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***EMPAGRAN*, THE FTAIA AND EXTRATERRITORIAL EFFECTS: GUIDANCE TO COURTS FACING QUESTIONS OF ANTITRUST JURISDICTION STILL LACKING**

“As a moth is drawn to the light, so is a litigant drawn to the United States.”—Lord Denning¹

“In the globalization system, *where* you are doesn’t matter much anymore.”—Thomas Friedman²

I. INTRODUCTION

The United States has the most developed and aggressive antitrust regime in the world, so it is not surprising that parties injured by worldwide price-fixing conspiracies would prefer to litigate their claims here than anywhere else.³ Our case law is filled with examples of domestic plaintiffs litigating antitrust claims against foreign defendants, and foreign plaintiffs litigating antitrust claims against domestic defendants.⁴ But recently a new twist has appeared: foreign plaintiffs bringing their antitrust claims against foreign defendants, in U.S. courts for injuries that took place outside the United States.⁵

At issue is the extraterritorial reach of the U.S. antitrust laws. The question is this: Can victims injured abroad by a worldwide price-fixing conspiracy bring suit in U.S. federal courts under U.S. antitrust law when the antitrust conduct also has an effect on domestic business? After three different Courts of Appeal answered the question in three different

1. *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (Eng.), quoted in Spencer Weber Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523, 523 (2002) [hereinafter Waller, *Courtroom*].

2. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 246 (Anchor Books 2000) (1999).

3. Waller, *Courtroom*, *supra* note 1, at 532 (explaining that there is a strong incentive for plaintiffs to bring price-fixing claims under the Sherman Act in the United States, rather than elsewhere, due in large part to the treble-damages provision of the Clayton Act and the United States’ more liberal discovery procedures, as well as class actions, contingent fees, punitive damages and jury trials.)

4. See Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999).

5. 1 VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INT’L DISPUTES IN U.S. COURTS* § 8:13 (2005) [hereinafter 1 NANDA & PANSIUS].

ways,⁶ the U.S. Supreme Court granted certiorari to settle the issue, and held that U.S. courts do *not* have jurisdiction under U.S. antitrust laws to try a case in which foreign buyers allege they have been injured by the price-fixing actions of foreign sellers—but only where the foreign injury is *independent* of any effect on U.S. commerce.⁷ The decision left open the question of whether foreign plaintiffs could bring actions in the United States if the foreign injury is *dependent* on the effect of the injury on U.S. business⁸ and, further, what is the standard for dependence?⁹

The case, *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*,¹⁰ was the penultimate action in a years-long string of litigation that was set in motion¹¹ in 1997 when the U.S. government began to prosecute ten companies and their corporate executives for conspiring to fix the prices and allocate sales of bulk vitamins.¹²

That prosecution, known as the *Vitamins Case*, resulted in the largest fines in U.S. history and spawned a host of civil class action lawsuits in the United States that led to record settlements.¹³ Hoffman-La Roche, a Swiss manufacturer, agreed to pay \$500 million, and BASF Aktiengesellschaft, a German manufacturer, paid \$225 million.¹⁴ More than ten corporate officials went to jail.¹⁵ Subsequently, three Japanese corporations, two more German companies, and two U.S. companies pleaded

6. See generally *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002); *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 WL 761360 (D.D.C. 2001).

7. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 175 (2004).

8. *Id.*

9. See *infra* Part V.

10. *Empagran I*, 542 U.S. 155.

11. Bernard Persky, *Empagran and the International Reach of U.S. Antitrust Laws*, 21 NYSBA ANTITRUST LAW SECTION SYMPOSIUM 21 (2005).

12. See Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 712-17 (2001) [hereinafter First, *Vitamins*], for a comprehensive overview of the *Vitamins* litigation. See also Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 222 (2003) [hereinafter Waller, *Incoherence*].

13. First, *Vitamins*, *supra* note 12, 712-17.

14. Roxanne C. Busey & Patrick J. Kelleher, *A Short History of Civil and Criminal Antitrust Remedies and Penalties*, chart at 1, <http://gcd.com/newsevents/publications> (follow "Publications Archive" hyperlink, choose "Litigation" under dropdown search) (last visited Mar. 26, 2006).

15. Jane Whittaker & Elliot Thomas, *Three Meanings of the Indefinite Article, Three Judgments and the Global Reach of U.S. Anti-Trust Laws*, 25 BUS. L. REV. 112, 112-14 (2004) (U.K.).

guilty and paid large fines,¹⁶ with U.S. criminal fines totaling over \$1 billion.¹⁷

Concurrent with the criminal enforcement, direct purchasers of the vitamins and vitamin premixes¹⁸ brought class action suits in federal courts,¹⁹ settling with six of the companies for \$1.05 billion, “the largest private antitrust price-fixing settlement in history.”²⁰ Twenty-two states’ attorneys general shared an additional \$340 million on behalf of the states and their citizens.²¹

Finally, five non-U.S. vitamin distributors, all of whom had conducted their transactions entirely outside the United States, attempted to recover damages in a class action in U.S. district court under U.S. antitrust law.²² These plaintiffs had purchased vitamins abroad from cartel members (or their alleged co-conspirators) between January 1, 1988, and February 1999, and had taken delivery outside the United States.²³ This was the action that came to be known as *Empagran*.

The defendants moved for dismissal, arguing that the court did not have power to adjudicate the case under the Foreign Trade Antitrust Improvement Act (FTAIA), a statute that limits the extraterritorial reach of

16. First, *Vitamins*, *supra* note 12, at 716–17.

17. Waller, *Incoherence*, *supra* note 12.

18. First, *Vitamins*, *supra* note 12, at 718. As First explains, vitamin manufacturers blend their products into combinations of vitamins. The components of each blend are determined by the use to which the blend will be put (for example, to be added to a type of animal feed, or a breakfast cereal supplement). The vitamins manufacturers also sell their vitamins “straight” to independent blenders who mix them themselves. The independent blenders’ suspicions that collusion was occurring among the vitamins manufacturers led to the class action lawsuits. *Id.* at 712–13.

19. *Id.* at 713. A final judgment in a suit by the government that a person has violated the antitrust laws is prima facie evidence against the defendant in a subsequent private damage action, under § 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1914).

20. *Id.* at 718.

21. Waller, *Incoherence*, *supra* note 12, at 223–24.

22. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 WL 761360, at *1 (D.D.C. 2001).

23. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 342 (D.C. Cir. 2003). Two domestic plaintiffs, Procter & Gamble Manufacturing Co. and Procter & Gamble Co., were initially part of the class but subsequently transferred their claims to another case that involved substantially the same claims and the same defendants. *Id.* at 343. The five plaintiffs remaining were companies in Ukraine, Australia, Ecuador, and Panama, all of whom had suffered their injuries outside the U.S. market. *F. Hoffman-La Roche Ltd. v. Empagran S.A., The Supreme Court Restricts the Applicability of U.S. Antitrust Laws with Regard to Injuries Suffered Abroad Independently from Effects on the U.S. Market*, Duke Law, <http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/fhovemp.html> (last visited Mar. 26, 2006) [hereinafter Duke Law].

the Sherman Antitrust Act.²⁴ The district court dismissed the case,²⁵ and plaintiffs appealed, arguing that the court had misinterpreted the FTAIA.²⁶

The FTAIA exempts from the reach of the Sherman Act both U.S. export-only activity and other commercial activities that take place totally abroad, unless such activities negatively affect U.S. domestic commerce.²⁷ Courts had split over a key phrase in the statute regarding whether that activity must be the basis for the plaintiff's own claim, or whether it was merely necessary that *someone* had a claim.²⁸

In deciding the issue, the Supreme Court gave short shrift to the semantic inquiry and deterrence arguments that had split the circuits and instead looked to principles of international law and comity to define the scope of the FTAIA²⁹—a somewhat surprising approach considering that the Court had ruled out comity in a leading case only twelve years before.³⁰

Key to the Court's decision was the distinction between dependent and independent effects.³¹ The Court held that when the foreign plaintiff's injury is *independent* of the effect of defendant's conduct on U.S. commerce, U.S. courts have no jurisdiction.³² Some believe the Court was implying it *would* have had jurisdiction if the foreign plaintiff's injury would not have occurred "but-for" the effect of the conduct on the U.S. market.³³ Others believe the Court could not have meant that but-for linkage would be enough, because such a loose standard would be enough to support jurisdiction in virtually every such case.³⁴ In fact, it has been said that the Court decided only a hypothetical situation.³⁵

24. Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6(a) (1982). *See infra* Part III.

25. *Empagran*, 2001 WL 761360 at *9.

26. *Empagran*, 315 F.3d at 340.

27. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 161 (2004).

28. Salil K. Mehra, "A" is for Anachronism: The FTAIA Meets the World Trading System, 107 DICK. L. REV. 763, 769 (2003) [hereinafter Mehra, *Anachronism*].

29. *Empagran I*, 542 U.S. at 164–73.

30. *See infra* Part IV.

31. *Empagran I*, 542 U.S. at 164.

32. *Id.* at 175.

33. *Perspectives on Empagran*, ANTITRUST SOURCE, Sept. 2004, at 1, 5, <http://www.abanet.org/antitrust/source/sept04/Sep04Empagran.pdf> (presenting remarks by Thomas C. Goldstein) [hereinafter Goldstein, *Perspectives*].

34. John H. Shenefield, *Empagran and the International Reach of U.S. Antitrust Laws*, 21 NYSBA ANTITRUST L. SEC. SYMP. 30 (2005) [hereinafter Shenefield, SYMPOSIUM].

35. *See infra* Part V.

With rampant globalization, instantaneous communication, and multinationals building products with components from all over the world and selling them far from where they are produced, it may be argued that there no longer are independent, national markets. The globalization of world trade and instantaneous communication have had a profound effect on the world.³⁶ The Internet has certainly complicated the issue further.³⁷ In today's globalized economy, businesses are not constrained by political or physical borders—"increasingly products have their origins in one country, are assembled in a second country, with parts from a third country, and are sold through fabricators in a fourth country ultimately to consumers in a fifth country."³⁸ When IBM stunned the business world in December 2004, by announcing it was in talks to sell its personal computer business to a Chinese PC maker, a *New York Times* article featured a picture of an IBM laptop with each component identified by its source—memory and display screen, South Korea; case, keyboard and hard drive, Thailand; wireless card, Malaysia; battery, Asia; graphics controller chip, Canada and Taiwan; microprocessor, United States; assembly, Mexico.³⁹ Clearly, these changes in how business operates have had an impact on antitrust regulation. While regulation still occurs at the national level, increasingly business is done globally.⁴⁰

36. See generally FRIEDMAN, *supra* note 2 (describing the new electronic global economy).

37. Salil K. Mehra, *Foreign-Injured Antitrust Plaintiffs in U.S. Courts: Ends and Means*, 16 LOY. CONSUMER L. REV. 347, 350 (2004) [hereinafter Mehra, *Ends and Means*].

38. John H. Shenefield, *Coherence or Confusion: The Future of the Global Antitrust Conversation*, 49 ANTITRUST BULL. 385, 386 (2004) [hereinafter Shenefield, *Coherence*]. He points out:

The last 25 years have seen two great trends—globalization and economic liberalization—which together have had a profound and transforming effect on most national economies, and concomitantly on efforts to safeguard competition in those economies by operation of law

Even apparently very localized companies cannot remain impervious to the combined impact of fluid capital markets, instantaneous international communication and the economic necessity of producers to buy from and sell into global markets. These facts of economic life directly affect regulatory policies: trade barriers have been forced down, and restrictions on foreign investments have likewise declined.

Id.

39. David Barboza, *An Unknown Giant Flexes its Muscles*, N.Y. TIMES, Dec. 4, 2004, at C1.

40. Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction—European Responses*, 26 HOUSTON J. INT'L L. 309, 310 (2004) (“[A]lthough trade is global, there is

Amid predictions that the exception would swallow the rule, the District of Columbia Circuit Court, on remand in *Empagran*, limited its jurisdiction to situations in which the domestic effect was the proximate cause of the plaintiffs' injuries.⁴¹ But the Supreme Court did not set out any standards for determining what the lower courts should consider in applying the FTAIA, and since its *Empagran* decision, cases interpreting the FTAIA in other courts have been decided inconsistently.⁴² The result of the Supreme Court's narrow ruling and lack of clear standard is continued uncertainty. Prospective plaintiffs still have little guidance on whether their claims will ultimately be heard by U.S. courts,⁴³ defendants are exposed to risks of unquantifiable later civil claims if they choose to settle government suits,⁴⁴ and foreign governments remain concerned about the reach of U.S. laws at a time when many are trying to develop their own antitrust regimes.⁴⁵

This Note argues that the question of the extraterritorial reach of the Sherman Act is still very much open, that the Supreme Court's decision gives limited guidance to the lower courts, and that the answer lies not in debating the interdependence of local effects and international injury, but in looking beyond the FTAIA for a solution. Part II provides a brief history of the extraterritorial effect of U.S. antitrust laws; Part III explains the split over construction of the FTAIA; Part IV sets out the Supreme

no single global regulator."); see also Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 280 (1992) (arguing that "effective regulation of the competitive process must somehow take place at the same level where the business activity itself is pursued, that is, the international level."). See also David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUSTON J. INT'L L. 287, 300 (2004) ("[G]lobal markets represent a source of opportunity, but governments can impede competitors' capacity to take advantage of those opportunities. Firms seek to minimize costs of operation, but each state border that is crossed may create additional compliance costs. Firms also seek to reduce uncertainty and increase planning predictability, but encounters with numerous legal systems reduce predictability.").

41. *Empagran v. F. Hoffman-La Roche (Empagran II)*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

42. See *infra* Part V.

43. See *infra* Part VI.

44. Defendants, in particular, may be much less likely to agree to settlements when facing criminal charges, because their subsequent civil liabilities could be much greater (and more difficult to estimate in advance). In fact, the Department of Justice and many foreign governments filed *amici curiae* briefs in the suit because of the potential harm such a result could have on antitrust enforcement. See Brief for the United States as Amicus Curiae Supporting Petitioners at 20–21, *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724).

45. See generally Layton & Parry, *supra* note 40.

Court's *Empagran* decision; Part V analyzes the aftermath of *Empagran* and recent court decisions construing its rule; Part VI offers a critique of the Supreme Court's decision; and Part VII looks at alternative approaches for deciding the question of when foreign plaintiffs' antitrust claims should be heard in U.S. courts, including the application of antitrust standing and an extension of the doctrine of forum non conveniens.

II. EXTRATERRITORIALITY

The extraterritorial application of the U.S. antitrust laws has evolved through the years in parallel with the extraordinary growth of transnational business. From the 1920s, when globalization began to develop,⁴⁶ through today, when the Internet and instantaneous communication make it possible for everyone to be everywhere,⁴⁷ the principles by which U.S. antitrust laws have been applied to foreign entities have shifted.⁴⁸

Conflicts were easily resolved when the basis for jurisdiction was pure territoriality, since territory has "well-defined and easily identifiable boundaries."⁴⁹ The territorial approach was exemplified in *American Banana v. United Fruit Co.*, where American Banana argued that United Fruit had seized one of its plantations in Costa Rica in collusion with local authorities in violation of the Sherman Act.⁵⁰ The Supreme Court held that the acts were done outside the jurisdiction of the United States.⁵¹ This approach was the rule on the extraterritorial application of U.S. law for the next several decades.⁵²

Pressures on the doctrine began to mount by the 1920s; by that time the international cartel movement was complicating business relationships

46. Jeremy C. Bates, Comment, *Home is Where the Hurt is: Forum Non Conveniens and Antitrust*, 2000 U. CHI. LEGAL F. 281, 317 (2000) (pointing out that antitrust law began its development in an era of rampant globalization resembling today's world more than is recognized).

47. Deanell Reece Tacha, *The Federal Courts in the 21st Century*, 2 CHAP. L. REV. 7, 25 (1999) ("The Internet knows no national boundaries and renders everyone with net access a speaker and a publisher.").

48. See James E. Ward, Comments, "Is That Your Final Answer?" *The Patchwork Jurisprudence Surrounding the Presumption Against Extraterritoriality*, 70 U. CIN. L. REV. 715, 717-21 (2002).

49. Gerber, *supra* note 40, at 293. "Where conduct occurs within a state's territory . . . the nexus is close, obvious and uncontested." *Id.* at 290.

50. See generally *American Banana v. United Fruit Co.*, 213 U.S. 347 (1909).

51. Ward, *supra* note 48, at 718 (explaining that the methodology in *American Banana* is "pure conflict of laws analysis based on vested rights and territoriality," and in accordance with its philosophy that "every nation possesses an exclusive sovereignty and jurisdiction within its own country . . . the legality of acts are to be determined wholly by the law of the country where the act is done.").

52. *Id.* at 719.

across national borders.⁵³ Business practices that spanned borders began to raise questions about which national laws applied.⁵⁴ The result was increased international acceptance of the “objective territorial principle,” which establishes the state’s jurisdiction over crimes begun outside the state’s territory but which cause injury within it.⁵⁵

As the volume of transnational trading grew, the “effects principle” developed to deal with the issue of antitrust’s extraterritorial application.⁵⁶ The leading case on the issue was *United States v. Aluminum Co. of America (Alcoa)*.⁵⁷ A Canadian subsidiary of Alcoa transacted all of Alcoa’s international business; it entered into an international cartel arrangement to fix aluminum prices worldwide, but none of the antitrust acts occurred within U.S. territorial boundaries.⁵⁸ The U.S. Justice Department alleged antitrust violations in the form of effects experienced within the United States.⁵⁹ Judge Learned Hand’s opinion stated “it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders that the state reprehends”⁶⁰ The court found the Sherman Act applicable to foreign conduct when it was “intended to affect imports and did affect them.”⁶¹ This principle came to be highly resented by other nations, although resistance has weakened as more of them have adopted the concept of applying their own laws beyond their borders.⁶²

This exercise of extraterritoriality has been constrained over the years (to a greater or lesser extent) by the principle of comity⁶³ or “reasonable-

53. Gerber, *supra* note 40, at 293.

54. *Id.*

55. *Id.* (“This concept appeared as a logical and appropriate extension of the territoriality idea, and it created few difficulties, because as originally conceived, its scope was narrow: it applied only when the consequences of conduct could be ‘localized.’”).

56. *Id.* at 290–91 (“It is now generally accepted that a state may prescribe norms where conduct has particular kinds of effects within its territory, regardless of where the conduct takes place.”).

57. *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

58. Ward, *supra* note 48, at 719.

59. *Alcoa*, 148 F.2d at 422–23.

60. *Id.* at 443. The decision has nearly the stature of a Supreme Court case because the Supreme Court had certified it to be heard by the Second Circuit. Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 AM. U. L. REV. 151, 160 n.42 (2004).

61. *Alcoa*, 148 F.2d at 444.

62. Gerber, *supra* note 40, at 294–95.

63. Comity is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to interna-

ness.”⁶⁴ While the government does consider comity before bringing cases against foreign nationals under federal antitrust laws, the majority of litigated cases involving foreign nationals, and therefore the development of the case law applying the principle of comity and its “rise and fall” since the 1970s, have been centered in private antitrust litigation.⁶⁵

The high point for comity was *Timberlane Lumber Co. v. Bank of America*.⁶⁶ The effects test had a number of shortcomings, such as ignoring the concerns of foreign governments.⁶⁷ In *Timberlane*, the Ninth Circuit set out a balancing test that took those interests into consideration.⁶⁸ The plaintiff, a U.S. company, alleged that the bank had conspired with officials in Honduras to monopolize the timber industry.⁶⁹ What made it different from *American Banana* and *Alcoa* was that the alleged antitrust activity took place entirely abroad (in Honduras), it involved only foreign citizens, and the economic impact was felt primarily in Honduras.⁷⁰ The court said that an effect on U.S. commerce was necessary but not

tional duty and convenience, and to the rights of its own citizens.” *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

64. Gerber, *supra* note 40, at 291. Gerber points out that the principle has been constrained in two ways: “One is to define more narrowly the kinds of effects required for the assertion of jurisdiction,” as done by the FTAIA, and, two, by using “balancing” or “reasonableness” factors in determining “whether there is prescriptive authority over foreign conduct or whether such authority should be exercised.” *Id.* at 295.

65. Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT’L L. 563, 566, 568 (2000) [hereinafter Waller, *Twilight*] (explaining that the need to apply comity arose because private litigants otherwise lacked incentive to consider the national interest in deciding whether to bring suits against foreign defendants). *See also* Wood, *supra* note 40, at 299 (noting that, notwithstanding substantive convergence on the law, “objections to extraterritorial enforcement, based on procedural grounds, continued,” and observing that “the remaining problems in this area tended to arise from private litigation in the United States, rather than government litigation.”).

66. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); Eleanor Fox, Testimony before the Antitrust Modernization Commission, Hearings on International Issues, § III (Feb. 15, 2006), http://www.amc.gov/commission_hearings/international_antitrust.htm [hereinafter Fox, Testimony] (referring to *Timberlane* as “the parent of U.S. antitrust comity ‘doctrine’”).

67. 3 VED P. NANDA, TRANSNATIONAL BUSINESS TRANSACTIONS § 13:3 (2005).

68. *Id.* The *Timberlane* test weighs (1) “the degree of conflict with foreign law or policy,” (2) the nationality or allegiance of the parties and the locations or principal places of businesses or corporations,” (3) “the extent to which enforcement by either state can be expected to achieve compliance,” (4) “the relative significance of effects on the United States as compared with those elsewhere,” (5) “the extent to which there is explicit purpose to harm or affect American commerce,” (6) “the foreseeability of such effect,” and (7) “the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.” *Timberlane*, 549 F.2d at 614.

69. *Timberlane*, 549 F.2d at 601.

70. Ward, *supra* note 48, at 721.

sufficient to determine whether the United States should assert jurisdiction.⁷¹ Instead, courts should look to whether the “interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”⁷² This test ultimately found its way into the *Restatement (Third) of Foreign Relations Law*,⁷³ and was seen as a middle-of-the-road approach between *American Banana* and *Alcoa*,⁷⁴ but it came to be criticized as leaving too much discretion over political decisions to judges, rather than to the executive and legislative branches where such decisions arguably belong.⁷⁵

The Supreme Court’s 1993 decision in *Hartford Fire Insurance Co. v. California*⁷⁶ signaled a major shift in application of the balancing doctrine.⁷⁷ There, the Court established a new principle of prescriptive jurisdiction, holding that balancing issues are relevant, if at all, only where there is a “true conflict” between U.S. and foreign law.⁷⁸ Plaintiffs had brought Sherman Act claims against domestic insurers and foreign reinsurers, alleging that they cut back the scope of insurance coverage for U.S. buyers through illegal agreements.⁷⁹ The U.K.-based defendants asserted their conduct was lawful under British law, and they moved to dismiss the complaint for lack of jurisdiction and for reasons of comity.⁸⁰ But the Supreme Court held that there was jurisdiction, because the foreign conduct produced substantial effects in the United States.⁸¹ The Court avoided comity balancing, holding that comity should be considered only where there is a true conflict between U.S. and U.K. law.⁸² A “true conflict” would be one in which compliance with one nation’s law would require one to violate the law of another,⁸³ but no conflict exists

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

72. *Id.*

73. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 130 (1998).

74. Ward, *supra* note 48, at 721.

75. John Byron Sandage, Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1699–1701 (1985).

76. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

77. Gerber, *supra* note 40, at 296.

78. *Id.* at 296.

79. See Eleanor M. Fox, *National Law, Global Markets, and Hartford: Eyes Wide Shut*, 68 ANTITRUST L.J. 73, 74 (2000).

80. *Id.* at 75.

81. *Hartford Fire*, 509 U.S. at 796.

82. Harry First, *Empagran and the International Reach of U.S. Antitrust Laws*, 21 NYSBA ANTITRUST L. SEC. SYMP. 26 (2005) [hereinafter First, SYMPOSIUM].

83. Gerber, *supra* note 40, at 296.

when the laws of both countries can be complied with at the same time.⁸⁴ Comity was “virtually eliminated” in such cases⁸⁵—until *Empagran I*. Justice Scalia wrote the dissenting opinion in *Hartford Fire*, and we will see echoes of that dissent in the Court’s *Empagran* opinion.⁸⁶

Empagran and the circuit split over the proper interpretation of the FTAIA gave the Supreme Court the opportunity to again address the extraterritorial reach of the Sherman Act.⁸⁷ Professor Harry First has said that it appears the Court wanted to revisit *Hartford Fire* and the approach taken by Justice Scalia in his dissent.⁸⁸ The situation was now complicated by foreign parties suing other foreign parties where their injuries did not have an effect in the United States.⁸⁹

III. THE FOREIGN TRADE ANTITRUST IMPROVEMENT ACT

The Foreign Trade Antitrust Improvement Act was enacted in 1982,⁹⁰ adding section 7 to the Sherman Act⁹¹ and exempting from the Sherman

84. *Hartford Fire*, 509 U.S. at 799. British law did not require the insurance companies to violate U.S. law, and so it was not impossible to comply with the laws of both countries. First, SYMPOSIUM, *supra* note 82.

85. Waller, *Twilight*, *supra* note 65, at 569. See also Gerber, *supra* note 40, at 296 (arguing that “by severely reducing conceptual constraints on U.S. jurisdictional claims, the Court has undermined decades of efforts to develop a more effective and internationally acceptable jurisdictional mechanism” and pointing out that some lower courts have interpreted the decision narrowly).

86. Eleanor M. Fox, *Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief*, 80 TUL. L. REV. 571, 578 (2005) [hereinafter Fox, *Remedies*].

87. 1 NANDA & PANSIUS, *supra* note 5 (pointing out that although the impact of the FTAIA on foreign plaintiffs had not been extensively litigated until recently, that changed with the contrasting approaches of the decisions of the Fifth Circuit in *Den Norske* and the Second Circuit in *Kruman*).

88. First, SYMPOSIUM, *supra* note 82, at 27.

89. Transcript of Oral Argument at *15, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724). Assistant Attorney General R. Hewitt Pate stated that there were no cases prior to 1982, when the FTAIA was enacted, in which a foreign cartel injured parties in the United States and separately injured people abroad. *Id.*

90. Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6(a) (1982). The FTAIA provides:

Conduct involving trade or commerce with foreign nations.

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

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

Act's reach export activity that does not have a negative effect on U.S. commerce.⁹² In effect, it legalized "export cartels."⁹³ The Court in *Empagran* explained the operation of the statute this way:

[The] language initially lays down a general rule placing *all* (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim."⁹⁴

Thus, it endorsed the "effects test," requiring that the effects of the anticompetitive conduct on U.S. commerce "give rise to a claim" under the antitrust laws.⁹⁵ But it turns out that "a" doesn't always mean "a";

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

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

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Id.

91. Sherman Act, 1 U.S.C. § 1 (1890). *See also* 1 NANDA & PANSIUS, *supra* note 5.

92. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 345 (D.C. Cir. 2003), *citing* *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796–97 n.23 (1993).

93. It is helpful to understand the political and economic background of the time: The FTAIA was "[e]nacted during a fit of industrial-policy enthusiasm and anti-Japanese hysteria[;] it legalizes U.S. export cartels—that is, price agreements and output restrictions that would earn their practitioners prison time if targeted at American consumers." Michael Greve & Richard Epstein, *Foreign Headaches*, NAT'L L.J., July 12, 2004, *available at* <http://www.federalismproject.org/masterpages/publications/foreign%20headaches.html>. An export cartel is composed of a group of producers within a single country whose conduct is directed solely at foreign markets. James R. Atwood, *Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels*, 50 L. & CONTEMP. PROBS. 153, 154 (1987).

94. *Empagran I*, 542 U.S. at 161 (internal citations omitted).

95. *Empagran*, 315 F.3d at 344.

sometimes it means “the.”⁹⁶ Congress did not define it, leaving courts to ponder⁹⁷ whether the claim necessarily had to be the plaintiff’s own, or whether it was only necessary that *someone* had a claim.⁹⁸

The district court’s decision applied the “restrictive view” of the FTAIA, that is, a plaintiff’s claim is restricted to injuries that actually arise from the effects of defendants’ antitrust conduct on U.S. commerce.⁹⁹ The plaintiffs had sought a determination based on the “less restrictive view,”¹⁰⁰ which would provide the court with jurisdiction over a foreign plaintiff suing a foreign defendant if *any* U.S. plaintiff—even the government—has a hypothetical cause of action (that is, a claim that some party *could* bring, even if it has not).¹⁰¹ On appeal, rather than adopting the position of the Fifth Circuit or the Second Circuit, the D.C.

96. In fact, entire articles have been written about the ambiguity of the word “a” in this context. See generally Whittaker & Thomas, *supra* note 15; Mehra, *Anachronism*, *supra* note 28. Judge Higgenbotham wrote, “The word ‘a’ has a simple and universally understood meaning. It is the indefinite article If the drafters of FTAIA had wished to say ‘the claim’ instead of ‘a claim,’ they certainly would have.” *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 432 (5th Cir. 2001) (Higgenbotham, J., dissenting).

97. *United States v. LSL Biotechnologies*, 379 F.3d 672, 678 (9th Cir. 2004) (“Federal courts did not shower the FTAIA with attention for the first decade after its enactment. But in the last ten years, and in particular the last five years, the case reporters have steadily filled with decisions interpreting this previously obscure statute.”).

98. Mehra, *Anachronism*, *supra* note 28 (“In other words, even if the plaintiff’s claim need not arise from the domestic effect, there must be a potential Sherman Act claim that another private party could bring arising from that effect.”).

99. *Empagran*, 315 F.3d at 340 (“The District Court held that, under FTAIA, a plaintiff must establish that the injuries it seeks to remedy actually arose from the anticompetitive effects of the defendants’ conduct on United States commerce. In other words, it is not enough for a plaintiff to show that other persons were injured by such United States effects; the United States effects themselves must give rise to plaintiff’s claim. This *restrictive view* of FTAIA’s jurisdictional reach finds support in the Fifth Circuit.”). See also *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001).

100. *Empagran*, 315 F.3d at 340–41 (“[Plaintiffs] contend that the District Court misconstrued FTAIA . . . according to [plaintiffs], Congress did not limit jurisdiction to the ‘the same claim’ as that on which the jurisdictional effects are based. Rather, Congress provided only that ‘a’ claim cognizable under the Sherman Act must exist. Once a jurisdictional nexus exists, FTAIA does not limit the types of plaintiffs who may seek relief. Thus, according to [plaintiffs], it does not matter that the transactions in which they purchased vitamins took place outside of U.S. commerce. This *less restrictive view* of FTAIA’s jurisdictional reach finds support in the Second Circuit.”) (emphasis in original). See also *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002).

101. Here the claim was not hypothetical; the government and numerous private plaintiffs had already sustained their cause of action under the Sherman Act in the original domestic *Vitamins* litigations. First, *Vitamins*, *supra* note 12, at 713–19; *Empagran*, 315 F.3d at 352.

Circuit carved out yet another approach, although one closer to that of the Second Circuit: where the anticompetitive conduct has an effect on U.S. commerce, that conduct must give rise to a claim by someone (not necessarily the plaintiff); a government cause of action is not in itself a sufficient basis for jurisdiction.¹⁰² Because the cartel's actions had obviously given rise to antitrust claims by U.S. parties,¹⁰³ the circuit court reversed the district court's decision and held that it had subject matter jurisdiction¹⁰⁴ (and that the plaintiffs had standing to bring their claims),¹⁰⁵ thus setting the stage for Supreme Court review of what was now a three-way circuit split.

102. *Empagran*, 315 F.3d at 350. The court held:

Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former. We hold 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. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's private claim. This interpretation has the appeal of literalism.

Id.

103. See First, *Vitamins*, *supra* note 12, at 718–19.

104. *Empagran*, 315 F.3d at 357, 359. The court did not entertain the plaintiffs' alternative theory that their injuries were a consequence of defendants' harm to U.S. commerce. The theory was:

[Plaintiffs'] complaint states a viable cause of action even under the District Court's *restrictive view* of FTAIA. [Plaintiffs] contend that [defendants] caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by the worldwide conspiracy, [plaintiffs] say, but the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage. Thus, according to [plaintiffs], the "fixed" United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts, [plaintiffs] claim that the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad.

Id. at 341 (emphasis in original). The Supreme Court ultimately remanded for consideration of this point. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 175 (2004).

105. Although the District Court did not rule on the issue of antitrust standing, the Appeals Court reviewed it and found that the plaintiffs' injury was an injury of the type

With the Fifth Circuit holding a “restrictive” view, the Second Circuit holding a “less restrictive” view, and the D.C. Circuit carving out a view somewhere between the two, the Supreme Court granted certiorari on this very narrow ground: whether the FTAIA exception to the Sherman Act applies to a situation in which foreign plaintiffs allege a wholly foreign injury, that is, one not dependent on injury to U.S. commerce.¹⁰⁶

Why were there so many different interpretations of the FTAIA? It is widely considered to be a poorly drafted statute,¹⁰⁷ full of “double negatives, triple negatives, carve-ins and carve-outs and a proviso that is an exception to one of the exceptions,”¹⁰⁸ and even its legislative history is contradictory.¹⁰⁹ But, according to the Supreme Court’s interpretation of

that the antitrust laws are intended to prevent (antitrust injury). *Empagran*, 315 F.3d at 357 (“The foreign purchasers have constitutional standing. They allege that they suffered injury-in-fact when they paid inflated prices for vitamins directly to the defendants . . . There is no dispute that the foreign plaintiffs in this case have been injured by paying inflated prices for vitamins.”).

106. *Empagran I*, 542 U.S. at 160.

107. *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 300 (3d Cir. 2002) (describing the statute as “inelegantly phrased” and referring to its “convoluted language”). One commentator has “translated” the FTAIA into “human readable form” thus:

Plaintiffs (may) have a claim involving foreign commerce under the Sherman Act if:

1. the conduct in question has a direct, substantial, and reasonably foreseeable effect
 - a. on domestic commerce or on import commerce; or
 - b. on American export commerce; and
2. such effect gives rise to a claim under the Sherman Act.

U.S. Jurisdiction Over Foreign Antitrust Claims After Empagran: Many Questions Remain Open, Latham & Watkins, July 8, 2004, at 1, 2, http://www.lw.com/resource/Publications/_pdf/pub1032_1.pdf.

108. Shenefield, SYMPOSIUM, *supra* note 34, at 29.

109. H.R. REP. NO. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487. See also *Empagran*, 315 F.3d at 352–56, for its review of the legislative history. Although the Supreme Court appeared to find the statute’s history definitive, the circuit court found much in the record that each side could rely on. Salil Mehra breaks down the House testimony in a table to show that one can find statements to support precisely opposite points of view. Salil K. Mehra, *More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement*, 77 TEMP. L. REV. 47, 65–66 (2004) [hereinafter Mehra, *More is Less*] (arguing that “[t]he ‘legislative history is clear’ argument is deeply flawed . . .” Not only is the testimony not clear, but “[t]he subcommittee that originally considered the bill rejected a Business Roundtable-proposed version of the language at issue that would have limited recovery to ‘injury so caused in the United States.’ This failed version of the FTAIA would have enacted the ‘narrow view.’”).

the legislative history, Congress' intent was to "make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."¹¹⁰

From the text of the House Report it appears that the FTAIA was not limited to conduct involving U.S. exports.¹¹¹ The bill's original language referred only to "export" trade, but it was broadened to "other than import" trade.¹¹² It has been argued, however, that its language does not support providing additional causes of action or additional standing, but only limits the Sherman Act's jurisdiction.¹¹³

Given the lack of unanimity on the interpretation of the FTAIA, three policy arguments have dominated the debate: (1) deterrence, (2) burden on the courts, and (3) the impact on development of antitrust regimes in countries that either have no antitrust laws or have underdeveloped systems.

Deterrence has been the most hotly debated of these arguments, with advocates on each side of the issue claiming it supports their position. On one side is the view that opening U.S. courtroom doors to a potential flood of additional lawsuits will have an enormously detrimental effect on deterrence.¹¹⁴ The U.S. government's amnesty program reduces the punishment for the first cartel member to come forward with information

110. *Empagran I*, 542 U.S. at 161.

111. H.R. REP. NO.67-686. David Gerber points out that "[g]iven that Congress often does not specify the geographical scope of legislation . . . the courts must resort to presumptions regarding congressional intent." Gerber, *supra* note 40, at 297.

112. A House Report noted that the House Judiciary Committee broadened the original bill, which referred only to "export trade or export commerce," and changed that language to "trade or commerce (other than import trade or import commerce)." The *Empagran* Court noted that the Committee "did so deliberately to include commerce that did not involve American exports but which was wholly foreign." *Empagran I*, 542 U.S. at 163.

113. Mehra, *Ends and Means*, *supra* note 37, at 349 (explaining that "the FTAIA is drafted as a limitation on the Sherman Antitrust Act's jurisdiction."). The point was made by Assistant Att'y Gen. R. Hewitt Pate:

[T]he statute cannot on its terms expand jurisdiction by reason of its language, which begins with a statement that the antitrust laws shall not apply, and then puts the plaintiff back where it was prior to the FTAIA if certain conditions are met. In no case can the statute operate to give additional causes of action or create additional standing on behalf of parties who didn't have it prior to the FTAIA.

Transcript of Oral Argument at *18, *Empagran I*, 542 U.S. 155 (No. 03-724).

114. See *infra* text accompanying notes 116-20.

about a cartel's activities; the argument is that companies, when considering taking advantage of the amnesty program, assess their financial exposure to other governmental and private actions flowing from the criminal admission.¹¹⁵ But if their civil liabilities are almost certain to be magnified because of an increase in the pool of potential (non-U.S.) plaintiffs, or if that risk, at minimum, makes it difficult even to estimate the potential damages, potential whistle-blowers may decline to come forward, and detection of the cartel's illegal activities will be hampered.¹¹⁶ The U.S. Department of Justice submitted an amicus brief arguing that the Court of Appeals' interpretation of the FTAIA would "substantially interfere" with the government's enforcement of the antitrust laws.¹¹⁷ In fact, it said, "the theoretical possibility of additional deter-

115. Since 1993, when the DOJ revised its leniency policy, the "U.S. amnesty programme has become 'the most effective generator of international cartel cases' for the division and 'unquestionably, the single greatest investigative tool available to anti-cartel enforcers'." William J. Baer, Tim Frazer & Luc Gyselen, *International Leniency Regimes: New Developments and Strategic Implications*, GLOBAL COMPETITION REV., <http://globalcompetitionreview.com/ara/international.cfm> (last visited Mar. 5, 2006) (citing U.S. Dept. of Justice, *Status Report: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program* (2004), <http://www.usdoj.gov/atr/public/guidelines/202531.htm>; Address by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Dept. of Justice, *Detecting and Deterring Cartel Activity Through an Effective Leniency Program*, Nov. 21–22, 2000, <http://www.usdoj.gov/atr/public/speeches/9928.htm>). The DOJ is so concerned about protecting the viability of its amnesty program that "it will not share information provided by an amnesty applicant with foreign antitrust enforcement authorities (unless permitted by the applicant)." *Id.* (citing Address by Gary R. Spratling, Deputy Asst. Att'y Gen., Antitrust Division, U.S. Dept. of Justice, *Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy—An Update*, Feb. 16, 1999, available at <http://www.usdoj.gov/atr/public/speeches/2247.htm>). Observers have noted the irony that the Department of Justice sided here "with the very vitamins defendants it had prosecuted." Joe Sims, *U.S. Supreme Court Tackles International Antitrust Issues*, Jones Day, Aug. 2004, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S1032.

116. William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 311 n.9 (2003) [hereinafter Kovacic, *Extraterritoriality*]. See also Donald C. Klawiter, *Global Cartel Enforcement in 2004: Penalties, Leniency Considerations and Coordination*, GLOBAL COMPETITION REV., The Antitrust Review of the Americas 2004: US Cartels, http://www.globalcompetitionreview.com/ara/us_cartels.cfm (arguing, before the Supreme Court decision, that if *Empagran* were upheld, "the damage risk increases several-fold and may create, for some companies, a significant disincentive to apply for leniency.").

117. Brief for the United States as Amicus Curiae Supporting Petitioners at 20–21, *Empagran I*, 542 U.S. 155 (No. 03-724) (arguing that the amnesty program has been more valuable to the Department of Justice "than all of the Division's search warrants, secret audio or videotapes, and FBI interrogations combined . . . Faced with joint and several liability for co-conspirators' illegal acts all over the world, a conspirator could not

rence . . . would come only at the expense of weakening the ability of the United States government to discover the wrongdoing in the first place.”¹¹⁸ Governments of a number of other countries with developed antitrust regimes filed briefs taking the same position.¹¹⁹

On the other side is the view that the threat of treble damages exerts a powerful deterrent effect on potential antitrust violators, from which American consumers benefit. This view was articulated in the majority opinions in *Pfizer v. Government of India*¹²⁰ and *Kruman v. Christie's Int'l*,¹²¹ and in Judge Patrick Higginbotham's widely cited dissent in *Den Norske v. HeereMac*.¹²² The D.C. Circuit in *Empagran* found the deterrence argument to be “most compelling”¹²³ in deciding that it should take the “less restrictive view” of the FTAIA, citing Judge Higginbotham's opinion for the proposition that “a global price-fixing scheme could sustain monopoly prices in the United States even in the face of domestic liability, since the profits from abroad would subsidize the U.S. operations.”¹²⁴

Another policy concern is the potential impact on U.S. courts if the FTAIA provided wider access to foreign plaintiffs. Observers predicted

readily quantify its potential liability. The prospect of civil liability to all global victims would provide a significant disincentive to seek amnesty from the government.” The amnesty program, in the government's judgment, “deters cartel behavior more effectively than any increase in private litigation after the cartel has been exposed,” and so deterrence is best maximized, they argue, “not by maximizing the potential number of private lawsuits, but by encouraging conspirators to seek amnesty and expose cartels in the first place.”)

118. *Id.* at 23.

119. See Brief of the United Kingdom in Support of Petitioners at 9–13, *Empagran I*, 542 U.S. 155 (No. 03-724); Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 28–29, *Empagran I*, 542 U.S. 155 (No. 03-724).

120. *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314–15 (1978).

121. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 403 (2d Cir. 2002).

122. *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 434–35 (5th Cir. 2001).

123. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 355–57 (D.C. Cir. 2003). The D.C. Circuit said of the deterrence argument:

We are persuaded that, if foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be under-deterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy.

Id. at 356.

124. *Id.* at 256, quoting *Den Norske*, 241 F.3d at 435 (Higginbotham, J., dissenting).

that already burdened courts would be forced to deal with extremely difficult cases involving complex procedural issues and factual inquiries.¹²⁵ The Sherman Act covers not only price-fixing, the adjudication of which is fairly straightforward, but also other more complex and subjective antitrust issues.¹²⁶ If the FTAIA did not preclude jurisdiction over foreign plaintiffs whose antitrust claims were independent of U.S. effect, plaintiffs would be able to bring claims on any antitrust basis.¹²⁷

The third policy concern is that the extension of our antitrust reach into what should arguably be the jurisdiction of other states would retard the

125. *Den Norske*, 241 F.3d at 431 (“Any reading of the FTAIA authorizing jurisdiction” in the case “would open U.S. courts to global claims on a scale never intended by Congress.”). The issue was raised in oral argument before the Supreme Court in *Empagran*. Stephen M. Shapiro, attorney for petitioners-defendants, stated:

[C]onsider global plaintiffs from 192 countries coming to the United States and asking a single district court judge to decide how much they’ve been overcharged, how much competition there was locally, what trade barriers there were that might have prevented competition, calculate the damages for every man, woman, and child on the face of the Earth that perhaps . . . has an antitrust claim.

Transcript of Oral Argument at *11, *F. Hoffman-La Roche, Ltd. v. Empagran S.A.* (*Empagran I*), 542 U.S. 155 (2004) (No. 03-724). When a member of the court commented, “I suppose that’s the penalty for engaging in a worldwide conspiracy,” *id.* at *11–12, Shapiro answered, “But that penalty is imposed on our district court judges. They would . . . be forced to untangle these incredibly different procedural problems . . . U.S. courts are not world courts equipped to do this.” *Id.* at *12. The U.S. government’s *amicus curiae* brief argued the same point, noting that for plaintiffs who would be allowed to sue under the D.C. Circuit’s holding, the statutory inquiry would turn on claims and persons not before the court. “The court of appeals’ decision thus would thrust upon federal courts the potential for burdensome and protracted satellite litigation that is far removed from the claim before the court.” Brief for the United States as Amicus Curiae Supporting Petitioners at 23, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724).

126. Transcript of Oral Argument at *17–18, *Empagran I*, 542 U.S. 155 (No. 03-724). Attorney General R. Hewitt Pate argued,

[T]o pursue this path would embroil the district courts around the country in all forms of satellite litigation, and it’s very important to recognize that this is not a test that would apply only to a notorious worldwide conspiracy, such as was at issue here, but would apply to rule of reason cases, joint venture cases, could apply even to Section 2 cases under the Sherman Act any time a plaintiff was able to allege that some other plaintiff somewhere suffered from a U.S. effect that was related to that conduct So in our judgment, the Court should pay attention to the practical realities of enforcement.

Id.

127. *Id.*

development of antitrust law abroad.¹²⁸ Europeans believe that an overbroad application of U.S. jurisdiction would weaken private antitrust enforcement in Europe's courts.¹²⁹ Courts need a steady diet of cases to feed the development of a body of jurisprudence that will in turn facilitate private enforcement of antitrust claims; if those cases are attracted to the United States, foreign antitrust development will suffer.¹³⁰

IV. THE SUPREME COURT'S SURPRISING DECISION IN *EMPAGRAN*

The Supreme Court's decision in *Empagran*¹³¹ was less surprising than its reasoning.¹³² It reversed the D.C. Circuit and held that U.S. courts do *not* have subject matter jurisdiction over foreign plaintiffs when their claims are based on injuries that are independent of injury to U.S. plaintiffs,¹³³ and remanded the case back to the circuit court for consideration of an alternate theory (which was not before it): whether there would be jurisdiction if the effects were *not* independent.¹³⁴

128. Transcript of Oral Argument at *9, *Empagran I*, 542 U.S. 155 (No. 03-724). Petitioners' attorney Stephen M. Shapiro argued,

Congress wanted the treble damage remedy to be available to protect our commerce. It expected other countries to adopt their own laws to deal with overcharges within their own territories, and other nations, of course, have done just that. They've passed over 100 different pieces of legislation all around the world, from Albania to Zambia, we see new antitrust laws that have been passed, and it would discourage that process if the U.S. courts attempted to subsume all of these foreign overcharge disputes into our court system.

Id.

129. See Margaret Bloom, *Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remedies? A Post-Empagran Perspective from Europe*, 61 N.Y.U. ANN. SURV. AM. L. 433, 436 (2005).

130. *Id.* at 451.

131. The unanimous 8-0 decision was written by Justice Breyer. *Empagran I*, 542 U.S. 155. Justice Sandra Day O'Connor recused herself because she owns shares of Procter & Gamble, which was seeking to bring suit on behalf of its foreign affiliates. Sandra Rubin, *U.S. Antitrust Reach Shortened*, NAT'L POST, June 30, 2004, available at 2004 WL 85149593 (2004).

132. Ronald W. Davis, *Empagran and International Cartels—A Comity of Errors*, 19 ANTITRUST 58, 59 (2004).

133. “[When t]he price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse effect . . . the FTAIA exception does not apply (and thus the Sherman Act does not apply) . . .” *Empagran I*, 542 U.S. at 164.

134. *Id.* at 175. Thomas C. Goldstein, attorney for plaintiffs-appellants, has pointed out that Justice Breyer, in his opinion, wrote seven times, four of them in italics, that the Court was “only reaching the question of whether or not there is a claim when the injury

What was surprising was the Court's approach. Justice Breyer took merely four short paragraphs of a 17-page opinion to deal with the lower courts' linguistic disagreements over the meaning of the phrase "gives rise to a claim."¹³⁵ The opinion dismissed the basis for appellate disagreement, holding that it makes just as much "linguistic sense to read the words 'a claim' as if they refer to the 'plaintiffs' claim' or 'the claim at issue'" as to read it to mean "a" claim, that is, anyone's claim.¹³⁶ Although conceding that plaintiffs' linguistic arguments might be the "more natural reading of the statutory language," it concluded that considerations of comity and history make it clear that was not the FTAIA's intent.¹³⁷

Rather than parsing the words of the statute, the Court revisited the purpose of the FTAIA and found that Congress "designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce"¹³⁸ and used the principle of comity to help determine the scope of the statute. Because an ambiguous statute must be construed to "avoid unreasonable interference with the sovereign authority of other nations,"¹³⁹ and since the FTAIA was certainly ambiguous, it would be unreasonable to apply our antitrust laws to foreign conduct where that conduct did not cause domestic injury.¹⁴⁰ The justification, the Court said, for such "interference seems insubstantial."¹⁴¹

An example illustrates the Court's concern with how a broad application of the FTAIA could interfere in foreign affairs: It hypothesized a situation in which, under the circuit court's theory, a buyer in a foreign country would be able to sue his own domestic supplier in a U.S. court

simply by noting that unnamed third parties injured [in the United States] by the American [cartel member's] conduct would also have a cause of action. Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, *but unhappy with its own sovereign's provisions for private antitrust enforcement*, provided that a different plain-

overseas is completely unrelated to the injury of the United States." Goldstein, *Perspectives*, *supra* note 33.

135. *Empagran I*, 542 U.S. at 173-74.

136. *Id.*

137. *Id.* at 174. *See also* 1 NANDA & PANSIUS, *supra* note 5.

138. *Empagran I*, 542 U.S. at 169. This view has ample support in the House Report of the bill's passage, as the Court noted. *Id.*

139. *Id.* at 164. The Court noted that harmony among those sovereign interests are more important "in today's highly interdependent commercial world." *Id.* at 165.

140. *Id.*

141. *Id.*

tiff had a cause of action against a different firm for injuries that were within U.S. [other-than-import] commerce.¹⁴²

The Court rejected the plaintiffs' argument that because most other nations have laws against price fixing,¹⁴³ there is little likelihood that litigating a price-fixing claim among foreign parties in the United States would interfere with the interests of other nations.¹⁴⁴ It observed that there are still major differences among the antitrust laws of those countries that have antitrust regimes,¹⁴⁵ and, while it is true that price-fixing is universally prohibited by countries that have antitrust laws, even those countries disagree dramatically about remedies. The application of our treble-damages provisions to conduct abroad, it noted, has "generated considerable controversy."¹⁴⁶

The Supreme Court also dismissed the parties' positions on deterrence. The Court noted that although the defendants' arguments about deterrence made sense,¹⁴⁷ so did those of the plaintiffs and the numerous "supporting enforcement-agency amici" who made arguments to the con-

142. *Id.* at 166, quoting P. AREEDA & H. HOVENKAMP, ANTITRUST LAW § 273 (Supp. 2003) (emphasis added).

143. See Shenefield, *Coherence*, *supra* note 38, at 402 ("[T]here exists today a rough consensus on certain—but not all—core antitrust principles. Most antitrust laws share certain features. Virtually all competition regimes prohibit cartels. Most also condemn certain kinds of vertical arrangements. Most forbid the exclusionary exploitation of monopoly or abuse of a dominant market position. In addition, prohibitions of anticompetitive mergers are commonplace and many national laws also impose premerger notification obligations.").

144. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 167 (2004), citing *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 797–99 (1993).

145. See Kovacic, *Extraterritoriality*, *supra* note 116, at 309 ("A half-century ago, only one country, the United States, had antitrust statutes and active enforcement. Today over ninety jurisdictions have competition laws, and the number will exceed one hundred by the decade's end."). The differences, however, create problems for business and enforcement. "The multiplication of antitrust laws raises concerns that enforcement by jurisdictions with dissimilar substantive standards, procedures, and capabilities will discourage legitimate business transactions and needlessly increase the cost of controlling anticompetitive conduct." *Id.* Note also that there are countries that have no antitrust laws.

146. *Empagran I*, 542 U.S. at 167–68. The decision also noted briefs filed by Germany, Canada and Japan that argued that to apply our remedies would "permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody" and would undermine their own antitrust enforcement policies "by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." *Id.*

147. *Id.* at 174–75.

trary.¹⁴⁸ It said that, despite considerable disagreement about the impact of private suits on the deterrence of illegal cartel behavior, there was not enough empirical evidence on either side,¹⁴⁹ and it found neither argument ultimately convincing enough to alter its conclusion that the statute should be read narrowly.¹⁵⁰

148. *Id.* at 174. Amici included the DOJ, the United Kingdom, Germany, Canada, and Japan. In particular, the U.S. government sees the exposure of foreign cartels to increased liability in the United States, especially through the treble damages provision, as a threat to its leniency programs. See William E. Kovacic, General Counsel, Federal Trade Commission, *Private Participation in the Enforcement of Public Competition Laws* (May 15, 2003), <http://www.ftc.gov/speeches/other/030514biicl.htm> [hereinafter Kovacic, *Private Participation*], for an in-depth discussion of the DOJ's leniency program. Indeed, the *Vitamins* prosecution itself might not have been so successful if Rhone-Poulenc had not taken advantage of the leniency program and come forward with evidence against its fellow conspirators. First, *Vitamins*, *supra* note 12, at 715–16.

149. *Empagran I*, 542 U.S. at 174–75. One of the arguments is that leniency programs may become less effective as an anti-cartel device when private actions proliferate and the exposure to damages increases. See generally Kovacic, *Private Participation*, *supra* note 148 (“Private rights of action diminish, if not eliminate, the gate-keeping authority of public prosecutors and reduce their ability to control the development of policy by their selection of cases . . . and magnify the role of the courts in implementing the law.”). Kovacic continues:

A court might seek to correct . . . perceived infirmities in the antitrust system by recourse to means directly within its control—namely, by modifying doctrine governing liability standards or by devising special doctrinal tests to evaluate the worthiness of private claims. [Arguably, this is what is happening here.]

. . . [In particular, courts may] “equilibrate” the antitrust system . . . [by constructing] doctrinal tests under the rubric of “standing” or “injury” that make it harder for the private party to pursue its case; . . .

. . . [T]he hypothesis helps explain the modern evolution of U.S. antitrust doctrine. Since the mid-1970s, the U.S. courts have established relatively demanding standards that private plaintiffs must satisfy to demonstrate that they have standing to press antitrust claims and have suffered “antitrust injury.”

Id. But one commentator has argued that the differing goals of compensation and deterrence have been conflated in this argument. See Hannah L. Buxbaum, *Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 365, 373–74 (2004) (arguing that deterrence could be accomplished through public regulation rather than through private enforcement, and that although the United States has an additional interest in permitting private plaintiffs to sue and receive compensation for their injuries, “it has no such interest with respect to foreign plaintiffs. The broad view therefore unnecessarily conflates the goal of compensation with the goal of deterrence.”).

150. *Empagran I*, 542 U.S. at 174–75.

Clearly the Court was concerned with judicial administration as well.¹⁵¹ The Court rejected as “unworkable” the plaintiffs’ suggestion that courts should take “account of comity considerations case by case.”¹⁵² The Court was concerned that the wide range of antitrust issues that courts would have to confront in applying foreign law could result in “procedural costs and delays [that] could themselves threaten interference with a foreign nation’s ability to maintain the integrity of its own antitrust enforcement system.”¹⁵³

Ultimately, the Court said,

[P]rinciples of prescriptive comity counsel against the Court of Appeals’ interpretation of the FTAIA . . . [I]f America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.¹⁵⁴

So, after years of debate among courts and scholars about the meaning of a single word in the FTAIA, and after hundreds of pages of arguments and briefs about the potential effect of its decision on deterrence of cartel behavior worldwide, the Court resurrected comity, an issue that had been dormant in antitrust law since *Hartford Fire*, to help construe the statute’s scope, even though the issue of comity was not even briefed or discussed as the case made its way through the lower courts.¹⁵⁵

151. Edward D. Cavanagh, *Empagran and the International Reach of U.S. Antitrust Laws*, 21 NYSBA ANTITRUST L. SEC. SYMP. 24 (2005) [hereinafter Cavanagh, SYMPOSIUM] (commenting that when Justice Rehnquist hears that a broad reading of the statute could invite a lot of plaintiffs to our courts, “his ears perk up very, very quickly, and he gets very interested in the argument.”).

152. *Empagran I*, 542 U.S. at 168.

153. *Id.* at 168–69.

154. *Id.* at 169.

155. It is not surprising that it was not, since *Hartford Fire* “pretty much kill[ed] off the concept of comity either in government cases or in private cases.” Waller, *Courtroom*, *supra* note 1, at 527. *See also* Fox, *Remedies*, *supra* note 86 (arguing that, “in its rhetoric, the *Empagran* Court launched a new life for comity.”).

V. ROUTE TO ANOTHER CIRCUIT SPLIT?

Although the Court may have resolved the circuit split over the meaning of “gives rise to a claim,”¹⁵⁶ its decision did not resolve the parties’ dispute in *Empagran*,¹⁵⁷ and it did little to provide guidance to lower courts.¹⁵⁸ Indeed, it has made their jobs more complex.¹⁵⁹ One scholar, in fact, has argued that the broad view of FTAIA construction—which would provide a court with jurisdiction over a foreign plaintiff as long as there were at least a hypothetical U.S. plaintiff with a cause of action—would at least have the virtue of greater certainty: parties would be clear about their exposure, leading to more settlements and less litigation.¹⁶⁰

156. Goldstein, *Perspectives*, *supra* note 33, at 4 (stating that “if we look behind [the decision] at what it is the Supreme Court thought it was doing, it thought it was resolving a circuit split between the Fifth Circuit’s *Den Norske* decision and D.C. Circuit’s ruling that ‘a claim’ meant ‘any person’s claim.’”).

157. Duke Law, *supra* note 23 (arguing that the decision “leaves the biggest question in the case undecided”). An article on Arnold & Porter LLP’s website immediately after the decision was published predicted:

Future plaintiffs in virtually every international cartel case (as well as all manner of non-cartel cases) will likely attempt to circumvent the Court’s *Empagran* ruling by asserting their participation in a “global” market—and arguing that, as a matter of economics, they could not have suffered injury “but for” the U.S. effects of any alleged anti-competitive conduct.

The Supreme Court Decision in Empagran, Arnold & Porter LLP, June 2004, at 1, 5 (on file with the *Brooklyn Journal of International Law*).

158. See, e.g., *U.S. Courts Reach Different Results on Issue Left Open by the U.S. Supreme Court’s Decision in Empagran*, ANTITRUST L. NEWSL., July 2005, at 2, <http://www.bakernet.com> (follow “Resources,” “Law Alerts,” “Global Publications,” and choose “July 2005 North American Antitrust Law Newsletter” hyperlink). See also *Perspectives on Empagran*, ANTITRUST SOURCE, Sept. 2004, at 1, 6, <http://www.abanet.org/antitrust/source/sept04/Sep04Empagran.pdf> (providing remarks by Jonathan S. Franklin, commenting that the business community “values certainty in legal applications, perhaps sometimes even over correct results.”) [hereinafter Franklin, *Perspectives*].

159. *Perspectives on Empagran*, ANTITRUST SOURCE, Sept. 2004, at 1, 2–3, <http://www.abanet.org/antitrust/source/sept04/Sep04Empagran.pdf> (providing remarks by Edward Swaine) [hereinafter Swaine, *Perspectives*]. Swaine argues as follows:

[The decision] failed to resolve any but the most extreme and easiest instances of foreign claims—that is, those claims that are completely estranged from U.S. effects, on which it is easiest to reach a view—and licensed a standardless inquiry into the relationship between antitrust markets. This will likely bedevil the lower courts.

Id.

160. Mehra, *More is Less*, *supra* note 109, at 60.

But if the Court's goal was to provide limits to U.S. extraterritorial antitrust jurisdiction,¹⁶¹ it did not do so clearly. The issue, as the Court framed it, encompassed only the most obvious, and perhaps only hypothetical, situation.¹⁶² Still undecided was the question of whether foreign plaintiffs could bring an action where the foreign injury was *not* independent of U.S. harm—that is, in the case when “the anticompetitive conduct’s domestic effects were linked to that foreign harm.”¹⁶³ Courts in various circuits already have answered this question differently since *Empagran*.¹⁶⁴

In the months immediately following the publication of the decision, practitioners commenting on it accurately predicted that future actions would be framed to take advantage of the door that the Court had left open.¹⁶⁵ They speculated that foreign plaintiffs would claim their injuries were dependent on the success of conspiracies affecting U.S. markets,¹⁶⁶

161. 1 NANDA & PANSIUS, *supra* note 5.

162. Duke Law, *supra* note 23. The article contends:

Arguably, for many products national markets can no longer be separated; instead, there is one world market, and a price fixing conspiracy needs to be worldwide in order to succeed. Where markets are separable, it makes sense that each country should restrain itself to regulating its own market. Yet where such separation is impossible, the effects doctrine breaks down, and new, alternative instruments of determining and restricting jurisdiction will be necessary. The Court did not address this problem, yet in assuming separable markets it may have decided a case that was only hypothetical.

Id. Edward D. Cavanagh speculates that Justice Breyer, who wrote *Empagran*, articulated the issue extremely narrowly to get the maximum number of justices to sign on to the opinion, and to achieve a unanimous result. Cavanagh, SYMPOSIUM, *supra* note 151, at 25. Even then, Justice Scalia, joined by Justice Thomas, apparently felt compelled to pen a short opinion stating they concurred because “the language of the statute is readily susceptible of the interpretation the Court provides . . .” *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 176 (2004) (Scalia, J., concurring).

163. Limiting the issue to the case in which the adverse foreign effect is independent of any domestic effect. *Empagran I*, 542 U.S. at 175.

164. *See infra* Part V.

165. *See Sims*, *supra* note 115 (predicting “[t]hat the plaintiffs’ bar will use it [the fact that the Court ‘left the door open a small crack’] to bring foreign antitrust claims seems virtually certain.”).

166. *See Clifford Chance LLP, Recent Developments in Antitrust Litigation in the UK and the U.S.*, July 2004 (“It is certain that there will be no dearth of plaintiffs willing and able to test this reach [of the FTAIA exception] by claiming that their injury in worldwide markets was dependent on the success of a conspiracy in US markets.”) (on file with the *Brooklyn Journal of International Law*).

leading lower courts to grapple with complex evidence of worldwide economic effects.¹⁶⁷

Indeed, a review of practitioners' commentary immediately after the opinion was published showed an initial sense of relief tempered by a sense that much was still left to be determined. Among the most optimistic were comments such as these: "good news for companies facing treble damages actions"¹⁶⁸ and "defendants . . . are free from the threat that an entire worldwide class of potential plaintiffs can seek treble damages" in U.S. courts.¹⁶⁹ Others observed that the questions left open were "sure to consume significant time and resources in the years ahead"¹⁷⁰ and speculated on the likelihood of a growth in litigation.¹⁷¹ But within

167. See *U.S. Supreme Court Limits Application of U.S. Antitrust Laws to Foreign Applications*, June 2004, Kelly Drye, http://www.kelleydrye.com/resource_center (type "Empagran" in Keyword search box). The writers predicted:

In cases where the market is international, American plaintiffs' lawyers will now plead in their complaints that the injury to foreign plaintiffs is linked to the domestic effects of the alleged violation. They will then work with their hired economists to develop evidence and arguments to support that allegation. The defense lawyers and their experts will seek to show the opposite. The lower courts will have to grapple with the meaning of this part of the Supreme Court's opinion, in particular what evidence will be sufficient to trigger application of the FTAIA.

Id.

168. Arnold & Porter, *supra* note 157 ("This is good news for companies facing civil antitrust treble damages actions. However, the decision is not definitive. It leaves key questions unanswered about the viability of foreign purchaser claims in an allegedly 'global' market where plaintiffs can claim some interrelationship, as a matter of economics, between the foreign and domestic effects of the underlying conduct.").

169. *Supreme Court Decides That Most Foreign Antitrust Plaintiffs Cannot Sue for Treble Damages Under the Sherman Act*, Proskauer Rose LLP, June 2004, at 1, 2, http://www.proskauer.com/site_search_in (type "Sherman Act" in Keyword search box) ("The immediate effect of the decision in *Empagran* is that most defendants alleged to have engaged in global anticompetitive conduct—both United States firms and foreign firms—are free of the threat that an entire worldwide class of potential plaintiffs can seek treble damages and attorneys' fees in the United States courts. In most cases, foreign purchasers from such defendants will be unable to recover their damages . . . even where there is proof that the defendants violated the Sherman Act and perhaps the competition laws of other countries.").

170. *New Supreme Court Decision Resolves Hotly-Disputed Issues of Antitrust Liability Flowing From International Cartel Activity*, Hughes Hubbard & Reed LLP, June 2004, at 1, <http://www.hugheshubbard.com/news.asp> (follow "Publications" hyperlink).

171. *F. Hoffman-La Roche Ltd. v. Empagran: Supreme Court Restricts Extraterritorial Reach of U.S. Antitrust Laws*, Wilmer Cutler Pickering Hale & Dorr, June 2004, at 3, <http://wilmerhale.com/publications> (type "Empagran" in Keyword search box). The firm's writers predicted:

only a few months, practitioners were beginning to anticipate what facts a plaintiff would have to plead to get past a motion to dismiss,¹⁷² and what further semantic parsing would be necessary.¹⁷³

What was not in question was that plaintiffs would exploit the ambiguities.¹⁷⁴ As expected, plaintiffs in actions already before the courts quickly recast their claims to ensure that their injuries were seen as *dependent* on U.S. effects.¹⁷⁵

A. Remand—Proximate Cause

On remand, the D.C. Circuit took up the question still left open by the Supreme Court, namely, what was to be the standard in a case where the plaintiff's injury was *not* independent? Would it be "but-for" causation, or something more?¹⁷⁶ Plaintiffs framed their argument as follows:

Empagran should put an end to most U.S. antitrust suits for injuries in foreign commerce premised on allegations that the unlawful conduct also affected U.S. commerce. We are, in particular, likely to have fewer cases in U.S. courts brought by consumers injured overseas as a result of global antitrust conspiracies We are, however, likely to see additional litigation about whether some plaintiffs that purchased overseas can sue in the United States if they can allege that their injuries were linked to effects on U.S. markets; and, if so, under what circumstances, [sic] the courts might allow such claims.

172. See Sims, *supra* note 115 ("If a boilerplate statement that the alleged foreign injury is linked to the alleged domestic injury is enough, then *Empagran*, unfortunately, may not have as great an effect in practice as it should One hopes that the Court of Appeals on remand in the *Empagran* case, and other courts in other cases, will require a significant factual showing.").

173. See also Jane Whittaker, *The Empagran Case: Closing the U.S. Courtroom Door?*, Practical Law Company, Aug. 2004, <http://competition.practicallaw.com/2-102-8926> ("The apparent victory for the cartelists in *Empagran* may not be as conclusive as they would wish. The case may have moved on from the meaning of 'a claim' to the interpretation of what amounts to independent foreign injury or indeed quantifying the word 'entirely' which seems to qualify the level of independence Certainly *Empagran* is not the end of the story."). See also Tony Woodgate & Jane Jellis, *Private EC Antitrust Enforcement*, GLOBAL COMPETITION REV., <http://www.globalcompetitionreview.com/ear/private.cfm> (last visited Mar. 5, 2006) ("Commentators on both sides of the Atlantic await, [sic] how this 'facilitation' test will be interpreted.").

174. Rubin, *supra* note 131 (quoting Bill Rowley, head of the antitrust group at McMillan Binch, as stating, "There is no more inventive a bunch of people in the world than U.S. plaintiff counsel and they will quickly be able to make very convincing arguments.").

175. See, e.g., *BHP New Zealand Ltd. v. UCAR International, Inc.*, 106 F. App'x. 138 (3d Cir. 2004) (not precedential).

176. Thomas C. Goldstein, who argued the plaintiffs' case, laid out the issue at the ABA Section of Antitrust Law Brown Bag Luncheon discussion: "[W]hat degree of relationship is required Is it 'but for' causation? Is it something else? How intrinsic does

Because the [defendants'] product (vitamins) was fungible and globally marketed, they were able to maintain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well. Otherwise, overseas purchasers would have purchased bulk vitamins at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States, thereby preventing the [defendants] from selling abroad at inflated prices. Thus, the super-competitive pricing in the United States "gives rise to" the foreign super-competitive prices from which the [plaintiffs] claim injury.¹⁷⁷

In what has come to be known as *Empagran II*,¹⁷⁸ the D.C. Circuit, relying on the hints provided by the Supreme Court¹⁷⁹ and adopting the argument of the government's amicus brief in the case,¹⁸⁰ rejected the idea that pleading a single global market¹⁸¹ would be enough to satisfy

the injury to the United States have to be for it to be said that it gave rise to the injury overseas?" Goldstein, *Perspectives, supra* note 33, at 4.

177. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd. (Empagran II)*, 417 F.3d 1267, 1270 (D.C. Cir. 2005).

178. *Id.*

179. Edward T. Cavanagh, *The FTAIA and Empagran: What Next?*, 58 SMU L. REV. 1419 (2005) [hereinafter Cavanagh, *What Next?*]. Cavanagh cites the prediction of former Assistant Attorney General John Shenefield that "the framework for any decision in *Empagran II* had been embedded like the da Vinci Code in *Empagran I*. *Id.* at 1433. Cavanagh maintained:

[It would be] implausible that a unanimous Court, after undertaking a detailed analysis of the policies underlying the FTAIA and after concluding that jurisdiction was lacking, would have remanded the matter to the circuit court with the expectation of a different result. Rather, it is more likely that the Supreme Court was simply giving the D.C. Circuit a roadmap to correct its error and save face.

Id. at 1437.

180. Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 426 n.51 (2005). Delrahim, former Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice, argued the Division was concerned that the plaintiffs' position presents a "slippery slope" and "no workable method" for drawing lines between cases that should be heard in district courts, and those that should not. *Id.* at 427.

181. Transcript of Oral Argument at *38, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724). Stephen M. Shapiro stated:

[T]he statutes here hinge jurisdiction on commerce. Lawyers can always draw a global conspiracy. Economists can always say there's a global market, and these issues would be enormous quagmires for the district courts if that's what our courts' jurisdiction turned on. Congress did not intend that. It intended a clear jurisdictional benchmark by focusing on our commerce . . . and the plain-

the FTAIA requirement that the U.S. effects of anti-competitive conduct would be enough to give rise to defendants' claims of foreign injury. "Gives rise to," held the court, "indicates a direct causal relationship, that is, proximate causation."¹⁸²

It appears the D.C. Circuit got the Supreme Court's message on comity: it held that "[t]o read the FTAIA broadly to permit a more flexible, less direct standard than proximate cause would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders."¹⁸³

B. Other Cases

Although *Empagran II* brought some clarity to the issue, the D.C. Circuit is not, after all, the Supreme Court. Courts in other circuits have ruled differently on the issue that the Supreme Court left open.¹⁸⁴ Although there seems, since *Empagran II*, to be a growing consensus that proximate causation, and not but-for causation, should be the standard, the limit of the Supreme Court's holding has left room for differing interpretations, and observers note there are still questions to be decided.

The first case in this line that was decided after *Empagran I*, *Sniado v. Bank Austria AG*,¹⁸⁵ was quickly dismissed by the Second Circuit. The case involved allegations that European banks fixed currency exchange fees, and the plaintiff, an American citizen, claimed he was injured when he exchanged currencies while he was traveling in Europe.¹⁸⁶ On remand from the Supreme Court, plaintiffs took advantage of the opening left by the *Empagran I* decision, arguing that his injury was *not* independent of the effect on U.S. commerce.¹⁸⁷ But the court found that the plaintiff had alleged merely a "worldwide conspiracy" (not claiming even a "but-for" predicate for his injury), which it found insufficient in light of

tiff before the court has to be alleging treble damages based on that particular injury.

Id.

182. *Empagran II*, 417 F.3d at 1271. *But see* Hanno Kaiser, *The End of the Empagran Saga. The D.C. Circuit Rules for the Defendants in Empagran II*, ANTITRUST REV., Aug. 2, 2005, <http://www.antitrustreview.com/archives/175> (arguing that proximate causation is not implied in the claim that "X gave rise to Y.>").

183. *Empagran II*, 417 F.3d at 1271.

184. Shenefield, SYMPOSIUM, *supra* note 34, at 29.

185. *Sniado v. Bank Austria AG*, 378 F.3d 210 (2004).

186. *Sniado v. Bank Austria AG*, 352 F.3d 73, 75–76 (2003).

187. *Sniado*, 378 F.3d at 212.

Empagran I; it vacated its prior order and affirmed the lower court's dismissal of the case.¹⁸⁸

In the same month, however, a district court in the Second Circuit refused to dismiss a claim involving distributors of chemical products in India.¹⁸⁹ The court in *MM Global Services* had previously found (before *Empagran I* was decided) that alleged resale price-fixing in India had resulted in "spillover effects" that inflated prices for the same chemicals in the United States.¹⁹⁰ Defendants now moved to dismiss on the grounds that *Empagran I* required a foreign plaintiff to show that the effects on domestic commerce gave rise to their foreign injuries, while the plaintiffs argued that their foreign injuries had an effect on domestic commerce.¹⁹¹ But the court held it had jurisdiction because the domestic harm and the foreign harm were "linked"; it accepted plaintiffs' view that *Empagran I* was limited to whether the court had jurisdiction over foreign effects that are "entirely independent" of domestic effects.¹⁹² Here, because the effects flowed back and forth, they were held to be not entirely independent.¹⁹³

Scholars and practitioners found this holding to be "difficult to harmonise with the result in *Sniado*"¹⁹⁴ and "at odds with the Supreme Court's interpretation" and policy goals.¹⁹⁵ But if the Supreme Court had adopted a clearer standard, the plaintiffs here would not have been able to exploit

188. *Id.* at 213.

189. *MM Global Services v. Dow Chemical Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004).

190. Mark P. Edwards & Jonathan D. Fischbach, *Still Searching for the Meaning of the FTAIA: Federal District Court Sustains Sherman Act Claim by Foreign Distributor Suffering Injury in India*, MORGAN LEWIS ON COMPETITION, Nov. 2004, at 3, <http://www.morganlewis.com/index.cfm> (follow "Publications," "Search," and type "Empagran" into "Keyword" field).

191. *MM Global Services*, 329 F. Supp. 2d at 342. See also Cavanagh, *What Next?*, *supra* note 179, at 1438.

192. Cavanagh, *What Next?*, *supra* note 179, at 1438.

193. *MM Global Services*, 329 F. Supp. 2d at 342–43.

194. Donald C. Klawiter & J. Clayton Everett, *Global Cartel Enforcement in 2005: Empagran, Executives and Equilibrium*, GLOBAL COMPETITION REV. (2005) (on file with the *Brooklyn Journal of International Law*).

195. Edwards & Fischbach, *supra* note 190. They also claim that under the court's theory, "Empagran has preserved subject matter jurisdiction for cases brought by foreign firms operating overseas where an 'effect' on United States commerce, even an indirect and attenuated one, results from foreign anticompetitive conduct." They argue this is at odds with another section of the FTAIA and also runs contrary to a decision in the Ninth Circuit, *United States v. LSL Biotechnologies, Inc.*, 379 F.3d 672 (9th Cir. 2004), where an agreement between a Mexican and Israeli company concerning the sale of seeds in the United States was considered to be too remote to be "direct."

the ambiguity it left open.¹⁹⁶ As one observer noted at the time, "If that type of allegation is sufficient to survive a motion to dismiss . . . the exception that the Supreme Court declined to address [whether U.S. courts may exercise jurisdiction in cases where foreign injuries are 'not independent' of effects on U.S. commerce] may end up swallowing the rule."¹⁹⁷

If the Supreme Court intended a proximate cause standard, a decision that got it wrong was *In re Monosodium Glutamate Antitrust Litigation*,¹⁹⁸ where the plaintiffs' argument was essentially identical to the "alternative" argument made in *Empagran II* that the foreign injury was not independent.¹⁹⁹ This district court found it did have jurisdiction, just a month before the court in *Empagran II* found the opposite.²⁰⁰

The court's holding differed from *Empagran II* and was even in conflict with *Empagran I*.²⁰¹ The allegations amounted only to but-for causation and did not meet the proximate cause standard under *Empagran II*.²⁰² But the court also weighed comity and deterrence differently from the Supreme Court, finding that, in cases of dependent foreign harm, comity is not to be considered and deterrence is of greatest importance.²⁰³ It is difficult to square that view with *Empagran I*, which held that courts should avoid interfering with other nations' sovereign authority.²⁰⁴

Since *Empagran II*, at least three cases have been dismissed at the district court level, two on the theory that but-for causation is not sufficient (*eMag Solutions v. Toda Kogyo Corp.*,²⁰⁵ in the Northern District of California, and *Latino Quimica-Amtex v. Akzo Nobel Chemicals*,²⁰⁶ in the Southern District of New York) and one for lack of direct effect (*CSR Limited v. Cigna Corp.*,²⁰⁷ in the District of New Jersey). The *Empagran*

196. Edwards & Fischbach, *supra* note 190.

197. Klawiter & Everett, *supra* note 194.

198. *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790 (D. Minn. 2005).

199. Cavanagh, *What Next?*, *supra* note 179, at 1438.

200. *In re Monosodium Glutamate*, 2005 WL 1080790.

201. Cavanagh, *What Next?*, *supra* note 179, at 1439.

202. *Id.*

203. Hanno Kaiser, *After Empagran: In re Monosodium Glutamate Antitrust Litigation*, ANTITRUST REV., <http://www.antitrustreview.com/archives/45> (May 27, 2005).

204. Cavanagh, *What Next?*, *supra* note 179, at 1439.

205. *eMag Solutions v. Toda Kogyo Corp.*, 2005 WL 1712084, at *6 (N.D. Cal. 2005) (slip copy).

206. *Latino Quimica-Amtex v. Akzo Nobel Chemicals*, 2005 WL 2207017, at *9 (S.D.N.Y. 2005) (slip copy).

207. *CSR Ltd. v. Cigna Corp.*, 2005 WL 3479908, at *20 (D.N.J. 2005).

saga itself finally ended in January 2006 when the Supreme Court denied a writ for certiorari from the *Empagran* plaintiffs.²⁰⁸

Timeline of Cases Applying FTAIA

<i>DATE</i>	<i>CASE</i>	<i>COURT</i>	<i>DISPOSITION</i>
June 2004	Empagran I	Supreme Court	Remanded
Aug. 2004	Sniado	2d Circuit	Dismissed
Aug. 2004	LSL Biotechnologies	9th Circuit	Dismissed
Aug. 2004	MM Global Services	District of Connecticut	Jurisdiction found
Aug. 2004	UCAR	3d Circuit	Remanded
May 2005	Monosodium Glutamate	District of Minnesota	Jurisdiction found
June 2005	Empagran II	D.C. Circuit	Dismissed
July 2005	eMag	Northern District of California	Dismissed
Sept. 2005	Latino Quimica-Amtex	Southern District of New York	Dismissed
Dec. 2005	CSR Ltd.	District of New Jersey	Dismissed

VI. CRITIQUE

Many commentators believe that the current confusion is rooted in the Supreme Court's approach to the case. By ignoring the allegations in the *Empagran* complaint, and deciding merely a hypothetical case,²⁰⁹ the Court left the real issues to the lower courts.²¹⁰ Practitioners argue that the decision and its progeny will cause "uncertainty [that] could be per-

208. *Empagran S.A. v. F. Hoffman-La Roche Ltd.*, 126 S. Ct. 1043 (Mem.) (2006).

209. Duke Law, *supra* note 23.

210. See Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels*, 72 U. CHI. L. REV. 265, 266 (2005); Davis, *supra* note 132, at 58, 63–64. The *Empagran I* Court has even been criticized on its inability to address such private law issues. See E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1573–74 (2004) ("The securities and antitrust cases that are taken and decided [in the years since Justice Powell's retirement] are less important and the decisions seem less coherent than in the earlier period [between the time Justices Powell and Rehnquist joined the court in 1972 until Powell's retirement]. This is a Court whose members had little in the way of experience with private law before arriving at the high court.").

petuated for many years, thereby compounding the chilling effect that U.S. antitrust laws may have on foreign business transactions occurring wholly outside the U.S.”²¹¹ The stability of private markets and public confidence in those markets hinge on businesses being able to depend on clear standards.²¹² Because *Empagran I* did not provide guidelines, it is argued, the uncertainty that existed before the decision remains, and cases will continue to have high settlement value because “the question of whether foreign injury is ‘inextricably intertwined’ with domestic injury will require a detailed factual inquiry.”²¹³

While the Second Circuit made it clear in *Sniado* that alleging a worldwide conspiracy is not enough to survive a motion to dismiss for lack of subject matter jurisdiction,²¹⁴ and the D.C. Circuit now requires proximate causation, scholars, practitioners, and businesspeople are still troubled. Their concern is reflected in comments submitted to the U.S. Antitrust Modernization Commission by the International Chamber of Commerce, which noted that although the D.C. Circuit Court has rejected the but-for approach, “there can be no assurance that such an approach would not be embraced by another appellate court or by a district court.”²¹⁵

The Supreme Court’s decision has also been criticized for its failure to properly distinguish between “effect” and “conduct.”²¹⁶ Professor Eleanor Fox argues that “harm is never caused proximately from the U.S. effect,” but rather, by the *conduct* that is barred by the Sherman Act.²¹⁷ She says that the Supreme Court’s approach will lead to underdeterrence.²¹⁸ The focus on effect also ignores the element of intent.²¹⁹

211. International Chamber of Commerce, *Comments on Selected Issues for Study by the U.S. Antitrust Modernization Commission*, § 3.5 (Sept. 25, 2005), available at http://www.amc.gov/public_studies.htm (follow “International” hyperlink).

212. Sullivan & Thompson, *supra* note 210.

213. Edward D. Cavanagh, *Empagran: A Post Script*, ANTITRUST PRACTITIONER, Dec. 2004, at 6 [hereinafter Cavanagh, *Post Script*].

214. Klawiter & Everett, *supra* note 194. See also John H. Shenefield, Jonathan M. Rich & J. Clayton Everett, *Second Circuit Construes FTAIA in Dismissing Claims Against Bank Austria*, MORGAN LEWIS ON COMPETITION, Oct. 2004, at 1, 2, <http://www.morganlewis.com/index.cfm> (follow “Publications,” “Search,” and type “Empagran” into “Keyword” field) (“The Second Circuit’s decision in *Sniado* provides little guidance about what degree of ‘interdependence,’ if any, is sufficient to establish a predicate for subject matter jurisdiction. It does make clear, however, that alleging a ‘worldwide conspiracy,’ without more, is insufficient.”).

215. International Chamber of Commerce, *supra* note 211, § 3.3.

216. Fox, Testimony, *supra* note 66, § IV.

217. *Id.* § IV.

218. *Id.* § IV.

219. 1 NANDA & PANSIUS, *supra* note 5.

In the meantime, even legislative action has overtaken *Empagran*, arguably shifting the balance of the original argument. Only weeks after the *Empagran* Supreme Court decision, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act,²²⁰ which reduces treble damages in civil litigation to actual damages for antitrust conspirators who cooperate with the government.²²¹ The new law also increases criminal fines and maximum jail terms. A former Deputy Assistant Attorney General in the Department of Justice's Antitrust Division welcomed the new law as evidence that Congress "understands how the prospect of massive civil liability can deter violators from seeking amnesty,"²²² and in that light would seem to be aligned with the *Empagran* Court's decision not to further extend liability. But the Court did not determine whether that liability helped or hurt deterrence. It could be argued that an *Empagran* decision that allowed foreign claims would increase deterrence under the new law.²²³

It is also strange that *Empagran I* was inconsistent with other decisions this term that narrowed extraterritoriality,²²⁴ and especially with its decision in *Intel v. Advanced Micro Devices*,²²⁵ where the Court not only

220. Antitrust Criminal Penalty Enhancement and Reform Act, Pub. L. No. 108-237, §§ 201–21, 118 Stat. 661, 665–69 (2004).

221. Daniel J. Bennett, Note, *Killing One Bird With Two Stones: The Effect of Empagran and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 on Detecting and Detering International Cartels*, 93 GEO. L.J. 1421, 1451–52 (2005).

222. Delrahim, *supra* note 180, at 424.

223. Bennett, *supra* note 221, at 1453–54 ("An increase in potential civil liability for those who violate the Sherman Act might [if *Empagran* had been decided to extend jurisdiction to foreign plaintiffs] thus increase the incentives to participate in the amnesty program, and thus increase deterrence of anticompetitive conduct.").

224. Franklin, *Perspectives*, *supra* note 158, at 7 (citing four other cases involving extraterritoriality, and referring to *Empagran* as an "outlier," in the sense that in all the others, the court held that U.S. jurisdiction could extend more broadly). *See also* Swaine, *Perspectives*, *supra* note 159 (saying the decision "endorsed—without explanation—an approach to international comity that was facially inconsistent with the majority opinion in *Hartford Fire* . . . , and even with this Term's decision in *Intel* . . . " and will likely "defeat the objectives the Court identified: namely, reassuring foreign nations that their sovereign interests (in *reducing* antitrust enforcement, at least) will be respected, and clarifying for wrongdoers their potential liability (by *reducing* that potential liability, as it happens) and thus facilitating the Justice Department's amnesty program.") (emphasis in original).

225. *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004). *See* Franklin, *Perspectives*, *supra* note 158, at 7 (arguing that *Intel* is inconsistent with *Empagran*, and pointing out that while Justice Breyer wrote the majority opinion in *Empagran*, he dissented in *Intel*).

broadened the reach of U.S. law, but did so in that case over the objection of European Commission officials.²²⁶

Did the *Empagran* Court give too much deference to the interests of foreign nations? One measure of that deference is the decision's references to foreign nations' amici briefs.²²⁷ Said one practitioner,

That the Court ultimately used comity as the principal basis for a qualified victory for defendants is evidence of the influence of the amici, including the governments of Germany, Canada, the United Kingdom, Japan, and others, along with international businesses and organizations. They joined in a chorus of outrage over the American system of treble damages, class actions, joint and several liability rules, and the like—all of which, the amici pointed out, threatened to make the United States the forum of choice for plaintiffs around the world, and thereby to upset different legal balances struck in foreign jurisdictions.²²⁸

Fox goes further: “[T]he interests expressed in nations’ amici briefs were either simply nationalistic (Japan wanted to protect the coffers of the Japanese conspirators) or speculative.”²²⁹

And is this issue actually about subject matter jurisdiction at all? Strangely enough, in a case that is generally discussed as being about subject matter jurisdiction, Justice Breyer used the term only once, and that was in quoting a treatise.²³⁰ In avoiding use of the term, he may have been signaling that the Court does not believe that that FTAIA is about subject matter jurisdiction, and that a plaintiff who pleads a wholly independent foreign injury does not state a claim under the Sherman Act as a substantive matter.²³¹ The practical significance of the distinction con-

226. Greve & Epstein, *supra* note 93 (arguing that the Supreme Court's decision in *Intel* only a week later suggests that *Empagran*'s promise of comity may prove empty—that decision broadly construed a federal comity provision regarding discovery requests, over the objection of the European Commission).

227. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 167–68 (2004).

228. Davis, *supra* note 132, at 59–60.

229. Fox, *Remedies*, *supra* note 86, at 581 (referring to Japan's brief, which noted that “a worldwide foreign plaintiff class could seek damages of scores of billions of dollars from just two or three Japanese defendants . . . [putting] Japanese firms at a serious competition disadvantage with other firms in that industry.” Brief of the Government of Japan as Amicus Curiae in Support of Petitioners at 10, *Empagran I*, 542 U.S. 155 (No. 03-724)).

230. *Empagran I*, 542 U.S. at 166.

231. E-mail from Elinor Hoffman, Adjunct Associate Professor of Law, Brooklyn Law School (Mar. 22, 2006, 5:59 P.M. EST) (on file with author); 1 SPENCER WEBER WALLER, ANTITRUST & AMERICAN BUSINESS ABROAD § 9:7B (3d ed. 2005) [hereinafter WALLER, ANTITRUST ABROAD] (“[T]he Court did not specifically discuss the lingering question of whether proof of the requisite effects on the U.S. market were jurisdictional

cerns the burden of proof and the level of review: if it is jurisdictional, the action is a dismissal—the burden is on the plaintiff and an appeals court should defer to the district court; if it is an element of the claim, then the action is a motion for summary judgment—the burden is on defendant, and the appeals court may review de novo.²³²

What happens next? Some have said that because *Empagran I* was decided so narrowly, and neglected to address the more likely factual situations (indeed, perhaps all fact patterns, as it remains to be seen whether the hypothetical situation it did decide will ever occur), lower courts will disagree on how to apply its rule and another circuit split is inevitable.²³³ Writing in December 2005, Professor Spencer Weber Waller predicted, “Years of additional litigation or statutory change will be necessary to definitively resolve this critical question [whether foreign antitrust plaintiffs suffering injury abroad can bring their claims to U.S. courts]. The split in the circuits and the importance of the issue strongly suggests that the Supreme Court will accept a petition for certiorari in the near future in order to resolve this point.”²³⁴

VII. ALTERNATIVES TO THE *EMPAGRAN* APPROACH

After *Empagran*, there is still a vigorous debate among antitrust scholars about how domestic laws should accommodate global trade. On one side are those who believe that competition authorities should set their own standards and continue to work together informally; on the other are those who believe international competition authorities should adopt one standard for the world.²³⁵

Professor Harry First is one of the proponents of expanding the extraterritoriality of national law along with adoption of bilateral enforcement cooperation agreements; he believes that new structures are not necessary because “a system of international competition law is already evolving, even without the formal adoption of legal principles and without the establishment of any new enforcement mechanism.”²³⁶ This system, he

or substantive in nature, but the thrust of the Court’s opinion suggests that the Justices view the issue as a substantive element of the offense.”)

232. 1 NANDA & PANSIUS, *supra* note 5 (arguing that this issue has been “largely ignored” by the courts and that, although the FTAIA has been viewed as jurisdictional, “in practice most Circuit Courts have not been unwilling to assert their review powers”).

233. Cavanagh, *Post Script*, *supra* note 213, at 7.

234. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 13:23.

235. See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 345–47 (2002) (describing the range of views on the subject).

236. First, *Vitamins*, *supra* note 12, at 712. See also Shenefield, *Coherence*, *supra* note 38, at 430 (noting that Sir Leon Brittan’s conclusion in 1992 was that “the only remedy

says, based on consensus and virtually unilateral enforcement, has created a de facto international competition law.²³⁷

But Professor Diane Wood has pointed out that the growing consensus that “national boundaries are of little if any relevance to the anticompetitive behavior of multinational enterprises” that led to the increasing use of independent extraterritorial jurisdiction around the world has ironically produced the very result it was intended to avoid—interdependence.²³⁸ There may be no way to make a distinction between foreign and domestic commerce “in a world where U.S. tax returns are prepared in India.”²³⁹ If the *Empagran* holding requires a “double effects test,” that is, a sufficiently adverse effect within the United States, and a U.S. effect that affects the foreign effect, then worldwide interdependence will ultimately make the test meaningless: if it is strictly applied, no foreign plaintiffs will be able to meet the test, and if it is loosely applied it could encompass virtually any case.²⁴⁰ This supports Professor Wood’s view that the wider application of extraterritorial jurisdiction leads to a greater need for international agreements.²⁴¹

available today is antitrust enforcement by the country in which the private conduct is taking place; other antitrust enforcement would be viewed as excessively extraterritorial.”).

237. First, *Vitamins*, *supra* note 12, at 727. But others have noted that the practical effect of cooperation agreements has been limited. Shenefield, *Coherence*, *supra* note 38, at 394. Eleanor Fox points out a reason: cooperation will work “only if the two jurisdictions see eye-to-eye on the anticompetitiveness of the restraint and the importance of the enforcement given other priorities.” Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT’L L. 911, 921 (2003) [hereinafter Fox, *Doha Dome*]. Edward Hand observed in a 2003 paper that “since 1991 we have made only one formal positive comity referral to the EU.” Edward T. Hand, *Department of Justice Experience in Reconciling Antitrust and Trade*, 47 N.Y.L. SCH. L. REV. 131, 135 (2003).

238. Wood, *supra* note 40, at 301–03 (pointing out the irony in that agreements on extraterritorial jurisdiction have given birth to new problems, which are pushing us back toward the model of international agreements on competition).

239. 1 NANDA & PANSIUS, *supra* note 5.

240. *Id.* § 8:13.

241. Wood, *supra* note 40, at 301. See also Shenefield, *Coherence*, *supra* note 38, at 388–89 (2004) for an overview of early attempts by the United States and international bodies to foster the development of antitrust law abroad. Shenefield states:

[A] goal of perfect convergence—coming to the same substantive point from different directions—is an illusion. It can never happen; it will never happen; and even if it could happen, it would in all probability be a bad thing. There are too many variations of country and culture to permit a uniform formulation of the law of competition to be successful everywhere and for all times.

Id. The opposite approach, however—each nation going its own way—results in “costly international enforcement chaos.” *Id.* at 389.

The international model, or “one-standard” view, is advocated by, among others, Professor Fox.²⁴² Antitrust authorities around the world have already taken steps in that direction: by creating a horizontal network of antitrust agencies (the International Competition Network, or ICN²⁴³) and by forming a World Trade Organization Working Group on the Interaction Between Trade and Competition Policy, although little action on that front has been taken to date.²⁴⁴

Perhaps comity no longer makes sense in a globalized economy.²⁴⁵ Fox argues that the comity doctrine works only on the “nation-to-nation level,” and does not take into consideration global concerns as proposed international antitrust models.²⁴⁶ Professor Waller maintains, in an article titled “The Twilight of Comity,” that more practical litigation matters (such as service of process, venue, personal jurisdiction, discovery, appellate review, and enforcement of judgments) restrain plaintiffs from suing, so that extraterritoriality and comity may no longer be of such great importance.²⁴⁷ This section considers other methods to achieve the Supreme Court’s goal in *Empagran*: to limit interference with other nations’ antitrust policies without harming global antitrust enforcement.

A. Reforming the FTAIA

It would be easy to conclude that the easiest way out of the muddle would be for Congress to rewrite the FTAIA. Given how badly written the statute is, it should be a good candidate for reform. In fact, the Antitrust Modernization Commission is studying this issue (among others)

242. See generally Fox, *Doha Dome*, *supra* note 237, at 911–12.

243. See International Competition Network Home Page, <http://www.internationalcompetitionnetwork.org> (last visited Mar. 5, 2006); see also Fox, Testimony, *supra* note 66, § I.

244. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 18:11; Fox, *Doha Dome*, *supra* note 237, at 911–12; see generally Friedl Weiss, *From World Trade Law to World Competition Law*, 23 FORDHAM INT’L L.J. 250 (2000). For a thorough analysis of the argument against putting antitrust enforcement within the WTO, see Shenefield, *Coherence*, *supra* note 38, at 430–32. For the opposing view, see Fox, *Doha Dome*, *supra* note 237, at 918 (“In trade disputes, the WTO provides judicialized panels whose resolutions are increasingly perceived as fair and legitimate. In competition law disputes, however, there is nowhere to go. The regulating nation is arbiter for the world.”).

245. Sam Foster Halabi, Recent Development, *The “Comity” of Empagran: The Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction Over International Cartels*, 46 HARV. INT’L L.J. 279, 293 (2005), citing Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., 183, 183 (1997).

246. Fox, Testimony, *supra* note 66.

247. Waller, *Twilight*, *supra* note 65, at 572, 578.

and will make a recommendation to the President and Congress.²⁴⁸ But experts differ on whether Congress should take on the task.

Many organizations representing business interests prefer a legislative approach, which they feel would provide the most certainty with regard to business transactions occurring entirely abroad.²⁴⁹ The International Commerce Commission is one such organization; it takes the view that Congress "is in the best position" to address the issue.²⁵⁰ Another is the Chamber of Commerce of the United States, which suggests that Congress codify the D.C. Circuit's proximate cause standard,²⁵¹ the Business Roundtable agrees, suggesting that if other courts diverge from the D.C. Circuit's approach, Congress should codify it.²⁵² The International Bar Association takes the same position, arguing that legislative action would provide legal certainty, that Congress is in the best position to consider policy implications of the extraterritorial effect of U.S. law, and that legislation would be faster than common law development.²⁵³

On the other hand, the American Bar Association believes the statute is best left as it is, and that the courts are "best suited" to deal with the issues left by *Empagran I*.²⁵⁴ Among its reasons is that causation standards are best developed in the courts; that Congress has generally left the setting of such standards to judicial interpretation, and that development of a post-*Empagran* jurisprudence would best be handled through the real-world circumstances of actual cases.²⁵⁵ This view has support in the tes-

248. Shenefield, SYMPOSIUM, *supra* note 34.

249. International Chamber of Commerce, *supra* note 211.

250. *Id.* § 3.6.

251. Chamber of Commerce of the United States of America, *Comments on Commission Issues Accepted for Study*, § 4 (Nov. 8, 2005), available at http://www.amc.gov/public_studies.htm (follow "International" hyperlink).

252. *Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission*, Antitrust Modernization Commission, § 6(B) (Nov. 4, 2005), available at http://www.amc.gov/public_studies.htm (follow "International" hyperlink).

253. International Bar Association, *Submission to the US Antitrust Modernization Committee*, at 13–15, 16 (Jan. 27, 2006), available at http://www.amc.gov/public_studies.htm (follow "International" hyperlink).

254. American Bar Association, Antitrust Section, *Submission to the Antitrust Modernization Commission Concerning Whether Congress Should Amend the FTAIA to Clarify the Circumstances in Which the Sherman Act Applies to Extraterritorial Anticompetitive Conduct*, § VII (Feb. 8, 2006), available at http://www.amc.gov/public_studies.htm (follow "International" hyperlink).

255. *Id.* § VI (B) (2),(3) (arguing that, if the Antitrust Modernization Commission does recommend that Congress revise the FTAIA, the language "should reflect clear, bright-line standards that simplify the analysis and provide the courts and public with practical guidance." *Id.* at § VII.).

timony of James Atwood, who argues that “legislative initiatives do not always solve the problems they set out to address,” a view that perhaps has no greater support than in the experience of the FTAIA itself;²⁵⁶ and Randolph Tritell, Assistant Director for International Antitrust at the Federal Trade Commission, who testified that, in light of recent decisions, “there does not appear to be a need to seek legislative clarification at this time.”²⁵⁷

Congressional consideration of the FTAIA could, however, open up a can of worms—the original purpose of the FTAIA in protecting U.S. export cartels may not play well on the foreign trade relations front. As Professor Fox asks, “Can we legitimately embrace jurisdiction when our ox is gored but disclaim jurisdiction when our ox is goring?”²⁵⁸ She takes the view that export cartel exceptions should be abolished,²⁵⁹ and proposes repealing the FTAIA and substituting a simple provision in its place: “The Sherman and FTC Acts shall not apply to harms not within the United States and not on U.S. territory.”²⁶⁰

B. Standing

It is curious that the issue at the heart of *Empagran* has been addressed only through the lens of subject matter jurisdiction and not through standing.²⁶¹ The circuit court in *Empagran* found that the plaintiffs had antitrust standing,²⁶² and the Supreme Court avoided the issue entirely,²⁶³ saying that “[t]he question of who can or cannot sue is a matter for other

256. James R. Atwood, Testimony before the Antitrust Modernization Commission, Hearings on International Issues, § 5 (Feb. 15, 2006), http://www.amc.gov/commission_hearings/international_antitrust.htm.

257. Randolph W. Tritell, Testimony before the Antitrust Modernization Commission, Hearings on International Issues, § I (Feb. 15, 2006), http://www.amc.gov/commission_hearings/international_antitrust.htm.

258. Fox, Testimony, *supra* note 66, § V.

259. *Id.*

260. *Id.* § IV (suggesting the Webb-Pomerene Act and Export Trading Certificate of Review Act should also be repealed). For a discussion of the WPA and ETC, see Margaret C. Levenstein & Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 AM. U. INT'L L. REV. 785, 789–804 (2005).

261. Cavanagh, SYMPOSIUM, *supra* note 151, at 25 (“I think all these cases could be decided on standing.”).

262. *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338, 357 (D.C. Cir. 2003).

263. Cavanagh, *What Next?*, *supra* note 179, at 1440. Cavanagh believes the Circuit Court’s reasoning was overruled by the Supreme Court in *Empagran I*, even though the Supreme Court did not reach the standing issue because it overturned the Circuit Court’s decision on other grounds. *Id.* at 1445.

statutes (namely, the Clayton Act) to determine.²⁶⁴ Decisions on foreign purchasers' standing in other courts are "sparse,"²⁶⁵ but at least two courts have rejected standing for foreign purchasers²⁶⁶ and one of those held that participation in the U.S. market is "crucial" to establishing antitrust standing.²⁶⁷ Yet one of the issues of importance to the Supreme Court—judicial administration—could be addressed more easily through standing.²⁶⁸

To establish antitrust standing, a threshold question that is separate from the question of subject matter jurisdiction,²⁶⁹ a plaintiff must overcome three limitations.²⁷⁰ First, he must meet constitutional requirements of standing under the Clayton Act²⁷¹ by establishing "injury-in-fact or threatened injury-in-fact caused by the defendant's alleged wrongdoing."²⁷² Second, he must establish "antitrust injury" by showing that the injury suffered is "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."²⁷³ This establishes that the plaintiff's injury is not just any injury, but an injury made illegal by the Sherman Act. Finally, a plaintiff must be a "proper plaintiff" according to a set of factors known as the *Associated General Contractors*²⁷⁴ factors: these include "the proximity ('remoteness') of the causal connection between the defendant's antitrust violation and the plaintiff's harm, evidence of an actual intent to cause that harm, whether there are more direct victims, the speculativeness of the plaintiff's claimed injury, and the potential for duplicative recovery or

264. *F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 173 (2004).

265. Cavanagh, *What Next?*, *supra* note 179, at 1440.

266. *Id.* at 1446 (referring to *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498 (N.D. Cal. 1997) and *In re Microsoft Corp. Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001)).

267. Cavanagh, *What Next?*, *supra* note 179, at 1447 (referring to *In re Microsoft*, 127 F. Supp. 2d at 715).

268. Comment, *Federal Statutes and Regulations, Foreign Trade Antitrust Improvement Act*, 118 HARV. L. REV. 476, 483–84 (2004).

269. Cavanagh, *What Next?*, *supra* note 179, at 1440. For a detailed analysis of this issue, see *id.* 1440–51.

270. WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 1:9 (2004) [hereinafter HOLMES, HANDBOOK].

271. Clayton Act, 15 U.S.C. §§ 12–27 (1914).

272. HOLMES, HANDBOOK, *supra* note 270 (citing *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F. 3d 799 (D.C. Cir. 2001)).

273. William C. Holmes, *Jurisdiction and Standing in the International Arena*, 14 LOY. CONSUMER L. REV. 537, 544 (2002) [hereinafter Holmes, *Jurisdiction*] (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

274. *Associated General Contractors*, 459 U.S. at 538–44 (1983).

overly complex apportionment of damages.”²⁷⁵ Simply put, application of standing requirements limits antitrust claims “to those who are in the best position to prosecute the claim and bars those claims arising from a ripple effect.”²⁷⁶

One of the merits of approaching the issue through standing is that the concerns that underpin standing analysis parallel, in some respects, the policies that inform decisions on subject matter jurisdiction.²⁷⁷ Both address judicial efficiency, detection, and deterrence.²⁷⁸ And the test for standing is proximate cause,²⁷⁹ now arguably the predicate for subject matter jurisdiction. Using standing doctrine, a court’s view on subject matter jurisdiction, whether narrow or broad, would not matter as greatly.

Professor Cavanagh believes that foreign plaintiffs would face “formidable hurdle[s]” to establishing standing if the standard were applied properly.²⁸⁰ Resolution of foreign claims under the standing doctrine would be easier than applying the FTAIA, he says.²⁸¹ Using standing analysis would be “more logical”²⁸² and avoid the “strange and strained construction of the FTAIA” that the Supreme Court set out in *Empagran*.²⁸³ In fact, Cavanagh argues, the Supreme Court should have decided the standing issue in *Empagran*.²⁸⁴

Perhaps the criticisms of the Supreme Court’s decision and the ramifications of the continuing development of the jurisdictional issues in

275. Holmes, *Jurisdiction*, *supra* note 273.

276. Edward D. Cavanagh, *Antitrust in the Second Circuit*, 65 ST. JOHN’S L. REV. 795, 810 (1991).

277. Davis, *supra* note 132, at 63 (pointing out that “the issues in *Empagran* have much in common with the issues in *Illinois Brick*,” the leading case on the standard for standing).

278. *Id.* at 63 (“Just as *Illinois Brick* balanced judicial efficiency, deterrence of violations, and other relevant factors to establish an extra-statutory rule as to who may sue and who may not, so also the *Empagran* scenario demands a careful analysis and balancing of judicial efficiency, cartel detection, and cartel deterrence.”).

279. Cavanagh, *What Next?*, *supra* note 179, at 1448.

280. Cavanagh, *Post Script*, *supra* note 213, at 7.

281. Cavanagh, *What Next?*, *supra* note 179, at 1431.

282. Holmes, *Jurisdiction*, *supra* note 273, at 546.

283. Fox, *Testimony*, *supra* note 66, § IV. *See also* Holmes, *Jurisdiction*, *supra* note 273, at 537 (“Rather than address the issue as one of standing, the courts have articulated an exceedingly intricate jurisdictional analysis under the [FTAIA] that few can hope to truly understand and that arguably does harm to both the statutory language of the Act and its legislative history.”).

284. Cavanagh, *What Next?*, *supra* note 179, at 1431.

lower courts will bring more attention to the issue of standing in foreign plaintiff antitrust litigation.²⁸⁵

C. Forum Non Conveniens

The real question should be this: should foreign antitrust plaintiffs be allowed to use U.S. courts to sue foreign defendants when the transactions occurred entirely outside the United States, when the behavior has already been discovered and the U.S. government has successfully concluded a criminal action, and when U.S. plaintiffs have separately pursued, or are pursuing, their own claims? In such cases, it would appear that all U.S. interests have been dealt with. The *Vitamins* cartel members acted on the international stage; now that so many countries have antitrust regimes, one might well ask why all claims against these actors should be litigated in the United States. If a means can be found to ensure that there is a venue in foreign courts in which to litigate such claims dismissed from U.S. courts, two of the policy concerns at issue—burden on the courts and impact on development of antitrust regimes—would be resolved, and overall deterrence would be only marginally reduced.²⁸⁶

A doctrine that has been used only infrequently in transnational antitrust litigation, but which may see renewed interest since *Empagran* (especially since the Supreme Court raised it in oral argument) is *forum non conveniens*.²⁸⁷ Waller believes the doctrine “holds considerable promise for use in foreign commerce antitrust litigation.”²⁸⁸ *Forum non conveniens* permits a court to abstain from the exercise of jurisdiction on the motion of a defendant when the forum chosen by the plaintiff is unjust to the defendant, and where a more convenient forum exists to hear the dispute.²⁸⁹ This common law doctrine, established in *Gulf Oil Corp. v. Gil-*

285. Cavanagh, *Post Script*, *supra* note 213.

286. See Buxbaum, *supra* note 149, at 373 (arguing that the policy goal of deterrence could be satisfied through public regulation with a high level of aggregate fines imposed by the United States and other countries, rather than through private enforcement).

287. Transcript of Oral Argument at *29, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724).

288. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27 (“The use of *forum non conveniens* would mean that litigation of jurisdictional questions would shift from the all or nothing proposition of whether the United States has jurisdiction to whether the U.S. is the *best* forum for resolution of the dispute.”) (emphasis in original). See also 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17 (arguing that *forum non conveniens* provides a powerful addition, if not a substitute, for disputes over jurisdiction and comity in appropriate transnational antitrust cases).

289. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27. Notice that jurisdiction is assumed. See Sandage, *supra* note 75, at 1707–08 (“The defendant’s objection in such

*bert*²⁹⁰ and developed in *Piper Aircraft Co. v. Reyno*,²⁹¹ requires a court to consider the presence of a suitable forum in another country, the plaintiff's nationality, the relevance of what nation's law would control the case, and a balance of "public" and "private" factors.²⁹²

Using forum non conveniens to decline hearing cases that have a closer connection with another country has the virtue of encompassing comity values, because it similarly addresses respect for the interests of the foreign sovereign.²⁹³ In addition, because the availability of another forum to hear the dispute is a factor in considering dismissal under forum non

a motion is typically not a challenge to the subject matter jurisdiction of the court per se, but rather an assertion of the impropriety of that particular court's exercising its jurisdiction over the case because litigation in such an inconvenient forum amounts to an illegitimate exercise of state power.").

290. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

291. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

292. William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1666 (1992).

293. Mladen Don Kresic, Note, *The Inconvenient Forum and International Comity in Private Antitrust Actions*, 52 FORDHAM L. REV. 399, 418 (1983). According to Kresic:

[C]omity analysis stresses national concerns and ignores the litigants' interests. Forum non conveniens, however, encompasses the requirement of comity within the framework of existing law. All factors used in balancing public or national interests involved in an antitrust action under *Timberlane* can be adequately weighed in a public interest analysis under forum non conveniens The opportunity given to defendants to present all national interest factors favoring dismissal under the public interest consideration of forum non conveniens should help reduce tensions caused by extraterritorial extension of the antitrust laws The strong public interest in American antitrust enforcement should also play a major role in the forum non conveniens analysis. Thus, the interest that a foreign state has in the litigation must outweigh the effects that the alleged antitrust violations have in the United States [I]f there is an anticompetitive effect in the United States, but it is outweighed by the effect in a foreign nation, then the suit may be dismissed in favor of an action brought in another forum.

Id. See also Reynolds, *supra* note 292, at 1714 ("The American courts' willingness to defer to the exercise of foreign jurisdiction not only shows the respect due other sovereigns, but is increasingly necessary in an ever-shrinking world."). Mladen Kresic and John Sandage's arguments against the broader use of comity analysis—because it is too complicated for judges and not appropriate for the judicial branch to engage in political balancing—show why forum non conveniens is a more appropriate tool in this arena. See generally Kresic, *supra*; Sandage, *supra* note 75. But see Bates, *supra* note 46, at 314 (arguing that using forum non conveniens in this way would stretch the doctrine beyond recognition into a diplomatic device).

conveniens,²⁹⁴ protections for plaintiffs can be built in:²⁹⁵ a court may condition dismissal on defendants' acceptance of the jurisdiction of the foreign court to ensure that the interests of foreign parties and governments can be addressed without depriving the plaintiff of a remedy.²⁹⁶ The litigation would then proceed in the foreign court, subject to foreign law and procedure.²⁹⁷ For this reason, dismissal for forum non conveniens has an advantage over dismissal for lack of subject matter jurisdiction or for reasons of comity: it ensures that the plaintiff gets its day in court and that defendants do not escape liability.²⁹⁸

In weighing the factors for or against dismissal for forum non conveniens under *Reyno*, a difference in the substantive law to be applied is not generally given great weight,²⁹⁹ although dismissal will not be granted in a case in which the remedy provided by the alternative forum is "so

294. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27. It may complicate matters, however, if some of the plaintiffs in an action are from countries that have developed antitrust regimes and some are from countries that do not.

295. Reynolds notes that *Reyno* specifically endorses some measure of discrimination against foreign plaintiffs: "When the home forum has been chosen [by plaintiff], it is reasonable to assume that the choice is convenient. When the plaintiff is foreign, however, this assumption is made less reasonable." Reynolds, *supra* note 292, at 1693.

296. 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17. See also Reynolds, *supra* note 292, at 1666–67 (pointing out that courts "routinely condition dismissal on the defendant's waiving the foreign limitations period and agreeing to accept service in a foreign jurisdiction," that they may also "condition a dismissal on the defendant's promise to pay any judgment" and that they "should also condition the dismissal on the willingness of the foreign court to hear the case—including third-party claims—a condition that assures the availability of the alternative forum." See also John Fellas, *Choice of Forum in International Litigation*, 704 PLI/LIT 239, 307 (2004) ("If the proponent of dismissal fails to comply with the order, the action will be reinstated in the U.S.")).

297. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27 (pointing out that there must be a meaningful remedy available, but it need not be as generous as that available in the United States for forum non conveniens to apply).

298. 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17 ("The doctrine of forum non conveniens has the appealing feature of eliminating the all or nothing aspect of litigation over jurisdiction to prescribe.").

299. Reynolds, *supra* note 292, at 1670, quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) ("The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry."). See also Erika Nijenhuis, Comment, *Antitrust Suits Involving Foreign Commerce: Suggestions for Procedural Reform*, 135 U. PA. L. REV. 1003, 1038–39 (1987), citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (in which the Court subordinated U.S. interests in antitrust enforcement to an arbitration agreement between the parties specifying a Japanese tribunal, even though Japanese antitrust enforcement (at the time) was not nearly as robust as in the United States.).

clearly inadequate or unsatisfactory that it is no remedy at all,³⁰⁰ something that the *Empagran* Court was concerned with.³⁰¹ This means there must not only be a criminal antitrust statute, but there must be a private right of action.³⁰²

Although such rights are not as widely available outside the United States, there is now a private right of action in the European Union.³⁰³ As noted earlier, the number of countries with developed antitrust regimes is growing. Certainly the type of case dealt with here—per se price fixing violations—is covered by the laws of all countries that have such regimes.³⁰⁴ And although Ecuador and Ukraine, two of the countries from which the plaintiffs in *Empagran* came, may not provide adequate anti-

300. Reynolds, *supra* note 292, at 1671, quoting *Reyno*, 454 U.S. at 254. See also Fel-las, *supra* note 296, at 284 (pointing out that a Brazilian forum was held to be adequate even though Brazil did not permit punitive damages in *De Melo v. Lederle Labs.*, 801 F.2d 1058 (8th Cir. 1986)).

301. Transcript of Oral Argument at *33, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724). The Court asked if defendants were proposing that the Court make a distinction between countries that have antitrust laws and those that do not. There is a danger that “[a]n aggressive policy favoring com-ity-based dismissals might create a two-tiered system, where foreign plaintiffs from de-veloped antitrust regimes such as the EU, Australia, and Canada are often barred from U.S. courts, while plaintiffs from many developing countries are admitted.” Sprigman, *supra* note 210, at 282. See also Reynolds, *supra* note 292, at 1667–68, for an overview of this issue, and Buxbaum, *supra* note 149, at 374–76, arguing that the doctrine of forum non conveniens could solve some of the procedural difficulties, but noting that because “dismissal on that basis is permissible only when there is an adequate alternative remedy abroad . . . a U.S. court would have no authority to order dismissal of a case involving a foreign transaction if the country in question did not permit private rights of action at all.”

302. Buxbaum, *supra* note 149, at 375–76. See also 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27 (arguing that if dismissal based on forum non conveniens is not warranted because a particular jurisdiction does not have a private right of action covering the subject matter of U.S. antitrust law, “[t]hat is only a reason to deny a motion in a particular case . . . and not to deny the applicability of the doctrine in its totality.”).

303. See Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431 (2004).

304. Dorsey D. Ellis, Jr., *Projecting the Long Arm of the Law: Extraterritorial Criminal Enforcement of U.S. Antitrust Laws in the Global Economy*, 1 WASH. U. GLOBAL STUD. L. REV. 477, 496–97 (2002) (noting that price-fixing agreements are unlawful under every competition law and universally deplored as adversely affecting consumer welfare). See also Reynolds, *supra* note 292, at 1681 (“The fact that a foreign forum has a strong interest in the outcome of the case may support a decision to dismiss an action. Often the foreign forum has a strong interest in having its own law applied in its own courts.”).

trust laws,³⁰⁵ the home countries of some, if not all, of the cartel members provide for private damage claims.³⁰⁶

It may be difficult for district court judges to make determinations about the adequacy of foreign antitrust regimes, both due to the complexity of the review and the fact that precedent provides little value for a current assessment,³⁰⁷ in addition, such judgments would likely be protested by foreign countries.³⁰⁸ It has been suggested that the U.S. Department of Justice should annually review foreign countries' antitrust regimes to determine whether they provide adequate relief for private parties, and that jurisdiction over cases where both plaintiff and defendant are foreign should be barred in such cases by amending the Clayton Act.³⁰⁹ Such a policy would have the benefit of consistency and predictability, and the executive branch is better positioned to assess the political tradeoffs,³¹⁰ although such determinations would probably be even more highly resented by foreign governments as an intrusion into their own political systems.³¹¹ While such a policy would be in keeping with a forum non conveniens analysis, it is probably not necessary.³¹²

Of course, a defendant who moves to dismiss on grounds of forum non conveniens generally does so because he wants the case dismissed entirely, not because he would rather have the case heard in another

305. They may be technically adequate. Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMPETITION. L. REV. 205, 221–23 (2005) (explaining that both these countries have recently enacted antitrust statutes which appear to be “robust” and allow for private damages, but it is questionable how adequate they really are).

306. Germany is part of the EU; Japan has an antitrust regime. See Fellas, *supra* note 296, at 278 (“[M]ost courts have granted motions to dismiss on grounds of forum non conveniens notwithstanding the fact that foreign law does not provide the *same* remedy as that available under U.S. law, as long as there is *some* remedy under foreign law.”) (emphasis added).

307. Jonathan T. Schmidt, Note, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 256 (2006).

308. Wurmnest, *supra* note 305, at 223.

309. Schmidt, *supra* note 307, at 258–59 (suggesting a detailed review that would “distinguish the types of claims for which a country’s relief is adequate from those for which it is inadequate.”).

310. Robert Walter Trenchard, *The Scope of Antitrust Jurisdiction Abroad: A Classic Conflicts-of-Law Problem*, at 31 (2004), available at <http://ssrn.com/abstract=533462>.

311. Bates, *supra* note 46, at 314–15 (arguing that comity is a better approach to the issue).

312. Fellas, *supra* note 296, at 284.

venue.³¹³ So defendants would be unlikely to make such a motion. (The perceived advantages for foreign plaintiffs in U.S. courts, however, such as treble damages and liberal enforcement of judgments, may be less advantageous than they appear at first blush: in many instances the plaintiff may only retain single damages or its equivalent anyway, due to foreign “claw-back” provisions, the fact that U.S. courts do not grant interest on damages as they do elsewhere, and the reduction of the availability of treble damages under the new Antitrust Criminal Penalty Enhancement and Reform Act.³¹⁴) However, although forum non conveniens is almost always considered on the motion of a party, there does not appear to be a bar to the court doing it sua sponte.³¹⁵

313. Transcript of Oral Argument at *34–35, *F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155 (2004) (No. 03-724). Plaintiffs’ attorney Thomas C. Goldstein stated:

If there’s some substantial remedy available in another country, then you can go somewhere else. But they didn’t file that motion because they’re trying to get rid of the case with respect to the majority of bulk vitamins commerce and with respect to most of the commerce in these worldwide markets for which there is no remedy.

Id. See 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17 (“Defendants often are not seeking to litigate in their home courts versus the United States, they more commonly seek outright dismissal.”) But there are other reasons a defendant may prefer a foreign venue over the United States even if the case cannot be dismissed outright: extensive discovery procedures, compulsory process, and treble damages. Reynolds, *supra* note 292, at 1673–74.

314. See Kresic, *supra* note 293, at 425 (“[F]oreign statutes, such as the British ‘claw back’ provisions, enable defendants to recover the punitive portion of the damages awarded in a United States action. Therefore, the remedy available in a foreign forum may be no less adequate than the one obtained in an American court.”). Waller also points out:

Plaintiff would also be free from further jurisdictional challenges If the end product is an enforceable judgment for single damages, it is difficult to say plaintiff is worse off than if the outcome had been a monumental treble damage jury verdict against a defendant with no U.S. assets and little prospect for enforcement abroad.

2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27. The new Antitrust Criminal Penalty Enhancement and Reform Act reduces the availability of treble damages for anti-trust conspirators who cooperate with the U.S. government. See *supra* note 215.

315. *Fine v. McGuire*, 433 F.2d 499, 501 (D.C. Cir. 1970) (“It is fair to suppose that the general contemplation was that transfer under 1404 would be triggered by a motion. This is not to say that a district judge may not initiate consideration of the convenience factor, but *ordinarily* at least he will not take action unless a party, and that party can be the plaintiff, files an appropriate motion.”) (emphasis added). In the context of enforcement of private forum selection clauses in international contracts, Hannah Buxbaum says

Perhaps it is time for the Court to add one or more factors to consider in forum non conveniens analysis, including the following: when all the defendants and all the plaintiffs are foreign entities;³¹⁶ when the U.S. government has successfully concluded criminal actions against the defendants; and when U.S. plaintiffs have separately pursued, or are pursuing, their own claims against defendants. If these factors are considered, and a court initiates the analysis sua sponte in such circumstances, with appropriate conditions regarding defendants' acceptance of foreign jurisdiction, the courts will have achieved the policy goals of the Supreme Court's *Empagran* decision.³¹⁷

It should be mentioned that the federal courts are split over whether, and under what circumstances, a district court may dismiss an antitrust case, specifically, on forum non conveniens grounds.³¹⁸ Clearly there is

that the court could raise forum non conveniens sua sponte in response to public interests, such as judicial efficiency, based on a reading of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 185, 198 (2004).

316. As a measure of how much litigation in this area has changed, virtually all case law and commentary on this subject assumes that at least one party—plaintiff or defendant—is domestic. See generally, e.g., Sandage, *supra* note 75; Kresic, *supra* note 293; Reynolds, *supra* note 292; Nijenhuis, *supra* note 299.

317. See Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?* 26 HOUS. J. INT'L L. 385, 399 (2004), observing that “it should be an acknowledged purpose of forum non conveniens doctrine to achieve the balance that is lacking in American law That, in fact, is what many courts are doing today, when, although they speak of convenience and inconvenience, their eyes seem fixed on the presence or absence of a domestic regulatory interest.” See also Bates, *supra* note 46, at 314–15 (pointing out that forum non conveniens asks a court to dismiss a case over which it has already concluded it has subject matter jurisdiction, personal jurisdiction, and that venue is proper, and arguing that this sequence of analysis makes forum non conveniens a poor means by which to limit the extraterritoriality of U.S. law).

318. See generally Lonny Sheinkopf Hoffman & Keith A. Reilly, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMORY L.J. 1137 (2000), for a detailed analysis of the circuit split and statutory authority involved in this issue, and noting that *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998) held that an antitrust suit is subject to dismissal under the forum non conveniens doctrine. *Id.* at 1173–74. The authors argue that, absent a clear statement of congressional intent to abrogate the doctrine, the better rule is to presume that courts have the discretion to decline jurisdiction. They propose a rule that the court should exercise it first to ensure that the forum with the most significant interest in the dispute adjudicates it; only secondarily when it would be seriously inconvenient for the suit to proceed in the forum court. See also Reynolds, *supra* note 292, at 1703 (arguing that the correct approach would be to ensure that the federal right is adequately protected in the foreign forum); Sandage, *supra* note 75, at 1713 (countering arguments that Congress has determined that U.S. antitrust law should extend to cases that courts would dismiss on forum non conveniens grounds; he points out that “it is simply inherent in the doctrine of forum non conveniens that

authority for the proposition that courts may do so,³¹⁹ although it may be necessary for the Supreme Court to resolve the split.³²⁰

It is also curious that little has been written about choice of law in the context of this issue. It is apparently assumed that once subject matter jurisdiction is established, the relevant law to be applied is the *lex fori*, or U.S. law.³²¹ If a court did a choice of law analysis that found a foreign antitrust law to be applicable, at least some of the advantages that plaintiffs have in bringing suit in U.S. courts would be undermined (although discovery, damages, and other procedural issues would be governed by the *lex fori*).

VIII. CONCLUSION

This Note argues that the Supreme Court's *Empagran* decision provides little guidance to courts or parties on the extraterritorial effect of U.S. antitrust law when foreign plaintiffs sue foreign defendants for injuries sustained outside the United States, with further circuit splits bound to develop due to the narrowness of its holding. Absent revision of the FTAIA, other legal doctrines, including the test for antitrust standing and the doctrine of forum non conveniens, could be used to address the issue.

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courts will exhaust adjudicative jurisdiction and dismiss a case even where legislative jurisdiction would go further . . . [otherwise] the convenient forum doctrine would be meaningless . . .").

319. 2 WALLER, ANTITRUST ABROAD, *supra* note 231, § 21:27.

320. *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944 (1st Cir. 1991) may be instructive; Justice Breyer, then Chief Judge of the First Circuit Court of Appeals, who wrote the opinion in *Empagran*, endorsed using forum non conveniens in a federal statutory case (with regard to securities regulation). In discussing domestic cases, he said that the statute at issue, § 1404(a), "at the least reflects a congressional policy strongly favoring transfers We can find no good policy reason for reading the special venue provisions as if someone in Congress really intended them to remove the courts' legal power to invoke the doctrine of forum non conveniens in an otherwise appropriate case." *Id.* at 949–50. Although then-Judge Breyer distinguished antitrust cases from securities cases, his comments about the growth in international commerce and the need to use forum non conveniens to "help the world's legal systems work together, in harmony," *id.* at 950, prefigure his concerns in *Empagran*.

321. 1 WALLER, ANTITRUST ABROAD, *supra* note 231, § 6:17.

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