protect against anticompetitive conduct. Congress is presumed to pass laws for the purpose of benefitting those citizens for whom it was adopted—in the

116. *Empagran II*, 417 F.3d at 1271 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1092 (2006).

117. *See, e.g., In re Monosodium Glutamate Antitrust Litig.*, No. Civ. 00MDL1328, 2005 WL 2810682 (D. Minn. Oct. 26, 2005) (finding that the D.C. Circuit's reasoning persuasive and as the plaintiffs put forth the exact same argument as the plaintiffs in *Empagran*—that otherwise arbitrageurs would have corrected the prices absent the worldwide conspiracy—it should be dismissed); *eMag Solutions LLC v. Toda Kogyo Corp.*, No. C 02-1611 PJH, 2005 WL 1712084 (N.D. Cal. July 20, 2005) (same); *Latinoquimica Amtex v. Akzo Nobel Chemicals, B.V.*, No. 03 Civ. 10312, 2005 U.S. Dist. LEXIS 19788 (S.D.N.Y. Sept. 7, 2005) (same). *But see* *Snaido v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004). The D.C. Circuit, Eighth Circuit, Ninth Circuit are the only circuit courts to rule on this issue and all require proximate cause. *See* discussion *infra*.

118. Victor P. Goldberg, Comment, *The Empagran Exception: Between Illinois Brick and a Hard Place*, 2009 COLUM. BUS. L. REV. 785, 792-93 (2009).

case of antitrust legislation, American harms and effects. Courts and Congress have delicately balanced various interests in the path to current extraterritorial application of antitrust laws.

Contrary to the claims of critics, global cartels are still subject to Sherman Act jurisdiction, where these cartels harm American consumers or where the harm felt by any plaintiff has a sufficient causal relationship to the effects in the United States.

After the Supreme Court's decision in *Empagran*, certain plaintiffs attempted to argue that there has been some split regarding the appropriate causation standard in cases factually similar to *Empagran II*, in an attempt to convince courts to adopt a but-for causation standard.¹¹⁹ While most circuits have followed the reasoning of the D.C. Circuit,¹²⁰ it some plaintiffs and scholars have argued that at least one federal district court allowed a foreign damages-based claim to go forward resting on the same general argument as the *Empagran II* plaintiffs.¹²¹ However, as discussed below, this case is not as factually similar as plaintiffs attempting to advance this argument would have a court believe.

In *MM Global Services, Inc.*, the plaintiffs argued that Dow and Union Carbide were involved in a global price-fixing conspiracy.¹²² The plaintiffs alleged that "as a direct and proximate result of the defendants' fixing of minimum resale prices and other terms of sale, competition in the sale and resale of Union Carbide products in and from the United States was improperly diminished and restrained."¹²³ The defendants

119. See, e.g., Appellees' Joint Answering Brief, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981 (9th Cir. Sept. 20, 2006) (arguing that *MM Global Servs., Inc. v. Dow Chem. Co.* allowed a claim to proceed that merely stated but-for causation).

120. Michelle A. Wyant, *Reconsidering the D.C. Circuit's Proximate Cause Standard for Extraterritorial Jurisdiction: Precluding the "Globalization" Theory to Promote Global Enforcement*, 7 RICH. J. GLOBAL L. & BUS. 15, 18 (2008) (stating that the D.C. Circuit's proximate cause standard has become the prevailing standard to establish subject matter jurisdiction post-*Empagran*).

121. See *MM Global Servs., Inc. v. Dow Chem. Co.*, 329 F. Supp. 2d 337, 339 (D. Conn. 2004).

122. *Id.* at 340. Plaintiffs alleged that Union Carbide directly and through their affiliates forced the plaintiffs to engage in a price maintenance conspiracy by with respect to the resale of Union Carbide products in India. *Id.* Plaintiffs further alleged that both Union Carbide and Dow refused to accept orders or cancelled orders if the prospective resale prices for end users in India fell below certain levels in an effort to maintain prices at a certain level. *Id.*

123. *Id.* at 340 (quoting the Amended Complaint).

moved to dismiss the antitrust claim for a lack of subject matter jurisdiction on the grounds that the plaintiffs failed to allege that the defendant's misconduct gave rise to antitrust effects in the United States that injured the plaintiffs, as required under the FTAIA and subsequent to the holding in *Empagran*.¹²⁴

The court disagreed with the defendants. In finding for plaintiffs, the court held that the plaintiff's allegations were sufficient to survive a motion to dismiss, as they properly alleged that the defendants' conduct had an effect on competition "in and from the United States and the plaintiffs were injured as a result of that effect."¹²⁵ The plaintiffs alleged that,

[a]s a direct and proximate result of the defendants' fixing of minimum resale prices and other terms of sale, competition in the sale and resale of products in and from the United States was improperly diminished and restrained, and as a result of such effect on competition, the plaintiffs were injured by being precluded from effectively and fully competing and maximizing their sales of products.¹²⁶

The court held that it was not inconceivable that domestic effects can give rise to both injuries to plaintiffs and affect domestic commerce and thereby rejected the defendant's defense of lack of jurisdiction and allowed the case to proceed. Plaintiffs have argued that in *MM Global Services*, the Court implicitly adopted a but-for causation test, representing an alternative to, and departure from, those courts that required proximate cause.

Subsequent cases interpreting *MM Global Services* in other jurisdictions have limited its value as precedent to the specific facts in that case. The later cases noted the *MM Global Services* plaintiffs made their purchases within the United States, and that, as such, the court did not directly rule on but-for causation. Moreover, and perhaps most importantly, *MM Global Services* preceded *Empagran II*.

The D.C. Circuit's standard of causation has properly become the prevailing standard for the application of extraterritorial jurisdiction in the antitrust context. This standard balances comity while still protecting the public from illegal conduct that has harmful domestic effects.

124. *Id.* (citing 15 U.S.C. § 6a(2); *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004)).

125. *Id.* at 342.

126. *Id.*

This proximate cause standard has become, and will remain, the prevailing standard for the following three reasons. First, the history of the enactment of the FTAIA and the plain language of the statute indicate that proximate cause is required to establish jurisdiction in these types of suits. Second, the D.C. Circuit correctly held that implementing the *Empagran* plaintiffs' alternative argument would harmfully implicate comity concerns. Third, no court post-*Empagran II* has permitted exercise of jurisdiction over claims that stated merely but-for causation, despite some flawed arguments to the contrary.

*The History of the Enactment of the FTAIA and the
Plain Language of the Statute Indicate That Proximate Cause Is
Required for the Application of Extraterritorial Jurisdiction in Those
Cases Where There Is a Direct, Substantial, and Reasonably
Foreseeable Effect on U.S. Commerce*

Commentators in the wake of the Supreme Court's holding in *Empagran* predicted a new circuit split on the issue of whether but-for causation is sufficient to state a claim under the FTAIA exception. However, as the Court of Appeals for the District of Columbia correctly noted, the legislative history of the FTAIA and the plain language of the statute require a proximate causation standard. No courts have disagreed with the D.C. Circuit on this point thus far.

At the time that the FTAIA was enacted by Congress, there was a circuit split regarding the importance of comity concerns in applying subject matter jurisdiction to foreign conduct. The FTAIA was enacted in 1982 in conjunction with the Export Trading Act of 1982. The purpose of the Act was to "aid the efforts of American business to compete vigorously and effectively throughout the world."¹²⁷ The primary purpose of the Act was to protect American companies who were engaging in export activities from the scrutiny of American anti-trust laws when conducting activities abroad. Because American antitrust laws are more restrictive than many competition laws in other

127. *A Bill to Amend the Sherman Act and the Clayton Act to Exclude from the Application of Such Certain Acts Certain Conduct Involving Exports: Hearing Before the S. Comm. on the Judiciary 1* (June 17, 1981) [hereinafter *FTAIA Hearing*] (prepared statement of Sen. Strom Thurmond, Chairman, S. Comm. on the Judiciary). See also *id.* (statement of William F. Baxter, Assistant Attorney General, Antitrust Division, DOJ) (stating that the purpose of the FTAIA is to reduce confusion regarding the application of antitrust laws to *export activities*).

countries, American companies were often at a disadvantage to their foreign counterparts, who were not subject to U.S. antitrust laws when conducting business abroad. In discussing the Act, Congress stated that in order to determine whether U.S. antitrust laws should apply to foreign conduct “[t]here must be a threshold determination that the conduct has the requisite direct and substantial effect on commerce in [the United States].”¹²⁸ However, Congress did not intend to prohibit all suits regarding foreign conduct, as it considered, and rejected, bills that would more explicitly and expansively limit the reach of extraterritorial jurisdiction of U.S. antitrust laws.¹²⁹

In discussing the FTAIA, Congress heard testimony before the Senate Committee on the Judiciary in which some expressed concern that the FTAIA did not require the anticompetitive act to occur within the United States for extraterritorial jurisdiction to apply, acknowledging that such a circumstance could exist.¹³⁰ Additionally, Congress acknowledged that the Supreme Court had not at the time of adoption, resolved the Circuit split regarding the importance of a comity analysis.¹³¹ In the face of these considerations, Congress adopted a test which requires a “direct, substantial, and reasonably foreseeable” effect on United States commerce to apply extraterritorial jurisdiction in antitrust cases—creating a jurisdictional nexus requirement which does not take into consideration comity concerns on its face.¹³² However, the FTAIA recognizes the growing effects of foreign state antitrust laws and restrictions, excluding from the reach of the Sherman Act those transactions and events that solely have consequences abroad.¹³³ Congress closely scrutinized those transactions and events that have a

128. *FTAIA Hearing, supra* note 128, at 2 (prepared statement of Sen. Strom Thurmond, Chairman, S. Comm. on the Judiciary). This standard evolved into the direct, substantial, and reasonably foreseeable language adopted by Congress in the FTAIA.

129. *See generally FTAIA Hearing, supra* note 128.

130. *Id.* at 34 (statement of Joel Davidow, Former Chief, Foreign Commerce Section, Antitrust Division, DOJ).

131. *Id.* at 40-41 (prepared statement of Robert Pitofsky, former Comm’r, FTC).

132. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT’L L. 1, 19 (1992) (noting that the author believes that after the adoption of the FTAIA, there exists a two-tiered approach to the extension of antitrust laws to foreign conduct, first whether there is a sufficient jurisdictional nexus and second, whether jurisdiction should be exercised after consideration of international comity concerns, as elucidated in *Timberlane*).

133. *See F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

“direct and substantial effect” felt in the United States.¹³⁴ While the FTAIA makes no specific reference to a causation standard between the direct and substantial effect and any particular harmed party, the legislative history indicates that Congress intended a proximate relationship in section 6a of the Act.

In particular, in relation to foreign cartels, the legislative history specifically submits that there should be no question that antitrust laws cover international cartel activity.¹³⁵ Because the legislative history of the enactment of the FTAIA indicates that Congress had no intention to affect current case law and no relevant pre-1982 case allowed for the assertion of subject matter jurisdiction over a foreign plaintiff where merely but-for causation was present, Congress clearly intended that wholly foreign conduct as well as conduct that results in harm that has only a tenuous connection to U.S. commerce be excluded from coverage under the FTAIA.

The language of the FTAIA also supports the contention that Congress intended a proximate cause standard. The statute states that conduct involving trade or commerce with foreign nations shall not come under the umbrella of Sherman Act enforcement actions unless two conditions are met. First, such conduct must have a direct, substantial, and reasonably foreseeable effect on U.S. commerce, and second, such effect must give rise to a claim.¹³⁶ The general controversy surrounding the interpretation of the FTAIA statute is the use of the words “a claim,” as opposed to the clearer “the claim.” The argument is that “a claim” in the statutory language means, not only the suing plaintiff’s claim, but *any* claim that may be asserted. If that definition is to be accepted then proximate cause is not required. However, as the D.C. Circuit correctly held, the use of “a claim” is sufficient to show that proximate cause is required. In making this determination, the D.C. Circuit noted that the legislative history of the FTAIA makes clear that the domestic effects requirement “does not exclude all persons injured

134. 15 U.S.C. § 6a (2006).

135. *FTAIA Hearing*, *supra* note 128, at 47 (prepared statement of Robert Pitofsky, former Comm’r, FTC).

[T]here is no debate that the antitrust laws should cover international cartel activity that affects U.S. markets—for example, a world-wide division of markets between U.S. and foreign companies that operates to exclude foreign companies from the U.S. market—and to be absolutely certain on this point, the legislative history probably should say so.

Id.

136. 15 U.S.C. § 6a(1) to (2) (2006).

abroad from recovering under the antitrust laws of the United States.”¹³⁷ However, as the D.C. Circuit correctly determined, the plain construction of Section 6a of the Sherman Act requires that the harmful effect specified in Section 6a(1) “gives rise to” a claim, indicating a direct causal relationship. Proximate cause generally defined is “a cause that directly produces an event and without which the event would not have occurred.”¹³⁸ Therefore, the most obvious construction of the statutory language is that proximate cause is required. The use of the article “a” instead of “the” is inconsequential in the context of the overall language of the statute.

Further, the use of the language “a claim” is, at most, ambiguous and courts must construe ambiguous statutes to avoid “unreasonable interference with the sovereign authority of other nations.”¹³⁹ To interpret the statute to mean that merely but-for causation is required would allow American antitrust law to supplant the laws of other nations.¹⁴⁰ As laws of construction require the opposite result, the proper interpretation of Section 6a requires proximate causation.

As indicated by the D.C. Circuit in *Empagran II*, proximate cause is the proper test as but-for causation harmfully implicates comity concerns. The D.C. Circuit in *Empagran*, on remand from the Supreme Court, determined that proximate cause was required to exercise extraterritorial jurisdiction over the *Empagran* defendants. The D.C. Circuit further stated that such a requirement was in accordance with principles of comity as to allow for but-for causation would “open the door to . . . interference with other nations’ prerogative to safeguard their own citizens from anti-competitive activity within their own borders.”¹⁴¹

This is true because but-for causation would allow U.S. courts to assert jurisdiction over foreign conduct where such conduct has merely tenuous contacts with the United States. As was demonstrated in the aftermath of the broad *Alcoa* decision, foreign states resent overarching exercises of jurisdiction of U.S. courts over conduct within their nations. Arguably, an expansion of the FTAIA exception to require only but-for

137. *Empagran v. F. Hoffmann-LaRoche*, 417 F.3d 1267, 1269 (D.C. Cir. 2005) (citing H.R. REP. NO. 97-686, at 17a).

138. BLACK’S LAW DICTIONARY 250 (9th ed. 2009).

139. *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

140. *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

141. *Id.*

causation would go beyond even the controversial holding in *Alcoa*.

b. Courts Have Consistently Held That Proximate Cause Is Required to Establish Jurisdiction under the FTAIA Exception and Cases Cited for the Proposition That But-For Causation Is Sufficient Are Improperly Applied

The current trend at the appellate level indicates that foreign plaintiffs are extremely limited in those cases in which they can bring before United States federal courts for violations of U.S. antitrust laws.¹⁴² Despite some early indication that a circuit split would result from the Supreme Court's decision in *Empagran* regarding the causation standard required under the FTAIA, the trend in recent cases indicates that proximate cause connecting the "direct, substantial and reasonably foreseeable effect" on domestic commerce and the alleged antitrust injury is required. First and foremost, every Circuit Court that has ruled on the issue of causation standards as to extraterritoriality under the FTAIA since the D.C. Circuit's holding in *Empagran II* has held that proximate cause is the requisite standard.¹⁴³

Some plaintiffs have attempted to argue that cases after *Empagran II* have adopted a but-for causation standard under the FTAIA.¹⁴⁴ These arguments are without merit and courts post *Empagran II* have universally rejected them.¹⁴⁵

142. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir. 2008) (adopting proximate cause requirement under the second prong of the FTAIA exception where all purchases were made outside of the United States and the plaintiffs acknowledged they could bring suit in the United Kingdom); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 539-40 (8th Cir. 2007) (requiring a proximate causal relationship between the domestic effect and the harm felt by plaintiffs); *Empagran v. F. Hoffmann-LaRoche*, 417 F.3d 1267, 1270-71 (D.C. Cir. 2005) (same).

143. *Id.*

144. *See, e.g., Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236 (S.D.N.Y. 2008). In *Boyd*, the plaintiff U.S. wheat farmers brought suit against an Australian agricultural distributor and its American subsidiary for actions in furtherance of monopolizing the market for wheat in Iraq to the foreclosure of U.S.-grown wheat in the Iraqi market. *Id.* at 244-45. The court held that "although plaintiffs may have alleged a plausible theory of causation based on the global interrelatedness of the wheat markets in Iraq and the United States, [the defendants'] extraterritorial conduct in Iraq was, at most, only a 'but for' cause of the . . . [harm felt] in the United States." *Id.* The court therefore declined to exercise extraterritorial jurisdiction.

145. *See supra* note 145.

The premiere case, often cited by plaintiffs arguing for recovery for injuries suffered abroad, is *MM Global Services*. Plaintiffs cite it for the proposition that but-for causation is sufficient.¹⁴⁶ However, as subsequent cases have correctly determined, *MM Global Services* does not stand for the proposition that but-for causation is sufficient to fall under the FTAIA exception.¹⁴⁷ This case is distinguishable. In *MM Global Services*, the plaintiff actually purchased a product at an inflated price as a result of price-fixing activity *within the United States*. As such the court never reached the issue of whether but-for causation was sufficient. Additionally, and perhaps most telling, is the fact that this decision was prior to *Empagran II*.

Another case cited for the proposition that but-for causation is sufficient is *Snaido v. Bank Austria AG*.¹⁴⁸ In *Snaido*, the Second Circuit dismissed a complaint of a plaintiff finding that the plaintiff did not establish but-for causation.¹⁴⁹ Though this may indicate that the Second Circuit would consider but-for causation, the Court decided this case prior to *Empagran II*, and subsequent lower court cases in the Second Circuit have required proximate cause.¹⁵⁰ Additionally, in *Snaido*, the Second Circuit never reached the issue of whether but-for causation was sufficient under the FTAIA, as the plaintiff failed to allege even but-for causation under the second prong of the FTAIA exception, and therefore the complaint failed regardless of the causation standard applied by the Court.

This author was unable to find any cases where a court actually evaluated but-for causation in the context of the statutory language of the FTAIA in a decision rendered after *Empagran II*.

c. Vulnerabilities of Foreign Commerce to Antitrust Law

Though *Empagran* made it more difficult for plaintiffs to bring suits based on foreign conduct, both the Supreme Court and the Court of

146. See *supra* note 116.

147. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981 (9th Cir. 2008).

148. 378 F.3d 210 (2d Cir. 2004).

149. *Id.*

150. See, e.g., *Boyd*, 544 F. Supp. 2d 236 (dismissing plaintiffs' case as but-for causation alleged was not sufficient to fall under the FTAIA exception); *Animal Science Prods., Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F. Supp. 2d 842 (D.N.J. 2008) (same).

Appeals for the District of Columbia Circuit were careful to carve out some limited exceptions to the rule. As a result, certain transactions and foreign acts are still susceptible to suit under the Sherman Act.

In *Empagran*, the Court seemingly set forth a different standard and elucidated different considerations for cases brought by the United States Government as a plaintiff, than that established for private causes of action. The Court stated that a Government plaintiff has legal authority broad enough to allow it to carry out the mission of the Sherman Act without being subject to additional concerns, such as those implicated when a private plaintiff brings a suit. For example, the Court found it well settled that “once the Government has borne the considerable burden of establishing a violation of law, all doubts as to the remedy are resolved in its favor.”¹⁵¹

It is perhaps the correct result. Many of the concerns about private litigants are not present when the Government is the plaintiff. The Court cites the Government’s purposes in bringing the suit are generally created by public interest motives and remedial scope, whereas a private litigant is concerned with restitution for its individual harm.¹⁵² Additionally, the Government as plaintiff is presumably in the best position to consider comity concerns as it interacts with foreign governments on a regular basis on the very issue of competition laws and other enforcement issues.¹⁵³

As far as prosecution of Sherman Act claims against foreign entities, comity is not necessarily a concern. The DOJ, FTC, and other governmental agencies consider comity concerns *prior to* deciding whether or not to bring enforcement actions.¹⁵⁴ The DOJ’s purposes, policies, and procedures illustrate this point; as an executive branch federal agency, the DOJ is in a better position than the courts to determine comity concerns and the conflict that the exercise of jurisdiction may create. The DOJ often works with the global community to establish antitrust standards and cooperate with foreign nations regarding investigation of Sherman Act claims.¹⁵⁵ Over 100 countries

151. *Empagran S.A. v. F. Hoffmann-LaRoche*, 542 U.S. 155, 170-71 (2004).

152. *Id.*

153. *See, e.g.*, Press Release, DOJ, Christine A. Varney to Participate in Eighth Annual International Competition Network Conference in Zurich, Switzerland (May 28, 2009), available at <http://www.justice.gov/opa/pr/2009/May/09-at-523.html>.

154. *See* DOJ Guidelines, *supra* note 2.

155. *Id.*

have their own antitrust statutes, and the United States Government, including the DOJ, has dialogue with its trading partners regarding these guidelines in furtherance of the creation of truly global rules to police global markets.¹⁵⁶

Additionally, the DOJ examines many of the factors involved in the courts' comity analyses as part of its investigation as to whether to bring a suit against a foreign entity. For example, before determining whether or not to challenge an alleged antitrust violation, the DOJ considers whether in bringing such a claim there would be a conflict with a foreign state's law.¹⁵⁷ The DOJ also considers whether a foreign country involved encourages a certain course of conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies.¹⁵⁸ The FTC and other agencies entrusted with antitrust enforcement also engage in the same type of comity analysis prior to commencing a lawsuit under the applicable American antitrust laws.¹⁵⁹

Before deciding to prosecute a particular case, governmental agencies consider whether their activities would interfere with or reinforce the objectives of the foreign proceeding, including any remedies contemplated or obtained by the foreign antitrust authority, the concerns voiced by the courts in examining comity in the subject matter jurisdiction context are largely irrelevant. Although the possibility that the court will examine a comity analysis provides a check on the sufficiency of the government's pre-suit investigation of these claims, the courts need not apply the *Empagran* test as stringently for Sherman Act coverage under the FTAIA (as the reasoning for adopting the standard dealt primarily with first and foremost with concerns of prescriptive comity). As such, foreign conduct may be subject to enforcement actions brought by the United States government regardless of whether such conduct is subject to suit in private enforcement actions and the Court in *Empagran* was correct in distinguishing the Government as plaintiff.

Another exception is that conduct involving import commerce. Conduct involving import commerce—the bringing of products or services into the United States is exempt from the FTAIA, regardless of the nationality of the purchasers or the locus of the purchase.¹⁶⁰

156. KESSLER & WALLER, *supra* note 12, at § 6:12.

157. DOJ Enforcement Guidelines, *supra* note 2, at § 3.2.

158. *Id.*

159. *Id.*

160. *Turicentro S.A. v. Am. Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002).

Further, activities factually similar to *MM Global Services* are most likely still subject to Sherman Act jurisdiction.¹⁶¹ If a foreign purchaser actually conducts a later-challenged transaction within the United States, as in *MM Global Services*, it seems that courts are still open to the exercise of extraterritorial jurisdiction in these circumstances.¹⁶² Therefore, these types of transactions are still vulnerable to suit, even after the adoption of the proximate cause standard, as they deal with direct purchases within the United States and export of those purchases from the United States.

IV. CONCLUSION

Courts have consistently declined to apply the but-for causation test advanced by plaintiffs seeking relief under the American antitrust laws in the context of global price-fixing conspiracy claims.¹⁶³ The general consensus among U.S. courts is that if a plaintiff in a global conspiracy claim cannot assert proximate causation, then the case may not proceed under the FTAIA.¹⁶⁴ Though but-for causation has been summarily

161. *MM Global Servs. Inc. v. Dow Chem. Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004).

162. *eMag Solutions LLC v. Toda Kogyo Corp.*, No. C 02-1611 PJH, 2005 WL 1712084 (N.D. Cal. July 20, 2005) (post-*Empagran II*, indicating that the holding in *MM Global Services* was not brought into question by *Empagran II*, as it did not deal with wholly foreign conduct where the plaintiffs had purchased product in the U.S., which led the court to conclude that the complaint properly alleged that defendants' conduct had an effect on competition in and from the United States, and that plaintiffs were injured as a result of that effect, even though part of the injury and effect were in regard to resale in India); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 989 n.9 (noting that while the plaintiff's argument that *MM Global Services* stood for the proposition that but-for causation was sufficient was flawed, the Ninth Circuit seemed to imply that the holding in *MM Global Services* was still relevant in factually similar cases).

163. *See, e.g., eMag Solutions LLC v. Toda Kogyo Corp.*, No. C 02-1611 PJH, 2005 WL 1712084, at **5-6 (N.D. Cal. July 20, 2005) (holding the plaintiff's argument that but for the fact that "had defendants' conspiracy not inflated U.S. prices, the foreign plaintiffs would not have been injured because lower American prices would have driven down international prices overall, including through arbitrage; and the domestic effects of the conspiracy caused their injuries because they had already bought some MIO in American commerce and could have purchased the rest of their MIO from the U.S. market had it remained competitive" was insufficient to assert jurisdiction as probable cause was required).

164. *See supra* note 143.

rejected, and courts have generally required proximate causation in the global conspiracy context, some avenues of litigation may still be available to private plaintiffs and some vulnerabilities to foreign conduct still exists.

For example, one circumstance in which a foreign plaintiff can bring a claim under the Sherman Act is where the foreign plaintiff actually made a purchase or engaged in conduct within the United States and suffered harm as a result of the anticompetitive conduct in the United States.¹⁶⁵ Additionally, parties involved in foreign anticompetitive conduct may still be subject to suit by the U.S. Government.¹⁶⁶ Further, third-party indirect purchasers may still test the proximate cause standard, though no case in this direct context has been decided in the post-*Empagran* world, and this Note proposes that such a case is not a permissible exercise of extraterritorial jurisdiction.

The result of the *Empagran* decision has yet to be fully felt, as the question remains as to what minimum would be sufficient to establish the requisite causal relationship. However, contrary to what some experts and commentators felt would result from the alleged imprecise *Empagran* holding, a standard has arisen which requires proximate cause in the second prong of the FTAIA test.

165. See, e.g., *MM Global Servs., Inc. v. Dow Chem. Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004) (where the plaintiff's injury arose directly from the defendants' price-fixing conspiracy, wherein the effects were inflated prices including those in the United States and the plaintiffs purchased the product in the United States, whereby rendering the claim not "purely foreign"). See also *In re DRAM Antitrust Litig.*, 546 F.3d 981, 989 n.9 (9th Cir. 2008) (distinguishing *MM Global Services* stating that the *MM Global Services* plaintiffs pled direct participation in U.S. commerce (the purchase of products at inflated prices within the United States), implicitly stating that such conduct satisfied the FTAIA exception).

166. See *supra* section III.c.

Notes & Observations