RECONSIDERING THE D.C. CIRCUIT'S PROXIMATE CAUSE STANDARD FOR EXTRATERRITORIAL JURISDICTION: PRECLUDING THE "GLOBALIZATION" THEORY TO PROMOTE GLOBAL ENFORCEMENT

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ABSTRACT

As businesses expanded with the rise of globalization, so did the effects of anticompetitive activity and, in turn, the reach of the U.S. antitrust laws. Though Congress addressed the extraterritorial jurisdiction of the U.S. antitrust laws with its implementation of the Foreign Trade Antitrust Improvement Act ("FTAIA"), the statute only created a three-way circuit split that led the Supreme Court to address the issue and determine that the foreign injury must arise from both foreign anticompetitive activity and the activity's adverse effects on domestic commerce. The D.C. Circuit further clarified the issue on remand by requiring a proximate cause relationship between the foreign injury and adverse effects on domestic commerce. However, the commentary speculated that the Supreme Court had only generated further confusion.

This article enters the discourse to assert that the D.C. Circuit has prevailed as the authority on the extraterritorial jurisdiction of the U.S. antitrust laws and should continue to prevail because it accords with the FTAIA's language and legislative history, traditional antitrust principles, and Supreme Court opinions. More significantly, this article reconciles the D.C. Circuit's proximate cause standard with opinions both before and after it to reveal that (1) proximate cause requires that the claimant's injury stem from participation in domestic commerce adversely affected by the foreign conduct, and (2) this requirement precludes foreign claimants from asserting claims based solely on the effects of globalization. As such, the D.C. Circuit's proximate cause standard not only prevents U.S. courts from acting as world courts but also promotes cooperation among the world's authorities to combat anticompetitive activity.

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I. INTRODUCTION

A. *Shifting to Global Models*

National boundaries no longer constrain businesses or the antitrust laws that govern their activities. "With rampant globalization, instantaneous communication, and multinationals building products with components from all over the world and selling them far from where they are produced," national markets are not only difficult to discern but may have given way to a single global market.[1] Though globalization provides businesses with greater opportunities to capitalize on increased efficiency and economies of scale, the phenomenon also creates greater opportunities for those businesses to engage in international anticompetitive activity and injure parties on a global scale.[2] Businesses may have operated on a national scale at one point, but when businesses shifted to a global model, so did the U.S. courts' subject matter jurisdiction over their anticompetitive practices.

Subject matter jurisdiction inquiries shifted from a focus on location of the anticompetitive conduct[3] to the location of the conduct's

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[1] S. Lynn Diamond, *Empagran, The FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 809 (2006) (describing globalization).

[2] Lacey M. Donovan, *Importing Plaintiffs: The Extraterritorial Scope of the Sherman Act After Empagran*, 91 IOWA L. REV. 719, 722 (2006) (observing that "[i]ncreased globalization creates greater opportunities for international cartel behavior and greater challenges for the U.S. in policing such cartels").

[3] Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (declining to assert subject matter jurisdiction over foreign conduct based on its location and stating, "what the defendant did in Panama or Costa Rica is not within the scope of the [Sherman Act]").

effects.[4] This provided U.S. courts with subject matter jurisdiction over foreign conduct as long as that conduct was intended to produce adverse effects on the U.S. market.[5] The shift paved the way not only for the global application of U.S. antitrust laws but also for foreign plaintiffs to take advantage of them. While foreign nations established antitrust regimes throughout the world, the U.S. courts emerged as the international forum of choice.[6] Foreign plaintiffs had always litigated claims against domestic defendants in U.S. courts, but, with effects-based subject matter jurisdiction, foreign plaintiffs began litigating claims against foreign defendants for foreign conduct by basing claims on that conduct's adverse effects on the U.S. market.[7]

However, a uniform standard with which to evaluate the effects necessary to confer subject matter jurisdiction over foreign conduct failed to emerge.[8] In 1982, Congress intervened and implemented the Foreign Trade Antitrust Improvement Act ("FTAIA") to clarify this very standard,[9] but the FTAIA only led to a three-way circuit court split in its interpretation.[10] In *F. Hoffman-La Roche, Ltd. v. Empagran* (*Empagran I*), the Supreme Court granted certiorari to

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[4] U.S. v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945) (establishing the "effects test," which determines subject matter jurisdiction based on (1) whether the conduct was intended to effect domestic commerce and (2) whether the conduct actually did so) [hereinafter *Alcoa*]; *accord* H.R. REP. No. 97-686, at 5 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2490 (recognizing that since *Alcoa*, "it has been relatively clear that it is the situs of the effects as opposed to the conduct that determines whether U.S. antitrust law applies").

[5] *Id.*

[6] Spencer Weber Waller, *The U.S. as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523, 532 (2002) (identifying the advantages to suing in U.S. courts that are unavailable in foreign courts and make U.S. litigation both controversial and attractive to foreign plaintiffs).

[7] Diamond, *supra* note 1, at 805.

[8] H.R. REP. No. 97-686, at 2, (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2487 (calling attention to the courts differing "in their expression" of the proper standard for subject matter jurisdiction over foreign transactions).

[9] *Id.*

[10] Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338, 352 (D.C. Cir. 2003) (requiring that the foreign conduct give rise to "some private person or entity['s]" claim as a result of the conduct's adverse domestic effects)[hereinafter Empagran]; Kruman v. Christie's Int'l PCL, 284 F.3d 384, 403 (2d Cir. 2002) (requiring only that the foreign conduct affect domestic commerce); Den Norske States Oljeselskap As v. Heeremac Vof, 241 F.3d 420, 427 (5th Cir. 2001) (requiring that the foreign conduct adversely affect domestic commerce and that the adverse domestic effects give rise to the plaintiff's claim, as opposed to any claim) [hereinafter *Den Norske*].

settle the dispute[11] but may have only provided clarification as to a hypothetical situation[12] - whether U.S. courts have subject matter jurisdiction over foreign plaintiffs whose injury arises from foreign anticompetitive activity but is independent from the adverse effects on the U.S. market.[13] The Supreme Court held that they do not and remanded the issue back to the D.C. Circuit to answer whether U.S. courts have subject matter jurisdiction over foreign plaintiffs whose injury arises from foreign anticompetitive activity and is dependent on the adverse effects on the U.S. market.[14] In *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.* (*Empagran II*), the D.C. Circuit held that U.S. courts do have jurisdiction but only where the foreign conduct's adverse domestic effects proximately caused the foreign injury.[15]

Commentators have speculated that the Supreme Court's remand would result in another circuit split even after the D.C. Circuit rendered its opinion.[16] This article addresses these speculations and enters the discourse to suggest the contrary and to assert that the D.C. Circuit's standard has emerged as the prevailing opinion because the opinions prior to the D.C. Circuit's decision are reconcilable with it, and opinions after the D.C. Circuit's decision have followed it. Had the commentary considered the D.C. Circuit's opinion in light of these opinions, the analysis would have revealed that proximate cause requires that the claimant's injury stem from participation in domestic commerce adversely affected by the foreign conduct and, that as a result of this requirement, precludes foreign plaintiffs from asserting claims based on the effects of globalization and basic market principles. Although the D.C. Circuit's opinion is not binding authority on the other circuits, this article submits that its opinion is the authority and should continue to prevail in light of the domestic participation requirement for proximate cause accords with the FTAIA's language and legislative history, traditional antitrust principles, and the Supreme Court's opinion. Moreover, precluding claims based on the effects of globalization not only constrains the U.S. courts' subject matter jurisdiction in a manner that avoids the U.S. courts acting as world courts but also promotes cooperation among the world's authorities to combat the anticompetitive practices made possible by globalization.

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[11] F. Hoffman-LaRoche Ltd. v. Empagran (*Empagran I*), 542 U.S. 155, 160 (2004).

[12] Diamond, *supra* note 1, at 829 (asserting that *Empagran I* did little to provide guidance to lower courts).

[13] *Empagran I*, 542 U.S. at 159.

[14] *Id.* at 175.

[15] Empagran S.A. v. F. Hoffman-LaRoche, Ltd. (*Empagran II*), 417 F.3d 1267, 1271 (D.C. Cir. 2005).

[16] Diamond, *supra* note 1, at 829.

B. The "Effects" of Expansion Raise Concerns

Enacted as a means to condemn trade restraints that "injuriously affect" the U.S.,[17] the Sherman Act of 1890 prohibits and defines the liability for "[e]very contract, combination, . . . or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations."[18] While the United States could prosecute claims for antitrust violations pursuant to the Sherman Act, the Sherman Act did not provide individuals with the same ability.[19] The Clayton Act of 1914 closed this gap by conveying standing in U.S. district courts for individuals, "[w]henever the U.S. is hereafter injured" and set forth the available remedies, including injunctive relief, treble damages plus costs, and attorney's fees.[20]

Although the Sherman Act clearly applies to domestic commerce and commerce between the United States and foreign nations, the Sherman Act's legislative history lends little guidance as to whether the Sherman Act applies to strictly foreign commerce.[21] Construed against its primary purpose, to protect U.S. commerce from "evils resulting directly to consumers,"[22] this lack of legislative guidance suggests that the Sherman Act primarily regulates domestic commerce.[23] Moreover, U.S. courts generally presume statutes do not apply extraterritorially in the absence of clear legislative intent to the contrary;[24] nevertheless, the reach of U.S. antitrust laws has been expanded.

Initially, determinations concerning the extraterritorial reach of U.S. antitrust laws focused solely on the alleged conduct's location.[25] U.S. courts based subject matter jurisdiction on territorial principles.[26] The extraterritorial application of the U.S. antitrust laws was

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[17] Stephanie A. Casey, *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*, 55 AM. U. L. REV. 585, 590 (2005) (citing 21 Cong. Rec. 2454, 2456 (1890) (explaining that one of the purposes of the Act was to create a federal cause of action redressing anticompetitive harms)).

[18] Sherman Antitrust Act, 15 U.S.C.A. §1 (2004).

[19] Casey, *supra* note 17, at 591 (noting that the legislative history contains little information regarding the application of that Act to foreign trade).

[20] Clayton Antitrust Act, 15 U.S.C. §15a (2000).

[21] Casey, *supra* note 17 at 591.

[22] *Id.* (citing 21 Cong. Rec. 2551, 2558 (1890) (statement of Senator Pugh)).

[23] *Id.* (asserting that the lack of legislative guidance "indicat[es] that Congress intended the Sherman Act to focus primarily on regulating domestic commerce").

[24] *Den Norske*, 241 F.3d at 428 (citing EEOC v. Arabian Am. Oil Co., 449 U.S. 244, 248 (1991)).

[25] *Am. Banana Co.*, 213 U.S. 347.

[26] *Id.*

first addressed by the Supreme Court in *America Banana Co. v. United Fruit Co.*[27] In this case United Fruit colluded with Costa Rican authorities to obtain control of an American Banana plantation on foreign soil. The Supreme Court declined to assert subject matter jurisdiction over the foreign conduct.[28]

Though subject matter jurisdiction based on the conduct's location prevailed for decades, this territorial-based notion of subject matter jurisdiction gave way to an effects-based notion of subject matter jurisdiction with the advent of *U.S. v. Aluminum Co. of Am.*[29] In *Alcoa*, Judge Learned Hand devised what later became known as the "effects test," where, if the foreign conduct was intended to affect domestic commerce and that conduct actually did affect domestic commerce, the conduct fell under the U.S. courts' subject matter jurisdiction.[30] Although an international cartel fixed world aluminum prices in violation of the Sherman Act and all of its conduct occurred in foreign territory, Judge Learned Hand found the court had subject matter jurisdiction because the defendants intended for their foreign conduct to affect domestic commerce, which it did.[31]

Basing subject matter jurisdiction on "objective territorial principle[s]" embraced by the "effects test" expanded the reach of U.S. antitrust laws to international cartel activities and business practices that no longer operated within national boundaries.[32] While the domestic effects produced by foreign anticompetitive conduct "emerged as the primary consideration" for determining the extraterritorial reach of the U.S. antitrust laws, a definitive standard defining the domestic effects required to justify subject matter jurisdiction over that conduct did not.[33]

For lack of a definitive standard, U.S. courts could establish subject matter jurisdiction over almost any anticompetitive activity

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[27] *Id.*

[28] *Id.*

[29] Diamond, *supra* note 1 at 812; *Alcoa*, 148 F.2d at 443-444.

[30] *Alcoa*, 148 F.2d at 444.

[31] *Id.*

[32] Diamond, *supra* note 1 at 812 (observing that as business practices began to cross national borders, "international acceptance of the 'objective territorial principle' . . . establish[ing] the state's jurisdiction over crimes begun outside the state's territory but which caus[e] injury within it," grew).

[33] Evan Malloy, *Closing the Antitrust Door on Foreign Injuries: U.S. Jursidiction Over Foreign Antirust Injuries in the Wake of Empagran*, 38 TEX. TECH. L. REV. 395, 404 (2006) (noting that "[p]rior to the FTAIA's enactment, courts were faced with conflicting standards").

conducted on an international scale.[34] Judge Learned Hand formulated his "effects test" with an intent element, but subsequent courts "virtually ignored" it and "so devalued" the effects required to establish subject matter jurisdiction that "eventually anything more than a de minimis effect on the U.S. market" sufficed.[35] For example, in *Waldbaum v. Worldvision Enterprises, Inc.*, the district court required that there simply be an anticompetitive effect in the United States, while in *Todhunter-Mitchell & Co. v. Anhauser-Busch, Inc.*, the district court required that foreign conduct produce a direct effect on the "flow of foreign commerce into or out of this country."[36]

Early on, commentators recognized that, with an increasingly global economy, "anything that affects the external trade and commerce of the U.S. also affects the trade and commerce of other nations."[37] However, courts continued applying the domestic effect requirement loosely to promote "Congress' foremost concern in passing the antitrust laws . . . the protection of Americans." These courts reasons that suits by foreign plaintiffs benefited American consumers with the "maximum deterrent effect of [the] treble damages" available under the Clayton Act.[38] Early courts promoting deterrence policies reasoned that defendants would only continue violating antitrust laws if foreign plaintiffs were precluded from asserting their claims, for the benefits gained from engaging in anticompetitive activity outweighed the potential cost in damages stemming from domestic plaintiffs alone.[39]

Aggressive extraterritorial enforcement of U.S. antitrust laws ensued from the combination of effects-based subject matter jurisdiction and treble damages. However, such stringent enforcement raised concerns regarding both the potential impact on the courts and the

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[34] Waller, *supra* note 6 at 525 (indicating that of 249 subsequent foreign commerce actions filed in U.S. courts, none were dismissed for lack of effects on the U.S. market).

[35] *Id.*

[36] Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Cas. (CCH) ¶ 62,378 at 76, 257 (S.D.N.Y. 1978); Todhunter-Mitchell & Co. v. Anhauser-Busch, Inc., 383 F.Supp. 586, 587 (E.D. Pa. 1974).

[37] Timberlane Lumber Co. v. Bank of Am. N.T. & S.A., 549 F.2d 597, 611 (9th Cir. 1976) (citing Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse*, 65 YALE L.J. 1087, 1150 (1956)).

[38] Pfizer, Inc. v. India, 434 U.S. 308, 314-315 (1978).

[39] *Id.* at 315 ("If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business . . . might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home."); *accord Kruman*, 284 F.3d at 403 (2d Cir. 2002).

mounting international tension with our allies and trading partners.[40] Allowing foreign plaintiffs to sue in U.S. courts "open[ed] [them] to global claims on a scale never intended by Congress."[41] Moreover, extraterritorial enforcement of U.S. antitrust laws led to a series of blocking statutes that greatly hindered the courts' discovery efforts.[42]

These unnecessary international complexities brought about by an unrestrained application of the "effects test" began to resonate with the courts. As expressed in *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, federal courts could not legitimately exercise subject matter jurisdiction over foreign conduct without "some effect or intended effect on American foreign commerce." However, the effects test alone was insufficient, for it failed to consider "whether American authority should be asserted. . . as a matter of international comity and fairness."[43] The *Timberlane* court adopted a seven factor balancing test that took these matters into account,[44] but the *Timberlane*

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[40] Clifford A. Jones, *Exporting Antitrust Courtroons to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER. L. REV. 409, 418-419 (2004); *accord* Waller, *supra* note 6 at 525-526 ("The reaction of foreign governments . . . created the sense that the overall interest[s] of the U.S. were not being well served by this all-out assault on anticompetitive behavior anywhere in worldwide commerce.").

[41] *Den Norske*, 241 F.3d at 431.

[42] Jones, *supra* note 40 at 418-419 (calling attention to blocking statutes implemented in Ontario and Quebec in response to investigations in the Canadian paper industry and the blocking statute implemented in the United Kingdom in response to Uranium litigation); *see also* Waller *supra* note 6 at 525-526.

[43] *Timberlane*, 549 F.2d at 613.

[44] *Id.* at 614-15. The *Timberlane* court formulated the following balancing test:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the U.S. as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the U.S. as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot, though one which may not always be present. Nationality is another; though foreign governments may have some concern for the treatment of American citizens and business residing there, they primarily care about their own nationals. Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the U.S. are sufficient to support the exercise of extraterritorial jurisdiction.

Id.

court's approach to constraining subject matter jurisdiction with considerations of international comity and fairness was not uniformly adopted.[45]

Concerns regarding U.S. export activity also grew. Businesses regarded the expansive application of U.S. antitrust laws as a handicap "chilling export conduct in a way that was not the case in other countries."[46] In 1982, Congress acted and implemented the Foreign Trade Antitrust Improvement Act ("FTAIA") to address the "business perception" that the U.S. antitrust laws were impeding exporters and to "clarify" the subject matter jurisdiction of U.S. courts over foreign antitrust injuries.[47] The FTAIA first bars the application of the Sherman Act to claims regarding import trade or commerce with foreign nations.[48] Then, the statute provides a "domestic injury exception," which brings non-import conduct back within the provisions of the Sherman Act if the conduct has a "direct, substantial, and reasonably foreseeable effect" on either domestic commerce or U.S. export trade and if the effect "gives rise to a claim" under the Sherman Act.[49]

Congress provided exporters with assurance that their anticompetitive practices would not be condemned under the U.S. anti-

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[45] Waller, *supra* note 6 at 526 (observing that while the Ninth and Third Circuits adopted the *Timberlane* test, the Seventh Circuit "emphatically rejected" it).

[46] *Id.* at 530.

[47] H.R. REP. NO. 97-686, at 4-5 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2489-2490.

[48] Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6(a) (2000) [hereinafter FTAIA]. The FTAIA provides that sections 1 through 7 of the Sherman Act do not apply to "conduct involving trade or commerce [other than import trade or import commerce] with foreign nations unless:"

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect –
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> (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
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> (B) on export trade or export commerce with foreign nations, of persons engaged in such trade or commerce in the U.S.; and
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> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
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> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph(1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the U.S. .

Id.

[49] *Id*; *see also* Casey, *supra* note 17 at 594 (simplifying the construction of the FTAIA).

trust laws as long as their activities did not affect the U.S. market.[50] Congress enacted the antitrust laws to protect American commerce, not foreign commerce.[51] If U.S. exporters engage in anticompetitive practices that harm foreign markets and foreign consumers, "either it is good for us, . . . none of our business, or at a minimum . . . somebody else's business will be negatively impacted."[52] "To be sure," domestic exporters are still subject to foreign antitrust laws, but Congress made it clear that they are not subject to ours as long as they do not harm our markets.[53] While Congress did address concerns regarding export activities, Congress did not address those regarding international comity, nor did it provide courts with clear guidelines regarding subject matter jurisdiction over extraterritorial claims.

Congress left comity to the courts,[54] and disagreement concerning its proper role in determining subject matter jurisdiction over foreign conduct followed. In *Hartford Fire Insurance Co. v. California*, the Supreme Court held that comity concerns were only relevant to the determination if a "true conflict" between U.S. and foreign law existed.[55] This holding greatly limited the extent to which U.S. courts could take comity into consideration, for a "true conflict" existed only where following the law of one nation necessitated breaking the law of the other.[56] However, the Supreme Court did not resolve the issue. Some lower courts simply disregarded the opinion.[57] The Ninth Cir-

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[50] H.R. REP. NO. 97-686, at 8-10 (1982) *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2493-2495 (stating that the FTAIA will send a "clear signal" to the export business community that the U.S. antitrust laws do not apply to "wholly foreign" or "export transactions" that do not adversely affect domestic commerce); *see* Waller, *supra* note 6 at 530 (commenting that "Congress wanted to make clear a very simple proposition – U.S. firms can engage in anticompetitive conduct that injures foreign markets and foreign buyers.").

[51] *Pfizer*, 434 U.S. at 314.

[52] Waller, *supra* note 6 at 530.

[53] H.R. REP. NO. 97-686, at 10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 ("If the foreign state in question has an antitrust regime, American-owned firms must still comply, but no longer is there any possibility that, . . . such firms will be subject to a different and perhaps stricter regimen of antitrust than their competitors of foreign ownership.").

[54] H.R. REP. NO. 97-686, at 13 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2498 (indicating that the FTAIA "would have no effect on the courts' ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction").

[55] Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 798 (1993) (citing Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

[56] *Hartford Fire*, 509 U.S. at 799 (holding that a true conflict exists only where "compliance with the laws of both countries is otherwise impossible").

[57] Waller, *supra* note 6, at 528.

cuit "pretended that *Hartford Fire* did not happen" and stated that *Timberlane* should be followed, while a judge in the Southern District of New York simply adopted the Supreme Court's wording and found "so-called true conflicts in a way that suggests he never read *Hartford Fire*."[58]

Furthermore, though Congress provided the FTAIA to define the courts' subject matter jurisdiction over extraterritorial claims, the courts had to wrestle with the FTAIA's construction and myriad of double and triple negatives before even discovering the ambiguity that awaited them in untangling the proper interpretation of "a claim." The proper interpretation of "a claim" led to a three-way circuit-split,[59] exactly the opposite of what Congress had hoped for when it "formulate[d] a standard to be applied uniformly through the federal judicial system."[60]

The issue centered on whether "a claim" should be read as "a" claim, meaning *any* plaintiff's claim, or "the" claim, meaning *this* plaintiff's claim. The Second Circuit broadly interpreted "a claim" and required only that the prohibited conduct's effect on domestic commerce violate the Sherman Act, for violations of the Sherman Act are predicated on the conduct rather than injury, suggesting that a plaintiff need not show his injury.[61] In contrast, the Fifth Circuit narrowly interpreted "a claim" and required that the domestic effect relate to the plaintiff's specific injury, finding a mere "close relationship" between the two insufficient to establish a claim.[62] Taking a moderate approach, the D.C. Circuit required that a private person or entity suffer an actual or threatened injury as a result of the Sherman Act violation's domestic effect.[63]

II. EMPAGRAN I & II

A. A Narrow Assumption Leaves Open a Wide Alternative

Prompted by the circuit-split, the Supreme Court granted certiori in *Empagran I*.[64] *Empagran I* dealt with an antitrust class action brought on behalf of foreign and domestic vitamin purchasers asserting an international price-fixing conspiracy by manufacturers and dis-

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[58] *Id.*

[59] *Empagran I*, 315 F.3d at 352; *Kruman*, 284 F.3d at 400; *Den Norske*, 241 F.3d at 427; *see* Malloy, *supra* note 19 at 405-06.

[60] H.R. REP. No. 97-686, at 6 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2491.

[61] *Kruman*, 284 F.3d at 400.

[62] *Den Norske*, 241 F.3d at 427.

[63] *Empagran*, 315 F.3d at 352.

[64] *Empagran I*, 542 U.S. at 160.

tributors pursuant to the Sherman Act.[65] The D.C. Circuit dismissed the suit as to the foreign purchasers for lack of subject matter jurisdiction.[66] The Supreme Court "assumed" that the foreign conduct independently caused the foreign injury, or rather, that "the [foreign] conduct's domestic effects did not help bring about that foreign injury."[67]

With respect to the meaning of "a claim," the Supreme Court removed itself from the circuit courts' linguistic debate quickly and focused its attention on other considerations. The plaintiffs read "a claim" as *any* claim, and though the Supreme Court acknowledged it as "the more natural reading," the Supreme Court observed that it also "makes linguistic sense" to read the phrase as the claim at issue.[68] The Supreme Court determined that reading "a claim" as the claim at issue best accorded with the Congressional intent behind the FTAIA and principles of prescriptive comity.[69]

These considerations led the Supreme Court to ultimately hold that the FTAIA precludes U.S. courts from exercising subject matter jurisdiction over foreign conduct that causes domestic injury but that independently causes foreign injury.[70] The Supreme Court first considered Congressional intent and observed that Congress specifically excluded wholly foreign injury from the reach of the U.S. antitrust laws in order to assure exporters that their business practices would not be hindered by their enforcement.[71] Thus, 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]

The Supreme Court, then, applied principles of prescriptive comity to define the scope of the Sherman Act.[73] As a starting point, the Supreme Court reiterated that courts construe ambiguous statutes to avoid *unreasonable* interference with foreign nations' sovereign authority.[74] From that rule of construction, the Supreme Court determined that applying the U.S. antitrust laws to *foreign* harm that is independent of any *domestic* harm may create conflicts between the laws of different nations that would disrupt the harmony necessitated by "today's highly interdependent commercial world."[75] In light of this

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[65] *Id.* at 159.
[66] *Id.* at 160.
[67] *Id.* at 175.
[68] *Id.* at 173-74.
[69] *Id.*
[70] *Id.* at 175.
[71] *Id.* at 162.
[72] *Id.* at 169 (emphasis omitted).
[73] *Id* at 169.
[74] *Id.* at 164.
[75] *Id.* at 164-65.

potential for conflict and interference with foreign nations' sovereign authority, the Supreme Court found "the justification for that interference seem[ed] insubstantial" when that foreign conduct did not produce domestic injury.[76] Therefore, subject matter jurisdiction over foreign conduct that produces independent foreign injury was unreasonable.[77]

Such an exercise of subject matter jurisdiction would unjustifiably risk replacing foreign antitrust regimes with our own.[78] The Supreme Court asked: "Why should American law supplant, for example, 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?"[79] If subject matter jurisdiction were permitted, foreign plaintiffs could sue on the basis of any foreign anticompetitive conduct as long as that conduct produced an adverse domestic effect effectively giving foreign plaintiffs their choice between U.S. and foreign law.[80] Though a "true conflict" as envisioned by the Supreme Court in *Hartford Fire*[81] would not occur where other nations have adopted antitrust laws similar to our own, the Supreme Court drew attention to conflicts regarding the proper remedy for injury, specifically treble damages.[82] Allowing foreign plaintiffs to take advantage of treble damages would undermine the competing considerations, such as amnesty programs, that led foreign authorities to decline permitting more generous remedies.[83]

Though the Supreme Court considered the deterrence arguments surrounding treble damages and the detection arguments surrounding the amnesty programs, it concluded that there was not enough empirical evidence to outweigh considerations regarding Congressional intent and principles of international comity.[84] While awarding treble damages to foreign plaintiffs may deter anticompetitive activity by off-setting foreign profits,[85] foreign profits could also subsidize the potential losses resulting from treble damages.[86] In ad-

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[76] *Id.* at 165.
[77] *Id.* at 165-66.
[78] *Id* at 166-67.
[79] *Id.* at 165.
[80] *Id.* at 166.
[81] *Hartford Fire,* 509 U.S. at 798.
[82] *Empagram I,* 542 U.S. at 167.
[83] *Id.* at 168.
[84] *Id.* at 174-75.
[85] H.R. REP. No. 97-686, at 10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2495.
[86] Brief for the U.S. as Amicus Curiae Supporting Petitioners at 20, F. Hoffmann-LaRoche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

dition, these damages could prevent the initial detection of antitrust violations by destroying amnesty-seeking incentives.[87] A violator could lessen his criminal penalties by taking part in an amnesty program; however, the potential liability resulting from global civil claims could overshadow his incentive to seek amnesty and prevent whistleblowers from coming forward with information.[88]

Furthermore, the Supreme Court determined that its holding best relieved the burden imposed on the courts by unchecked subject matter jurisdiction over foreign conduct. Motivated by concerns regarding the U.S. courts' burden in adjudicating the claims, the Supreme Court declined to adopt a case-by-case analysis with regard to comity considerations.[89] This approach would require courts to examine the manner with which foreign law, as compared to American law, treats violations resulting in detailed procedures that would not only delay proceedings but would also be unworkable for the courts.[90]

The Supreme Court concluded that applying American antitrust laws to foreign injury that is independent from domestic injury caused by foreign conduct would be an "act of legal imperialism;" therefore, comity concerns counsel against applying American antitrust laws to independent foreign injury, for while other nations may be free to adopt our antitrust policies, they cannot be imposed.[91] In the age of globalization where, as the Supreme Court noted, businesses conduct their affairs in a "highly interdependent commercial world,"[92] it is hard to imagine an instance where foreign anticompetitive conduct adversely affecting U.S. commerce would give rise to foreign injury that is wholly independent from adverse domestic effect.[93] However, the Supreme Court left open the issue of foreign injury that is dependant on the adverse domestic effects and remanded the case back to the D.C. Circuit to address the plaintiffs' alternative argument of re-classifying the plaintiffs' injury as dependent injury

B. Proximate Cause Precludes the "Globalization" Theory

In *Empagran II*, the D.C. Circuit addressed the subject matter jurisdiction question regarding dependent injury. The plaintiffs argued that the adverse effects of the defendant's foreign anticompetitive conduct on the domestic market were the "but-for" cause of the plain-

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[87] *Empagran I*, 542 U.S. at 168.
[88] Brief for the United Sates as Amicus Curiae Supporting Petitioner, *supra* note 86, at 20.
[89] *Empagram I*, 542 U.S. at 168-69.
[90] *Id.*
[91] *Id.* at 169.
[92] *Id.* at 165.
[93] *Id.* at 159-60.

tiff's harm.[94] More specifically, the plaintiffs argued that, because the plaintiffs' products were "fungible and globally marketed," the defendants could not have maintained their international price-fixing scheme without maintaining that scheme in the United States.[95] Had the defendants not maintained their price-fixing scheme in the United States, overseas purchasers would have been able to purchase the products at lower prices, either directly from the U.S. sellers, or from those who imported the products from the United States.[96] This potential arbitrage would have prevented the defendants from selling their products at super-competitive prices.[97] The plaintiffs' theory essentially described business in the age of globalization. The plaintiffs' claim was based on the market principles stemming therefrom. "Thus, the super-competitive pricing in the U.S. 'gives rise to' the foreign super-competitive prices from which the [plaintiffs] claim injury."[98]

Rejecting the plaintiffs' globalization theory, the D.C. Circuit held that but-for causation between domestic effects and foreign injury is "simply not sufficient" to bring anticompetitive foreign conduct within the FTAIA exception for two reasons.[99] One, FTAIA's language, "gives rise to," suggests a direct causal relationship between the domestic effects and the foreign injury as required by proximate cause.[100] Two, reading the FTAIA to require a more expansive standard "open[s] the door to . . . interference with other nations' prerogative to safeguard their own citizens from anticompetitive behavior within their own borders;" a proximate cause standard accords with principles of prescriptive comity.[101] Adverse domestic effects that merely "facilitate" the foreign injury do not establish proximate cause because the foreign conduct is indirectly related to the adverse domestic effects.[102]

III. THE AFTERMATH

A. The Discourse

After the Supreme Court decided *Empagran I*, scholars speculated that the Court's decision to address only independent foreign injury would give rise to another circuit split regarding claims based on dependent foreign injury. The articles written after *Empagran I*

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[94] *Empagran II*, 417 F.3d at 1270.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 1270-71.
[100] *Id.* at 1271.
[101] *Id.*
[102] *Id.*

brought attention to the ambiguity inherent in deciding a "perhaps only hypothetical, situation," and the manner with which plaintiffs could "exploit" the ambiguity by reframing their claims to assert that their injuries were dependent on adverse domestic effects.[103] Prior to *Empagran II*, a potential circuit split led to a split in the commentary.[104] Commentators arrived at opposite conclusions with regards to whether U.S. courts should assert subject matter jurisdiction over dependent injury.[105] Following *Empagran II*, commentators continued to speculate that the D.C. Circuit's proximate cause standard would not resolve the issue, noting that the D.C. Circuit is not binding authority on the other circuits[106] and that opinions prior to its ruling reached a separate conclusion.[107]

Commentators suggested that while the D.C. Circuit's proximate cause standard may emerge as the predominate standard,[108] a split among the circuit courts had already been established.[109] The

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[103] Diamond, *supra* note 1, at 830.

[104] Malloy, *supra* note 33, at 427-28 (arguing that U.S. courts should not assert subject matter jurisdiction over foreign conduct giving rise to foreign injury that is dependent on adverse domestic effects though addressing the D.C. Circuit's proximate cause); Jodi Stanfield, *Dependent Injury Based Claims: The Next Step in American Regulation of Antitrust*, 39 U.C. DAVIS L. REV. 1671 (2006) (arguing that U.S. courts should assert subject matter jurisdiction over dependent foreign injury as a means to implement further the policy objectives addressed by the Supreme Court in *Empagran I* but not addressing the D.C. Circuit's opinion in *Empagran II*).

[105] Malloy, *supra* note 33, at 427-28; Stanfield, *supra* note 104.

[106] Diamond, *supra* note 1, at 834.

[107] *Id.* at 836 (asserting that "[i]f the Supreme Court intended a proximate cause standard, a decision that got it wrong was *In re* Monosodium Glutamate Antitrust Litigation."); *see In re* Monosodium Glutamate Antitrust Litig., 2005 WL 1080790 (D. Minn. May 2, 2005) (*Monosodium I*) (exercising subject matter jurisdiction where the plaintiffs claimed injury based on a world-wide MSG and nucleotides price-fixing conspiracy that raised MSG and nucleotide prices in foreign commerce).

[108] *Id.* at 834; Edward D. Cavanagh, *The FTAIA & Empagran: What Next?*, 58 SMU L. REV. 1419 (2005).

[109] Cavanagh, *supra* note 108 at 1437-1440 (pointing to Sniado v. Bank Austria AG, BHP New Zealand Ltd. v. UCAR Int'l, Inc., MM Global Servs., Inc. v. The Dow Chem. Co., and *Monosodium I* as split decisions and criticizing the *Monosodium I* court, remarking that "a court need not accept mere conclusory allegations"); Diamond, *supra* note 1, at 834-836 (drawing attention to divergent standards in Sniado v. Bank Austria, MM Global Servs., Inc. v. Dow Chem. Co., and *Monosodium I*); Donovan *supra* note 2 (identifying MM Global Services, Inc. v. Dow Chem. Co. (as an expansive standard & *Empagran II* as a moderate standard for subject matter jurisdiction); *see Empagran II*, 417 F.3d at 1267 (requiring proximate cause to assert subject matter jurisdiction); *see* Sniado v. Bank Austria AG, 378 F.3d 210 (2d Cir. 2004) (declining to assert subject matter jurisdiction where

commentary endorsed the D.C. Circuit's proximate cause standard,[110] but failed to reconcile it with the prior opinion. Had the commentators done so, the analysis would have revealed that proximate cause requires that participation in domestic commerce be adversely affected by foreign conduct for a plaintiff to assert injury. Considering the opinions following *Empagran I* in light of this domestic participation requirement reconciles the apparent circuit split and reveals that the D.C. Circuit's proximate cause standard has emerged as the rule of law regarding U.S. courts' subject matter jurisdiction over foreign conduct, precluding plantiffs from asserting claims based on globalization and basic market principles.

B. Proximate Cause Prevails & Requires Participation in Domestic Commerce

Though speculation arose as to whether the Supreme Court's independent effects test in *Empagran I* would give rise to another circuit split, the decisions prior to *Empagran II* are reconcilable with it, and subsequent decisions have followed it. Thus, the D.C. Circuit's proximate cause standard has emerged as the rule of law regarding subject matter jurisdiction over extraterritorial conduct. Further, reconciling *Empagran II* with prior cases reveals that, in order to establish proximate cause, a plaintiff must assert that the defendant's participation in domestic commerce gave rise to the plaintiff's harm.

While the courts ruled somewhat inconsistently with respect to dependent claims prior to *Empagran II*, the decisions are reconcilable

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plaintiff asserted a worldwide exchange rate fixing scheme but did not characterize the scheme as even a but-for cause of his injury); BPH New Zealand Ltd. v. UCAR Int'l, Inc., 2004-2 Trade Cases P 74,503 (3rd Cir. 2004) (remanded); *Monosodium I*, 2005 WL 1080790 (asserting jurisdiction where the plaintiff alleged injury resulting from international MSG and nucleotide price-fixing scheme); MM Global Servs., Inc. v. Dow Chem. Co., 329 F. Supp. 2d 337 (D. Conn. 2004) (asserting subject matter jurisdiction where defendants allegedly compelled the plaintiffs to engage in a worldwide price-fixing conspiracy that inhibited plaintiff's ability to sell and resell the defendant's products in the United States).

[110] Casey, *supra* note 17 (arguing that considerations of prescriptive comity and judicial efficiency should take precedence over deterrence considerations); Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415 (2005) (asserting that the D.C. Circuit's proximate cause standard accords with the Antitrust Division of the U.S. Department of Justice's understanding of the U.S. courts subject matter jurisdiction over foreign conduct); Kevin O'Malley, *Does U.S. Antitrust Jurisdiction Extend to Claims of Independent/Dependent Foreign Injury*, 20 TEMP. INT'L & COMP. L.J. 219 (2006) (endorsing the D.C. Circuit's proximate cause standard and advocating a case-by-case determination).

with the D.C. Circuit's proximate cause standard. After *Empagran I*, plaintiffs asserted the globalization theory in order to take advantage of the argument left open by the Supreme Court: that the foreign injury caused by foreign conduct was dependant on domestic injury. *Sniado v. Bank Austria AG* was the first case in which the plaintiff asserted the globalization theory after *Empagran I* and the Second Circuit promptly dismissed it.[111] In *Sniado*, a traveler asserted that he was paying excessive and "supra-competitive" currency exchange fees and that these fees were the result of a price-fixing conspiracy.[112] Though the plaintiff failed to assert that adverse effects in the United States were a "but-for" cause of his injury, he did request that the court infer that "the domestic component" of the alleged "'worldwide conspiracy' was necessary . . . for the conspiracy's overall success" and that his injury was, therefore, dependent on adverse domestic effects.[113] Nevertheless, the Second Circuit found the allegations insufficient to establish jurisdiction.[114] Though the Second Circuit did not require a proximate cause standard, its decision to reject "but-for" causation as a sufficient basis for subject matter jurisdiction is in line with the D.C. Circuit's opinion in *Empagran II*.

MM Global Services, Inc. v. Dow Chem. Co. is the only case since *Empagran I* in which a court has exercised subject matter jurisdiction over a foreign plaintiff's injury based on adverse domestic effects.[115] In *MM Global*, the plaintiffs, certain foreign chemical distributors, asserted that the defendants compelled them to agree to take part in a global price-fixing conspiracy. The complaint alleged that the defendants threatened to refuse to sell products from the United States to the plaintiffs unless the plaintiffs maintained certain resale prices in India.[116] The plaintiffs alleged that their injury, sustained in India, was based on improperly diminished and restrained competition in the domestic sale of the defendants' product.[117] The court held that jurisdiction was proper because the defendant's foreign conduct caused the adverse domestic effects, which then gave rise to the plaintiffs foreign injury.[118]

Following *MM Global*, in *In re Monosodium Glutamate Antitrust Litigation*, the District Court of Minnesota also exercised subject matter jurisdiction where the plaintiff asserted the globalization the-

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[111] *Sniado*, 378 F.3d 210.

[112] *See id.*, 378 F.3d at 212.

[113] *Id.* at 213.

[114] *See id.*

[115] *MM Global*, 329 F. Supp. 2d at 337.

[116] *See id.* at 340.

[117] *Id.*

[118] *See id.* at 342.

ory,[119] but later reconsidered its decision.[120] The court's initial decision noted that the plaintiffs "craftily plead" the alternative theory recognized in *Empagran I* and, accordingly, maintained subject matter jurisdiction over the case.[121] Because the plaintiffs alleged dependent rather than independent harm, the policy considerations counseling against subject matter jurisdiction in *Empagran I* were not present.[122] The *Monosodium I* court found that: (1) comity concerns were irrelevant to subject matter jurisdiction determinations regarding dependent foreign harm;[123] (2) permitting foreign plaintiffs to sue was necessary to deter international anticompetitive conduct;[124] and (3) because Congress intended to apply the Sherman Act to international cartel activity that affected domestic commerce, "[a]ny major activities on an international cartel would likely have the requisite impact . . . to trigger . . . subject matter jurisdiction."[125]

Following the D.C. Circuit's decision in *Empagran II*, the District Court of Minnesota agreed to reconsider its decision in *Monosodium I* and subsequently dismissed the action for lack of subject matter jurisdiction.[126] On reconsideration, the *Monosodium II* court adopted the D.C. Circuit's proximate cause standard, finding that "[t]he global price-fixing cartel theory establishes only an indirect relationship" between the adverse domestic effects and foreign injury, not proximate cause.[127]

Although the District Court of Connecticut's decision in *MM Global* to exercise subject matter jurisdiction may seem at odds with *Empagran II*, it has since been reconciled with the D.C. Circuit's proximate cause standard. As noted in *eMag Solutions LLC v. Toda Kogyo Corp.*, the *MM Global* court did not address whether "but-for" causation is sufficient to assert subject matter jurisdiction over foreign claims under the FTAIA.[128] Further, the plaintiffs in *MM Global* plead direct participation in domestic commerce in addition to injury resulting from the adverse domestic effects brought about by a global

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[119] *Monosodium I.*

[120] *In re* Monosodium Glutamate Antitrust Litig. (*Monosodium II*), 2005 WL 2810682 (D. Minn. Oct. 26, 2005).

[121] *See Monosodium I*, 2005 WL 1080790, at *8.

[122] *See id.* at *6.

[123] *See id.*

[124] *See id.* at *7.

[125] *Id.* at *6.

[126] *See id.* at *4.

[127] *Id.* at *3.

[128] eMag Solutions LLC v. Toda Kogyo Corp., *id.* 2005 WL 1712084, at *7 (N.D. Cal. July 20, 2005).

price-fixing conspiracy,[129] whereas the plaintiffs in the cases following *Empagran II* plead a global price-fixing conspiracy alone, basing their dependant harm on the effects of globalization.[130]

The plaintiffs' participation in domestic commerce distinguishes *MM Global* from the line of cases following *Empagran II*. The plaintiffs in *MM Global* participated in both U.S. and foreign commerce by purchasing products in the United States and reselling them in India, whereas the plaintiffs in the cases following *Empagran II* participated in solely foreign commerce. The *MM Global* plaintiffs' participation in U.S. commerce was adversely affected by the defendant's global price-fixing scheme. The *MM Global* plaintiffs' foreign injury arose directly from the adverse domestic effects, thus meeting the *Empagran II* proximate cause standard.

Reconciling *MM Global* with *Empagran II* and the cases following it reveals that in order to satisfy the D.C. Circuit's proximate cause standard a plaintiff must allege that his foreign injury arose from participation in domestic commerce adversely affected by the defendant's foreign conduct. Where plaintiffs did not participate in U.S. commerce, and instead relied on global market principles in order to assert injury based on adverse domestic effects, courts have found only an indirect causal relationship.[131] The causal relationship between adverse domestic effects caused by foreign conduct and the foreign injury, without participation in domestic commerce is, at best, a "by-

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[129] *See* Latino Quimica-Amtex v. Akzo Nobel Chems. B.V., No. 03 Civ. 10312, 2005 WL 2207017, at *12-13 (S.D.N.Y. Sept. 8, 2005).

[130] In *In re* Dynamic Random Access Memory Antitrust Litig., *Latino,* and *eMag*, the plaintiffs alleged only super-competitive prices in U.S. as a result of a global price-fixing conspiracy resulted in the plaintiffs paying higher prices in foreign commerce. *In re* Dynamic Random Access Memory Antitrust Litig., No. C 02-1486, 2006 WL 515629 (N.D. Cal. Mar. 1, 2006) (where plaintiffs asserted international price fixing as part of an international monopolization claim); *Latino*, 2005 WL 2207017; *eMag*, 2005 WL 1712084. In Advanced Micro Devices. Inc. v. Intel Corp., AMD asserted injury to its German subsidiary resulted in its lost income; however, reduced income flow is not participation in U.S. commerce, and U.S. courts do not recognize reduced income flow as a direct domestic effect or injury. Advanced Micro Devices, Inc. v. Intel Corp. (*Intel*), 452 F. Supp. 2d 555, 561 (D. Del. 2006) (citing Info. Res., Inc. v. Dun & Bradstreet Corp., 127 F. Supp. 2d 411, 417 (S.D.N.Y. 2001); Optimum S.A. v. Legent Corp., 926 F. Supp. 530, 533 (W.D. Pa. 1996)). In CSR Ltd. v. Cigna Corp., the plaintiffs alleged higher prices paid for asbestos-related insurance coverage as a result of an Australian group boycott and argued this boycott effected the market for coverage of U.S. risks. However, the district court observed that an asbestos insurance coverage market does not exist in the U.S. CSR Ltd. v. Cigna Corp., 405 F. Supp. 2d 526, 540-41 (D.N.J. 2005).

[131] *See Intel*, 452 F. Supp. 2d 555, *CSR*, 405 F. Supp. 2d 526; *Legent*, 926 F. Supp. 530; *Dynamic*, 2006, WL 515629; *Latino*, 2005 WL 2207017; *eMag*, 2005 WL 1712084.

product of a number of factors relevant to market conditions and the like," i.e. globalization.[132] Plaintiffs alleging the globalization theory "rely on general market principles to allege that, in a global market, the effect of anticompetitive conduct in one location (i.e. the U.S.), will cause a ripple effect that will necessarily 'be felt' in others."[133] This causal link is too indirect to support subject matter jurisdiction,[134] for "no persuasive authority" supports the proposition that a "global price-fixing conspiracy sufficiently alleges causation – and a claim under the FTAIA-post *Empagran I & II*."[135] The globalization theory asserts no more than "but-for" causation and establishes only an indirect relationship predicated on market principles,[136] which cannot pass muster under the D.C. Circuit's proximate cause analysis.

The D.C. Circuit's proximate cause standard has emerged as the standard for determining subject matter jurisdiction over extraterritorial antitrust claims. This has been shown in three ways. First, courts require "extraordinary circumstances,"[137] such as "an intervening change of law,"[138] to reconsider decided issues. The fact that the *Monosodium II* court reconsidered its earlier decision suggests that courts recognize the D.C. Circuit's proximate cause standard as the law, demonstrating the weight of *Empagran II*'s authority. Second, although the *MM Global* court reached a different outcome than *Empagran II*, the two cases can be reconciled. In any event, *MM Global* reveals that proximate cause requires participation in domestic commerce. Third, since *Empagran II*, not a single court has maintained subject matter jurisdiction over foreign conduct where the plaintiff asserted injury based on the globalization theory.[139]

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[132] *Intel*, 452 F. Supp. 2d at 561.

[133] *Latino*, 2005 WL 2207017, at *13.

[134] *Id.*

[135] *Dynamic*, 2006 WL 515629, at *5.

[136] *Monosodium II*, 2005 WL 2810692, at *3.

[137] *Id.* at *2 (citing Conrad v. Davis, 120 F.3d 92, 95 (8th Cir. 1997)).

[138] *Id.* (citing Grozdanich v. Leisure Hills Health Ctr., 48 F. Supp. 2d 885, 888 (D. Minn. 1999)).

[139] *Intel*, 452 F. Supp. 2d 555 (dismissing for lack of subject matter jurisdiction where the plaintiffs asserted an injury based on a worldwide monopolization claim that included allegations of international price-fixing); *Dynamic*, 2006 WL 515629 (declining to exercise subject matter jurisdiction over a global DRAM price-fixing conspiracy); *CSR*, 405 F. Supp. 2d at 526 (declining subject matter jurisdiction where plaintiffs alleged injury based on an Australian group boycott that raised asbestos-related insurance coverage by restricting the plaintiffs' ability to obtain alternative coverage in the United States from a U.S. subsidiary even though the plaintiffs stressed that the coverage at issue was global and included risks in the United States); *Monosodium II*, 2005 WL 2810692 (reconsidering and reversing its former decision to exercise subject matter jurisdiction over an alleged MSG and nucleotide global price-fixing and market allocation scheme); *Latino*, 2005 WL

The recent opinion from the Eastern District of Pennsylvania, *In re Graphite Electrodes Antitrust Litigation v. UCAR Int'l., Inc.*, confirms this analysis.[140] In that case, a Saudi Arabian corporation purchased graphite electrodes in the foreign market and, like many plaintiffs before it, alleged injury based on a worldwide price-fixing conspiracy that artificially inflated the electrode prices.[141] Unsurprisingly, the Eastern District of Pennsylvania dismissed the corporation's claim for lack of subject matter jurisdiction.[142] Participation in domestic commerce adversely affected by foreign conduct did not give rise to the corporation's foreign injury. It neither purchased the electrodes in domestic commerce nor asserted that the prices it paid for them were set in the United States.[143] The *Graphite* court distinguished *MM Global* on the grounds that it "did not involve the wholly-foreign transactions at issue here,"[144] and explicitly followed the D.C. Circuit's judgment in *Empagran II*.[145] Therefore, the D.C. Circuit's opinion is clearly the authority on subject matter jurisdiction over extraterritorial antitrust claims, precluding plaintiffs from asserting the globalization theory.

C. *Courts Should Continue to Require Proximate Cause*

Although "the D.C. Circuit is not, after all, the Supreme Court,"[146] courts should nevertheless recognize its opinion as the authority on subject matter jurisdiction over extraterritorial jurisdiction, for the D.C. Circuit's proximate cause standard accords with the

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2207017 (dismissing for lack of subject matter jurisdiction where plaintiffs asserted that the defendants agreed to allocate the markets for and fix the prices of chemicals incorporated into food, pharmaceutical, herbicide and plastic additives on a global scale); *eMag*, 2005 WL 1712084 (declining to assert subject matter jurisdiction where plaintiffs alleged that the defendants engaged in a worldwide magnetic iron oxide price-fixing conspiracy that injured the plaintiffs through higher purchase prices in foreign commerce).

[140] 2007 WL 137684 (E.D. Pa.) (slip opinion).

[141] *Id.* at *1.

[142] *Id.* at *6.

[143] *Id.* at *4.

[144] *Id.* at *6 (noting that it "did not involve the wholly-foreign transactions at issue here").

[145] *Id.* at *5-6 ("*Empagran II* is logical as a matter of statutory interpretation and follows from the Supreme Court's discussion of the importance of 'prescriptive comity' in *Empagran I*." The court "will follow the reasoning set forth in *Empagran I* and *Empagran II* and the district opinions following them.") (These opinions include: *Intel,* 452 F. Supp. 2d at 555; *Dynamic*, 2006 WL 515629; *Monosodium II*, 2005 WL 2810682; *Latino*, 2005 WL 2207017; *eMag*, 2005 WL 1712084).

[146] Diamond, *supra* note 1, at 834.

FTAIA's language and legislative history, traditional antitrust principles, and the Supreme Court's opinion in *Empagran I*. With regard to the language and history of the FTAIA, the D.C. Circuit's proximate cause standard accords with the distinction between "with" and "among" embedded in the phrase "trade or commerce with foreign nations." Further, *Empagran II* most sensibly applies the requirements that the conduct have a "direct, substantial and foreseeable effect," and that this effect give rise to the claim. The provision refers to conduct involving "trade or commerce *with* foreign nations,"[147] which may be distinguished from commerce between or among foreign nations.[148] "[T]rade or commerce *with* foreign nations" suggests subject matter jurisdiction requires participation in U.S. commerce.[149] Trade or commerce "between" or "among" foreign nations would suggest the contrary and permit subject matter jurisdiction over wholly foreign transactions.[150] This, however, is not in accord with the statutory language.

Congress does not have the authority to regulate wholly foreign commerce. The Commerce clause grants Congress the power "to regulate Commerce *with* foreign Nations," as opposed to "between" or "among" foreign nations.[151] The D.C. Circuit's proximate cause standard ensures that only plaintiffs who participate in domestic commerce can assert claims over foreign conduct in U.S. courts, preventing the expansion of subject matter jurisdiction over foreign conduct beyond the purview of Congress.

Moreover, the "most sensible interpretation" of the requirement that conduct have a "direct, substantial, and reasonably foreseeable effect"[152] is as a "synonym for proximate cause."[153] This language reflects the traditional proximate cause definition provided by tort law.[154] Proximate cause requires a direct link between the conduct

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[147] FTAIA, 15 U.S.C. § 6(a) (2000) (emphasis added).

[148] *See Den Norske*, 241 F.3d at 426.

[149] *See id.*

[150] *See id.*

[151] *See id.* at 426 n.18 (noting that "even if Congress indeed intended to regulate purely foreign commerce with the Sherman Act, it was not empowered to do so under the Commerce Clause.")

[152] FTAIA, 15 U.S.C. § 6(a)(1) (2000).

[153] 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, 11 (Nov. 18, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201509.pdf.

[154] Casey, *supra* note 17, at 509 n.129 (citing DAN B. DOBBS, THE LAW OF TORTS § 182 (2001); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 42 (5th ed. 1984) (concluding the FTAIA is "indicative of proximate cause standards")).

and the harm—the conduct be a substantial factor giving rise to the harm, and the manner by which the harm occurred must be foreseeable.[155] Lastly, as noted by the D.C. Circuit, "gives rise to" suggests that the provision requires a "direct causal relationship, that is, proximate causation," which cannot be satisfied with "a mere but-for 'nexus.'"[156]

Though language takes priority over legislative history in considering a statute's construction,[157] the D.C. Circuit's proximate cause standard accords with the FTAIA's legislative history as well. Pursuant to its primary concern, domestic commerce,[158] Congress implemented the FTAIA to "exempt from the Sherman Act export transactions that did not injure the U.S. economy."[159] Through exempting these transactions, Congress intended to promote American exports by assuring domestic exporters the ability to participate in efficient joint ventures without incurring liability under the antitrust laws of the United States, so long as those ventures did not harm domestic commerce.[160] This assurance allows U.S. exporters to better compete with foreign competitors by giving U.S. exporters the latitude to engage in anticompetitive conduct abroad as long as that conduct adversely affects foreign commerce alone.[161] Congress implemented "the optimal antitrust policy," for the FTAIA permits U.S. exporters to engage in anticompetitive conduct to increase profits when "the welfare loss from the U.S. national perspective is zero."[162]

The D.C. Circuit's proximate cause standard implements this policy by excluding claims based on global market principles rather than participation in domestic commerce from the U.S. courts' subject

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[155] *Id.*

[156] *Empagran II*, 417 F.3d at 1271.

[157] *Den Norske*, 241 F.3d at 425-26.

[158] *See Pfizer*, 434 U.S. at 314.

[159] *Hartford Fire*, 509 U.S. at 796 n.23.

[160] H.R. REP. NO. 97-686, at 10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (expressing the intention to "[free] American-owned firms that operate entirely abroad or in U.S. export trade" from liability under the U.S. antitrust laws where "their activities lack the requisite domestic effects," i.e. where their activities do not adversely affect domestic commerce).

[161] H.R. REP. NO. 97-686, at 9-10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2494-95 (addressing the business perception that the U.S. antitrust laws impeded U.S. exporters' ability to compete in foreign markets).

[162] Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122, 2143 (2001) (reasoning from the following two premises: (1) anticompetitive conduct in the context of export commerce poses a far greater risk to competition in the U.S. than anticompetitive conduct in the context of import commerce and (2) trade restraints in export commerce generally harm foreign consumers, not domestic consumers).

matter jurisdiction.[163] If U.S. exporters engaged in anticompetitive activity abroad, and plaintiffs could assert claims based on market principles stemming from globalization, these prospective plaintiffs could tie their foreign injuries to some remote adverse affect on U.S. commerce based on economic theory rather than the exporters' actual conduct. Such a result would undermine Congress' purpose in implementing both U.S. antitrust laws and the FTAIA.

The D.C. Circuit's proximate cause standard protects U.S. exporters from such claims and gives effect to a lexical priority rule ordering Congress' concerns: (1) protect U.S. commerce and (2) where U.S. commerce remains unharmed, protect U.S. exporters.[164] Thus, if a U.S. exporter's anticompetitive activity injures a foreign plaintiff while participating in U.S. commerce, that foreign plaintiff may bring a claim under the U.S. antitrust laws, for permitting such a claim protects U.S. commerce. However, where a U.S. exporter's anticompetitive activity injures a foreign plaintiff while participating in wholly foreign commerce, that foreign plaintiff may not bring a claim under the U.S. antitrust laws, for the conduct does not harm U.S. commerce; therefore, the U.S. exporter is entitled to protection.

While Congress intended to extend the same protection of our antitrust laws to domestic and foreign participants in U.S. commerce,[165] Congress' "foremost concern" in implementing the U.S. antitrust laws was the protection of domestic commerce.[166] Congress never intended for this protection to extend to plaintiffs claiming injury arising from their participation in wholly foreign commerce. American antitrust laws do not regulate foreign commerce; they regulate domestic commerce.[167] Therefore, courts "should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the U.S."[168] The D.C. Circuit's proximate cause standard achieves this balance in accordance with these traditional antitrust principles, for a plaintiff must assert participation in domestic commerce to establish that his or her foreign injury arose directly from the adverse domestic effects brought about by foreign conduct. This participation in domestic commerce ensures that the U.S. antitrust laws protect foreign and domestic participants in

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[163] *See Empagran II*, 417 F.3d at 1271.

[164] *See id.*

[165] H.R. REP. NO. 97-686, at 10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (stating that "[f]oreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.").

[166] *Pfizer*, 434 U.S. at 314.

[167] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies.") (citing *Alcoa*, 148 F.2d at 443).

[168] *Alcoa*, 148 F.2d at 443.

domestic commerce, while excluding non-participants asserting claims based on injuries with remote ties to domestic commerce.

Lastly, the D.C. Circuit's proximate cause standard comports with the Supreme Court's opinion in *Empagran I*, for it respects international comity, reduces the burden on U.S. courts, and promotes harmony amongst antitrust authorities. The D.C. Circuit's proximate cause standard gives effect to principles of international comity, in that it limits subject matter jurisdiction over extraterritorial claims to those cases in which the United States has an interest and excludes claims that would best be determined in another forum.[169] Because proximate cause requires that the plaintiff participate in domestic commerce in order to establish that his claim arose from adverse domestic effects, the U.S. has an interest in adjudicating the claim, for it arose out of participation in domestic commerce. Exercising subject matter jurisdiction over claims based on the globalization theory permits plaintiffs to seek redress for their injuries in U.S. courts "even if those plaintiffs had no commercial relationship with any U.S. market and their injuries were unrelated to the injuries suffered in the U.S."[170]

If a plaintiff does not have a commercial relationship with the United States, the United States has little interest in resolving his claim and the claim would be more appropriately brought in another forum. Entertaining such claims only contributes to the U.S. courts' burden. Declining to follow the D.C. Circuit's proximate cause standard "effectively" provides for "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."[171] Refusing to assert subject matter jurisdiction over claims based on indirect ties to U.S. commerce relieves U.S. courts from the burden of adjudicating claims that would be more appropriately brought in other forums. The D.C. Circuit's proximate cause standard prevents U.S. courts from asserting subject matter jurisdiction over

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[169] Casey, *supra* note 17, at 609; *see Intel*, 452 F. Supp. 2d at 564 (declining to assert subject matter jurisdiction over a worldwide monopolization claim where plaintiffs had already filed claims in a number of foreign jurisdictions where the alleged conduct had actually taken place).

[170] *Den Norske*, 241 F.3d. at 427-28. This quotation suggests that the United States does not have an interest in adjudicating claims asserted by plaintiffs lacking a commercial relationship with the United States because, absent a commercial relationship with the U.S., the injury incurred by the plaintiff does not affect domestic commerce and, therefore, the U.S. does not have a financial stake in the matter.

[171] *Empagran I*, 542 U.S. at 166.

"marginal" claims[172] that should be adjudicated in a forum with a more direct stake in redressing the injury.

Thus, the proximate cause standard avoids overburdening U.S. courts through respect for foreign nations' "prerogative to safeguard their own citizens from anticompetitive activity."[173] A less direct standard would only interfere with this prerogative[174] by effectively supplanting foreign nations' antitrust schemes.[175] The D.C. Circuit's proximate cause standard gives effect to the Supreme Court's concerns regarding international comity. By precluding claims based on wholly foreign commerce, the D.C. Circuit's standard ensures deference to foreign nations that have a direct interest in resolving the claim.

By respecting international comity concerns and deferring to foreign nations with a significant interest in claims based on wholly foreign commerce, the D.C. Circuit's proximate cause standard promotes the "harmony particularly needed in today's highly interdependent commercial world."[176] While the Supreme Court did not find that, "on balance," there was enough empirical evidence to determine which side was "correct,"[177] the D.C. Circuit's proximate cause standard balances the competing considerations surrounding the effect treble damages have on deterrence, as well as participation in amnesty programs in a manner that facilitates cooperation among antitrust authorities.

The D.C. Circuit's proximate cause standard maintains the deterrent effect of treble damages with respect to anticompetitive activity that affects domestic commerce to the extent that injury arises from participation in our markets. However, awarding treble damages awards has "generated considerable controversy"[178] and precipitated blocking statutes passed to prevent the U.S. government from obtaining foreign discovery or enforcing U.S. judgments abroad.[179] This controversy stems from the manner with which those treble damages undermine foreign authorities' enforcement policies, for awarding these damages to foreign plaintiffs allows them "to bypass their own less generous remedial schemes" and creates a disincentive to participate in foreign amnesty programs.[180]

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[172] Casey, *supra* note 17, at 609 (meaning claims based on remote ties to the U.S.).
[173] *Empagran II,* 417 F.3d at 1271.
[174] *Id.*
[175] *Empagran I,* 542 U.S. at 161.
[176] *Id.* at 164-65.
[177] *Id.* at 174.
[178] *Id.* at 167.
[179] Delrahim, *supra* note 110, at 422; *accord* Jones, *supra* note 40, at 418-419; Waller, *supra* note 6, at 525-526.
[180] *Empagran I,* 542 U.S. at 167.

Creating disincentives to participate in these programs hinders exposing violations in the first place.[181] The D.C Circuit's proximate cause standard removes this disincentive to the extent that the United States does not have a significant interest in resolving the claim for lack of participation in U.S. commerce. Proximate cause, therefore, retains conspirators' incentive to participate in amnesty programs and expose violations resulting in harm that stems from participation in wholly foreign commerce and promotes the U.S. ability to enforce our antitrust laws. Refusing to assert subject matter jurisdiction over wholly foreign claims promotes the "cooperation and best efforts of foreign authorities" needed to enforce U.S. antitrust laws in the international context by removing some of "the fear that the results of their efforts will be applied in follow-on treble damages suits in U.S. courts."[182] The D.C. Circuit's proximate cause standard accords with the FTAIA's language and legislative history, traditional antitrust principles, and the Supreme Court's opinion in *Empagran I*. Therefore, courts should continue to recognize it as the authority for subject matter jurisdiction over foreign conduct.

IV. CONCLUSION: PROXIMATE CAUSE PROMOTES GLOBAL ENFORCEMENT

The Supreme Court's decision in *Empagran I* interpreting the FTAIA left open the question of whether U.S. courts had subject matter jurisdiction over foreign claims asserting injury that is dependant on the adverse domestic effects brought about by foreign conduct. This question gave rise to speculation that the decision would lead to another split among the lower courts regarding subject matter jurisdiction over foreign conduct. However, on reconsideration, the D.C. Circuit's proximate cause standard has emerged as the prevailing standard.

Though decisions prior to *Empagran II* may have differed in their formulations of the standard, each decision reached a result that is reconcilable with the D.C. Circuit's standard and each decision after *Empagran II* has followed it. Reconciling the D.C. Circuit's proximate cause standard with prior cases reveals that proximate cause requires that claimants' participation in U.S. commerce adversely effected by foreign conduct gives rise to their foreign injury and precludes claimants from asserting claims based on global market principles. The consensus following the opinion demonstrates the weight of the D.C.

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[181] Delrahim, *supra* note 110, at 423 (explaining that the prospect of unlimited civil liability in U.S. courts deters antitrust violators from ever coming forward and undermines amnesty programs' important role in the discovery of anticompetitive behavior in both the United States and abroad).

[182] *Id.*

Circuit's authority. The fact that one court reconsidered its prior opinion in order to rule in accordance with the D.C. Circuit suggests that courts recognize the opinion as the rule of law. Though the D.C. Circuit's opinion is not binding authority, courts should continue to follow the opinion as if it were, for the D.C. Circuit's proximate cause standard accords with the FTAIA's language and legislative history, traditional antitrust principles, and the Supreme Court's opinion in *Empagran I*.

In the age of globalization, we require global solutions to global problems, including international cartels. The U.S. courts are not "world courts" and should not act in that capacity. By honoring the FTAIA's language and legislative history, traditional antitrust principles, and the Supreme Court's opinion in *Empagran I*, the D.C. Circuit restrained the U.S. courts' subject matter jurisdiction in a manner that preserves claims in which the United States has an interest in resolving and dismisses those more appropriately brought in another forum. Through deferring to other authorities, we do not lose our ability to adjudicate claims that have a significant effect on the welfare of the U.S. economy. Instead, we gain the opportunity to cooperate with foreign authorities in order to best adjudicate claims that have a significant effect on the world economy.