

BALANCING DETERRENCE, COMITY  
CONSIDERATIONS, AND JUDICIAL  
EFFICIENCY: THE USE OF THE D.C.  
CIRCUIT’S PROXIMATE CAUSE STANDARD  
FOR DETERMINING SUBJECT MATTER  
JURISDICTION OVER EXTRATERRITORIAL  
ANTITRUST CASES

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### INTRODUCTION

The application of U.S. antitrust laws to foreign anticompetitive conduct has been a controversial topic<sup>1</sup> since the enactment of the Sherman Anti-Trust Act in 1890 ("Sherman Act").<sup>2</sup> One of the central difficulties in applying U.S. antitrust laws lies in the increasingly interrelated nature of markets.<sup>3</sup> Thus, in order to protect the U.S. marketplace from the harmful effects of global cartels and deter the formation of those cartels, it is necessary to apply U.S. antitrust laws to at least some anticompetitive conduct occurring abroad.<sup>4</sup> On the other hand, the application of U.S. laws

1. See Lily Henning, *Antitrust Goes Global: D.C. Circuit Opens the Door to Foreign Victims of Vitamin Price Fixing*, LEGAL TIMES, Oct. 13, 2003, at 1 (commenting that there is "often heated debate over how to interpret the scope of U.S. antitrust laws and their application to foreign conduct"). See generally C. DOUGLAS FLOYD & E. THOMAS SULLIVAN, PRIVATE ANTITRUST ACTIONS: THE STRUCTURE AND PROCESS OF CIVIL ANTITRUST LITIGATION § 1.1.4 (1996) (discussing the development of litigation under the Sherman Act and concluding that the extraterritorial application of U.S. antitrust laws is limited "as a practical matter" due to its controversial nature).

2. Sherman Anti-Trust Act of 1890, 15 U.S.C. §§ 1-7 (2000).

3. See Kenneth S. Reinker, Recent Development, *Case Comment: Roche v. Empagran*, 28 HARV. J.L. & PUB. POL'Y 297, 303-04 (2004) (observing that conspiracies to engage in anticompetitive conduct, such as price-fixing, usually involve global cartels that simultaneously affect the economies of many nations). See generally ORG. FOR ECON. CO-OPERATION & DEV., *World Trade*, in OECD MAIN ECONOMIC INDICATORS 25, 25 (2005), available at <http://www.oecd.org/dataoecd/43/20/358279>

00.pdf (indicating that the volume of world trade is constantly increasing from year to year). For example, the volume of world trade in goods and services for 2001 was \$1972.3 billion, that amount increased to \$2312.7 in 2004, and further increased to \$2447.8 by the second quarter of 2005. *Id.*

4. See FLOYD & SULLIVAN, *supra* note 1, § 1.1.4 (identifying three situations which lead to the extraterritorial application of antitrust laws). These three situations are:

(1) activities of foreign firms within the United States which have an effect in this country, (2) activities of foreign firms outside United States boundaries which have an adverse effect on the United States economy, and (3) activities of United States firms located outside of the country which have adverse effects on the economy of the United States.

*Id.* (quoting E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 75-161 (3d ed. 1994)). Cases involving the application of U.S. antitrust laws beyond U.S. borders to reach foreign anticompetitive conduct are referred to as "extraterritorial antitrust cases" throughout this Comment.

abroad must not be so sweeping that it interferes with the sovereignty of other nations.<sup>5</sup> Jurisprudence in this area of law, therefore, may be characterized as a constant struggle to balance the United States' interest in protecting its own market against the interests of foreign nations in regulating their own markets.<sup>6</sup>

Performing this balancing act is increasingly difficult as the United States is also interested in ensuring that the court system is not overburdened by frivolous litigation.<sup>7</sup> This goal is difficult to achieve because foreign plaintiffs prefer to bring suits in the United States where they have the opportunity to recover treble damages, as opposed to bringing suits in their home countries where such remedies are not an

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5. The *Restatement (Third) of Foreign Relations Law of the United States* calls for a limited exercise of jurisdiction when the individual or the conduct is connected to another state and the exercise of jurisdiction is not unreasonable. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987). This consideration for the laws of foreign sovereign nations is referred to as "international comity." See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (establishing that "comity" is "neither a matter of absolute obligation" nor "of mere courtesy and goodwill"). The Court defined "comity" as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Id.* at 164. The 1995 Antitrust Enforcement Guidelines reflect support by the Department of Justice (DOJ) and the Federal Trade Commission for the extraterritorial application of U.S. antitrust laws, while observing the concept of international comity in the exercise of the agencies' prosecutorial discretion. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.2 (1995), available at <http://www.usdoj.gov/atr/public/guidelines/internat.htm>. The guidelines list eight factors that should be considered when making enforcement decisions:

- (1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad;
- (2) the nationality of the persons involved in or affected by the conduct;
- (3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;
- (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
- (5) the existence of reasonable expectations that would be furthered or defeated by the action;
- (6) the degree of conflict with foreign law or articulated foreign economic policies;
- (7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and
- (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.

*Id.*

6. See Susan E. Burnett, Comment, *U.S. Judicial Imperialism Post Empagran v. F. Hoffman-LaRoche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 EMORY INT'L L. REV. 555, 559-60 (2004) (explaining the constant tension between two U.S. policy objectives: protecting the U.S. market from foreign anticompetitive activity on the one hand, and respecting the laws of other sovereign nations on the other hand).

7. See Deborah J. Buswell, *Foreign Trade Antitrust Improvements Act: A Three Ring Circus—Three Circuits, Three Interpretations*, 28 DEL. J. CORP. L. 979, 997 (2003) (arguing that restricting the reach of U.S. antitrust laws would result in decreasing procedural costs and lessening the docket load for U.S. courts).

option.<sup>8</sup> Although expanding the jurisdictional reach of federal courts may deter cartels from forming by instilling the fear of unlimited civil liability upon potential violators,<sup>9</sup> many commentators have warned that such an expansion would only serve to open the floodgates to a sea of potential foreign plaintiffs and overburden the U.S. court system.<sup>10</sup>

The Supreme Court's 2004 decision in *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*<sup>11</sup> addressed these issues when it settled a circuit split over the question of what jurisdictional threshold a foreign plaintiff must meet in order to sue in a U.S. federal court to recover for injuries suffered outside the United States due to an antitrust violation.<sup>12</sup> The Court in *Empagran* decided to restrict the jurisdictional reach of federal courts,<sup>13</sup> creating an "independent effects" test where courts may not assert jurisdiction over claims alleging an injury due to foreign anticompetitive conduct when that conduct is independent of any adverse domestic effects on the United States.<sup>14</sup> This holding left open the question of how courts should determine whether a sufficient link exists between adverse effects to the U.S. marketplace and the alleged foreign harm to demonstrate

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8. See Makan Delrahim, Deputy Assistant Attorney Gen., Antitrust Div., Dep't of Justice, Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications, Address Before the American Bar Association Section of Antitrust Law Fall Forum 2 (Nov. 18, 2003) [hereinafter Delrahim Speech], available at <http://www.usdoj.gov/atr/public/speeches/201509.pdf> (stating that, although a growing number of countries have developed their antitrust laws, the "unexpected consequence" of this worldwide interest in pursuing antitrust violations has been an increase in foreign parties pursuing treble damage remedies in U.S. federal courts).

9. See Joseph P. Bauer, *Multiple Enforcers and Multiple Remedies: Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 310 (2004) (arguing that treble damages are an incentive for domestic and foreign plaintiffs to come forward, enhancing the deterrent component of U.S. antitrust laws). See generally AM. BAR ASS'N SECTION OF ANTITRUST LAW MONOGRAPH 13, TREBLE-DAMAGES REMEDY 16-18 (1986), (explaining that, while the purpose behind treble damages is not entirely clear based on available historical materials, the remedy serves both as a penalty for violators and an incentive for persons or corporations to sue).

10. See, e.g., SPENCER WEBER WALLER & JEFFREY L. KESSLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 5:15 (2004) (observing that balancing foreign and national interests imposes a "heavy burden" on federal judges, who, in large part, do not have a background in international law); see also Thomas Köster & H. Harrison Wheeler, *Appellate Courts Split on the Interpretation of the Foreign Trade Antitrust Improvements Act: Should the Floodgates be Opened?*, 14 IND. INT'L & COMP. L. REV. 717, 727 (2004) (rejecting counter-arguments that legal requirements such as standing, personal jurisdiction and forum non conveniens are sufficient to undercut the "floodgates" argument).

11. 542 U.S. 155 (2004) (*Empagran*).

12. See *id.* at 160-61 (stating that the Court granted certiorari to resolve a split between the Fifth and Second Circuits); see also discussion *infra* Part I.C (discussing the split in the circuits on the question of what constitutes a showing by the plaintiff that a domestic effect gave rise to "a claim" under the FTAIA).

13. See *Empagran*, 542 U.S. at 168-70 (excluding from the jurisdiction of federal courts all foreign injury cases that are independent of any adverse anticompetitive conduct in the United States).

14. *Id.* at 168-69.

dependency.<sup>15</sup> For example, suppose there are only five oil refineries in the world and four of them conspire to inflate the price of crude oil to \$300 per barrel. Suppose further that there are only four companies in the world that own barges that are able to transport oil. The four oil companies agree to share part of their profits with those four oil transportation barge companies as long as the barge companies promise to stop serving a Venezuelan competitor refinery. The Venezuelan corporation could then sue in a U.S. court, claiming that its foreign injury arose from a global scheme that would not have survived if the oil refineries had not succeeded in imposing inflated prices in the United States, among other major world markets, and had not created a market allocation scheme that put it out of business. Thus, the inflated prices in the United States helped bring about the foreign injury because a global scheme must impose inflated prices and produce market allocation in all major markets to survive.<sup>16</sup> In order to create a clear standard that would prevent companies from bringing a suit of this nature in U.S. courts, the United States Court of Appeals for the D.C. Circuit clarified that the plaintiff was required to show that its injury was *proximately caused* by the adverse effects of the defendants' anticompetitive conduct on U.S. commerce.<sup>17</sup> The claim described above alone would not survive proximate causation. Instead, the Venezuelan company would have to show that the higher prices it paid were *directly linked* to higher prices affecting the U.S. marketplace.<sup>18</sup> For example, if the Venezuelan company's largest customer was a U.S. company, then the Venezuelan company could sue on the basis that it lost profits as a result of lost market share in the United States; this was the result of anticompetitive effects in the United States because consumers lost the benefit of buying the Venezuelan oil, which was previously sold at lower prices due to lower transportation costs.

This Comment will evaluate the probable effects of using the D.C. Circuit's proximate cause standard in extraterritorial antitrust cases in light of the Supreme Court's decision in *Empagran*. The analysis will center on considerations of deterrence, comity, and judicial efficiency. It will argue

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15. *See id.* at 175 (remanding the case to the D.C. Circuit to decide whether a "but for" causation is sufficient to establish that the foreign harm is dependent upon U.S. anticompetitive conduct).

16. This example mirrors *Empagran*'s alternative argument that its foreign injury was dependent on a price-fixing conspiracy's effects on the U.S. domestic market. See discussion *infra* Part II, for an in-depth analysis of that alternate theory.

17. *See Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (rejecting the "worldwide" effect argument that the maintenance of a global price-fixing scheme necessarily requires prices to be artificially inflated in all countries, including the United States, because it is insufficient to establish proximate cause).

18. *See id.* at 1272 (clarifying that to establish proximate causation, the plaintiff must show there was a direct connection between U.S. prices and the prices the plaintiffs paid for the good or service that is the subject of the complaint).

that, although this restrictive interpretation of the Supreme Court's guidelines may decrease the overall deterrent effect of U.S. antitrust laws in the world at large, it correctly reflects the Supreme Court's express directives to give due deference to the interests of foreign nations by preventing marginal claims from being litigated in U.S. federal courts, a situation that Congress never intended. Other circuit courts should therefore follow the D.C. Circuit's lead and impose the proximate cause requirement in cases of extraterritorial antitrust.

Part I of this Comment will examine the development of jurisdictional approaches to the extraterritorial application of U.S. antitrust laws from the enactment of the Sherman Act to the circuit split that eventually led to the *Empagran* decision. Part II will provide an analysis of the Supreme Court's restriction of the jurisdictional reach of the Sherman Act in *Empagran* and the D.C. Circuit's further restrictions through the imposition of the proximate cause standard. Part III will examine the effects of imposing proximate causation on the Court's independent effects test and it will conclude that other courts should impose this standard because it ensures greater deference to sovereign nations, as intended by Congress, and limits foreign plaintiffs' access to U.S. courts as a forum for the adjudication of marginal claims.

## I. BACKGROUND

### A. *The Early Extraterritorial Antitrust Cases: The Supreme Court Expands the Jurisdiction of Federal Courts*

Congress enacted the Sherman Act as a means to condemn monopolization and other trade restraints that "injuriously affect" the United States.<sup>19</sup> Thus, section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations . . . ."<sup>20</sup> The legislative history of the Sherman Act includes little discussion of the application of the Act to foreign trade, indicating that Congress intended the Sherman Act to focus primarily on regulating domestic commerce.<sup>21</sup> Congress was particularly concerned with

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19. See 21 CONG. REC. 2454, 2456 (1890)(statement of Sen. Sherman) (stating that one of the purposes of the Act was to create a federal cause of action to redress anticompetitive harms). See generally Andrew Stanger, Note, *Analyzing U.S. Antitrust Jurisdiction over Foreign Parties After Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2003 BYU L. REV. 1453, 1456-57 (observing that the Supreme Court later "shaped the broad language of [U.S. antitrust statutes] into well-defined categories of illegal antitrust activity, the most common of which are monopolies, cartels, tying arrangements, and vertical price fixing").

20. 15 U.S.C. § 1 (2000).

21. Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*,

protecting U.S. commerce from “evils resulting directly to consumers.”<sup>22</sup> As the original Sherman Act did not give individuals standing to sue wrongdoers, Congress enacted the Clayton Act of 1914 (“Clayton Act”)<sup>23</sup> to provide that “[w]henver the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court. . . .”<sup>24</sup> One of the most important provisions of the Clayton Act established the remedies available to successful complainants: injunctive relief or treble damages plus costs and attorney’s fees.<sup>25</sup>

The Sherman Act’s history reflects a steady movement towards expanding the jurisdiction of federal courts up to the recent *Empagran* decision.<sup>26</sup> Still, when deciding questions of subject matter jurisdiction in cases involving foreign anticompetitive conduct, courts have generally presumed that “Congress legislates against the backdrop of the presumption against extraterritoriality.”<sup>27</sup> Underlying this view is the notion that the United States cannot impose its laws on other sovereign nations.<sup>28</sup> Thus, the Supreme Court initially weighed considerations of international comity above concerns regarding the ability of U.S. antitrust laws to deter foreign anticompetitive activity that could harm domestic markets.<sup>29</sup> This

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114 HARV. L. REV. 2122, 2127 (2001) (concluding that Congress intended the Sherman Act’s reference to “foreign nations” to mean foreign restraints on U.S. commerce; that is, the Act is only concerned with restrictions on foreign trade to the extent that such restrictions have an impact in the United States). Senator James George of Mississippi made one of the few comments on the application of the Sherman Act to acts occurring outside the United States. See 21 CONG. REC. 1753, 1766 (1890) (statement of Sen. George) (questioning what should be done in a situation where foreign or domestic conspirators enter foreign territory in order to engage in their illegal activities and evade U.S. laws).

22. 21 CONG. REC. 2551, 2558 (1890) (statement of Sen. Pugh).

23. Clayton Act of 1914, ch. 323, 38 Stat. 730 (codified as amended in scattered sections of 15 U.S.C. § 15a (2000)). See generally Jaafar A. Riazzi, Note and Comment, *Finding Subject Matter Jurisdiction over Antitrust Claims of Extraterritorial Origin: Whether the Seventh Circuit’s Approach Properly Balances Policies of International Comity and Deterrence*, 54 DEPAUL L. REV. 1277, 1280-81 (2005) (outlining the history of the Sherman Act and the Clayton Act).

24. Clayton Act of 1914, ch. 323, 38 Stat. 731 (codified as amended in 15 U.S.C. § 15(a) (2000)).

25. *Id.*

26. See WALLER & KESSLER, *supra* note 10, § 5:3 (noting that the evolution toward expansion of jurisdiction also led to a “similar evolution towards legal uncertainty”).

27. *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 428 (5th Cir. 2001) (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)) (explaining that “unless there is the affirmative intention of the Congress clearly expressed, [courts] must presume [that legislation] is primarily concerned with domestic conditions”).

28. The Supreme Court initially confined jurisdiction to hear Sherman Act claims solely to conduct occurring within United States territory. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-57 (1909) (refusing to apply the Sherman Act to an American corporation accused of buying out competitors and instigating the Costa Rican government to seize plaintiff’s property to drive it out of business). The Court stated that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” *Id.* at 356.

29. See Burnett, *supra* note 6, at 569 (commenting that *American Banana* had the effect

restrictive approach to jurisdiction, however, survived only for a brief period of time before the Supreme Court began expanding the applicability of U.S. antitrust laws to foreign anticompetitive conduct.<sup>30</sup>

*B. Congress Enacted the FTAIA as a Means to Restrict the Jurisdictional Reach of the Sherman Act*

In response to courts that were arriving at different formulations for assessing the reach of the Sherman Act,<sup>31</sup> Congress enacted the Foreign Trade Antitrust Improvements Act ("FTAIA"),<sup>32</sup> a jurisdictional statute designed to ensure that the antitrust laws would be applied "uniformly throughout the federal judicial system."<sup>33</sup> Congress fashioned the FTAIA after the *Alcoa* effects test,<sup>34</sup> which Judge Learned Hand devised in 1954.<sup>35</sup> The *Alcoa* test established that courts could exercise jurisdiction over claims against violators who intended the anticompetitive activities they

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of making U.S. markets "exceedingly vulnerable because the United States was unable to independently protect its domestic commerce from harmful effects created by conduct occurring in foreign territory").

30. See *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (holding that conduct occurring partly in the United States and affecting U.S. commerce could form the basis of an antitrust suit in U.S. federal courts). The Court distinguished *Sisal* from *American Banana* on the grounds that the defendants' conduct in *Sisal* was "intended to restrain trade . . . and to increase the market price within the United States." *Id.* (emphasis added). In *Sisal*, U.S. banks entered into contracts and conspiracies while in the United States and established a monopoly so that Sisal Corp. was the only sisal importer in the United States and the Comision Exportadora de Yucatan was the only purchaser of sisal from producers. *Id.* at 273. Although the Mexican government aided the monopoly by passing favorable laws at the insistence of the conspirators, the Court held that federal courts could assert jurisdiction in this case because the conspiracy "brought about forbidden results within the United States." *Id.* at 276.

31. See H.R. REP. NO. 97-686, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2490 (noting that, due to disparate judicial interpretations of the *Alcoa* effects test, it was necessary to clarify the judicial standards for determining jurisdiction). For further details on the *Alcoa* effects test, see notes 35-36 *infra*.

32. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2000). According to the FTAIA, the Sherman Act applies to conduct involving commerce with foreign nations if:

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
  - (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 [the Sherman Act].

*Id.*

33. H.R. REP. NO. 97-686, at 6, reprinted in 1982 U.S.C.C.A.N. 2487, 2491; see *id.* at 5, reprinted in 1982 U.S.C.C.A.N. 2487, 2490 (noting that one of the purposes behind the FTAIA is to clarify ambiguity about the extraterritorial reach of U.S. antitrust law).

34. See *id.* at 5-6, reprinted in 1982 U.S.C.C.A.N. 2487, 2490-91 (discussing the various interpretations of the *Alcoa* test, which led to the enactment of the FTAIA).

35. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 444 (2d Cir. 1945) (holding as illegal a quota system for the export of aluminum to the United States, devised by European companies, in order to sustain a price-fixing monopoly held by an American company).

undertook abroad to produce effects in the United States, and that the anticompetitive conduct did in fact produce those effects.<sup>36</sup>

The FTAIA begins by removing from the reach of the Sherman Act all conduct “involving trade or commerce” that is not “import trade or import commerce” (i.e., export activity or wholly foreign activity).<sup>37</sup> The statute then carves back in a “domestic injury exception,” allowing the Sherman Act to reach non-import conduct if the conduct has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce or on U.S. export trade<sup>38</sup> and this effect “gives rise to a claim” under the Sherman Act.<sup>39</sup> Congress intended the FTAIA to protect U.S. exporters who could

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36. *Id.* at 443-44. The *Alcoa* test expanded the jurisdictional reach of federal courts, reflecting a growing concern for protecting domestic commerce from foreign anticompetitive conduct. See Burnett, *supra* note 6, at 571 (mentioning that *Alcoa* was a means to correct “market failures” shielded by national borders that would otherwise have prevailed and created injuries beyond the jurisdictional reach of federal courts). The *Alcoa* court thus rejected the *American Banana* approach of looking to where the conduct occurred and, instead, decided to base Sherman Act coverage on whether the effects of anticompetitive conduct—regardless of where the conduct occurred—were felt in the United States. 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 272c (2d ed. 2000). Although Judge Learned Hand, who authored the *Alcoa* decision, made reference to taking into account the boundaries imposed by international law, the opinion mainly placed notions of comity on a backburner. See *Alcoa*, 148 F.2d at 443 (providing only one statement regarding the deference to other nations, where Judge Learned Hand warned that courts “should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States”). Later, the Ninth Circuit added a gloss to the *Alcoa* effects test, creating a balancing test that required courts to weigh whether foreign interests dominated the domestic interest when determining the propriety of asserting jurisdiction over the matter. *Timberlane Lumber Co. v. Bank of Am. Corp.*, 549 F.2d 597, 615 (9th Cir. 1977). This test proved “unmanageable” as evidenced by the fact that it took a decade of litigation to resolve that case. See *United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 957 (7th Cir. 2003) (using the *Timberlane* case as an example of how a fact-intensive jurisdictional test may create adjudication problems in antitrust cases).

37. 15 U.S.C. § 6a; see Stanger, *supra* note 19, at 1462 (emphasizing that the Sherman Act applies “in full force” to all import trade or import commerce, so that any individual or corporation that “imports goods or services into the United States—whether domestic or foreign—is subject to the Sherman Act”).

38. 15 U.S.C. § 6a(1); see H.R. REP. NO. 97-686, at 7-8, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2492-93 (clarifying that the reach of the Sherman Act is not limited to import trade or import commerce where non-import activity affects commerce within the United States or unfairly disadvantages U.S. exporters). The “substantial, direct, and foreseeable effect” requirement is not new, having been used previously in the *Restatement (Third) of Foreign Relations Law of the United States*. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(a) (1987) (stating that whether exercise of jurisdiction is reasonable depends on “the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory”).

39. 15 U.S.C. § 6a. Conflicting interpretations with regard to this second prong of the FTAIA’s test eventually led to a circuit split. Compare *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 429 (5th Cir. 2001) (interpreting the meaning of the FTAIA language mandating that the effect of the anticompetitive conduct “giv[e] rise” to a claim as requiring a showing by the foreign plaintiff that its “injuries [arose] from the anticompetitive conduct on a United States market”), with *Kruman v. Christie’s Int’l P.L.C.*, 284 F.3d 384, 400 (2d Cir. 2002) (holding that “[t]he ‘effect’ on domestic commerce need not be the basis of for a plaintiff’s injury, it only must violate the substantive provisions of

show that U.S. antitrust laws hindered their business activities.<sup>40</sup> By restricting the jurisdictional reach of the Sherman Act, the FTAIA exempts both American exporters and wholly foreign actors from U.S. antitrust laws unless their conduct results in direct or substantial adverse effects on U.S. domestic commerce.<sup>41</sup> At the same time, the FTAIA expressly acknowledges that foreigners may bring suits in U.S. courts as a means to deter illegal antitrust activity that harms competition in the United States.<sup>42</sup>

Congress left the courts to resolve the question of whether to consider questions of comity, stating that the FTAIA “is intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions.”<sup>43</sup> Following the enactment of the FTAIA, the Supreme Court seemed to indicate a complete abandonment of the doctrine of comity in its determination of subject matter jurisdiction.<sup>44</sup> In *Hartford Fire*, the Court held that comity concerns could only be considered after other jurisdictional requirements were satisfied, and even

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the Sherman Act”).

40. See H.R. REP. NO. 97-686, at 4, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2489 (mentioning that “a perception exists among businessmen . . . that antitrust law prohibits efficiency-enhancing joint export activities”).

41. See *id.* at 8-9, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2493-94 (clarifying that enacting this statute promotes predictability regarding when U.S. antitrust laws will apply to international business transactions).

42. See Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 297-99 (2002) (exploring the Supreme Court's holding in *Pfizer v. Government of India*, 434 U.S. 308 (1978), that the FTAIA permits foreign claimants to bring U.S. antitrust actions in U.S. courts); see also H.R. REP. NO. 97-686, at 10, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (citing *Pfizer* to support the proposition that “to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate [U.S.] laws, willingly risking the smaller amount of damages payable to injured domestic persons”). In *Pfizer*, the Court determined that foreign plaintiffs could sue in U.S. courts and justified its decision by acknowledging “American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.” 434 U.S. at 315.

43. H.R. REP. NO. 97-686, at 13, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498. Congress indicated that the first step in a court's analysis should be to determine whether subject matter jurisdiction exists. *Id.* Once such a finding is made, the FTAIA should “have no effect on the courts' ability to employ notions of comity, or otherwise take into account the international character of the transaction.” *Id.* (citing *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 1287 (3d Cir. 1977)).

44. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 774-75 (1993) (refusing to dismiss for lack of jurisdiction a case involving a conspiracy by London-based reinsurance companies devised entirely outside of the United States and aimed at limiting insurance coverage in the United States). Many commentators predicted that the doctrine of comity would eventually disappear from court opinions. See, e.g., Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 564-65 (2000) (stating that the Supreme Court “dealt comity a near death blow” and predicting that invoking comity would unlikely be successful in achieving the dismissal of an antitrust case after *Hartford Fire*); see also Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C.J. INT'L L. & COM. REG. 393, 432 (1994) (stating that the Supreme Court's view that a conflict of laws was a necessary precondition for the application of the doctrine of comity “undercuts the comity doctrine and clears the way for broader extraterritorial application of U.S. antitrust laws”).

then, comity could only be a factor when a “true conflict” between U.S. and foreign law existed.<sup>45</sup> The Supreme Court eventually backed away from such a limited use of the comity doctrine and followed Justice Scalia’s dissent in *Hartford Fire*,<sup>46</sup> in which he argued that even if the presumption against applying U.S. laws extraterritorially is overcome, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>47</sup>

C. *The Circuits Split on the Interpretation of the FTAIA Jurisdictional Requirement that a Domestic Effect “Give[] Rise to a Claim”*

Although Congress enacted the FTAIA to clarify how federal courts should determine subject matter jurisdiction over an extraterritorial antitrust claim,<sup>48</sup> the language of the statute eventually led to a split in the circuits.<sup>49</sup> The circuit split on the meaning of “a claim” signaled that the issue was prime for consideration by the Supreme Court.<sup>50</sup> The Court had to resolve whether to accept the expansive or the restrictive interpretation of the FTAIA, by setting a standard that federal courts could follow when exercising subject matter jurisdiction over extraterritorial claims.<sup>51</sup>

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45. See *Hartford Fire Ins. Co.*, 509 U.S. at 798-99 (finding there was no conflict between U.S. and British law, even though the conduct in this case conformed to British law but violated U.S. law). The Court stated that a true conflict only arises when it is impossible for an international actor to conduct itself in a manner that leads to compliance with the laws of two nations. *Id.* at 799. Because British law did not *compel* the London reinsurance companies to engage in agreements to set insurance terms which violated U.S. laws, there was no conflict, as the reinsurers could have chosen to act in a manner that would comply with both U.S. and British laws. *Id.*

46. See *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004) (citing Justice Scalia’s dissent in *Hartford Fire*, 509 U.S. at 817, to support the Court’s adoption of the rule of construction where the court “assume[s] that legislators take account of the legitimate sovereign interests of other nations when they write American laws”).

47. *Hartford Fire Ins. Co.*, 509 U.S. at 814-15 (Scalia, J., dissenting) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)). Justice Scalia contended that federal courts could not assert subject matter jurisdiction over the case because of the conflict between the laws of the United States and Great Britain. See *id.* at 821 (stating that when foreign and domestic laws provide different rules governing a dispute, courts should undertake a conflict-of-laws analysis).

48. See discussion *supra* Part I.B.

49. See Riazzi, *supra* note 23, at 1286 (articulating the main issue in the circuit split as whether or not the second prong of the FTAIA “closed the federal courthouse door on the plaintiffs”). At least one commentator has described the FTAIA as a “drafting disaster” where courts were left to manage and interpret the standards set out by the statute, leading to different approaches undertaken in its application. See Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMUL REV. 2151, 2157 (2003) (characterizing the FTAIA as “difficult to read” and “difficult to comprehend” and asserting that poor draftsmanship is to blame for the Act’s varied interpretations).

50. See Köster & Wheeler, *supra* note 10, at 726 (commenting that Supreme Court review is necessary to resolve the split in the circuits on the question of the jurisdictional reach of the Sherman Act, as provided by the FTAIA).

51. See *id.* at 727-28 (predicting correctly that the Court would curtail the jurisdiction of the Sherman Act as the Fifth Circuit did).

The split centered on the interpretation of one word: what the FTAIA meant by “a claim.”<sup>52</sup> Courts developed three different interpretations of what a plaintiff had to show to establish the jurisdictional requirement that the domestic effect “give[] rise to a claim.”<sup>53</sup> Under the Fifth Circuit’s narrow interpretation, courts could only assert jurisdiction where an anticompetitive domestic effect gave rise to the plaintiff’s specific injury.<sup>54</sup> In other words, the requirement that the injury give rise to “a claim” meant “the plaintiff’s claim” not merely “anyone’s claim.”<sup>55</sup> In contrast, the Second Circuit’s broad interpretation only required plaintiffs to show that the anticompetitive conduct produced effects on U.S. domestic commerce that violated the substantive provisions of the Sherman Act.<sup>56</sup> Thus, the plaintiff merely had to argue that the activity affecting U.S. domestic commerce could give rise to “any claim” because the Sherman Act prohibited the conduct.<sup>57</sup>

Finally, the D.C. Circuit established a “middle of the road” approach<sup>58</sup> where courts could assert jurisdiction over claims of alleged

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52. See discussion *infra* Part I.C (comparing the differing interpretations that three circuit courts adopted when deciding this question).

53. See *supra* notes 50-56 and accompanying text (describing the approaches taken by the Fifth, Second, and D.C. Circuit Courts).

54. See *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 427 (5th Cir. 2001) (asserting that “the FTAIA requires more than a ‘close relationship’ between the domestic injury and the plaintiff’s claim”). In that case, Statoil, a Norwegian oil company that drilled exclusively in the North Sea, claimed that heavy-lift barge services companies in the Gulf of Mexico, the North Sea, and the Far East, conspired to create a market allocation scheme so that the companies involved could maintain monopolies over the areas they served. *Id.* at 422. Under the conspiracy agreement, Heeremac and McDermott would take on all the projects in the Gulf of Mexico and Saipem would receive a higher allocation of projects in the North Sea in exchange for not involving itself in any projects in the Gulf. *Id.* Statoil claimed that the scheme led to the inflation of its operating costs in the North Sea and that the effects of the monopolistic scheme gave rise to a Sherman Act claim in the United States because U.S. companies were also affected by the higher prices they had to pay for heavy-lift services. *Id.* at 425. The Fifth Circuit rejected Statoil’s arguments, finding instead that the domestic effect did not give rise to Statoil’s claim since Statoil’s injury arose from inflated prices in the North Sea, while the higher prices U.S. companies paid for heavy-lift services arose from inflated prices in the Gulf of Mexico. *Id.* at 427.

55. See *id.* at 427 n.22 (framing the appropriate inquiry as whether the plaintiff’s injury was the result of anticompetitive effects in the U.S. market “regardless of the situs of the plaintiff’s injury”).

56. See *Kruman v. Christie’s Int’l P.L.C.*, 284 F.3d 384, 400 (2d Cir. 2002) (involving plaintiffs who purchased items at auctions conducted outside the United States that filed a class action lawsuit against Christie’s and Sotheby’s for conspiring to set buyer’s premiums and seller’s commissions at identical levels).

57. See *id.* at 399-400 (supporting its reading of the FTAIA by citing legislative history, which states that the impact of the illegal conduct does not need to be experienced by the injured party within the United States). A plain reading of the language of the FTAIA supported this interpretation of the statute, the court reasoned, because “Congress used the indefinite article (‘a’) rather than the definite article (‘the’).” *Id.* at 400.

58. See *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 315 F.3d 338, 350 (D.C. Cir. 2003) (recognizing that “[o]ur view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former”).

anticompetitive conduct if the conduct violated the Sherman Act and the conduct gave rise to “‘a claim’ by someone, even if not the foreign plaintiff who is before the court.”<sup>59</sup> In *Empagran*, foreign plaintiffs brought an action on behalf of foreign and domestic purchasers, who bought bulk vitamins “for delivery outside the United States,”<sup>60</sup> against foreign and domestic corporations who distributed and sold bulk vitamin products around the world, alleging that they conspired to raise prices for vitamins.<sup>61</sup> The plaintiffs maintained that the basis for subject matter jurisdiction was that the defendants’ conduct was of a “global nature” producing worldwide effects.<sup>62</sup> The D.C. Circuit reversed the district court’s dismissal of the case for lack of subject matter jurisdiction,<sup>63</sup> and rejected the district court’s finding that the plaintiffs’ showing “that other persons were injured by such United States effects” was insufficient under the FTAIA.<sup>64</sup> Instead, under the circuit court’s reading of the FTAIA, the foreign plaintiffs could sue in a U.S. federal court because the alleged anticompetitive conduct affected prices in the United States, regardless of the fact that the foreign plaintiffs in this case had not actually purchased bulk vitamins in the United States.<sup>65</sup>

Imagine a situation where only five companies in the world manufacture sneakers. The five companies conspire to fix the price of sneakers in all of their respective markets at \$150 each. The United States is one of the markets affected by the inflated prices. An Ecuadorian retailer brings suit in the United States on behalf of purchasers of sneakers that bought the sneakers outside the United States. Under the Second Circuit’s interpretation, the retailer could successfully bring the suit because the Sherman Act prohibits price-fixing. The retailer would also be successful in the D.C. Circuit because the price of sneakers is higher in the United States as well, and in theory, someone in the United States could

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59. *Id.* at 341.

60. *Id.* at 342.

61. *Empagran S.A. v. F. Hoffman-LaRoche*, No. Civ. 001686TFH, 2001 WL 761360, at \*3 (D.D.C. June 7, 2001).

62. *See id.* (establishing that the plaintiffs’ argument was that, because the conspiracy fixed prices world-wide, any foreign purchaser paid inflated prices for bulk vitamins abroad).

63. *See id.* (dismissing the case because the plaintiffs’ injuries did not allege that their “precise injuries” have the “requisite domestic effects necessary to provide subject matter jurisdiction over this case”). After the district court dismissed their claim, the domestic purchasers transferred their claim to another pending suit, and therefore did not take part in the subsequent appeal. *Empagran*, 315 F.3d at 343.

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

65. *See id.* at 349-50 (rejecting the Fifth Circuit’s restrictive interpretation of the FTAIA and explaining that the foreign plaintiff does not necessarily have to suffer injury in the United States, as long as it can show that *someone* could bring a claim based on the U.S. anticompetitive conduct). The court later clarified that “the plaintiff must allege that some private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant’s violation of the Sherman Act.” *Id.* at 352.

successfully bring such a suit. However, the retailer would be unsuccessful in the Fifth Circuit because the fact that prices are inflated in the United States did not give rise to the purchasers' specific injury (i.e., paying higher prices for sneakers in Ecuador).

## II. THE SUPREME COURT ESTABLISHES THE INDEPENDENT EFFECTS TEST AND THE D.C. CIRCUIT IMPOSES PROXIMATE CAUSATION

In resolving the split in the circuits, the Supreme Court embraced the Fifth Circuit's more restrictive reading of the FTAIA's language, clarifying that "a claim" meant "the plaintiff's claim" or "the claim at issue."<sup>66</sup> Under this ruling, the plaintiff must first show that the conduct that caused its harm also "significantly and adversely"<sup>67</sup> affected U.S. domestic commerce or customers within the United States.<sup>68</sup> In addition, the plaintiff must show that its foreign injury is linked to the adverse effect on U.S. commerce.<sup>69</sup> Thus, the FTAIA does not apply when "the foreign effect is *independent* of any adverse domestic effect."<sup>70</sup>

According to the Court, this reading of the statutory language is the most compatible with the FTAIA's legislative history.<sup>71</sup> The Court based its analysis of the FTAIA jurisdictional test on the doctrine of international comity, asserting that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."<sup>72</sup> Congress, it reasoned, had no intention of allowing U.S. antitrust laws to

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66. See *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 172-74 (2004) (concluding, after an examination of the FTAIA legislative history and the doctrine of comity, that this reading is consistent with congressional intent in enacting the statute).

67. *Id.* at 164.

68. See *id.* at 161-62 (observing that the Sherman Act does not prevent American exporters from entering into anticompetitive arrangements abroad as long as the conduct only adversely affects foreign markets).

69. See *id.* at 165-67 (stating that although Congress created an exception for plaintiffs seeking redress from anticompetitive conduct that gives rise to foreign as well as domestic harm, it did not expand the Sherman Act's jurisdictional reach to such an extent that a plaintiff with an independent foreign injury may sue in U.S. courts).

70. See *id.* at 163-64 (emphasis added) (assuming that the price-fixing conspiracy at hand "significantly and adversely" affected customers in the United States and abroad, but "the adverse foreign effect [was] independent of any adverse domestic effect"). The Court based its ruling on this assumption because, although the plaintiffs alleged that the price-fixing conspiracy generally had a direct, substantial, and reasonably foreseeable effect on U.S. commerce, such as conducting meetings and agreements in the United States among the defendants to establish the price-fixing scheme, they did not allege that they purchased any vitamins in the United States. *Empagran S.A. v. F. Hoffman-LaRoche*, No. Civ. 001686TFH, 2001 WL 761360, at \*3 (D.D.C. June 7, 2001). Therefore, the Supreme Court assumed that the "relevant 'transactions occur[ed] entirely outside U.S. commerce.'" *Empagran*, 542 U.S. at 160 (quoting *Empagran*, 2001 WL 761360, at \*4).

71. See *Empagran*, 542 U.S. at 169 (supporting the Court's holding by remarking 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").

72. *Id.* at 164.

interfere with the ability of foreign nations to enforce their own laws to regulate commercial activity affecting their own markets.<sup>73</sup> The Court questioned:

Why should American law supplant . . . Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?<sup>74</sup>

The Court also indicated that its holding would result in a more efficient handling of claims brought by foreign plaintiffs.<sup>75</sup> The Court refused to create a rule that would allow courts to take account of comity considerations on a case-by-case basis.<sup>76</sup> This approach would be unworkable because it would force federal courts to engage in a time-consuming analysis of foreign and domestic law for every case before them.<sup>77</sup> The Court further noted that the procedural delays that would result from such a rule would interfere with a foreign country's ability to enforce and maintain its own antitrust system.<sup>78</sup> Instead, excluding all independent foreign injury cases from the jurisdiction of federal courts prevents federal judges from having to undertake this comparative analysis altogether.<sup>79</sup>

The Supreme Court remanded the case to the D.C. Circuit to resolve the issue of whether the court had subject matter jurisdiction over Empagran's alternate theory that "because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the

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73. *See id.* at 169 (articulating that, although Congress may have hoped that other countries would enact laws similar to U.S. antitrust laws, it cannot impose them on other countries that have chosen to pursue other policies). The Supreme Court indicated that following the D.C. Circuit's approach to asserting jurisdiction would have unwanted effects of opening the floodgates to foreign plaintiffs hoping to evade their own laws:

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

*Id.* at 166 (citing 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 273 (Supp. 2003), which concluded that this is a reasonable limitation that Congress would impose).

74. *Id.* at 165.

75. *See id.* at 167-69 (indicating that courts would be unable to undertake a lengthy and complicated comparison of U.S. and foreign interests "simply and expeditiously").

76. *Id.* at 168.

77. *See id.* (explaining that, because the Sherman Act covers different types of anticompetitive agreements, such an analysis would be highly technical and would result in lengthy proceedings and high procedural costs and delays).

78. *Id.*

79. *Id.*; *see* discussion *infra* Part III.C (explaining how judges may avoid entertaining an inquiry on the merits of the case by dismissing it for lack of subject matter jurisdiction through a 12(b)(1) motion).

United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury.”<sup>80</sup> Thus, the question the D.C. Circuit was presented with was whether but-for causation was “sufficient to bring the price-fixing conduct within the scope of the FTAIA’s exception.”<sup>81</sup> Empagran argued that because F. Hoffmann-LaRoche and its alleged co-conspirators globally marketed bulk vitamins, they were able to sustain artificially inflated prices world-wide, including in the United States.<sup>82</sup> If prices were not inflated in the United States, overseas purchasers could have purchased the vitamins at lower prices in the U.S. market, which would have prevented the conspirators from maintaining their price scheme.<sup>83</sup> Therefore, the inflated prices in the United States gave rise to the foreign injury—paying higher prices abroad.<sup>84</sup>

In a short opinion by Circuit Judge Henderson, the D.C. Circuit held that it did not have subject matter jurisdiction over this alternate theory of liability because a showing of but-for causation is insufficient to establish jurisdiction under the FTAIA domestic injury exception.<sup>85</sup> Instead, the court asserted that the FTAIA’s causation language—“gives rise to”—

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80. *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1269 (D.C. Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3288 (U.S. Oct. 26, 2005) (No. 05-541) (quoting *Empagran*, 542 U.S. at 175).

81. *Empagran*, 542 U.S. at 175.

82. *See Empagran*, 417 F.3d at 1270. The vitamin industry has a relatively small number of producers so that when the defendants entered into a price-fixing and market-allocation scheme, it prevented vitamins from being traded between North America and other regions. Corrected Brief for Appellants at 16-17, *Empagran*, 417 F.3d 1267 (No. 01-7115) [hereinafter Corrected Brief for Appellants]. The fact that vitamins are fungible goods, meaning they are exchangeable and are not specified by ownership, furthered the claim because the vitamins could easily be sold to any willing purchaser (unlike, for example, high technology products made specifically for one customer). *See BLACK’S LAW DICTIONARY* 714 (8th ed. 2004) (defining “fungible goods” as “goods that are interchangeable with one another; goods that, by nature or trade usage, are the equivalent of any other like unit, such as coffee or grain”). The appellants therefore argued that if the defendants had not controlled the U.S. market in this way, other companies could have undercut the cartel’s prices and led to its collapse. *See* Corrected Brief for Appellants, *supra*, at 18.

83. *Empagran*, 417 F.3d at 1271. Because U.S. consumers constitute such a large share of the world market in bulk vitamins, it was imperative that defendants control U.S. markets to ensure the survival of the cartel. Corrected Brief for Appellants, *supra* note 82, at 19. In this way, the argument progresses, the price-fixing and market allocation schemes had a direct, substantial, and reasonable effect on the U.S. domestic market, which in turn gave rise to the plaintiffs’ claim (i.e., paying artificially inflated prices abroad). *See* Brief of Amici Curiae Legal Scholars in Support of Respondents at 5-6, *Empagran*, 417 F.3d 1267 (No. 01-7115) (contending that jurisdiction over *Empagran* would be proper because “the cartelists’ conduct . . . had a ‘substantial effect’ on ‘trade or commerce . . . with foreign nations,’ where there was an intertwined effect on imports and exports of vitamins”).

84. *Empagran*, 417 F.3d at 1271.

85. *See id.* (finding that it was not enough to argue that the vitamin market is a “single, global market”). Such an argument, the court maintained, establishes merely an indirect connection between the inflated U.S. prices and the inflated prices paid by foreign purchasers which gave rise to the claim. *Id.*

indicated that plaintiffs had to show “a direct causal relationship, that is proximate causation,” between adverse domestic effects and the alleged foreign harm in order to recover.<sup>86</sup> The court concluded that this more restrictive reading of the FTAIA prevents “open[ing] the door to . . . interference with other nations’ prerogative to safeguard their own citizens from anti-competitive activity within their own borders.”<sup>87</sup>

### III. THE D.C. CIRCUIT’S PROXIMATE CAUSE STANDARD IS CONSISTENT WITH SUPREME COURT DIRECTIVES AND CONGRESSIONAL INTENT

On remand from the Supreme Court, the D.C. Circuit established that, for a claim to satisfy the Supreme Court’s independent effects test, the plaintiff must show a direct link between an alleged foreign harm and a U.S. adverse domestic effect.<sup>88</sup> The imposition of such a standard will likely have the effect of limiting access to federal courts by foreign plaintiffs with claims only marginally tied to anticompetitive effects in the U.S. marketplace.<sup>89</sup> At the same time, a more restrictive jurisdictional standard may have the broader result of decreasing the overall deterrent effect of U.S. antitrust laws.<sup>90</sup> Nevertheless, other circuit courts should follow the D.C. Circuit’s imposition of proximate causation as the basis for establishing jurisdiction under the Supreme Court’s independent effects test because it is in line with the Supreme Court’s reasoning in *Empagran*<sup>91</sup> and it correlates with legislative intent in passing the Sherman Act and the FTAIA.<sup>92</sup> Although the general deterrent effect of U.S. antitrust laws may be sacrificed in the interest of observing the sovereignty of other nations which may have less stringent antitrust laws,<sup>93</sup> such an outcome is consistent with three U.S. interests, discussed below: (1) protecting the

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86. *See id.* (implying that the “mere but-for ‘nexus’” is not in line with the plain language of the FTAIA).

87. *Id.* (alluding to the Supreme Court’s warnings that a more expansive interpretation of the FTAIA could lead to supplanting other nations’ determinations about how to regulate anticompetitive conduct affecting their markets).

88. *See id.* (requiring plaintiffs to show that their foreign injury was directly tied to the anticompetitive effects occurring in the United States); *see also supra* notes 85-87 and accompanying text (discussing the court’s reasoning in establishing proximate causation as the threshold test for determining subject matter jurisdiction).

89. *See discussion infra* Part III.B-C.

90. *See discussion infra* Part III.B.

91. *See F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (holding that the principles of comity provide support for holding that foreign plaintiffs may bring suit in the United States only when they can show that their foreign injury is dependent on domestic effects).

92. *See discussion infra* Part II.A-C (supporting the claim that proximate causation is consistent with legislative intent). *See generally* AREEDA & HOVENKAMP, *supra* note 36, § 273(a) (maintaining that when foreign conduct is involved, courts should be mindful of the will of Congress).

93. *See discussion infra* Part III.A-B (discussing the impact of requiring proximate causation as it relates to deterrence and comity analysis).

welfare of U.S. consumers rather than the world's consumers;<sup>94</sup> (2) maintaining good relations with foreign nations;<sup>95</sup> and (3) relieving the overburdened federal court system.<sup>96</sup>

A. *Restricting the Exercise of Jurisdiction Over Foreign Claims Reflects Congress' Intent That U.S. Laws Protect Only U.S. Commerce From Harmful Antitrust Activity*

The Supreme Court has lauded private antitrust actions as “a significant supplement” to the efforts by the Department of Justice (“DOJ”) to enforce antitrust laws and deter anticompetitive conduct.<sup>97</sup> However, maintaining general deterrence policies is not of sufficient “empirical significance” to offset the prevailing importance of narrowly construing the reach of U.S. antitrust laws.<sup>98</sup> A narrow application of these laws avoids interference with the interests of foreign nations whose claims are only marginally linked to U.S. domestic commerce.<sup>99</sup> Although Congress passed the Sherman Act to deter anticompetitive conduct that harms consumers,<sup>100</sup> it is unlikely that it envisioned the extraterritorial application that some circuit courts subsequently permitted.<sup>101</sup> Congress never contemplated the expansion of the U.S. antitrust laws' reach to such an extent that federal courts essentially became the world's courts.<sup>102</sup> The history behind early

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94. See discussion *infra* Part III.A.

95. See discussion *infra* Part III.B.

96. See discussion *infra* Part III.C.

97. See *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 572-73 n.10 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)) (finding a party civilly liable for the antitrust violations of its agents in a suit brought by a private plaintiff).

98. See *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 174-75 (2004) (supporting the Court's view by emphasizing that it is unclear which deterrence policies are preferable).

99. See *id.* at 169-70 (noting that competing briefs in this case analyzed data available regarding the role of private actions in deterring anticompetitive conduct, and reached opposite conclusions: “(1) that potential treble-damage liability would help enforce widespread anti-price-fixing norms (through added deterrence) and (2) . . . that such liability would hinder antitrust enforcement (by reducing incentives to enter amnesty programs)”). Because it is impossible to determine conclusively the effect of restricted jurisdiction on deterrence, the Court refused to allow those considerations to factor into its decision. *Id.*

100. See *Buswell*, *supra* note 7, at 996 (stating that the “primary” and “underlying purpose” of the antitrust laws is deterrence of anticompetitive activity); *supra* notes 19-22 and accompanying text (providing support for stating that Congress intended to deter anticompetitive conduct and protect U.S. domestic commerce by enacting U.S. antitrust laws).

101. See *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 427-28 (5th Cir. 2001) (noting that Congress never intended a broad extraterritorial application of U.S. antitrust laws that would allow plaintiffs having injuries “unrelated to the injuries suffered in the United States” to flock to U.S. courts).

102. See *AREEDA & HOVENKAMP*, *supra* note 36, § 273(a) (asserting that “Congress did not intend American antitrust law to rule the entire commercial world; and Congress knew that domestic economic circumstances often differ from those abroad”); see also Joshua P. Davis, *Supreme Court Review of the Foreign Trade Antitrust Improvements Act: A Case of a Misleading Question?*, 38 U.S.F. L. REV. 431, 447 (2004) (stating that “the FTIAIA

U.S. antitrust laws indicates a “primary concern for the domestic market and an initial reluctance to intervene in foreign anticompetitive arrangements.”<sup>103</sup> Although the underlying policy reason for the Sherman Act was that of ensuring consumer economic welfare,<sup>104</sup> it is clear that neither the Sherman Act nor any other U.S. antitrust law was formulated to regulate commercial activity with little or no effect in the United States.<sup>105</sup> Recent legislative history supports this view, suggesting that Congress intended to limit the reach of the Sherman Act through the FTAIA so that foreign plaintiffs could only bring suits in the United States when their foreign injury had a direct and substantial link to U.S. commerce.<sup>106</sup>

However, deterrence should remain an important U.S. interest where it stops adverse anticompetitive conduct for the purpose of protecting the welfare of U.S. consumers.<sup>107</sup> The FTAIA reflects such an interpretation of U.S. deterrence policy in that the FTAIA, by its plain language, does not prohibit U.S. exporters from engaging in anticompetitive conduct that affects solely foreign markets,<sup>108</sup> nor does it prohibit foreigners from

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indicates that Congress was somewhat less concerned with antitrust injuries abroad than with those in the United States”).

103. See Clifford A. Jones, *The Growth of Private Rights of Action Outside the U.S.: Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409, 412 (2004) (explaining that the move toward greater interest in international cartels began in 1938 after the discovery of the existence of pre-World War I cartels in which several American firms participated).

104. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 71 (1978) (asserting that the legislative intent behind the U.S. antitrust laws “overwhelmingly support[s] the conclusion that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare”). Bork argues that courts should work toward maintaining consistency within the body of antitrust laws; courts should therefore read antitrust laws in light of the overarching goal of promoting consumer welfare unless congressional intent indicates a contrary reading. *Id.*

105. See ALBERT H. WALKER, *HISTORY OF THE SHERMAN LAW* 16 (1980) (quoting Senator Sherman, who argued on behalf of his proposed bill, “[w]hile we should not stretch the powers granted to Congress by strained construction, we cannot surrender any of them; they are not ours to surrender; but whenever occasion calls, we should exercise them for the benefit and protection of the people of the United States”); see also BORK, *supra* note 104, at 20 (noting that the language of the Sherman Act was “opaque” and chosen “to allay fears that the law might go beyond the then narrowly conceived commerce power of Congress”).

106. See H.R. REP. NO. 97-686, at 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494-95 (clarifying that wholly foreign transactions and export transactions are not subject to the jurisdiction of U.S. courts “absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor”). See generally Cavanaugh, *supra* note 49, at 2185 (arguing that Congress did not intend to expand subject matter jurisdiction through the FTAIA for the purpose of increasing deterrence).

107. See Neal R. Stoll & Shepard Goldfein, *Limiting the Sherman Act’s Extraterritoriality*, N.Y.L.J., Jan. 14, 2004, at 6 (quoting Judge Kaplan as saying that “[u]nless the Court is to impute to Congress an intention to establish an antitrust regime to cover the world, the answer must be that no subject matter jurisdiction exists where a foreign plaintiff alleges harm from foreign effects”); see also Delrahim Speech, *supra* note 8, at 7 (arguing that allowing class action suits by foreign plaintiffs claiming foreign injuries is inconsistent with the purpose of U.S. antitrust laws, which is “to protect consumers, competition, and commerce in the United States”) (emphasis added).

108. H.R. REP. NO. 97-686 at 10, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495. The

engaging in anticompetitive conduct in foreign markets.<sup>109</sup> Although a domestic firm or individual may seek recourse in U.S. courts if it is affected by U.S. exporters' anticompetitive conduct, a foreign firm similarly affected may not bring suit in the United States.<sup>110</sup> The legislature must constantly make value trade-offs, assessing "how much consumer welfare is to be sacrificed for what amount of additional wealth for small dealers and worthy men."<sup>111</sup> From the point of view of U.S. interests, there is no need to deter anticompetitive conduct that does not negatively impact the welfare of the U.S. consumer or the interest of U.S. businesses.<sup>112</sup> The legislature has therefore sacrificed foreign consumer welfare in exchange for protecting U.S. exporters (although those exporters may be liable for their conduct in other places).<sup>113</sup>

It is also important to note that private actions are not the sole means of deterring anticompetitive conduct; the government also pursues the goal of

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House Report emphasizes that courts cannot assert jurisdiction over claims where export-oriented activity results in solely foreign anticompetitive effects:

[A] price-fixing conspiracy directed solely to exported products or services, absent a spillover effect on the domestic marketplace, would normally not have the requisite effects on domestic or import commerce. Foreign buyers injured by such export conduct would have to seek recourse in their home courts.

*Id.*

109. See *supra* notes 37 and 41 and accompanying text (clarifying that the FTAIA does not apply to all non-import activity, which encompasses exports and wholly foreign conduct).

110. See H.R. REP. No. 97-686 at 10-11, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495-96 ("[A] domestic exporter is assured a remedy under our antitrust laws for injury caused by unlawful conduct of a competing United States exporter. But a foreign firm whose nondomestic operations were injured by the very same export oriented conduct would have no remedy under our antitrust laws.").

111. See BORK, *supra* note 104, at 79-80 (explaining that in the case of price-fixing, there is always a conflict between consumer and producer interests and the legislature must find a way to balance these interests). The decision to protect exporters through the FTAIA is rational, as anticompetitive conduct undertaken by U.S. exporters will pose little danger to the United States, in comparison to agreements affecting imports. Note, *supra* note 21, at 2143. The export exception therefore reflects the optimal antitrust policy: U.S. exporters are able to increase profits through anticompetitive conduct affecting solely foreign commerce, and the welfare loss from the U.S. national perspective is zero. *Id.*

112. The deterrent function of U.S. antitrust laws is thus preserved, as plaintiffs may freely seek redress in U.S. courts when the anticompetitive conduct that caused their harm is directly linked to adverse U.S. domestic anticompetitive effects. *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

113. See *Stoll & Goldfein, supra* note 107, at 6 (quoting the solicitor general, who stated that "policy considerations based on deterrence counsel against the panel's expansive interpretation of the FTAIA that permits suits for injuries sustained abroad that arise from foreign conduct"). Such a view is bolstered by the facts in *Empagran*, a suit brought on behalf of foreign plaintiffs who purchased bulk vitamins outside the United States: plaintiffs, whose own injuries arise out of effects on foreign commerce, should not be able to recover under U.S. antitrust laws, but instead, should "seek redress under the law of the land where the effects occurred; a view that merges with the original, stated goal of the Sherman Act—to protect American trade." *Id.*; see Note, *supra* note 21, at 2143 (suggesting that the existence of the FTAIA's export exception refutes the possibility that the United States has any economic interest in protecting competition simply for its own sake in international trade).

detering anticompetitive conduct through avenues such as the DOJ's leniency program.<sup>114</sup> The leniency program is designed to protect from criminal prosecution corporations or individuals who reveal the misconduct of their co-conspirators before an investigation is underway.<sup>115</sup> In many cases, a conspiracy would likely remain undetected if not for the fact that a co-conspirator discloses its wrongdoing and breaks ranks with its cohorts.<sup>116</sup> Since the informant remains vulnerable to private civil actions under a system with an expansive jurisdictional test,<sup>117</sup> unlimited civil liability serves to discourage corporations and individuals from confessing antitrust violations.<sup>118</sup> The informants could face an endless amount of private suits for treble damages from foreign plaintiffs around the world.<sup>119</sup> For this reason, it is preferable to limit foreign plaintiffs' access to U.S. courts so that informants continue providing information to the government.<sup>120</sup> In this sense, a more restrictive jurisdictional standard

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114. Brief for the United States as Amicus Curiae Supporting Petitioners at 19, *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) [hereinafter Brief for the United States] (arguing that price-fixing conspiracies are difficult to detect, so the DOJ's amnesty program serves an important role as an enforcement tool by providing incentives for co-conspirators to come forward). *But see* Jones, *supra* note 103, at 411 (stating that private antitrust actions in the United States maintain a ten to one ratio to government enforcement efforts, indicating that they are an effective means to provide compensation for victims and penalties for violators).

115. See DEP'T OF JUSTICE, INDIVIDUAL LENIENCY POLICY 1 (1994), <http://www.usdoj.gov/atr/public/guidelines/0092.pdf> (providing for leniency if the individual "reports the wrongdoing with candor and completeness and provides full . . . cooperation"); DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY 1 (1993), <http://www.usdoj.gov/atr/public/guidelines/0091.pdf> (allowing corporations to avoid criminal prosecution if they report illegal antitrust activity "at an early stage").

116. See Brief for the United States, *supra* note 114, at 19 (asserting that price-fixing conspiracies are "inherently difficult to detect and prosecute"). The government also pointed out that the amnesty program has led to the investigation of the "majority of the Antitrust Division's major international investigations, including the investigation of the vitamin cartel."; *id.* at 20. See ORG. FOR ECON. CO-OPERATION & DEV., REPORT ON THE NATURE AND IMPACT OF HARD CORE CARTELS AND SANCTIONS AGAINST CARTELS UNDER NATIONAL COMPETITION LAWS 3 (2002), <http://www.oecd.org/dataoecd/16/20/2081831.pdf> (acknowledging that only one in seven of all international cartels are detected).

117. See Salil K. Mehra, *More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement*, 77 TEMPLE L. REV. 47, 54 (2004) (explaining that the Justice Department restricts its amnesty to criminal prosecutions only, so private plaintiffs may freely bring civil actions against violators that have reported illegal activities).

118. See Brief for the United States, *supra* note 114, at 20 (reasoning that, if federal courts could assert jurisdiction over antitrust conduct occurring abroad, potential amnesty applicants would decide not to come forward because that would mean increasing the scope of their civil liability exposure). *But see* H.R. REP. NO. 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (maintaining that allowing foreign plaintiffs to sue in U.S. courts helps to deter cartels because "defendants would [otherwise] continue to violate [U.S.] laws, willingly risking the smaller amounts of damages payable only to injured domestic persons").

119. See Brief for the United States, *supra* note 114, at 20 (citing 15 U.S.C. § 15(a) (2000), which provides that even if conspirators come forward and receive amnesty from criminal prosecution, they are still vulnerable to civil suit).

120. See James M. Griffin, Deputy Assistant Attorney Gen., Antitrust Div., Dep't of

serves to foster greater deterrence through government enforcement.<sup>121</sup>

Reexamine the facts described in the Ecuadorian sneaker retailer example above. Proponents of a broader jurisdictional reach would argue that the sneaker manufacturers would be less inclined to enter a conspiracy in a global environment where any one of their millions of customers could sue for treble damages. Thus, broad jurisdiction would deter the cartel from ever forming, as conspirators would evaluate the potential costs and benefits of the activity and likely decide that unlimited civil liability would be too high a cost to bear. This, however, assumes they will get caught. Supporters of broader jurisdiction argue from an economic standpoint that making treble damages available to a larger number of plaintiffs produces stronger disincentives to potential violators, thereby reducing the overall number of global cartels.<sup>122</sup>

Although this may be true for some anticompetitive behavior, it fails to take into consideration the concealability of certain activities such as price-fixing.<sup>123</sup> In those situations, increasing the likelihood of detection may

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Justice, *An Inside Look at a Cartel at Work: Common Characteristics of International Cartels*, Address Before the American Bar Association Section of Antitrust Law 48th Annual Spring Meeting 4 (Apr. 6, 2000), available at <http://www.usdoj.gov/atr/public/speeches/4489.pdf> (asserting that the leniency program achieves the government's goal of early detection of antitrust violations).

121. See WILLIAM BREIT & KENNETH G. ELZINGA, *ANTITRUST ENFORCEMENT AND ECONOMIC EFFICIENCY: THE UNEASY CASE FOR TREBLE DAMAGES* (1974), reprinted in *ECONOMIC ANALYSIS AND ANTITRUST LAW*, at 346 (Terry Calvani & John Siegfried eds., 1979) (noting that "the public agency has the edge in investigating antitrust violations, if not in litigating them as well"); see also Cavanaugh, *supra* note 49, at 2185 (stating that even if the argument that barring foreign plaintiffs from suing in U.S. courts will decrease deterrence was correct, allowing such suits "may well have the perverse effect of decreasing overall deterrence" by undermining the DOJ's leniency program). But see ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 116, at 3 (concluding that strong sanctions provide incentives for whistleblowers to report to the protection of leniency programs).

122. See Corrected Brief for Appellants, *supra* note 82, at 37 (arguing that suits legitimately brought in the U.S. "may not provide sufficient deterrence," as a violator could offset its liability in the United States through its illegal operations abroad). But see Davis, *supra* note 102, at 447 (stating that it is not necessary to impose treble damages for all injuries caused by an international antitrust violation to deter conspirators from affecting U.S. commerce, as U.S. competitive markets are likely to act to deprive conspirators of "some, if not all, of the spoils from anticompetitive conduct"). Davis concludes that, although exposure to civil liability in the United States may not account for the full injuries caused by the conspiracy throughout the world, but "may generally suffice as deterrence against causing harm in the United States commerce." *Id.*

123. See RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 226 (1976) (assessing the social costs of antitrust violations and explaining that "the penalty for a concealable offense such as price-fixing should be greater than the social costs imposed by the particular conspiracy in suit"). Posner's analysis is premised on the idea that the pecuniary or non-pecuniary penalties assessed against antitrust violators should be equal to the violation imposed on society. *Id.* at 221. If the penalty for violating the law were less than the violation to society, the violator would likely expect the cost of punishment to be lower than the benefit the violator would derive from continuing to engage in the unlawful activity. *Id.* at 221-22. This would lead to excessive amounts of illegal activity. *Id.* However, if the penalty for a violation were higher than the social cost, such a system would deter illegal activity that confers greater benefits on society than the costs it imposes. *Id.* at

have a greater effect on deterring conduct than maintaining an expansive jurisdictional threshold that allows any foreign plaintiff to sue.<sup>124</sup> This is because, in determining whether to engage in anticompetitive behavior, the prospective violator will discount the punishment cost of the violation by the probability of actually being discovered to determine the expected cost of engaging in the unlawful activity.<sup>125</sup> By increasing the violator's probability of being turned in by an informant, and then allowing the victims of the anticompetitive conduct affecting U.S. commerce to recover treble damages, the *Empagran* decision reflects an efficient mechanism to achieve the deterrence of conduct harming U.S. commerce. Thus, the sneaker manufacturers, assessing the risk that one of the conspirators may denounce the activity, may decide it is more costly to undertake the activity.

*B. A More Restrictive Jurisdictional Standard Ensures the Observance of the Interests of Foreign Nations in Determining Their Own Regulatory Schemes*

Requiring a "direct causal relationship" between the plaintiff's foreign injury and adverse domestic effects accords with principles of comity as it ensures that courts assert jurisdiction only over cases in which the United States would have an interest in resolving.<sup>126</sup> Eliminating the possibility that a plaintiff may bring suit in the United States on a claim based on a "worldwide effect" is significant "because almost all large scale conspiracies will inevitably affect U.S. commerce."<sup>127</sup> Consequently, a but-for causation test could give U.S. courts jurisdiction over cases that would more appropriately be resolved in another forum. The imposition of a proximate cause standard will therefore prevent the assertion of jurisdiction over these marginal cases.<sup>128</sup> The plain meaning of the FTAIA

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222. Posner offers the example of a monopolistic merger that imposes social costs of \$1 million, but confers benefits of \$2 million through the organization of the market in question. *Id.*

124. See Corrected Brief for Appellants, *supra* note 82, at 21 (stating that the effective use of the leniency program leads to enhanced detection and disclosure which in turns deters cartel behavior after the cartel is exposed).

125. See POSNER, *supra* note 123, at 223 (supporting the theory that punishment cost be higher than social costs of the violation). For example, if the social cost of a price-fixing arrangement is \$1 million but there is only a twenty-five percent chance of being caught and punished, if the fine is \$1 million, the expected punishment cost will be only \$250,000. See *id.* at 223-24. Under those circumstances, a violator would have incentive to continue its illegal activity.

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

127. See Burnett, *supra* note 6, at 629 (arguing that the "worldwide" effects test is a weak jurisdictional standard).

128. See *Empagran*, 417 F.3d at 1271 (citing the Supreme Court's opinion in *Empagran*, where Justice Breyer questions why U.S. law should supplant the law of foreign nations

supports such a standard, as it cannot be read to require anything less than a proximate effect on domestic commerce that gives rise to the alleged foreign harm.<sup>129</sup> The imposition of a stronger nexus between the alleged injury and a domestic effect “show[s] deference to other nations and regulatory bodies who have a significant interest in regulating anticompetitive effects occurring within their own territory.”<sup>130</sup>

Underlying the Supreme Court’s holding in *Empagran* was the view that Congress did not intend courts to exceed the limitations prescribed by customary international law.<sup>131</sup> It is well established in American jurisprudence that even though a statute may apply extraterritorially,<sup>132</sup> it “should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.”<sup>133</sup> Those

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regarding their determination about how best to protect their own customers from anticompetitive conduct caused by foreign companies).

129. The proximate cause standard reflects the FTAIA language requiring a plaintiff to show the conduct in question had a “direct, substantial and reasonably foreseeable effect” on domestic commerce. 15 U.S.C. § 6a(1) (2000). Treatises that examine causation requirements indicate that proximate causation requires a showing of “direct linkage,” “substantial factors,” and “natural and probable consequences.” See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 182 (2001) (noting that courts often require a plaintiff proving proximate cause to show cause in fact and “that the harm or its manner of occurrence was foreseeable”); see also DAN B. DOBBS ET AL., *PROSSER AND KEETON ON TORTS* § 42 (5th ed. 1984) (clarifying that proximate causation depends on “whether the conduct has been so significant and important a cause that the defendant should be legally responsible”). The plain language of the FTAIA is thus indicative of proximate cause standards. See generally Delrahim Speech, *supra* note 8, at 11 (recognizing that “the most sensible interpretation of the term ‘direct’ is as a synonym for ‘proximate cause’”).

130. Burnett, *supra* note 6, at 628. Considerations of comity advise against applying U.S. antitrust laws to claims that only marginally affect U.S. domestic commerce. See *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 165-66 (2004) (questioning the validity of applying U.S. antitrust laws to claims that are independent of U.S. domestic effects). The Court began its analysis with one question:

Why is it reasonable to apply this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim? We can find no good answer to that question.

*Id.* at 165-66.

131. See *Empagran*, 542 U.S. at 164 (asserting the statutory rule of construction that assumes “legislators take account of the legitimate sovereign interests of other nations when they write American laws”); see also H.R. REP. NO. 97-686, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2498 (clarifying that “[t]he Bill is intended neither to prevent nor encourage additional judicial recognition of the special international characteristics of transactions”). Congress indicated that a court could balance the interests of foreign nations after it asserted subject matter jurisdiction over a claim. *Id.* at 12, reprinted in 1982 U.S.C.C.A.N. 2487, 2498.

132. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting) (conceding that the presumption against extraterritoriality has been overcome with respect to the Sherman Act, so that “it is now well established that the Sherman Act applies extraterritorially”).

133. Justice Scalia maintains that although Congress may have the constitutional authority to enact a law that applies extraterritorially, it is “generally presumed” that the jurisdictional reach of such laws will not exceed the limitations imposed by customary international law. *Id.* at 815.

principles require nations to respect other sovereign nations by limiting the exercise of their jurisdiction “with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”<sup>134</sup> To prevent the unreasonable exercise of jurisdiction by U.S. federal courts, the D.C. Circuit clarified the Supreme Court’s independent effects test to make certain that claims are proximately related to U.S. commerce before courts may reach beyond U.S. borders to adjudicate them.<sup>135</sup> A more expansive jurisdictional test would therefore impermissibly allow U.S. courts to act contrary to the interests of foreign nations.<sup>136</sup>

Although some nations still do not have antitrust laws, or do not seriously enforce them, U.S. courts should not be swayed by such factors in determining whether to exercise extraterritorial jurisdiction absent an alleged anticompetitive conduct that meets requisite, domestic effects.<sup>137</sup> Policy questions, such as deterring anticompetitive conduct occurring abroad to prevent such effects from eventually harming U.S. commerce, cannot overcome considerations of comity or yield a different result from that reached in *Empagran*.<sup>138</sup> Instead, barring a foreign plaintiff’s access to

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134. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987). The Restatement gives a list of relevant factors when determining whether the exercise of jurisdiction over a person or activity is unreasonable, including: to what extent the activity is linked to the territory of the regulating state; the connections between the regulating state and the person or activity to be regulated; the character of the activity to be regulated; whether the regulation may protect or harm existing justified expectations; how important the regulation is to international politics, law, or economics; how consistent the regulation is with traditions of the international system; whether other states may have an interest in regulating the activity; and the likelihood regulation will conflict with the regulatory scheme of another state. *Id.* § 403(2)(a)-(h). Exercising extraterritorial jurisdiction only when reasonable is a principle that the Restatement considers a rule of international law. *Id.* § 403 cmt. a.

135. See *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (explaining that a “less direct standard 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”).

136. See *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 427-28 (5th Cir. 2001) (cautioning that under an expansive interpretation of the FTAIA,

any entities, anywhere, that were injured by any conduct that also had sufficient effect[s] on United States commerce could flock to the United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States

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137. See Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT’L & COMP. L. REV. 205, 223-24 (2005) (arguing that requiring courts to analyze foreign laws for “adequacy” or “efficiency” would be a complicated task that could lead to tensions with foreign nations).

138. See *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 174-75 (2004) (concluding that the dispute over efficient enforcement policies is unclear and not empirically important enough to “overcome the considerations we have previously discussed or change our conclusion”).

federal courts when a showing of proximate causation is absent avoids the kind of “unreasonable interference with the sovereign authority of other nations” that the Supreme Court intended to prevent.<sup>139</sup>

Consider once again the Ecuadorian sneaker retailer example above. Suppose one of the conspiring manufacturers from which the retailer purchased sneakers is from Mexico. The Mexican legislature met and decided that the best policy for its country is to impose a prison sentence of ten years on violators in order to send a strong message that such behavior is intolerable. The Ecuadorian retailer, caring little for the public policy initiative of Mexico and enticed by the prospect of recovering treble damages, brings the suit in the United States. Because the retailer is suing on a “worldwide effects” theory, U.S. courts would rightly reject the claim. Clearly, Mexico has a greater interest in enforcing its laws against a violator from its country than does the United States, which is hardly involved at all. Furthermore, treble damages conflict with Mexico’s interest of setting an example through jail time, a goal its legislature has deemed important. There is no reason why U.S. courts in this case should interfere with Mexico’s legitimate interest in adjudicating the case and furthering its own regulatory scheme.

It is also important to note that observing the principles of comity does not mean the United States will have to forgo its interests in deterring international cartel formation.<sup>140</sup> Such an argument was better founded

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139. See *id.* at 164 (noting that “[the] rule of statutory construction cautions courts to assume that legislators take account of the legitimate interests of other nations when they write American laws”). The Supreme Court warned that “[e]ffectively, the United States 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.” *Id.* at 166 (quoting AREEDA & HOVENKAMP, *supra* note 36, § 273). Justice Breyer summarized this point well in *Empagran* when he stated:

Congress might have hoped that America’s antitrust laws, so fundamental a component of our economic system, would commend themselves to other nations as well. But, if 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.

*Id.* at 169.

140. See Cavanaugh, *supra* note 49, at 2189 (noting that failure to assert Sherman Act jurisdiction over a claim does not necessarily lead to decreased deterrence since “[t]he conduct in question may well be within the jurisdiction of another antitrust authority, which may then take appropriate enforcement measures”). *Contra* Mehra, *supra* note 42, at 318-19 (calling for the adoption of an expansive jurisdictional test that eliminates considerations of comity because such a standard increases deterrence). According to Mehra, the possibility that a claim may be dismissed on comity grounds reduces the deterrent effect on a potential violator who will discount the expected punishment by the probability that the case will be thrown out based on comity considerations. *Id.* Thus, a potential violator would be encouraged to commit a violation of U.S. antitrust law. *Id.* This argument is faulty, however, as it ignores the fact that if the violator has engaged in activity that affects U.S. commerce, U.S. courts can always assert extraterritorial jurisdiction over the claim. See *supra* Part II (providing analysis of the jurisdictional test set forth by the Supreme Court in *Empagran*, which allows foreign and domestic plaintiffs to sue in U.S. courts where their

when most other countries did not have significant antitrust laws.<sup>141</sup> Currently, more than one hundred countries have enacted antitrust laws,<sup>142</sup> and several of those countries are in the process of reviewing their laws and policies to increase enforcement.<sup>143</sup> The further foreign nations develop their antitrust laws, the greater the risk that the unlimited application of U.S. antitrust laws may result in an inappropriate interference with the regulatory policies of sovereign nations.<sup>144</sup> This is especially true given the tensions that already exist due to the fact that most countries have crafted their domestic policies without including sanctions as high as those available in the United States<sup>145</sup> and do not apply those sanctions as

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injury is tied to anticompetitive conduct affecting U.S. domestic commerce).

141. See Cavanaugh, *supra* note 49, at 2186 (refuting the need to have a more expansive approach to jurisdiction because such an argument loses force in light of the modern global economy and because the “antitrust landscape” has changed dramatically since the enactment of the FTAIA); Joel L. Klein, Assistant Attorney Gen., Antitrust Div., The War Against International Cartels: Lessons from the Battlefield, Address Before Fordham Corporate Law Institute 9 (Oct. 14, 1999) [hereinafter Klein Speech], available at <http://www.usdoj.gov/atr/public/speeches/3747.pdf> (conceding that the United States “stood almost alone” in its efforts to deter antitrust violations for several decades, but recognizing that “the global environment in which we work today is radically different”). Nations motivated by stronger interests in protecting “free markets defended by sound antitrust laws and sound antitrust enforcement” have enacted their own antitrust laws in the past decade. *Id.* at 9-10.

142. See Delrahim Speech, *supra* note 8, at 2-3 (explaining that many of these jurisdictions maintain effective court systems, although not all of them provide for private rights of action). ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 116, at annex B (outlining the sanctions available in every OECD country for punishment of hard core cartels, such as damages, injunctions, imprisonment and fines).

143. See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 116, at 4 (listing Brazil, Canada, Denmark, France, Israel, the Netherlands, New Zealand, Norway, Sweden, Switzerland and the United Kingdom as countries that are currently revising their antitrust laws). Some jurisdictions have also crafted their competition laws so that they may reach extraterritorial conduct that affects national commerce. See Note, *supra* note 21, at 2144 (citing as examples Germany, the United Kingdom, Japan, France and Australia).

144. See Delrahim Speech, *supra* note 8, at 8 (insisting that it should not be assumed that the U.S. antitrust regime “is uniquely well-suited, acting alone, to deter and remedy anticompetitive behavior across the globe, regardless of other jurisdictions’ interests in enforcing their own antitrust laws”).

145. See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 116, at 11 (comparing the sanctions available in OECD countries). Most OECD countries provide the possibility of heavy fines against corporations involved in a cartel, with maximum fines expressed as a monetary amount, a percentage of turnover for a specified period of time, or both. *Id.* Less than half of the OECD countries provide for sanctions against individuals participating in unlawful cartel activity. *Id.* Only nine countries make cartel participation a criminal offense. *Id.* The United States provides for all of the mentioned sanctions. *Id.* Fourteen countries permit recovery through private antitrust actions, including the United States. *Id.* at 11; see Hannah L. Buxbaum, *Foreign Plaintiffs in U.S. Courts: Jurisdictional Conflicts on Global Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 365, 373 (2004) (noting that private treble damages is a uniquely American remedy, and most other regimes oppose the availability of multiple damages awards altogether). *But see* Jones, *supra* note 103, at 425 (highlighting the EU’s allowing recovery equal to 150% of damages to illustrate that foreign plaintiffs can recover in jurisdictions that award prejudgment interest even if those regimes do not award treble damages).

liberally as does the United States.<sup>146</sup> In recognizing this growing concern, the Supreme Court correctly sought to emphasize the need to limit the extraterritorial application of U.S. antitrust laws to achieve increased harmonization of competition laws.<sup>147</sup> Such harmonization will result in greater cooperation among nations as a means to facilitate international commerce,<sup>148</sup> increase detection and deterrence of cartel formation,<sup>149</sup> and strengthen international relationships.<sup>150</sup> This approach avoids interfering with the ability of other sovereign nations to regulate anticompetitive activities that affect their country but have little connection with the United States.<sup>151</sup>

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146. See *ORG. FOR ECON. CO-OPERATION & DEV.*, *supra* note 116, at 11-12 (analyzing data to conclude that there is “substantial variation across countries” in the number of prosecutions and the amount of sanctions applied in those prosecutions). In the period between 1998 and 2002, the United States was among the countries that imposed the highest amount of fines against corporations and individuals, and it was only joined by Canada in sentencing individuals to prison terms. *Id.*

147. See *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 163-64 (2004) (stating that limited extraterritorial jurisdiction helps conflicting laws work together in a highly interdependent commercial world).

148. See *ORG. FOR ECON. CO-OPERATION & DEV.*, *supra* note 116, at 2 (concluding that cartels result in adverse effects to efficiency in a market economy). A cartel’s most notable impact is that of raising prices above competitive levels and reducing output, which either forces consumers to pay higher prices for products or forgo the product altogether. *Id.* Another substantial effect of a cartel is that it shelters its members from market forces, so there is a reduced pressure to control costs or innovate, both of which lead to market stagnation and harm to the consumer. *Id.*

149. See *Klein Speech*, *supra* note 141, at 9 (urging further cooperation between countries because “the conspirators are working globally, so antitrust enforcers must do so as well”). The growing cooperation among nations has resulted in conspirators having fewer safe havens where they will be shielded from enforcement. *Id.* at 10. As nations strengthen their antitrust enforcement policies, formal and informal cooperation agreements will be increasingly more efficient at detecting and deterring cartel formation. *Id.* at 11-12; see *Note*, *supra* note 21, at 2144 (stating that the “widespread growth and potential harmonization” of the laws of many nations “can and should fill the gaps in worldwide antitrust protection”).

150. See *Burnett*, *supra* note 6, at 629-31 (indicating that bilateral and multilateral treaties and cooperation between nations foster good relations among different countries and lead to a greater exchange of information on corporations’ illegal activities). In 2001, enforcement agencies of the United States and thirteen other jurisdictions, including the European Union, joined to form the International Competition Network (ICN) to work together toward the detection and deterrence of cartel organizations. Int’l Competition Network, History, <http://www.internationalcompetitionnetwork.org/history.html> (last visited Nov. 22, 2005). ICN membership has now swelled to seventy-seven national or multinational competition agencies that enforce antitrust laws. Int’l Competition Network, ICN Membership Contact List (Oct. 31, 2005), [http://www.internationalcompetitionnetwork.org/icn\\_membership\\_list.pdf](http://www.internationalcompetitionnetwork.org/icn_membership_list.pdf).

151. See *Burnett*, *supra* note 6, at 629 (calling for courts to require “a nexus between the actors, the transaction and the regulating State” to avoid unnecessary interference with the regulatory schemes of foreign nations). Because investigations of global cartels frequently require assistance of foreign countries in investigating illegal activities, cooperation between countries achieves the goal of deterrence “without unduly contributing to international friction.” *Id.* at 633-34. Thus, greater cooperation also reduces tension among nations that view U.S. assertions of extraterritoriality as motivated by “pecuniary self-interest.” *Id.* at 631. To this effect, the United States has entered into formal bilateral agreements regarding

*C. Restricting Access to Federal Courts Will Weed Out Marginal Claims*

Given that private actions make up the majority of antitrust claims heard in federal court,<sup>152</sup> requiring a showing of proximate causation should have a positive impact on the use of judicial resources in handling antitrust claims.<sup>153</sup> The purpose of imposing the proximate cause standard is not to keep *all* foreign claims out of U.S. courts.<sup>154</sup> Instead, applying the standard will merely weed out claims by private plaintiffs alleging foreign harms that are no more than tangentially related to U.S. adverse domestic effects.<sup>155</sup> In this way, federal courts may succeed in avoiding “lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays would themselves threaten interference with a foreign nation’s ability to maintain the integrity of its own antitrust enforcement system.”<sup>156</sup>

Some commentators have argued that courts have other avenues through which they can weed out marginal cases, and therefore it is not necessary to restrict the jurisdictional reach of the Sherman Act in order to achieve this result.<sup>157</sup> For example, courts will dismiss cases where damages claims are

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antitrust cooperation with Germany, Australia, and Canada. *Id.* at 631-32. The DOJ has also established contracts to facilitate collection of evidence with Australia, Brazil, Canada, Germany, the European Communities, Israel, Japan and Mexico. *Id.*

152. See LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR, tbl. C-2, at 2 (2004), available at <http://www.uscourts.gov/judbususc/judbus.html> (tabulating the number of civil cases commenced in U.S. District Courts by basis of jurisdiction and nature of suit during the twelve-month period ending September 30, 2004). In 2004, there were 752 total antitrust cases of which 731 were private actions (97.2%). *Id.*

153. See Buswell, *supra* note 7, at 997 (noting that “placing some limits on the numbers of plaintiffs likely to raise a claim under the FTAIA alleviates expenses and burdens on the court system”).

154. The FTAIA’s legislative history indicates that Congress intended courts to reach only the activities of global cartels that have the requisite effects on domestic commerce: “[a]ny major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction.” H.R. REP. NO. 97-686, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2498.

155. See Buswell, *supra* note 7, at 997 (explaining that imposing restrictions on the jurisdictional reach of U.S. antitrust laws “force[s] foreign plaintiffs to seek remedies in their own countries”).

156. See *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 168-69 (2004) (clarifying that the Court’s holding avoids “lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays would themselves threaten interference with a foreign nation’s ability to maintain the integrity of its own antitrust enforcement system”).

157. See, e.g., 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, 292 (2005) (arguing that other jurisdictional considerations such as venue and personal jurisdiction would limit access to U.S. courts); Köster & Wheeler, *supra* note 10, at 727 (asserting that “[o]ther legal requirements, such as standing, personal jurisdiction, and forum non conveniens, will . . . contribute to the filtering of marginal cases”); see also Bauer, *supra* note 9, at 323 (emphasizing the concern that plaintiffs bringing frivolous cases to federal courts is addressed by “the willingness of judges to grant summary judgment” or impose sanctions).

speculative,<sup>158</sup> where venue is lacking,<sup>159</sup> or where the doctrine of forum non conveniens exempts foreign parties from U.S. laws.<sup>160</sup> Courts may also realize the potential gain for plaintiffs who seek treble damages and consequently look favorably upon motions for summary judgment and motions to dismiss.<sup>161</sup> It is therefore possible that in some cases, courts may establish, before significant discovery occurs and prior to a full trial, whether plaintiffs have sufficiently established their case.<sup>162</sup>

One of the central advantages of adopting the proximate cause standard is that it provides a framework for courts to make such determinations more efficiently by clarifying the Supreme Court's otherwise vague independent effects test.<sup>163</sup> Indeed, one of the impacts of requiring a showing of proximate causation is that it may lead to a greater number of dismissals following a challenge to the sufficiency of facts alleged in the complaint<sup>164</sup> because it provides a more determinative test for

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158. See Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437, 450 (2001) (noting that courts have justified dismissal of damages claims where damages are speculative or where it is likely that the court would have to engage in complex calculations).

159. See Mehra, *supra* note 42, at 307 (acknowledging that reading the FTAIA broadly may create a "burden of foreign parties on U.S. courts," but suggesting that personal jurisdiction and venue requirements may mitigate the consequences of expanding the jurisdictional reach of the Sherman Act). One commentator has noted that the obstacles of "service of process, venue, personal jurisdiction, motion practice, myriad discovery disputes, creating a persuasive record at trial, surviving appellate review, and enforcing any resulting judgment," in cases involving foreign commerce "far exceed the question of whether the United States courts have jurisdiction to prescribe anticompetitive conduct done abroad by foreign nationals." Waller, *supra* note 44, at 572.

160. See Michael G. McKinnon, Comment, *Federal Judicial and Legislative Jurisdiction over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions Beyond the Timberlane/Restatement Comity Approach*, 21 PEPP. L. REV. 1219, 1242 (1994) (explaining that defendants in a case may use the doctrine of forum non conveniens to send the action to a more appropriate forum). Although courts normally give greater deference to the plaintiff's choice of forum, this is not the case for foreign plaintiffs. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (emphasizing that the court will normally assume that when the home forum is chosen, the forum is convenient; but "[w]hen the plaintiff is foreign . . . this assumption is much less reasonable").

161. See Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1104 (1986) (noting that "disposal of antitrust cases prior to trial is encouraged"). In analyzing data concerning the use of motions to dismiss and motions for summary judgment, Calkins concluded that "courts have adjusted to the treble damages remedy . . . by being relatively more willing to keep cases from going to trial." *Id.* at 1140.

162. See Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 584 (1991) (clarifying that in cases where plaintiffs allege price-fixing conspiracies, "a plaintiff must establish that its injuries result from those same price and output effects" and courts will dismiss the case if the plaintiff cannot prove that conduct-nexus link).

163. See discussion *supra* Part I.A-B for an explanation of how the proximate cause requirement accords with the Supreme Court's majority opinion in *Empagran* and the legislative histories of the Sherman Act and the FTAIA.

164. Challenges may be based either on 12(b)(1) motions to dismiss for lack of requisite effects or on 12(b)(6) motions to dismiss for failure to state a claim. AREEDA & HOVENKAMP, *supra* note 36, § 273c4 (Supp. 2005). While 12(b)(1) motions may require a

jurisdiction.<sup>165</sup> At least one court applied the D.C. Circuit's proximate cause test and dismissed the claim based on but-for causation after merely one hearing on a hybrid "motion to dismiss the claims . . . for failure to state a claim and for lack of subject matter jurisdiction."<sup>166</sup> This suggests that the application of the proximate cause standard will be similar to "the typical case involving subject matter jurisdiction" where any fact finding under a 12(b)(1) motion to dismiss for lack of requisite effects, if necessary,<sup>167</sup> is "well-defined and do[es] not normally consume enormous judicial resources."<sup>168</sup> An early challenge would allow courts to avoid having to go through a factual analysis that may only reveal, at the end of costly<sup>169</sup> and time consuming litigation,<sup>170</sup> that the case has no merit.<sup>171</sup>

It is far better to impose a more restricted jurisdictional test, such as the proximate cause standard, that dissuades foreign plaintiffs from forum shopping for a more lucrative remedy in the form of treble damages whenever they have claims based on world-wide effects.<sup>172</sup> More

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court to look beyond the facts alleged in a complaint, the 12(b)(6) motion does not require the judge to look beyond the complaint. *Id.* A divided Seventh Circuit indicated that FTAIA claims should only be subject to 12(b)(1) motions, but other courts still allow challenges based on 12(b)(6) motions. *See, e.g., United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (supporting this holding on the notion that the FTAIA is a jurisdictional statute and does not involve the substantive elements of the claim); *see also infra* note 176 (providing an example of a court that allows both motions to challenge an FTAIA claim).

165. *Cf. AREEDA & HOVEMKAMP, supra* note 36, § 273c4 (Supp. 2005) (noting that the flaw in using a balancing test to determine jurisdiction is that it is "complex, fact-laden" and "indeterminate" and may lead to substantial litigation before a dismissal on the grounds of lack of subject matter jurisdiction).

166. *See eMag Solutions L.L.C. v. Toda Kogyo Corp.*, No. C 02-1611 PJH, 2005 WL 1712084, at \*4 (N.D. Cal. July 20, 2005) (following the D.C. Circuit decision in *Empagran* and dismissing a complaint relying on an alternate theory based on but-for causation where four foreign plaintiffs brought suit against a Delaware company alleging that defendants were part of a worldwide conspiracy to set the prices for a product used to manufacture such things as audio and video tapes).

167. A defendant has two options in a 12(b)(1) challenge: it can make a facial challenge contesting the sufficiency of the pleadings or a factual challenge of the facts alleged. *See AREEDA & HOVEMKAMP, supra* note 36, § 273c4 (Supp. 2005) (explaining that in a facial challenge the court accepts the plaintiff's allegations as true whereas a factual challenge "goes beyond the face of the complaint"). Thus, under 12(b)(1) standards, "the court is not bound to accept the truth of the allegations in the complaint, but may look beyond the complaint and the pleadings to evidence that calls the court's jurisdiction into doubt." *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 990 (7th Cir. 2000).

168. *United Phosphorous, Ltd.*, 322 F.3d at 957 (Wood, J., dissenting).

169. *See POSNER, supra* note 123, at 41 (cautioning that "enforcement resources consumed in marginal cases are unavailable for more important ones"). *See generally* Buswell, *supra* note 7, at 997 (emphasizing that the American taxpayer will have to fund increased litigation).

170. *See POSNER, supra* note 123, at 232 (calculating that the typical antitrust case takes two or three months and the trial record might run ten to fifteen thousand pages).

171. *See Snyder & Kauper, supra* note 162, at 584 (acknowledging that many cases are dismissed later in litigation, sometimes only at the conclusion of trial, if plaintiffs fail to "establish the facts on which their theories of antitrust injury are based").

172. *See Burnett, supra* note 6, at 615 (warning that one repercussion of allowing the

importantly, it will create a disincentive to so-called “competitor plaintiffs,”<sup>173</sup> which resort to using federal courts as a means to wear down competitors and extract a settlement for marginal cases.<sup>174</sup> In order to guarantee a well-functioning judiciary system, it is crucial that lawsuits of this nature be dismissed early in the litigation process.<sup>175</sup> If foreign plaintiffs are aware that U.S. courts will dismiss marginal claims at the outset of litigation, they will calculate that the cost of filing a suit will outweigh any expected benefit from a judgment.<sup>176</sup> If the expected judgment is zero because the court will likely dismiss the case, it follows that a plaintiff’s willingness to bring the suit and incur litigation expenses will be zero as well. By employing such a simple cost-benefit analysis before filing such a claim to harm competitors, corporations should conclude that such frivolous litigation will yield little, if any, benefit.<sup>177</sup>

#### CONCLUSION

As this Comment discusses, courts should follow the D.C. Circuit’s lead in imposing proximate causation as the standard to determine whether a foreign injury due to anticompetitive conduct is independent of U.S. domestic effects. Although private antitrust actions are important to the goal of deterring anticompetitive conduct, the interest in deterrence must be counterbalanced with considerations of international comity and judicial

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expansive extraterritorial application of U.S. laws is the increased potential for forum shopping “as foreign litigants seek remedies unavailable under their local laws”). Foreign plaintiffs may also be attracted to U.S. courts because they “provide broad discovery rules, generous class actions, jury trials, and subsidized contingency fees.” *Id.* at 616.

173. These competitor plaintiffs may sue their rivals in order to prevent them from merging or entering into contractual agreements, restrain aggressive pricing, or “merely to burden [them] with litigation costs.” *See Snyder & Kauper, supra* note 162, at 551 (explaining that, although private actions may have a “prominent role” in antitrust enforcement, they also may be used to subvert competition). At least one commentator has raised the possibility that corporations may seek amnesty despite the potential civil liability in order to benefit from inflicting criminal penalties and civil damages on co-conspirators, who are most likely also competitors. *See Mehra, supra* note 117, at 54 (explaining that corporations seeking amnesty will weigh the benefit of avoiding jail time against several factors such as the potential profits to be gained from the cartel, the expected amount of civil damages it may have to pay, the likelihood of detection, and its discount rate).

174. *See Bauer, supra* note 9, at 323 (commenting that bringing suits only to wear down rivals is an extreme tactic, often recognized as such by judges). One of the main concerns in this area of law is that private parties, unlike governments, are concerned solely with their own enrichment and may file suits as a way to protect themselves from competitors. *Id.*

175. *See POSNER, supra* note 123, at 232 (characterizing the ordinary antitrust case as “unmanageable” and as a “malignant growth[] on the judicial system”).

176. *See id.* at 228 (explaining that because the budgetary constraints on private plaintiffs are low, they will bring any lawsuit where the expected judgment is greater than the expected cost of litigation).

177. *Cf. Snyder & Kauper, supra* note 162, at 576-77 (noting that the Supreme Court’s decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)—a decision that made it more difficult for plaintiffs to establish antitrust injuries—resulted in the creation of “significant barrier[s] to actions brought by competitors”).

efficiency.<sup>178</sup> As discussed in this Comment, it is not in the best interest of the United States to allow marginal claims to be litigated in U.S. federal courts.<sup>179</sup> By permitting foreign plaintiffs to have broad access to U.S. federal courts, the United States, in effect, supplants the laws of other nations, which is a result that Congress did not contemplate.<sup>180</sup> A more restrictive standard achieves the Supreme Court's goal of ensuring that foreign plaintiffs litigate their claims in their home courts instead of bringing them in the United States.<sup>181</sup> Forcing foreign plaintiffs with marginal claims to seek redress in their home countries minimizes conflicts with foreign nations, as it ensures greater harmonization of laws while simultaneously fostering cooperation among nations which may lead to worldwide deterrence of anticompetitive activity.

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178. See discussion *supra* Part III.A (noting that legislative history and Supreme Court decisions support the circuit court's approach in placing comity considerations as the basis for the imposition of the proximate cause standard).

179. See *supra* notes 135-136 and accompanying text (explaining that a more expansive approach to the jurisdictional reach of U.S. courts would lead to unnecessary interference with the interest of foreign nations and would overburden the federal court system).

180. See discussion *supra* Part III.B (examining the text and legislative history of the Sherman Act and the FTAIA to conclude that Congress did not intend to become the world's court).

181. See discussion *supra* Part III.C (discussing how a more restrictive approach can weed out marginal claims and push foreign plaintiffs to seek redress in their home jurisdiction).