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STANDING FOR EXTRATERRITORIALITY: DEFINING THE *EMPAGRAN* EXCEPTION

*Max Huffman**

INTRODUCTION

The attractions of the U.S. forum for foreign plaintiffs;¹ the sophistication of the U.S. class-action bar;² steadily and rapidly increasing global economic interdependence; and instant around-the-world communication³ have combined to bring foreign plaintiffs in ever-increasing numbers into U.S. courts. Nowhere is this reality more apparent than in the antitrust arena. The U.S. system promises “jury trials, wide-ranging pretrial discovery without judicial supervision * * *, extraterritorial discovery, treble damages,”—a

* Visiting Assistant Professor, University of Cincinnati College of Law (2005-2007). J.D., University of Cincinnati College of Law (1998); B.A., Cornell University (1995). Thanks to Richard R. Huffman, for his lifelong mentorship; to Roy T. Englert, Jr., and Donald J. Russell for early guidance and inspiration on this topic; and to Darren Bush, my wife Patricia V. Galvan, Donna Nagy, and Michael Van Alstine for invaluable comments on drafts of this article. Opinions and errors are my responsibility.

¹ See, e.g., *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981) (*forum non conveniens* decision rejecting effort to sue in U.S. court under U.S. tort laws over an airplane crash that occurred in Scotland). See also *Smith Kline & French Labs Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982) (Lord Denning) (“As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”).

² See Lily Henning, *Antitrust Goes Global: D.C. Circuit Opens the Door to Foreign Victims of Vitamin Price Fixing*, Legal Times, Oct. 13, 2003 (“Already some lawyers have begun to cast their nets for client, hopping planes to places as far afield as the Czech Republic to look for purchasers who bought vitamins from cartel members.”).

³ See *ibid.* (noting that foreign plaintiffs are contacting plaintiffs’ counsel).

remedy scheme available only under U.S. law—“class actions, [and] contingent fees.”⁴ These features combine to create “a multi-color brochure for international antitrust tourism.”⁵

Efforts by private plaintiffs to enforce the U.S. antitrust laws extraterritorially have become an enormous industry.⁶ The effects of those efforts may be positive for those private plaintiffs who are successful, but they threaten significant consequences for defendants and federal courts now faced with worldwide class actions and the attendant procedural difficulties. Defendants’ calculus of litigation risk must undergo wholesale revision. And extraterritorial enforcement efforts threaten consequences for public enforcement and for international relations that are only beginning to be understood.⁷

A recent reflection of the challenges facing federal courts in this global age, *F. Hoffman-LaRoche Ltd. v. Empagran S.A. (Empagran)*⁸ is the most recent in a long line of decisions testing the extraterritorial reach of the U.S. antitrust laws—a line extending nearly a century back to Justice Holmes’s 1909 opinion in *American Banana*.⁹ The *Empagran* Court held the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA)¹⁰ precluded the assertion by U.S. courts of jurisdiction over claims by foreign plaintiffs alleging harm felt in wholly foreign commerce.¹¹ The holding applied to

⁴ Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 Geo Mason L. Rev. 505, 516 (1998).

⁵ Deputy Assistant Attorney General Makan Delrahim, *Remarks: Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* 17 (Nov. 18, 2003) (*Remarks*), available at <http://www.usdoj.gov/atr/public/speeches/201509.pdf>.

⁶ See Delrahim, *Remarks, supra*, at 3 (referring to a “new breed of plaintiffs”).

⁷ The attention to the issues has not been confined to the courthouse. One Department of Justice official, addressing “U.S. ‘judicial imperialism’ in private antitrust damages actions,” noted the “level of attention and concern the [extraterritoriality] cases have attracted in the international community.” Deputy Assistant Attorney General Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* 9-10 (Nov. 18, 2003), available at <http://www.usdoj.gov/atr/public/speeches/201509.pdf>.

⁸ 542 U.S. 155 (2004).

⁹ 203 U.S. 347 (1909) (Holmes, J.).

¹⁰ 15 U.S.C. § 6a.

¹¹ *Empagran*, 542 U.S. at 159.

claims of foreign harm lacking any nexus to an effect in domestic U.S. commerce.¹²

The *Empagran* Court included in its opinion an exception that may well swallow its general rule. While plaintiffs not alleging a sufficient nexus between an effect in domestic commerce and their own wholly foreign harm are precluded from suit in federal court, plaintiffs able sufficiently to show “the anticompetitive conduct’s domestic effects were linked to their foreign harm” are excepted from the limitation.¹³ This important exception is the “*Empagran* exception.”

Ongoing litigation in lower courts shows the *Empagran* exception has the effect of encouraging artful pleading of nexuses between domestic effects and foreign harm, injecting as much uncertainty into the extraterritoriality analysis under the FTAIA as existed before

Beyond merely posing difficult substantive issues, the *Empagran* litigation raised a hubbub of tremendous proportions in the international commercial and regulatory communities. See, e.g., Hannah L. Buxbaum, *National Courts, Global Cartels: F. Hoffman-LaRoche Ltd. v. Empagran S.A. (U.S. Supreme Court 2004)*, 5 *German L. Rev.* 1095 (2004) (“foreign receptivity to U.S. enforcement efforts came to an end” as a result of the lower court’s opinion in *Empagran*). The line-up of *amici curiae* in the Supreme Court included, on the petitioner’s side, several national governments and business organizations. See the Supreme Court online docket for 03-724, available at <http://www.supremecourtus.gov/docket/03-724.htm> (visited February 7, 2006). *Amici* included the governments of the United States, Canada, Germany, Belgium, the United Kingdom, Northern Ireland, the Netherlands and Japan, and business organizations the U.S. Chamber of Commerce, the Organization for International Investment, the International Chamber of Commerce, and an association of European banks. On the respondent’s side, a public-interest firm and myriad economics and law professors filed papers as *amici*. See *ibid.* *Amici* for respondent included the public interest firm Public Citizen, a so-called Committee to Support the Antitrust Laws, and several notable economists and economics professors and law professors.

None of this excitement should be a surprise when one considers the size of the potential damages awards at issue in litigation that, like *Empagran*, raises the possibility of applying to claims by world-wide plaintiff classes the U.S. approach of trebling damages awards in antitrust litigation. See Clayton Act § 4, 15 U.S.C. § 15. Treble damage awards are by no means a universally, or even commonly, accepted remedy. See Griffin, 6 *GEO. MASON L. REV.*, *supra*, at 516. So too with procedural aspects of antitrust litigation in the United States, perhaps most notably the class action device. See *ibid.*; *supra* n. 6 & accompanying text.

¹² *Empagran*, 542 U.S. at 159.

¹³ *Id.* at 175.

Empagran.¹⁴ On remand (*Empagran II*), the D.C. Circuit held that plaintiffs' allegations—that fixed prices in domestic U.S. commerce were the but-for cause of their harm as purchasers in wholly foreign commerce—fell short of establishing the nexus requirement.¹⁵ Some courts have followed suit, and some have diverged. As these inconsistent decisions show, the battle over extraterritoriality now has shifted to how to define the degree of nexus required under the *Empagran* exception.¹⁶ This issue will not resolve itself neatly. With the steadily increasing interdependence of the world economy,¹⁷ private efforts to apply U.S. laws extraterritorially will continue to be a hotbed of litigation activity.¹⁸

¹⁴ See *supra* nn. 194-219 and accompanying text (describing cases).

¹⁵ *Empagran, S.A. v. F. Hoffmann-Laroche Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005) (*Empagran II*), cert. denied, 126 S. Ct. 1043 (2006).

¹⁶ See, e.g., *Empagran S.A. v. F. Hoffmann-LaRoche Ltd.*, 417 F.3d 1267, __ (D.C. Cir. 2005) (holding that the *Empagran* exception requires allegations that harm suffered in foreign commerce was proximately caused by an effect felt in domestic U.S. commerce).

¹⁷ See, e.g., John M. Connor, *Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels*, Purdue Univ. Dep't of Agricultural Econ. Staff Paper 04-08, at 1 (2004) ("Today, many industries are led by a few multinational companies with sales spread across the Northern Hemisphere * * *"); Geoffrey Hazard, *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1666 (1998) (noting steadily increasing international issues).

On the question of litigation activity going forward, see 2 Spencer W. Waller, ANTITRUST AND INTERNATIONAL BUSINESS ABROAD § 13:23 (3d ed., Supp. 2005) ("This issue is being tested in the current wave of cases testing whether foreign purchasers injured abroad may sue in the United States when there is a substantial domestic impact, but where the plaintiff's injury is felt solely outside the United States * * *. Despite the Supreme Court's decision in *Empagran*, important questions remain as what circumstances, if any, foreign antitrust plaintiffs suffering injury abroad can bring their claims to U.S. courts. Years of additional litigation or statutory change will be necessary to definitively resolve this critical question.") (footnotes omitted). See also 1 *id.* § 9.7 ("The FTAIA is an immensely important statute.").

Private plaintiff efforts to bring matters before U.S. courts and take advantage of U.S. litigation procedure and substantive rules of law are not limited to the antitrust context. Famous examples of forum shopping exist. See, e.g., *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981) (*forum non conveniens* decision rejecting effort to sue in U.S. court under U.S. tort laws over an airplane crash that occurred in Scotland). Other significant substantive legal schemes that raise the extraterritoriality issues discussed in this article include the federal securities laws and RICO. Analysis of the application of these arguments to those, and possibly other, schemes would be valuable.

¹⁸ See Delrahim, *Remarks, supra*, at 17.

The article explores the *Empagran* exception and is the first to propose a workable and consistent approach for its application. The article proceeds in three parts. In Part I it gives some background of the statutory scheme and the prudential antitrust standing doctrine. In Part II it considers *Empagran* in more depth and argues the Court's holding is best understood by reference to principles of antitrust standing. In Part III the article examines courts' recent efforts to apply the *Empagran* exception and shows how standing doctrine could be applied to improve on those efforts.

The article concludes courts' treatment of the *Empagran* exception reflect a lack of understanding of the essential legal scheme. Well-understood principles of antitrust standing, a prudential doctrine that permits courts to deny plaintiffs the right to sue if they are not appropriately efficient vindicators of the policies underlying the U.S. antitrust laws, will provide better means of dealing with issues of extraterritorial application going forward.

I. BACKGROUND OF ANTITRUST STANDING AND THE CONTROVERSY OVER EXTRATERRITORIALITY

A. *Understanding Antitrust Standing*

Standing is a threshold inquiry that a court will address before turning to the merits of a plaintiff's claim.¹⁹ Standing doctrine exists to ensure the plaintiff suing is appropriately situated to vindicate the purposes of the antitrust laws. The purpose of the private action, in turn, is twofold: (1) deterring conduct Congress has determined to be

¹⁹See 1 Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 3.03d, at 97 (2003) (noting that "the antitrust injury doctrine depends less on the plaintiff's proof than on its theory of injury, and theories that do not depend on proof are well suited to pre-discovery disposition"); *id.* § 3.03a, at 91 (antitrust injury doctrine "enables antitrust courts to dispose of more claims at an early stage of litigation by simply examining the logic of the plaintiff's theory of injury") (citing *Juster Assocs. v. City of Rutland*, 901 F.2d 266, 270 (2d Cir. 1990)).

Antitrust standing is distinct from the Article III standing analysis, which inquires whether there is a case or controversy providing a court constitutional authority to hear an issue.

inimical to U.S. economic interests, and (2) compensating plaintiffs for harm suffered by an antitrust violation.²⁰

Antitrust standing doctrine enjoys a long pedigree. The common-law background to Clayton Act Section 4 (Section 4),²¹ the private right of action provision of the antitrust scheme, was rife with extra-statutory limitations on recovery.²² Primary limitations included such well-known concepts as proximate cause and certainty of damages.²³ Early judicial glosses on Sherman Act Section 7, the precursor to Section 4, imposed these common law limitations to suits by antitrust plaintiffs.²⁴ Reliance on common law principles was carried forward with the enactment of Section 4, and remains the norm today.²⁵

²⁰ See William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1450 (1985) (citing Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809 (1977)); Phillip E. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1127 (1976).

²¹ 15 U.S.C. § 15(a). The section reads in pertinent part:

(a) Amount of recovery; prejudgment interest

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

²² See *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 532-533 (1983).

²³ See *id.* at 532 (citing F. Bohlen, *Cases on the Law of Torts* 292-312 (2d ed. 1925), and 3 J. Lawson, *Rights, Remedies, and Practice* 1740 (1890)).

As Judge Posner colorfully has noted, these limitations include:

venerable principles of tort causation illustrated by *Gorris v. Scott*, 9 L.R. Ex.-125 (1874). The plaintiff's animals, which were being transported on the deck of the defendant's ship, were washed overboard in a storm. They would have been saved if the deck had been panned, as was required by statute. But since the purpose of the statute was to prevent contagion, not drowning, the defendant was not liable.

Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698, 708-709 (7th Cir. 1984).

²⁴ See, e.g., *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910) (no standing for shareholder of victim company because the injury was "indirect, remote and consequential").

²⁵ See *Associated General Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 531 (1983) ("Congress intended the [Sherman] Act to be construed in light of its common law background."). Cf. *American Soc. of Mech. Eng'rs, Inc. v. Hydrolevel*

Three doctrines comprise the modern antitrust standing analysis.²⁶ The first is antitrust injury, most prominently attributed to *Brunswick Corp. v. Pueblo Bowl-O-Mat*,²⁷ which requires that the injury for which a plaintiff seeks recompense be an injury of the sort the antitrust laws were intended to prevent.²⁸ The second is the “indirect purchaser” analysis from *Illinois Brick Co. v. Illinois*.²⁹ Since *Illinois Brick*, it generally has been the rule that, as among plaintiffs who seek standing as customers, only those plaintiffs that purchased directly from the defendant had standing to sue for antitrust injury. The third aspect of the standing inquiry is a vaguely defined

Corp., 456 U.S. 556, 568 n.6 (1982) (“imposing liability * * * in accord with those common law [agency] principles honors the congressional intent behind the antitrust statutes”).

²⁶ “Antitrust standing” exists only if, at a minimum, the harm suffered is of a sort against which the antitrust laws were meant to protect. More is required. See William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 497 (1980) (“Antitrust injury is a rule of standing in the broad sense insofar as it defines the type of harm that is compensable * * *. The antitrust standing doctrine, however, narrows the class of those who may recover for antitrust injury.”). The plaintiff must be an appropriately efficient plaintiff to vindicate the purposes of the antitrust laws. In addition to antitrust injury, to have antitrust standing the plaintiff must convince the court that factors such as the directness of the injury, the existence of other plaintiffs, concerns for manageability of the litigation, and the danger of complex damages apportionment weigh in favor of the plaintiff’s suit proceeding. See *Associated General Contractors*, 459 U.S. at 540-544.

²⁷ 429 U.S. 477 (1977).

²⁸ Harm is a requirement of the prudential antitrust standing doctrine, which turns in part on whether a plaintiff’s “harm” can be termed “antitrust injury.” See *Associated General Contractors*, 459 U.S. 519, 535 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977). See also John E. Lopatka & William F. Page, *Brunswick at 25: Antitrust Injury and the Evolution of Antitrust Law*, 17 *Antitrust* 20, 20-21 (2002); Philip E. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 *Harv. L. Rev.* 1127, 1130-1136 (1976). Harm is also a requirement of Article III standing. As a constitutional matter, federal courts only have power to hear a case if there is “injury in fact.” See *Associated General Contractors*, 459 U.S. at 535 n.31 (differentiating between Article III standing and antitrust standing). “Antitrust injury” is injury that flows from a violation of the antitrust laws, and not just from a violation, but from that which made the conduct illegal. See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 486-487 (1977) (rejecting argument that plaintiffs need only prove “they are in a worse position than they would have been had the petitioner not committed those acts,” and requiring proof of “antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful”).

²⁹ 431 U.S. 720 (1977).

amalgam of other considerations contributing to the prudential question whether a court should entertain a private antitrust action.

1. The Classical Standing Framework

The Supreme Court's most complete and coherent statement of the antitrust standing doctrine came in *Associated General Contractors of California v. California State Council of Carpenters*.³⁰ The Court announced an inquiry involving five considerations courts should balance to determine whether the plaintiff is the appropriate one to vindicate the policies of the antitrust laws: (1) the question of antitrust injury; (2) whether the plaintiff is a direct purchaser; (3) whether other plaintiffs are available to sue if standing is denied to this plaintiff; (4) concerns for "judicial manageability"; and (5) concerns for "either the risk of duplicate recoveries * * * or the danger of complex apportionment of damages."³¹

Antitrust injury holds that the plaintiff "must prove * * * injury of the type the antitrust laws were meant to prevent and that flows from that which makes the defendants' acts unlawful."³² *Brunswick Corp.* held a plaintiff could not sue for injury caused by an increase in competition from the defendant's acquisition of the plaintiff's

³⁰ *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 437 (1983). See generally *deAtucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510, 513 (S.D.N.Y. 1985) (noting that "analysis of standing under [Clayton Act] § 4" should start "with the Supreme Court opinions in *Associated General Contractors* * * * and *Blue Shield of Virginia v. McReady*, 457 U.S. 519 (1982)).

³¹ *Associated General Contractors*, 459 U.S. at 540-544.

One commentator quite reasonably, but incorrectly, reads into *Associated General Contractors* a sixth element in the standing analysis, that of the defendant's intent toward the particular plaintiff. See C. Douglas Floyd, *Antitrust Violations Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 Minn. L. Rev. 1, 8 (1997) (citing *Associated General Contractors*, 459 U.S. at 537). See also *Associated General Contractors*, 459 U.S. at 537 n.35 ("specific intent of defendant to cause injury to a particular class of persons should 'ordinarily be dispositive' in creating standing to sue") (citation omitted). The opaque discussion in *Associated General Contractors* of this element concludes that "improper motive * * * is not a panacea that will enable any complaint to withstand a motion to dismiss." *Id.* at 437. "[T]he motive allegation [is not] of controlling importance." *Id.* at 437 n.37.

³² *Brunswick*, 429 U.S. at 489.

competitor.³³ Other contexts of the application of the injury doctrine include preventing claims by employees alleging harm from conduct that harms their employers and claims by plaintiffs with business relationship with the victim of an antitrust violation.³⁴ Those types of cases have in common the fact that the plaintiff's harm is derivative.

Illinois Brick precludes plaintiffs from suing as purchasers alleging harm on a pass-through theory, whereby their harm in paying inflated prices to a middleman is derivative of the middleman's own harm.³⁵ The primary concern underlying the *Illinois Brick* holding is that of duplicate recovery if both direct and indirect plaintiffs are able to sue.³⁶ This element serves the essential function of the injury element in the case of plaintiffs who are purchasers.³⁷

³³ *Brunswick*, 429 U.S. at _____. The plaintiff alleged the competitor otherwise would have gone out of business, giving plaintiff a monopoly. *Brunswick*, 429 U.S. at 488; Roger D. Blair & William H. Page, *The Role of Economics in Defining Antitrust Injury and Standing*, in _____, at 70. The Court noted that "if respondents were injured * * *, while respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful." *Ibid.* "What made the merger unlawful, however, was the *potential* for predatory behavior on Brunswick's part. But this had nothing to do with Pueblo's reduced profits. Page & Blair, _____, *supra*, at 70.

³⁴ *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 751 (9th Cir. 1984) (Kennedy, J., dissenting) (dissenting from a finding of employee standing); *Hairston v. Pac-10 Conference*, 101 F.3d 1315, 1320-1321 (9th Cir. 1996) (Trott, J., concurring) (no antitrust standing for business associates of victim of an antitrust violation).

And while the current statement of the antitrust injury rationale is less than 30 years old, the doctrine has a long pedigree. As early as 1910, the Third Circuit held that "neither a creditor nor a stockholder that was injured by a violation of the antitrust laws could recover treble damages." *Associated General Contractors*, 459 U.S. at 533 (citing *Loeb v. Eastman Kodak Co.*, 183 Fed. 704, 709 (3d Cir. 1910)).

³⁵ In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the plaintiffs alleged harm from a price-fixing conspiracy. *Id.* at 726-727. The plaintiffs did not purchase directly from the defendants, but were end users of the products. They alleged harm on a "pass-through" theory. *Id.* at 727. The direct purchasers were distributors, who sold to contractors, who in turn sold to plaintiffs. *Ibid.* They claimed to pay higher prices for the products because the direct purchasers' prices were passed to their customers, who in turn passed them on to the plaintiffs. *Ibid.*

³⁶ *Illinois Brick*, 431 U.S. at 730-731 (citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972)).

³⁷ But cf. *Hawaii v. Standard Oil Co. of Cal.*, _____ (holding a state does not have standing to sue in *parens patriae* status for harm to its general economy based partly on a concern for duplicate recovery).

The other three elements of the *Associated General Contractors* standing inquiry generally inform the question whether the plaintiff is an efficient vindicator of the purposes of the antitrust laws. A failure to establish one or all of the remaining elements should not destroy standing for a plaintiff that can establish antitrust injury or, if relevant, direct purchase. But meeting the latter three elements might perhaps create standing where the first two elements are not met.³⁸

Standing more likely will be found for the particular plaintiff before the court if no other private persons would make appropriate plaintiffs.³⁹ The “other plaintiff” element is explained by the perhaps self-evident proposition that for the deterrent function of the private remedy to be fulfilled, some private plaintiff should be able to sue to vindicate harm caused by an antitrust violation.⁴⁰ If no other private plaintiff exists, and the other elements of the *Associated General Contractors* analysis are satisfied, it would frustrate the purposes of the private remedy to deny standing to this plaintiff.⁴¹

The “other plaintiff” element is harder to justify under the compensation rationale. If a plaintiff has suffered antitrust injury, it should be entitled to an opportunity to prove its right to

Arguably, the “business associate” form of derivative harm (see *Hairson v. Pac-10 Conference*, 101 F.3d 1315 (9th Cir. 1996)) is more closely analogous to the *Illinois Brick* rule than it is to the *Brunswick* rule.

³⁸ See, e.g., *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) (finding standing in a situation in which commentators agree antitrust injury was not satisfied).

³⁹ *Associated General Contractors*, 459 U.S. at 542.

⁴⁰ This explanation supports the view expressed by some scholars that the deterrence function of private antitrust enforcement predominates over the compensation function. See *infra* n. 53.

⁴¹ Professors Areeda and Hovenkamp noted, “[o]f course, the remote plaintiff may become the only one when the immediate victim has some reason to avoid suing or is itself deficient in standing, antitrust injury, or ability to prove damages.” 1 Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 3.05e, at 112-113 (2003).

This element best justifies the much-criticized holding in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). For criticism, see, e.g., *id.* at 485 (Rehnquist, J., dissenting); Page, 37 *Stan. L. Rev.*, *supra*, at 1449 (“The Court’s attempt to fit the various doctrines into a coherent pattern, however, was notably unsuccessful. *McCready* is particularly unfortunate because it seriously undermines the concept of antitrust injury.”). in which a patient was held to have standing to sue her health insurance provider alleging a conspiracy to exclude psychologists from Blue Shield’s health plans. See 457 U.S. at 484-485 (Clayton Act section 4 applies to “any person” injured “by reason of” an antitrust violation).

compensation, whether or not other plaintiffs also enjoy a right to seek compensation. For this reason, this element can be thought to create standing if it does not otherwise exist. But the “other plaintiff” element should not be permitted to destroy standing. The compensation function will be served only if the particular plaintiff suffering antitrust injury has a right to sue.⁴²

Standing is less likely to be found if a suit by that plaintiff would be unmanageable for the court system.⁴³ The Court in *Associated General Contractors* gave scant indication how to understand this element of the analysis.⁴⁴ The first two elements might be specific instances of the application of this element. The more direct plaintiff’s injury, the less danger of “long and complicated proceedings involving massive evidence and complicated theories.”⁴⁵ If plaintiff’s harm is a sort meant to be protected against,

⁴² See *Anza v. Ideal Steel Supply Corp.*, 547 U.S. ___, 126 S. Ct. 1991, 2003 (2006) (Thomas, J., dissenting) (“If multiple plaintiffs are direct victims of a tort, it would be unjust to declare some of their lawsuits unnecessary for deterrence absent any basis for doing so in the relevant statute.”). But see Page, 37 *Stan. L. Rev.*, *supra*, at 1452 (“If compensation were taken as a standard, then all causally related harms would be compensable, and the resulting deterrent effects would be unpredictable from an economic point of view.”). Professor Page’s argument assumes the compensation function is permitted to override the antitrust injury requirement. This article treats the injury element as an essential prerequisite to achieving the appropriate level of compensation.

⁴³ *Associated General Contractors*, 459 U.S. at 543 & n.50 (noting that a concern for judicial manageability was discussed in the legislative history of the Sherman Act). Statements by Senator Edmunds contained in the legislative history of the Sherman Act noted concerns that “everybody might sue everybody else in one common suit and have a regular *pot-pourri* of the affair * * * and take twenty years in order to get a result as to a single one of them.” *Associated General Contractors*, 459 U.S. at 543 n.50 (quoting 21 *Cong. Rec.* 3148 (1890)).

⁴⁴ An analogy might be made to the context of class action certification. One requirement for certification of a class under Federal Rule of Civil Procedure 23(b)(3) is that the class be manageable. “Manageable,” in the context of Rule 23, requires a court to balance the benefits to be gained from certification against the administrative and ministerial challenges inherent in entertaining the action as a class action. 7A *Wright et al.*, *Federal Practice & Procedure* § 1780, at 189-190. Certification should not be granted if the challenges are not overcome by corresponding efficiency benefits. *Ibid.* Analogous to Senator Edmunds’ concerns in 1890, the manageability criterion aims to streamline the “interminable litigation” that might occur when large numbers, all claiming an interest in the subject matter of a suit, are permitted to sue.

⁴⁵ *Associated General Contractors*, 459 U.S. at 543 (quoting *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968)).

the unmanageability threshold that the system should be willing to endure to provide that plaintiff a remedy is much higher.

Again, for the deterrence and compensation functions of the private remedy to be served, the manageability element cannot destroy standing that exists under the first two elements. The marginal cost to the system of each additional plaintiff, especially in the context of class action litigation, is small and decreasing. And the difference between marginal benefit to the plaintiff and the marginal cost to the defendant from permitting each individual plaintiff to sue remains constant as the number of plaintiffs increases. Thus, the same arguments for permitting one plaintiff to sue support permitting another. The result is that if a plaintiff can demonstrate antitrust injury and direct purchase, no matter how unwieldy the litigation, that plaintiff should be permitted to sue.⁴⁶

Courts also should consider whether permitting the plaintiff's suit would create the risk of complex apportionment of damages.⁴⁷ The archetypal example of denying standing for concerns of complexity is *Hawaii v. Standard Oil Co.*⁴⁸ In that case, the Court denied standing to sue in *parens patriae* status to a state government seeking to collect for harm suffered generally in the state economy.⁴⁹ An important underpinning of that holding was the impossibility of proving the amount of relief to be awarded.⁵⁰

⁴⁶ If the fact of unmanageability of the litigation can undo standing for private plaintiffs, an antitrust violator would be well-served to harm as many plaintiffs as possible—the opposite of the deterrence goal of the private remedy. Cf. 7AA Charles A. Wright et al., *Federal Practice & Procedure* § 1780, at 196 (noting concerns for giving defendants incentives to harm as many plaintiffs as possible, thereby undermining manageability).

⁴⁷ *Associated General Contractors*, 459 U.S. at 545.

⁴⁸ 405 U.S. 251 (1972).

⁴⁹ See *id.* at 262-266.

⁵⁰ *Id.* at 262 n.14 (“Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health—a task extremely difficult, ‘in the real economic world rather than an economist's hypothetical model.’”) (quoting *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 489 (1968)). *Hawaii* also relied on the danger of duplicate recovery, the rationale underlying *Illinois Brick*.

2. Protecting the Purposes of Private Enforcement

Scholarship supports the proposition that the ideal private remedy is one that serves perfectly the deterrent function.⁵¹ But in turn, the ideal deterrence is one that perfectly compensates the plaintiff for the harm it has suffered.⁵² The challenge facing courts is to fashion remedies that both deter and compensate appropriately—a process to which scholars have referred as “optimizing” remedies.⁵³ Four interrelated bodies of doctrine—substantive standards for antitrust

⁵¹ Page, *supra*, 37 Stan. L. Rev. at 1450-1452. Professor Page has argued that of the dual purposes of private antitrust enforcement, “the deterrence function must predominate” in determining the appropriate private remedy. See Page, *supra*, 37 Stan. L. Rev. at 1451. Professor Page argues that deterrence makes compensation to private plaintiffs unnecessary (*id.* at 1452). That argument ignores the necessity for incentives for private plaintiffs to bring suit to deter violations. He further argues that “only deterrence provides a coherent standard for imposition of an efficient penalty.” *Ibid.* That is an appropriate analysis in the context of public enforcement, but has no application in the context of private enforcement. It also ignores the clear mandate of Congress in Clayton Act section 4 to provide treble damages compensation. Professor Page’s discussion of why compensation to plaintiffs cannot be the sole governing standard for determining an antitrust remedy—“all causally related harms would be compensable, and the resulting deterrent effects would be unpredictable from an economic point of view”—is strong. The solution is to strike an acceptable balance between the deterrence and compensation rationales, as the Supreme Court did in *Associated General Contractors*, and not to write compensation out of the analysis. Professor Page implicitly recognizes this role of compensation in evaluating the perfect antitrust remedy: “Any system of deterrence must define the size of the deterrent penalty and *identify the person who will bring suit.*” Page, *supra*, 37 Stan. L. Rev. at 1452 (emphasis added). Identifying the correct plaintiff has nothing to do with deterrence. It is purely a function of compensating the correct party, or parties, for the injury suffered. That argument ignores the primacy of the antitrust injury element. If deterrence were the only, or primary, goal, the result would be accomplished as efficiently by granting the enforcement agencies more significant civil enforcement powers. This is especially so in light of the inverse-deterrence concerns highlighted in *Empagran*. See *infra* nn. 68-71 and accompanying text. Unlike the public enforcement regime, private enforcement does not entail any purely deterrent or punitive aspects. To the extent a private remedy is deterrent, that is derivative of the compensation to private plaintiffs. Any punitive aspect of the private remedy is the result of overcompensation to the plaintiff. The compensatory aspect of the private antitrust remedy drives the analysis.

⁵² Professor Page argues that the compensation criterion is a subsidiary analysis. That argument ignores that without compensation, there would be little to no private antitrust enforcement. Although private plaintiffs can seek injunctive relief under Clayton Act § 16, 15 U.S.C. § 25, private claims for injunctive relief are primarily used as add-ons to claims for damages.

⁵³ See William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652 (1983).

liability,⁵⁴ subject-matter jurisdiction of U.S. antitrust courts,⁵⁵ the scope of the treble damages remedy,⁵⁶ and standing for private antitrust plaintiffs⁵⁷—operate to create, and to limit, the recovery available to a private antitrust plaintiff. Of these, the prudential standing analysis is the best candidate for optimizing the remedies available to private plaintiffs in light of the purposes those remedies should serve.⁵⁸ Whether and how remedies are to be administered depends largely on the prudential question which plaintiffs will be permitted to sue.⁵⁹

The problem presented by private enforcement is that plaintiffs are—and should be—motivated solely by their own best interests.⁶⁰ That issue does not arise in the context of public antitrust enforcement by the Department of Justice or the Federal Trade

⁵⁴ See 15 U.S.C. §§ 1-7.

⁵⁵ Subject-matter jurisdiction generally has been the repository of the extraterritoriality analysis. See 15 U.S.C. § 6a (FTAIA); see generally *infra* notes 83-87 and accompanying text.

⁵⁶ See Clayton Act section 4, 15 U.S.C. § 15(a).

⁵⁷ See Page, *supra*, 37 Stan. L. Rev. at 1446-1447 (treating antitrust standing, the *Illinois Brick* doctrine, and the antitrust injury doctrine from *Brunswick Corp.* as “three major doctrines [that] have been called into service” to “set economically rational limits on the size of treble damage liability and on the frequency of antitrust litigation”). *Associated General Contractors* treated these doctrines as elements of the standing analysis. See *Associated General Contractors*, 459 U.S. at 545.

⁵⁸ Cf. Page, *supra*, 37 Stan. L. Rev. at 1450 (noting the “complementary relationship” of antitrust injury and standing “in approximating the standard of optimal deterrence”). Substantive standards for liability, subject-matter jurisdiction, and the scope of the treble damages remedy, which are the most firmly grounded in statute and the least malleable, are the least likely candidates for optimization.

This article does not contend, as some have before, that some level of optimal deterrence exists that encourages “efficient” antitrust violations. See Page, *supra*, 37 Stan. L. Rev. at 1450-1458; William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652 (1983). Whether criminal or tortious conduct can ever be efficient seems primarily an issue for political debate. Antitrust is not the only context in which Congress has seen fit, for reasons of its own, to impose economically inefficient penalties or civil liability.

⁵⁹ See Page, *supra*, 37 Stan. L. Rev. at 1446-1447 (describing “three major doctrines” that are employed to “set economically rational limits on the size of treble damage liability and on the frequency of antitrust litigation.” This article has argued that the three doctrines are subsumed into the *Associated General Contractors* standing analysis).

⁶⁰ See Page, *supra*, 37 Stan. L. Rev. at 1445 (“firms quite rationally employ a rent-seeking antitrust strategy, whose aim is not only to exact treble damages, but to inhibit rivalry and efficient distribution practices”).

Commission. The agencies in recent decades have undertaken their enforcement efforts with views toward the policies of economic efficiency most courts and commentators agree should be advanced by U.S. antitrust enforcement.⁶¹ But little incentive exists for private plaintiffs to limit their claims so the remedy does not result in too great of deterrence by the defendant.⁶² In private enforcement, then, courts are given the task of optimizing remedies. That is a question of balancing concerns for over-deterrence (produced by excess compensation) and under-deterrence (the result of insufficient compensation).

Over-deterrence is the chilling of economically useful conduct through the specter of the liability that will be imposed if that useful conduct should cause harm.⁶³ A standard of remedying harm that risks producing “false positives”—liability where no anticompetitive conduct actually took place—is bothersome twice over. First, it imposes liability where none should be imposed. Second, it prevents possible defendants from toeing the line between strident

⁶¹ See generally William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *Antitrust L.J.* 377 (2003). As to the relevance of economic analysis to antitrust enforcement, see Richard A. Epstein & Michael S. Greve, *Introduction: The Intractable Problem of Antitrust Jurisdiction*, in *Competition Laws in Conflict: Antitrust Jurisdiction in a Global Economy* 1, 1 (Richard A. Epstein & Michael S. Greve, eds., 2004).

⁶² An exception might exist for a plaintiff that might find itself a defendant in future litigation raising the same issues. Research has uncovered no analysis of the degree to which private plaintiffs consider their own potential future liability in their litigation decisions. Such an analysis would be helpful in understanding parties' litigation decisions.

Psychological factors are relevant here as well. Private plaintiffs overvalue their claim because they might be blind to factors apart from the defendant's conduct—such as mismanagement of their business—that caused or contributed to the harm they suffered. The massive incentives for private plaintiffs to engage in antitrust litigation overwhelm any hopes for self selection.

⁶³ One context in which the over-deterrence concern is found—that of unitary anticompetitive conduct in violation of section two of the Sherman Act (15 U.S.C. § 2)—has been much remarked. See, e.g., Robert Bork, *The Antitrust Paradox* (2d ed. 1993); Richard Posner, *Antitrust Law* (2d ed. 2001). The over-deterrence concern in the case of collusive conduct made illegal by 15 U.S.C. § 1, like the price-fixing at issue in *Empagran*, is that economically efficient joint-venture activity can be confused with per-se illegal activities.

competition, which is the essence of competition and therefore highly desirable, and anticompetitive activity.⁶⁴

The opposite concern from over-deterrence is that of under-deterrence. If the total liability stemming from anticompetitive conduct, discounted by the likelihood liability will be imposed at all, is less than the total expected benefit from the conduct, rational economic actors will engage in the conduct.⁶⁵ Conversely, if the total liability appropriately discounted exceeds the total expected benefit, they will not. The under-deterrence concern arises if either (1) the regulatory regime insufficiently penalizes conduct, or (2) the judicial system somehow fails to give full effect to the regulatory scheme.

A twist on the under-deterrence concern is an “inverse deterrence” argument that came to the fore in *Empagran*. Under the inverse deterrence argument, excessive private enforcement produces negative externalities that harm public enforcement efforts. This harm occurs because public enforcement relies heavily on the Department of Justice’s leniency program to uncover criminal antitrust conspiracies.⁶⁶ The leniency program permits the first cartel

⁶⁴ Differentiating between the acme of competitive conduct and anticompetitive conduct can be difficult or impossible. By way of specific example in the context of unitary anticompetitive conduct, courts and noted commentators long have recognized that an effort to monopolize a market by defeating all of one’s competitors is economically desirable conduct. See *Brooke Group, Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 227 (1993); *U.S. v. AMR Corp.*, 335 F.2d 1109, 1114-1115 (10th Cir. 2003) (“the mechanism by which a firm engages in predatory pricing-- lowering prices--is the same mechanism by which a firm stimulates competition”) (quoting *Cargill, Inc. v. Monfort of Colorado*, 479 U.S. 104, 122 (1986)). But the predation cause of action exists when a dominant competitor goes too far. The sheep of desirable conduct enough resembles the wolf of predation that engaging in the one might give rise to liability for the other.

The same rationale applies in the context of collusive conduct. 15 U.S.C. § 1. For example, in *Shell Oil Co. v. Dagher*, the Ninth Circuit held that members of a concededly legal joint venture had fixed prices in violation of Sherman Act section one when they agreed on the price for a product produced by the joint venture. The Supreme Court reversed. *Texaco, Inc. v. Dagher*, 126 S. Ct. 1276 (2006). The false positive in *Dagher* was the court of appeals’ confusion of the sheep of a procompetitive joint venture with the wolf of a price-fixing cartel.

⁶⁵ See *Pfizer Corp.*, 434 U.S. at 315.

⁶⁶ See Brief of the United States and Federal Trade Commission as *Amici Curiae*, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, S. Ct. No. 03-724, at 19-21. See also Barnett, *Presentation, supra*, at 1 (describing the amnesty program as one of seven prongs of the

member to disclose the cartel and cooperate with prosecutors to avoid criminal prosecution.⁶⁷ But it says nothing about civil liability that might follow.⁶⁸ Excessive potential civil liability decreases the likelihood that avoiding criminal liability is a sufficient incentive for a member to disclose participation in a cartel.⁶⁹

B. Analysis of the FTAIA

Congress in 1982 recognized the burgeoning antitrust extraterritoriality issues. It enacted the FTAIA⁷⁰ to define the scope

Department of Justice's cartel enforcement strategy); *id.* at 6-7 (describing the operation and importance of DOJ's amnesty program).

⁶⁷ See *Department of Justice Corporate Leniency Policy* (issued Aug. 10, 1993), available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>.

⁶⁸ See *Kruman*, 129 F. Supp. 2d at 622. The trial court in *Christie's* noted:

In January 2000, word leaked that Christie's had availed itself of the amnesty program of the Antitrust Division of the United States Department of Justice and confessed that it had engaged in fixing prices of auction services with Sotheby's. As one might expect, a veritable flood of class actions was filed in response to this news, each seeking to recover damages under the United States antitrust laws on behalf of variously described classes of purchasers and sellers who bought or sold through these houses at non-internet auctions in the United States.

Ibid.

⁶⁹ Then, and somewhat circularly, because of the *prima facie* effect of a criminal conviction of antitrust conduct in a private antitrust suit, the public enforcement efforts usually provide the driving force behind private suits. So, according to the inverse deterrence argument, excessive potential civil liability can decrease the effectiveness of antitrust enforcement at all levels. In effect, the inverse deterrence rationale threatens the same effect as under-deterrence—reducing the regulatory scheme's effectiveness at uncovering existing antitrust conspiracies.

⁷⁰ 15 U.S.C. § 6a. The FTAIA reads in full:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

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

(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

of appropriate extraterritorial application of the U.S. antitrust laws. The FTAIA received little attention for nearly two decades⁷¹—perhaps because of its opacity,⁷² perhaps because it appeared merely to codify existing law,⁷³ or perhaps because the global stage was not until recently set for the current wave of multinational litigation. Even the Supreme Court’s highly contentious 1993 extraterritoriality decision, *Hartford Fire Insurance Co. v. California*,⁷⁴ relegated the FTAIA analysis to a footnote.⁷⁵ In recent years, clever arguments by plaintiffs’ counsel have resuscitated the statute.⁷⁶

Like other statutes that memorialize limitations on courts’ power,⁷⁷ the FTAIA first takes away courts’ authority over all

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

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

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

⁷¹ See Delrahim, *Remarks, supra*, at 3 (“it lay almost unnoticed in dusty pages of the United States Code”)

⁷² See *ibid.* (noting the underuse of the FTAIA “may have something to do with” the FTAIA’s “inelegant phras[ing]”); 2 Spencer W. Waller, *Antitrust & Am Business Abroad* § 13.23 (3d ed. Supp. 2005) (noting the “obscure and badly drafted Foreign Trade Antitrust Improvements Act”).

⁷³ See, e.g., *Empagran*, 542 U.S. at 169 (“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.”) (citing H.R. 97-686, reprinted in 1982 U.S.C.C.A.N. 2487, 2487-2488); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993)..

⁷⁴ 509 U.S. 764 (1993).

⁷⁵ See *Hartford Fire*, 509 U.S. at 796 n.23.

⁷⁶ See, e.g., *Statoil*, 241 F.3d 420 (5th Cir. 2001); *Kruman v. Christie’s Int’l P.L.C.*, 284 F.3d 384 (2d Cir. 2002); *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003). There is irony in plaintiffs’ counsel bringing this statute to the fore. It was enacted to *limit* U.S. antitrust courts’ extraterritorial reach. See *Empagran*, 542 U.S. at 169. See also *The In Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 498 (M.D.N.C. 1987) (noting that the statute was a response to complaints by American firms that the U.S. antitrust scheme made them less competitive on the world stage).

⁷⁷ Ready examples include the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. See *MacArthur Area Citizens Ass’n v. Republic of Peru*, 809 F.2d 918, 919-20 (D.C. Cir. 1987) (comparing the FTCA with the FSIA).

antitrust claims in wholly foreign or export commerce—then gives some back. Congress provided the antitrust laws “shall not apply to conduct” involving wholly foreign commerce or export trade or export commerce, “unless” an exception is met.⁷⁸ The exception is comprised of two primary parts. Subsection (1) requires that for conduct to be within the reach of the antitrust laws, it must have “a direct, substantial and reasonably foreseeable effect” on domestic commerce, import commerce, or the business of U.S. exporters.⁷⁹ Subsection (2) requires further that the conduct “give rise to a claim” under the substantive antitrust laws.⁸⁰

The FTAIA codified a version of the common-law “effects test,” an analytic exercise to determine the reach of a court’s power to apply the antitrust laws. Courts have rejected the bright-line of *American Banana*, which has been interpreted broadly to have held the U.S. antitrust laws do not address extraterritorial conduct.⁸¹ Courts, most notably the Second Circuit in *Alcoa*,⁸² have held that if the extraterritorial conduct has a sufficient effect on U.S. commerce, a U.S. court will assert jurisdiction over an antitrust claim arising from that conduct.⁸³ The legislative history of the FTAIA supports

⁷⁸ 15 U.S.C. § 6a(1) (quoted in full *supra* n.19). See *Empagran*, 542 U.S. at 162.

⁷⁹ 15 U.S.C. § 6a(1). See ___ Spencer W. Waller, *Antitrust & Am. Business Abroad* ___ (3d ed. Supp. 2005).

⁸⁰ 15 U.S.C. § 6a(2) (referring to “sections 1 to 7 of this title, other than this section”)

⁸¹ This interpretation overstates the holding of *American Banana*. The case is better understood as relying on the “act of state” doctrine in holding that the decision of Costa Rica to lend its support—including military support—to the defendants to give them a leg up on competitors could not be challenged. Cf. *McBee v. Delica Co., Ltd.*, 417 F.3d 107, 120 n.8 (1st Cir. 2005) (“Notably, *Steele* [v. *Bulova Watch Co.*, 344 U.S. 280 (1952)] cited *American Banana* and rejected a territorial interpretation of that case; it read *American Banana* as applying only when there were no effects in the United States from the foreign antitrust violation.”).

⁸² *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.). In *Alcoa*, the Second Circuit sat as a court of last resort through a procedural quirk brought about by 4 recusals on the Supreme Court. See *id.* at 421; 15 U.S.C. § 29 (statutory language enacted to permit certification specifically to Judge Hand). The effects test in antitrust can be traced earlier to the Supreme Court’s decision in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

⁸³ The FTAIA codified an arguably more restrictive effects test in which the elements exist in the conjunctive: the overseas conduct must have “a direct, substantial, *and* reasonably foreseeable effect” on domestic U.S. commerce. 15 U.S.C. § 6a (emphasis added). See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). Whether a “reasonably

the understanding that Congress intended the effects test to retain vitality.⁸⁴

II. IN EXTRATERRITORIAL APPLICATION: UNDERSTANDING *EMPAGRAN*

The *Empagran* litigation is the source of the modern rules governing extraterritoriality and an example of their application. *Empagran* was a private tag-along action after guilty pleas and record criminal fines in a prosecution of cartel members by the Antitrust Division. The *Empagran* litigation came into the courts after cartel members had availed themselves of the leniency program. Primarily, though, *Empagran* was another example of efforts in the past decade by foreign plaintiffs to avail themselves of attractive U.S. antitrust laws and procedures.

The *Empagran* plaintiffs sued vitamin manufacturers alleging price fixing—a violation of section one of the Sherman Act that

foreseeable” effect is the same as an intended effect is not clear. See *McBee v. Delica Co.*, 417 F.3d 107, 120 n.9 (1st Cir. 2005) (“The FTAIA’s ‘reasonably foreseeable’ requirement appears to be related to this traditional intent requirement.”).

The “effects test” has analogs in many substantive legal schemes. See, e.g., *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 & n.24 (2d Cir. 1975) (Friendly, J.) (“the federal securities laws * * * do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses”) (applying an “effects test” in the context of extraterritorial application of the U.S. securities laws); *Doe I v. Unocal Corp.*, 395 F.3d 932, 961 (9th Cir. 2002) (effects test in the securities law arena); *McBee v. Delica Co.*, 417 F.3d 107, 120-121 (1st Cir. 2005) (“substantial effects” test for extraterritorial Lanham Act jurisdiction); *OSRecovery, Inc. v. One Groupe Int’l, Inc.*, 354 F. Supp. 2d 357, 367 (S.D.N.Y. 2005) (applying an “effects test” in the context of a private RICO claim under 18 U.S.C. §§ 1962, 1964, relying on *Bersch* and *Empagran*). None of securities, RICO or the Lanham Act have a statutory analog to the Foreign Trade Antitrust Improvements Act, however. See *In re Royal Ahold N.V. Securities Litig.*, 351 F. Supp. 2d 334, 356 n.10 (D. Md. 2004) (“the securities laws are silent as to extraterritoriality”); *McBee*, 417 F.3d at 121 (noting that Congress has not enacted an analog to the FTAIA in the trademark scheme). An interesting analysis would consider the degree to which the arguments in this article apply more broadly to other substantive schemes that also rely on an effects test for determining the extent of extraterritorial jurisdiction. Cf. *Royal Ahold*, 351 F. Supp. 2d at 356 (“I find [*Empagran*] both legally and factually distinguishable from the present [securities] dispute.”).

⁸⁴ See 1982 U.S.C.C.A.N. at 2487-2488, 2494-2495.

regularly gives rise to civil and criminal penalties⁸⁵—on a worldwide scale.⁸⁶ The plaintiffs, distributors of vitamins from around the globe, originally were a class of “foreign and domestic purchasers of vitamins.”⁸⁷

The defendants’ arguments for dismissing the foreign purchasers’ claims proceeded on two fronts. First, defendants contended the FTAIA limited the court’s jurisdiction to claims of domestic harm felt as a result of the effect of antitrust-violative conduct on domestic U.S. commerce.⁸⁸ Second, defendants contended the foreign purchasers lacked standing to sue.⁸⁹ Under the antitrust standing approach, unless the plaintiffs suffered injuries flowing from that which makes the defendant’s acts unlawful—which, defendants’ argued, were the effects of the alleged conduct on U.S. commerce—the plaintiff’s injuries should not be cognizable in a U.S. antitrust court.⁹⁰ The district court dismissed the foreign plaintiffs’ claims “because the conspiracy’s effect on U.S. commerce did not cause the foreign purchasers’ injury.”⁹¹ It based its holding on a lack of subject

⁸⁵ 15 U.S.C. § 1. “Cartels are ‘the supreme evil of antitrust.’ The fixing of prices, bids, output, and markets by cartels has no plausible efficiency justification; therefore, antitrust authorities properly regard cartel behavior as *per se* illegal or a “hard core” violation of the competition laws.” Assistant Attorney General Thomas O. Barnett, *Seven Steps to Better Cartel Enforcement*, 11th Annual Competition Law & Policy Workshop 1 (June 2, 2006) (*Presentation*), available at <http://www.usdoj.gov/atr/public/speeches/216453.pdf>; Deputy Assistant Attorney General Thomas O. Barnett, *Antitrust Enforcement Priorities: A Year in Review*, Fall Forum of the Section of Antitrust Law 1 (Nov. 19, 2004) (*Priorities*) (noting that “the highest enforcement priority is rooting out and prosecuting illegal cartels—naked agreements not to compete”), available at <http://www.usdoj.gov/atr/public/speeches/206455.pdf>. See also, e.g., Richard A. Posner, *The Chicago School Of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, 933 (1979) (noting that the most conservative commentators argued for enforcement only of price fixing and mergers to monopoly); John E. Lopatka & William F. Page, *Monopolization, Innovation and Consumer Welfare*, 69 Geo. Wash. L. Rev. 367, 388 (2001) (arguing in support of presumptive unlawfulness of horizontal price fixing).

⁸⁶ *Empagran*, 315 F.3d at 340.

⁸⁷ *Id.* at 342.

⁸⁸ See *Empagran*, 2001 WL 761360, at *2; *Empagran*, 315 F.3d at 343.

⁸⁹ See *Empagran*, 2001 WL 761360, at *5; *Empagran*, 315 F.3d at 341.

⁹⁰ See Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing En Banc 8-9, *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, D.C. Cir. No. 01-7115 (filed Mar. 24, 2003) (Government D.C. Cir. Brief).

⁹¹ *Id.* at 343.

matter jurisdiction and did not reach defendants' standing argument.⁹² After procedural wrangling, only the foreign purchasers' claims, alleging harm suffered in Australia, Ecuador, Panama and the Ukraine, were before the courts on appeal. Defendants pressed those same arguments to the D.C. Circuit.⁹³

A. Literalist Statutory Construction and Worldwide Conspiracy

Plaintiffs advanced two theories under which the FTAIA might permit the assertion of jurisdiction over their claims. The first was a broad reading of the extent of extraterritorial jurisdiction permitted by the FTAIA. Plaintiffs argued under this theory that jurisdiction could be had over any suit alleging harm flowing from antitrust-violative conduct, so long as the conduct also had some effect in domestic commerce.⁹⁴ Plaintiffs further argued the effect in domestic U.S. commerce need have no connection to their harm.

Plaintiffs' broad theory found primary traction in a literalist interpretation of the language Congress employed in the FTAIA.⁹⁵ Under subsection (2) of the statute, for extraterritorial jurisdiction to be available, the complained-of conduct must have an appropriate effect on U.S. commerce, and "such effect" must "give[] rise to a claim" under the antitrust laws.⁹⁶ Defendants argued the conduct alleged must give rise to *the plaintiff's* claim. Plaintiffs argued the

⁹² See *Empagran*, 315 F.3d at 343.

⁹³ See *id.* at 344, 357 (statutory interpretation and standing arguments, respectively).

After the court of appeals reversed the district court and reinstated the foreign purchasers' claims, the United States and the Federal Trade Commission filed a brief as *amici curiae* supporting defendants' ultimately unsuccessful effort at *en banc* review. See Government D.C. Cir. Brief. The government brief echoed both the statutory and the standing arguments. It also combined the arguments, arguing—in a foreshadowing of the Supreme Court's ultimate analysis—that "principles of antitrust injury and standing" are "embedded in the FTAIA." *Id.* at 8-9.

⁹⁴ *Empagran*, 315 F.3d at 344 (inquiring whether "it [is] enough for a plaintiff to show that the anticompetitive effects of the defendant's conduct on U.S. commerce give rise to an antitrust claim under the Sherman Act by someone, even if not by the plaintiff who is before the court").

⁹⁵ This sort of careful statutory analysis has only recently gained traction in antitrust decisionmaking. See, e.g., *Empagran*, 542 U.S. at 173-174; *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. ___ (2006).

⁹⁶ 15 U.S.C. § 6a(2).

conduct alleged must only give rise to a *claim*. It is not difficult to appreciate why the plaintiffs' proffered interpretation appeared to give proper effect to Congress's use in subsection (2) of the indefinite article "a," rather than the definite article "the."

In an earlier case, *Kruman v. Christie's International PLC*,⁹⁷ the Second Circuit had accepted a variation of the broad theory of extraterritorial jurisdiction. The *Kruman* court instead held that the conduct complained of need only have violated the substantive provisions of the Sherman Act, and need not have caused any harm in U.S. commerce.⁹⁸ "A claim" might include a claim that could be brought by the enforcement authorities, which have no obligation to demonstrate harm to seek injunctive relief and criminal penalties for violation of the antitrust laws.⁹⁹

The D.C. Circuit in *Empagran* interpreted "a claim" to mean a claim by a private plaintiff. Thus, some plaintiff must have suffered harm in domestic U.S. commerce from the effect of the conduct. The foreign plaintiffs' claims would then be derivative of that domestic plaintiff's claim.

The *Empagran* plaintiffs' second theory became the *Empagran* exception. Under this theory, if the FTAIA permitted jurisdiction only over claims with a nexus to an effect on domestic U.S. commerce, plaintiffs' claims might nonetheless be cognizable. Plaintiffs argued the defendants had been engaged in a worldwide price-fixing conspiracy, in which all conduct was interdependent on all other conduct.¹⁰⁰ The court of appeals described the interdependence theory as one of a possibility of arbitrage by third parties purchasing at competitive prices in one location and selling below the fixed price level in another or by would-be purchasers in

⁹⁷ 284 F.3d 384 (2d Cir. 2002).

⁹⁸ See *Kruman*, 284 F.3d at 399-400; *Empagran*, 315 F.3d at 348 (discussing the Second Circuit's holding in *Kruman*).

⁹⁹ See 15 U.S.C. § 4; *Empagran*, 542 U.S. at 170-171 (noting the distinction between private plaintiffs and government plaintiffs is that government plaintiffs need not show standing).

¹⁰⁰ "Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." *Empagran*, 542 U.S. at 175.

price-fixed markets purchasing instead in competitive markets and importing to their home markets.¹⁰¹

The interdependence theory is not new. In *DeAtucha v. Commodity Exchange, Inc.*,¹⁰² the plaintiff alleged that “because of the fungibility of silver and silver futures, the United States market * * * and the London Exchange function from an economic standpoint as a single market.”¹⁰³ “DeAtucha’s theory of standing, as we understand it, is that he may sue under American antitrust laws because the defendants’ manipulation of the American silver markets produced his injury on the [London Exchange].”¹⁰⁴

Economic theory supports an allegation that, in a worldwide conspiracy, stable prices in a particular geographic locale is essential to maintaining stable prices in others.¹⁰⁵ Successful cartels only can exist in environments that permit the members to detect “cheating”—that is, pricing below the agreed cartel price in an effort to gain market share.¹⁰⁶ Cheating in a worldwide market seemingly could occur if one producer arranged to sell to distributors in a non-price-fixed market, enabling those distributors to move the product to their home markets on their own initiative. Fixing prices in every market in which the cartel members compete is a sure way to avoid this form of cheating.

The related arbitrage concern argued by the plaintiffs throughout the *Empagran* litigation, and noted by the D.C. Circuit, is that even independent of cheating by participants in the cartel, distributors or third parties could take advantage of lower prices in one geographic

¹⁰¹ *Empagran*, 417 F.3d at 1270-1271.

¹⁰² 608 F. Supp. 510 (S.D.N.Y. 1985).

¹⁰³ *DeAtucha*, 608 F. Supp. at 511 (quoting plaintiff’s complaint, ¶ 28).

¹⁰⁴ *Id.* at 513.

¹⁰⁵ See Connor, Staff Paper 04-08, *supra*, at 6 (noting the likelihood of geographic arbitrage in the world market for vitamins at issue in *Empagran*).

¹⁰⁶ See Katherine M. McElroy & John J. Siegfried, *The Economics of Price Fixing*, in *Economic Analysis and Antitrust Law* 139, 143 (Terry Calvani & John Siegfried, eds., 2d ed. 1988) (conditions required to stabilize cartels); George Stigler, ___, in *Economic Analysis and Antitrust Law* ___, 149 (Terry Calvani & John Siegfried, eds., 2d ed. 1988) (cheating is incentivized).

market to move product on their own from a lower-priced, competitive market to a fixed-price one.¹⁰⁷

On the other hand, strong reason exists to believe maintaining a worldwide conspiracy is sufficiently difficult that localized price-fixing behavior is much more likely. The larger the scope of the conspiracy, the more difficult and expensive is reaching agreement among cartel members as to prices and market shares in the diverse geographic locales within the scope of the conspiracy and monitoring the behavior of co-conspirators.¹⁰⁸ Additionally, a worldwide conspiracy might involve too many players with too diverse of interests and corporate cultures to be maintainable at all.¹⁰⁹ Those factors seem at least as likely to undermine any arguments of global interdependence in a worldwide cartel as the cheating and arbitrage arguments are to bolster them.¹¹⁰

On the initial appeal from the trial court, the D.C. Circuit did not address plaintiffs' theory of worldwide independence.¹¹¹ Neither did the Second Circuit in *Kruman* inquire into the existence of a causal connection.¹¹² By contrast, the Fifth Circuit, in *Den Norske Stats Oljeselskap As v. HeereMac V.O.F. (Statoil)*,¹¹³ did address the

¹⁰⁷ A thorough analysis of this effect is found in Connor, Staff Paper 04-08, *supra*.

¹⁰⁸ See. McElroy & Siegfried, *Price Fixing, supra*, at 146-147 (discussing the difficulties of fine-tuning fixed prices among participants in a cartel).

¹⁰⁹ See *id.* at 148 (necessity for a sufficiently small number of firms to permit control of cheating on a price agreement).

One criticism of the foregoing assertions is that geographic breadth of a cartel is less important than sheer size as far as goes the challenges of maintaining solidarity among its members. Research has not uncovered analysis of which factor—size of cartel/numerosity of participants or geographic breadth—is more important. But surely they are not independent qualities. A cartel of great geographic scope is likely to be larger than one that is purely local. Also, geographic scope does present particularized challenges. Those would include some of the same language and culture barriers that accompany all cross-border business dealings.

¹¹⁰ But see Connor, Staff Paper 04-08, *supra*, at 7-10 (arguing the vitamins cartel at issue in *Empagran* was vast and sophisticated).

¹¹¹ *Empagran*, 315 F.3d at 341.

¹¹² *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 399-400 (2d Cir. 2002) (FTAIA relates to conduct, not to the injury; injury is governed by Clayton Act Section 4).

¹¹³ 241 F.3d 420 (5th Cir. 2001).

causal connection between domestic effect and foreign injury.¹¹⁴ That court held “the critical portion of the FTAIA at issue” was the requirement that “the domestic effect on commerce ‘gives rise’ to the antitrust claim.”¹¹⁵ The plaintiff had argued that “the market * * * is a single, unified, global market.”¹¹⁶ But “the FTAIA requires more than a ‘close relationship’ between the domestic injury and the plaintiff’s claim; it demands that the domestic effect ‘gives rise’ to the claim.”¹¹⁷ Because the plaintiffs apparently failed to plead any causal connection, the court did not have occasion to define what degree of nexus would be required for a harm felt in domestic U.S. commerce to confer authority on a U.S. antitrust court to decide a suit over a derivative foreign harm.

B. The Supreme Court’s Analysis of the FTAIA

The Supreme Court held the FTAIA precluded the assertion of jurisdiction by U.S. courts to remedy wholly foreign harm with no nexus to an effect in U.S. commerce.¹¹⁸ *Empagran* came to the Supreme Court by way of a split among the Courts of Appeals. The Fifth Circuit, in *Den Norske Stats Oljeselskap AS v. Heeremac VOF (Statoil)*, 241 F.3d 420 (5th Cir. 2001), held that U.S. antitrust courts’ jurisdiction did not extend to harm suffered in foreign commerce. The Second Circuit in the Christie’s Auction House litigation, *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002), reached the opposite conclusion. The D.C. Circuit in *Empagran* aligned itself close to *Kruman*, holding that the foreign plaintiffs’ claims could be heard in U.S. antitrust courts. *Empagran*, 315 F.3d at 350. Interpreting statutory subsection (1), the Court held the complained-of conduct must have had a direct, substantial and

¹¹⁴ *Statoil*, 241 F.3d at 425 (noting argument that “Statoil’s injury in the North Sea was a ‘necessary prerequisite to’ and was ‘the quid pro quo for’ the injury suffered in the United States domestic market”).

¹¹⁵ 241 F.3d at 424 n.13 (quoting 15 U.S.C. § 6a(2)).

¹¹⁶ *Id.* at 425.

¹¹⁷ *Id.* at 427.

¹¹⁸ *Empagran*, 542 U.S. at 159.

reasonably foreseeable effect on domestic commerce, import commerce, or on the business of U.S. exporters.¹¹⁹ Interpreting statutory subsection (2), the Court held the conduct's effect on domestic U.S. commerce must have given rise to the plaintiff's claims under the antitrust laws.¹²⁰ The Court left an exception for claims of foreign harm with a sufficient nexus to the effect on U.S. commerce and remanded the case for the D.C. Circuit to determine whether that exception had been met.¹²¹

The Supreme Court reversed the D.C. Circuit on plaintiffs' literalist theory. It held that plaintiffs must do more than merely allege the defendant's antitrust-violative conduct gave rise to "a" claim under the antitrust laws. Plaintiffs must allege that the conduct gave rise to "the" claim that formed the basis of their lawsuit.¹²²

Two primary rationales supported the interpretation.¹²³ First, the Court relied on the statutory interpretive principle of prescriptive comity to construe any ambiguity in the FTAIA "to avoid unreasonable interference with the sovereign authority of other nations."¹²⁴ Second, the Court was convinced from a read of the

¹¹⁹ *Empagran*, 542 U.S. at 162 (interpreting 15 U.S.C. § 6a(1)). Section 6a(1) literally requires that for conduct is within the purview of a U.S. antitrust court only if "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."

¹²⁰ See *Empagran*, 542 U.S. at 162 (interpreting 15 U.S.C. § 6a(2)). Section 6a(2) literally requires that, once a plaintiff has demonstrated the requisite effect to meet the first element of the FTAIA, the plaintiff prove also that "such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section. If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States."

¹²¹ *Empagran*, 542 U.S. at 175.

¹²² *Id.* at 174. No confusion exists as to this part of the Court's holding. See, e.g., *Sniado v. Bank Austria A.G.*, 378 F.3d 210 (2d Cir. 2004), *on remand from* 542 U.S. 917 (2004), *vacating and remanding in light of* *Empagran*. In *Sniado*, the plaintiffs had not alleged any nexus between a domestic effect of overseas conduct and their foreign injuries. The Second Circuit held that in light of *Empagran*, the complaint must be dismissed. *Id.* at 213.

¹²³ See generally Cavanaugh, 58 S.M.U. L. REV., *supra*, at 1429.

¹²⁴ 542 U.S. at 164 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)).

language and legislative history of the FTAIA that the statute narrowed, rather than broadened, the scope of extraterritorial application of the U.S. antitrust laws *vis-a-vis* the state of the law before its enactment.¹²⁵

Justices Scalia and Thomas concurred in the judgment only. They would have relied solely on the text of the FTAIA, interpreted in the light of “the principle that statutes should be read in accord with the customary deference to the application of foreign countries’ laws within their own territories”—that is, the prescriptive comity canon¹²⁶

1. Prescriptive Comity

Under the prescriptive comity rationale, the Court paid exceptional respect to concerns for the possible harm to international comity from U.S. antitrust courts’ jurisdictional overreaching. The presence in the litigation of several foreign government *amici* figured prominently in the opinion.¹²⁷

On prescriptive comity generally, see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812-822 (1993) (Scalia, J., dissenting in part). Under this doctrine, “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Id.* at 814-815 (quoting *Murray v. The Schooner Charming Betsey*, 2 Cranch 64, 118 (1804) (Marshall, C.J.). “Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.” *Id.* at 815.

¹²⁵ 542 U.S. at 169. The opinion qualified this discussion as helpful “to those who find legislative history useful.” *Id.* at 163. Writing for six Justices, Justice Breyer appears to be referring in this passage to a concurrence in which Justice Scalia, joined by Justice Thomas, concurred in the judgment by relying solely on the text of the statute and canons of construction. See 542 U.S. at 176 (Scalia, J., concurring). See generally Max Huffman, *Review Essay: Using All Available Information*, 25 REVIEW OF LITIGATION 501, __ (2006) (noting the regularity with which Justices Breyer and Scalia concur in each other’s opinions, advancing their own views of the statutory interpretive process).

¹²⁶ 542 U.S. at 176.

¹²⁷ See 542 U.S. at 167-169 (citing to briefs filed by the governments of Germany, Canada and Japan).

Foreign government *amicus* involvement has been an untold story of recent Supreme Court Terms. In the 2004 Term (a year after *Empagran* was decided), *amicus* The Bahamas was permitted to present argument supporting respondent Norwegian Cruise Lines. See *Spector v. Norwegian Cruise Lines Ltd.*, ___. An interesting analysis might compare

The emphasis on comity was an about-face from the Court's opinion eleven years previous in *Hartford Fire Ins. Co. v. California*.¹²⁸ In *Hartford Fire*, the Court held on an analysis of the effects test that a U.S. court should exercise jurisdiction over a claim of overseas conspiracies with effects in U.S. markets.¹²⁹ "Even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct * * *, international comity would not counsel against exercising jurisdiction in the circumstances alleged here."¹³⁰ By contrast, in *Empagran*, all eight voting Justices agreed that comity considerations were controlling. Despite that about face, the Court in *Empagran* did not explicitly cast doubt on the *Hartford Fire* rule.¹³¹ What the Court did do is elevate the comity question from an afterthought in *Hartford Fire* to a preeminent decision rationale in *Empagran*.¹³²

The fulcrum of the prescriptive comity analysis in *Empagran* was this: stepping on toes internationally is acceptable to protect domestic commerce. It is not acceptable in order to protect wholly foreign commerce.¹³³ The opinion contrasted the case of application of U.S. antitrust laws to foreign commerce to redress domestic injury with the same overseas application to redress foreign injury.¹³⁴ In each situation, extraterritorial antitrust jurisdiction raises comity concerns

foreign government participation with the debate over the use of foreign authority in federal judicial opinions.

¹²⁸ 509 U.S. 764 (1993). See Hannah Buxbaum, *National Courts, Global Cartels: F. Hoffman-LaRoche Ltd. v. Empagran S.A. (U.S. Supreme Court 2004)*, 5 German L. Rev. 1095, 1101 (2004) (discussing *Empagran* as evidence of a "renewed interest on the part of the Supreme Court in using principles of comity to confine the extraterritorial reach of U.S. antitrust law").

¹²⁹ *Hartford Fire*, 509 U.S. at 798.

¹³⁰ *Ibid.*

¹³¹ Cf. *McBee v. Delica Corp.*, 417 F.3d 107 (1st Cir. 2005) (relying on both *Empagran* and *Hartford Fire*).

¹³² See Buxbaum, 5 German L. Rev., *supra*, at 1102 (*Empagran* "signals acceptance of the notion that comity operates actually to limit the reach of U.S. law to foreign conduct").

¹³³ *Id.* at 1100 ("the principle of non-interference is not absolute. Statutes must be construed to prevent *unreasonable* interference—but, as the Court notes, sometimes interference with foreign sovereign authority is justified").

¹³⁴ *Empagran*, 542 U.S. at 165. Cf. Cavanaugh, 56 S.M.U. L. REV., *supra*, at 2159-2180 (listing "concrete factual scenarios in which jurisdictional issues arise"—combinations of foreign or domestic conduct and foreign or domestic harm).

by “interfer[ing] with a foreign nation’s ability independently to regulate its own commercial affairs.”¹³⁵ In the case of domestic injury, the Court held it is “reasonable” to apply our laws to regulate the foreign conduct.¹³⁶ But in the case of foreign injury, the Court held “the justification for that interference” with the foreign nation’s regulatory authority “seems insubstantial.”¹³⁷ *Empagran* can read as a definitive modern statement that the policies of the U.S. antitrust scheme support the protection of U.S. commerce. Understood this way, the opinion teaches that comity considerations are an analysis that should be undertaken as part of the prudential standing inquiry, which seeks to limit private suit to shoe cases in which U.S. antitrust policies are advanced.¹³⁸

2. Statutory Interpretation

The statutory interpretive analysis in *Empagran* initially involved a conclusion that the FTAIA was meant “to clarify, perhaps to limit, but not to *expand* in any significant way, the Sherman Act’s scope as applied to foreign commerce.”¹³⁹ The Court found no cases prior to

¹³⁵ *Empagran*, 542 U.S. at 165.

¹³⁶ *Id.* at 165. See Buxbaum, 5 German L. Rev., *supra*, at 1103.

¹³⁷ *Empagran*, 542 U.S. at 165.

¹³⁸ One commentator, addressing the *Empagran* Court’s prescriptive comity analysis, concludes that it foreordained the D.C. Circuit’s holding on remand. Cavanagh, 58 S.M.U. L. Rev., *supra*, at 1437. According to this argument, when the D.C. Circuit analyzed plaintiffs’ claims under the *Empagran* exception, it was required to hold no subject-matter jurisdiction exists because of comity concerns. *Id.* at 1434. That analysis overlooks two things: (1) the Court’s use of the word “reasonable” to describe the degree of interference with foreign nations’ sovereign authority over matters implicating their own domestic commerce (*Empagran*, 542 U.S. at 165-166), and (2) the continuing vitality of Court’s decision in *Hartford Fire*. Far from condemning all efforts to bring claims of harm in foreign commerce in U.S. antitrust courts, one can infer from *Empagran* a weighing of the degree of impingement on foreign sovereignty against the interests of the United States in the enforcement of its laws. See 542 U.S. at 165 (“application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused”). The latter is a question of the degree to which the harm plaintiffs allege reflects an effect on U.S. commerce.

¹³⁹ 542 U.S. at 169. For this conclusion, the Court relied solely on the legislative history of the FTAIA. See *ibid.* (citing 1982 U.S.C.C.A.N. at 2487-2488).

the FTAIA's 1982 enactment in which private plaintiffs had been able to seek redress for foreign injury suffered in foreign commerce.¹⁴⁰ If it had been so before, and the FTAIA had either left unchanged or further limited the scope of the antitrust laws' extraterritorial reach, it would be difficult to demonstrate a basis for jurisdiction over a claim of foreign harm post-FTAIA.¹⁴¹

The Court rejected of the lower court's literalist reading of the FTAIA.¹⁴² This rejection is surprising because of the apparent ease with which it was reached. The literalist interpretation hews closely to the plain language of the FTAIA. Section 6a(1) permits suit in a U.S. antitrust court if the complained-of conduct "gives rise to a claim" under the substantive antitrust laws.¹⁴³

The Court held the conduct must give rise to the claim—that of the plaintiff suing—rather than just any claim.¹⁴⁴ Neither the Court nor the concurrence made any effort to construe away Congress's choice of the indefinite article "a," noting respondents' "linguistic logic."¹⁴⁵ It acknowledged "respondents' linguistic arguments might show that respondents' reading is the more natural reading of the statutory language."¹⁴⁶ In concurrence, Justice Scalia—famous for

¹⁴⁰ *Id.* at 169-170.

¹⁴¹ *Id.* at 170-171.

¹⁴² *Id.* at 173-175.

¹⁴³ 15 U.S.C. § 6a(2). See *supra* nn. 72-87 and accompanying text (describing the FTAIA).

¹⁴⁴ *Empagran*, 542 U.S. at 174-175.

¹⁴⁵ *Id.* at 174.

¹⁴⁶ *Ibid.* The majority was comfortable that notions of prescriptive comity overcame the statute's plain language. *Id.* at 175 (majority opinion).

Again, an argument has been made that this reasoning precluded a decision for the plaintiffs on remand. "Clearly, plaintiffs' alternative theory"—what this article has termed their theory of worldwide interdependence—"would expand antitrust jurisdiction, since they have cited no decisions that upheld Sherman Act jurisdiction over foreign transactions on their * * * theory before the FTAIA's enactment." Cavanaugh, 58 S.M.U. L. REV., *supra*, at 1434. That analysis ignores the story of extraterritoriality of commerce, remarked numerous times by courts and commentators, over the decades since the FTAIA was enacted in 1982. Increasing interdependence of world markets increases the likelihood that a foreign harm will flow from a domestic effect. The fact that plaintiffs prior to 1982 had been unsuccessful making those allegations does little to inform the likelihood of success of that argument on remand in *Empagran II*, and even less to inform the likelihood of success of that argument under the *Empagran* exception going forward.

his “textualist” statutory interpretive philosophy¹⁴⁷—“concur[red] in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides.”¹⁴⁸

C. *What Empagran Did Not Do*

The Court refused to create a bright-line rule prohibiting suits by foreign plaintiffs injured in foreign commerce and noted that its decision did not preclude further consideration on remand.¹⁴⁹ Instead, the Court declined to address plaintiffs’ worldwide conspiracy argument.

We have assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury. * * * Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury. * * *

The Court of Appeals, however, did not address this argument * * *, and, for that reason, neither shall we.¹⁵⁰

¹⁴⁷ See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997). See also Huffman, *Review Essay: Using All Available Information*, 25 *Review of Litigation* 501 (2006).

¹⁴⁸ *Empagran*, 542 U.S. at 176 (Scalia, J., concurring). Justice Scalia was swayed by principles of “deference to the application of foreign countries’ laws within their own territories.” *Ibid.*

¹⁴⁹ *Id.* at 175.

¹⁵⁰ *Ibid.*

Throughout the opinion the Court took great pains to make clear that it “base[d] its decision” on the assumption that “the adverse foreign effect is independent of any adverse domestic effect.” *Empagran*, 542 U.S. at 175. (This caveat was repeated in some form or another __ times in the opinion.) See, e.g., *id.* at 165 (“why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim?*”) (emphasis in original).

The avenue of argument the Court left for plaintiffs to allege their harm in foreign commerce was caused by the effects of the defendant's conduct in U.S. commerce is the *Empagran* exception. And the Court did nothing to define its contours.¹⁵¹

Where the statutory exception to the FTAIA's blanket prohibition "gives back,"¹⁵² the *Empagran* exception gives back some more. The *Empagran* exception demonstrates the Court's appreciation that the state of multinational commerce has not remained constant since the FTAIA was enacted in 1982 and will continue to develop going forward. A rule imposing an inflexible approach as to the geographic scope of courts' extraterritorial reach would not accommodate changing circumstances.¹⁵³ In the *Empagran* exception, the Court permitted ongoing analysis of the kinds of harms cognizable under U.S. antitrust laws.

D. What Really Happened in Empagran

The *Empagran* Court did not mention, let alone discuss or decide, the standing arguments decided by the D.C. Circuit, discussed by other courts and commentators, and pressed by the parties and *amici*.

¹⁵¹ See *In re Monosodium Glutamate Antitrust Litig.*, 2005-1 Trade Cas. ¶ 74,781, 2005 WL 1080790, at *1 (D. Minn. May 2, 2005) ("the Supreme Court expressly declined to address the issue presented in this case: whether subject matter jurisdiction exists when a plaintiff's foreign injury is allegedly linked to the domestic effects of the allegedly anti-competitive conduct").

¹⁵² See *supra* n. 79 and accompanying text.

¹⁵³ In fact, decisions since *Empagran* have held allegations of worldwide interdependence sufficient to meet the *Empagran* exception and to survive motions to dismiss. See *infra* nn. 194-219 and accompanying text. In other words, courts before *Empagran* had not been faced with allegations of a truly interdependent worldwide cartel. See Connor, Staff Paper 04-08, *supra*, at 7 (arguing the vitamins cartel was *sui generis*); John M. Connor, *Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement* 1 (2003) ("The international cartels discovered and prosecuted since 1995 are qualitatively different from those operating during the interwar period. They are truly *global* cartels and as such represent the ultimate stage in the evolution of the cartel as a form of business enterprise."). *Empagran* made explicit that no reason exists why sufficient allegations of worldwide interdependence could not permit a suit alleging foreign harm to proceed. 542 U.S. at 175. And economic theory, discussed above, supports those holdings. See *supra* nn. 109-111 and accompanying text.

The reasons for that failure are unclear.¹⁵⁴ The standing analysis was ripe for decision in *Empagran*. The question had been addressed (and the standing argument rejected) by the court of appeals below.¹⁵⁵ It had been fully briefed by the parties and *amici* and was the subject of argument by the United States as *amicus*.¹⁵⁶ Nonetheless, good reason exists to understand Justice Breyer's opinion in *Empagran* as following the antitrust standing rationale.¹⁵⁷

¹⁵⁴ The opinion's author, Justice Breyer, has been called the Court's primary antitrust thinker. See Huffman, 25 Rev. Litig., *supra*, at 514 n.49. Certainly he was able to follow the antitrust standing argument and apply it if he preferred. Other Members of the *Empagran* Court had written important opinions in standing cases. See, e.g., *Associated General Contractors*, 459 U.S. 519 (Stevens, J.); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 485 (Rehnquist, J., dissenting); *id.* at 493 (Stevens, J., dissenting).

¹⁵⁵ See *Empagran*, 315 F.3d at 357-359.

¹⁵⁶ One commentator has suggested that the failure to rely on standing as a decision rationale reflects a desire to let the issue percolate further before it becomes the basis for decision. Cavanaugh, *supra*, 58 S.M.U. L. Rev. at 1431. That explanation is misguided for two reasons. First, the antitrust injury doctrine was established in *Brunswick* without significant underlying percolation in the courts of appeals. The primary discussion of antitrust standing as a decision principle had come from an article the year before by Professor Areeda. Areeda, 89 Harv. L. Rev., *supra*. By contrast, when *Empagran* was decided, not only was antitrust standing doctrine well established, its application in the extraterritoriality framework had been analyzed by lower courts, including the D.C. Circuit in *Empagran*, and by noted commentators. See *Empagran*, 315 F.3d at 357-359; *Statoil*, 241 F.3d 420, 431 n.32 (5th Cir. 2001); *deAtucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510 (S.D.N.Y. 1985); 1 Waller, *supra*, § 9.7 (noting the relevance of standing issues in the FTAIA context); Cavanaugh, 56 S.M.U. L. Rev., *supra*, at 2187-2188. Second, the Court regularly signals its refusal to decide an issue not decided by the courts below—in fact, it refused to define the scope of the *Empagran* exception, preferring to let the D.C. Circuit decide that issue first—but it did not do so with regard to standing. See *Empagran*, 542 U.S. at 175. See also, e.g., *Anza v. Ideal Steel Supply Corp.*, ___ S. Ct. ___ (2006) (“We decline to consider Ideal’s § 1962(a) claim without the benefit of the Court of Appeals’ analysis * * *.”).

¹⁵⁷ At oral argument by the government *amici* in support of petitioners, the standing argument received a somewhat ignominious reception. Then-acting Assistant Attorney General R. Hewitt Pate argued, “with respect to the foreign-incurred injuries, [the foreign plaintiff] must show injury by reason of that which makes the conduct illegal, and since Alcoa in [1945], and certainly under Hartford, it is the effect on U.S. commerce that make the conduct the concern of the Sherman Act.” Argument Tr. 19, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, S. Ct. No. 03-724 (argued April 26, 2004) (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (1945) (Hand, J.); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)). See also Brief of the United States and Federal Trade Commission as *Amici Curiae* in Support of Petitioners ___ - ___, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, S. Ct. No. 03-724; Brief of the U.S. Chamber of Commerce and Organization for International Investment as *Amici Curiae* in Support of Petitioners 13-22, *F. Hoffman-*

The failure to address standing reflects the narrowness of the Court's opinion. Foreign harm with no connection to an effect on U.S. commerce—the only direct application of the opinion—does not raise difficult prudential issues. The Court had no need to rely on a prudential doctrine. That standing doctrine underlies *Empagran* is made clear by a structural analysis of the FTAIA and by examining three features of the Court's opinion interpreting the statute.

1. The FTAIA Preserved the Standing Doctrine

The Second Circuit in *Kruman* noted the essential distinction between the substantive provisions of the U.S. antitrust scheme—what the FTAIA refers to as “sections 1 to 7 of this title”¹⁵⁸—and the right of action provisions, which include Clayton Act section 4, the basis for the antitrust standing inquiry.¹⁵⁹ The Second Circuit's careful analysis of the structure of the U.S. antitrust laws and its broad extraterritoriality holding did nothing to prejudice defendants' abilities to argue a lack of standing in that case.¹⁶⁰

LaRoche Ltd. v. Empagran S.A., S. Ct. No. 03-724. Justice Stevens—the author of *Associated General Contractors*, 459 U.S. 519, and an important dissent in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 493 (1982)—queried in response: “I don't follow the [argument].” *Ibid.* Because the transcript was taken before individual questioners were identified, the *Empagran* argument transcript does not identify Justice Stevens as the questioner. Additionally, due to an interruption by another Justice, the transcript does not finish the question. The article fills in the blanks with observations from one who was present in the gallery for argument.

¹⁵⁸ 15 U.S.C. § 6a.

¹⁵⁹ Cavanaugh, *supra*, 56 S.M.U. L. REV. at 2175. This distinction was lost on the D.C. Circuit in *Empagran*.

¹⁶⁰ *Kruman*, 284 F.3d at 403 (remanding to the trial court to decide the standing issue in the first instance).

Determining what might have happened in *Kruman* on remand may be a process of reading tea leaves, but there is ample indication in the district court's opinion that it would have dismissed plaintiffs' claims on remand on the grounds of antitrust standing. Judge Kaplan of the Southern District of New York observed the distinction on which the Second Circuit relied between illegal conduct and the private right to a remedy.

[I]t is perfectly appropriate for the United States to punish the conspiracy—the formation and continuation of the illicit agreement—because it took place in substantial part in this country * * *. But it would be appropriate for the United States to provide remedies for

The *Kruman* analysis is a highly defensible interpretation of the FTAIA in light of a broader understanding of the U.S. antitrust scheme. The *Kruman* court understood the FTAIA as a jurisdictional provision that spoke to the type of conduct forbidden—conduct that violates the U.S. antitrust laws—rather than to the type of plaintiff that may bring suit to remedy harm caused by that conduct.¹⁶¹ This understanding of the FTAIA relies on a separation in the U.S. antitrust scheme between the substantive, jurisdictional provisions and the right of action provision contained in the Clayton Act.¹⁶²

By contrast, the D.C. Circuit approach in *Empagran* ignored the careful distinction in the antitrust laws between the conduct standards and the private right of action provision, specifically rejecting arguments that the schemes should be treated separately.¹⁶³ That court treated the FTAIA as a hybrid provision that spoke to both the type of conduct over which suit is cognizable and the type of plaintiff that is permitted to sue.¹⁶⁴ The FTAIA does contain a bare glimmer of support for that interpretation in its explicit textual reference to the

injuries suffered in consequence of overt acts that occurred outside this country only if those acts, either individually or perhaps collectively, had direct, substantial and reasonable effects here that caused the injuries to be remedied.

Kruman, 129 F. Supp. at 625-626. (The quoted passage reflects looseness in the court's use of the phrase "United States." In the context of punishment, the United States is the Justice Department, which prosecutes criminal antitrust violations. In the context of providing remedy for private plaintiffs, the United States is the court system.) Judge Kaplan also cited provisions in the legislative history of the FTAIA demonstrating the concern for the location of the particular plaintiffs' injuries and the nexus between the effect and the injury. 129 F. Supp. 2d at 624-625 (quoting H.R. No. 97-686 7-12 (1982), reprinted in 1982 U.S.C.C.A.N. 2487. Judge Kaplan surely would not have taken long on remand to discover in that same legislative history the express intent to preserve the doctrines of antitrust standing and antitrust injury. See H.R. 97-686, reprinted in 1982 U.S.C.C.A.N. 2487, 2496 ("Conduct which has an anticompetitive effect which impinges only on [plaintiffs] located in foreign nations and which has a neutral or procompetitive domestic effect" does not give rise to standing under the antitrust laws.).

¹⁶¹ *Kruman*, 284 F.3d at 399-400.

¹⁶² Clayton Act § 4, 15 U.S.C. § 15.

¹⁶³ *Empagran*, 315 F.3d 338, 350-351 (D.C. Cir. 2003) (calling the structural argument "plausible but ultimately unconvincing").

¹⁶⁴ See *Empagran*, 315 F.3d at 358 (fact of FTAIA being satisfied implies plaintiffs were appropriate plaintiffs to bring suit).

type of exporter plaintiff that must suffer harm to permit extraterritorial jurisdiction: “sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.”¹⁶⁵ But that textual support, at most, is a limitation on standing applicable only to a narrow class of exporter plaintiffs. It cannot support reading the FTAIA to address the antitrust standing inquiry more broadly.¹⁶⁶

Two strong arguments refute the D.C. Circuit’s hybrid approach to the FTAIA. First, the FTAIA gives no indication, in its text or in its legislative history, of any intent to supplant the body of antitrust standing doctrine that has grown up around interpretations of Clayton Act section 4.¹⁶⁷ To the contrary, the legislative history explicitly recognized the preservation of “existing concepts of antitrust injury or antitrust standing.”¹⁶⁸ Second, the FTAIA applies equally in actions brought by the government.¹⁶⁹ This is so although the antitrust enforcement agencies are not required to establish standing to bring suit over substantive antitrust violations.¹⁷⁰ If satisfying the FTAIA precludes a standing analysis, the statutory inquiry resolves the standing question even for those government plaintiffs that need not establish standing. The opposite side of the same coin is that the extraterritoriality analysis under the FTAIA is redundant to an analysis under Section 4, violating the principle that statutes should be construed to avoid redundancy.¹⁷¹ The better understanding is

¹⁶⁵ 15 U.S.C. § 6a, 6a(1)(B).

¹⁶⁶ Under the *expressio unius et exclusio alterius* canon of construction, the explicit reference to exporter plaintiffs is evidence that the FTAIA does not address the standing inquiry for other plaintiffs.

¹⁶⁷ See *deAtucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510, 517 n.20 (S.D.N.Y. 1985) (holding the FTAIA “not applicable to the instant action (because it relates to jurisdiction, not standing)”).

¹⁶⁸ H.R. Rep. No. 97-686 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2496.

¹⁶⁹ See U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for Int’l Operations* §§ 3.12, 3.121 (Apr. 1995) (“To the extent that conduct in foreign countries does not ‘involve’ import commerce but does have an ‘effect’ on either import transactions or commerce within the United States, the Agencies apply the ‘direct, substantial, and reasonably foreseeable’ standard of the FTAIA.”).

¹⁷⁰ See, e.g., 15 U.S.C. § 4 (granting to the Department of Justice power to enforce substantive provisions of the Sherman Act). See also *Empagran*, 542 U.S. at 170-171.

¹⁷¹ See *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 256 (1992) (O’Connor, J., concurring).

that the FTAIA speaks to conduct of concern, and Section 4 governs the right to sue.

2. The Supreme Court in *Empagran* Followed These Standing Decision Principles

The likely explanation for the Court's failure to discuss antitrust standing is that Justice Breyer chose to apply the rationale implicitly, couching his opinion as an interpretation of the FTAIA in light of principles of prescriptive comity.¹⁷² Three features of the Court's opinion in *Empagran* justify reading it as a standing opinion, even if couched as a jurisdiction holding. First is the Court's reliance on *California v. American Stores Co.*¹⁷³ to support the argument that cases involving the United States as a plaintiff do not inform the extraterritoriality analysis for private plaintiffs. Second is the Court's emphasis on doctrine, including comity considerations and the first-principles deterrence rationales, that are best suited to a malleable standing analysis. Third is the Court's failure to overrule its opinion in *Hartford Fire*. *Empagran* should be seen as evidence of what the Supreme Court will do when the standing issue is squarely presented in the extraterritoriality arena.

¹⁷² This explanation finds support in the treatment of standing in briefing by the United States as *amicus*. The United States argued that the standing question was subsumed into the FTAIA. See Brief of the United States and Federal Trade Commission as *Amici Curiae* in Support of Petition for Reh'g En Banc, *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, D.C. Cir. No. 01-7115, at 9, available at <http://www.usdoj.gov/atr/cases/f200800/200866.pdf>.

One implication of this interpretation is that Justice Scalia in concurrence, who dissented from the Court's failure to recognize comity limitations on the extraterritorial reach of the antitrust laws in *Hartford Fire*, misunderstood the actual import of the majority's *Empagran* opinion. In light of the vigor of his dissent in *Hartford Fire*, it is unlikely that a decision in line with the *Hartford Fire* approach of treating comity as a prudential matter—what this article argues is placing the comity concern into the standing framework—would command a concurrence in any of its reasoning by Justice Scalia. On the other hand, treating what is essentially a standing analysis as a matter of interpretation informed by notions of prescriptive comity might have been a political compromise to avoid fracturing as in *Hartford Fire*.

¹⁷³ 495 U.S. 271 (1990).

a. Public Versus Private Enforcement

The distinction between public and private enforcement and the citation to *American Stores* makes sense in a standing analysis. They do not make sense in the context of subject-matter jurisdiction. As the *American Stores* Court noted, private plaintiffs “must have standing * * * in order to obtain relief.”¹⁷⁴ But “[i]n a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief.”¹⁷⁵ *Empagran* cited this authority to distinguish *Timken Roller Bearing Co.*, *National Lead Co.*, and *American Tobacco Co.*,¹⁷⁶ which respondents had cited as examples of extraterritorial application of the U.S. antitrust scheme pre-FTAIA.¹⁷⁷ Because those cases were brought by the United States, not by private plaintiffs, they did not speak to the standards for extraterritoriality in private litigation.

The FTAIA makes no distinction between public and private plaintiffs. It applies equally whether the suit is one by the government as a regulator or a private plaintiff seeking compensation for harm suffered as a market participant. There also is no distinction between public enforcement and private enforcement in the substantive definition of an antitrust claim. If a distinction between the two is relevant, it is because only the private plaintiff finds its right of action in Section 4 and must prove standing. The *Empagran* Court’s invocation of that distinction, and of *American Stores*, is a reliance on the standing inquiry.

Also, the Court expressly noted the different incentives between private plaintiffs and government plaintiffs.¹⁷⁸ This reflects an invocation of the optimization goals that this article has argued are

¹⁷⁴ *American Stores*, 495 U.S. at 296 (discussing standing in the context of the private injunctive remedy under Clayton Act § 16).

¹⁷⁵ *Id.* at 295.

¹⁷⁶ *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. National Lead Co.*, 332 U.S. 319 (1947); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

¹⁷⁷ *Empagran*, 542 U.S. at 170.

¹⁷⁸ *Empagran*, 542 U.S. at 171 (citing Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 *Antitrust L.J.* 159, 194 (1999)).

embedded in the prudential standing inquiry.¹⁷⁹ The FTAIA, by contrast, does nothing to address the differential incentives.

b. Reliance on Previously Unused Rationales

Reliance on comity concerns and deterrence rationale as decision principles makes more sense in a standing analysis. One court recently has

reject[ed] the notion that a comity analysis is part of subject matter jurisdiction. Comity considerations * * * are properly treated as questions of whether a court should, in its discretion, decline to exercise subject matter jurisdiction that it already possesses. Our approach to each of these issues is in harmony with the analogous rules for extraterritorial application of the antitrust laws.¹⁸⁰

Comity and deterrence principles are not grounded anywhere in the text of the antitrust laws. In particular, they are not found in the text of the FTAIA. Instead, Congress explicitly left to the courts the question whether and how to invoke comity principles. And the inverse deterrence argument did not exist in 1982; the amnesty program on which it is based has been in existence only since 1993.¹⁸¹

The prudential standing inquiry is an inquiry in which the common law always has been employed to advance the doctrine.¹⁸² It is thus an inquiry that permits courts to address principles not set

¹⁷⁹ See *supra* nn. 53-64 and accompanying text.

¹⁸⁰ *McBee v. Delica Co.*, 417 F.3d 107, 111 (1st Cir. 2005) (citing *Empagran*, 542 U.S. 155, and *Hartford Fire*, 509 U.S. 764).

¹⁸¹ See Department of Justice, *Corporate Leniency Policy*, *supra* n. 67.

¹⁸² See *Associated General Contractors*, 459 U.S. at 533 (“Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation”); *Blue Shield v. McCreedy*, 457 U.S. at 477 (comparing standing doctrine to common-law tort causation). Cf. Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 *Tex. L. Rev.* 705, 706 (1982) (noting that the antitrust laws are interpreted in the nature of common law analysis).

down by Congress in statutory text. The Court's reliance on extra-statutory principles is better understood as reliance on standing doctrine than subject-matter jurisdiction doctrine.

A contrary explanation might be that prescriptive comity principles speak to interpretations of the antitrust laws generally, including the FTAIA. That is the most reasonable understanding of Justice Scalia's concurrence in *Empagran*. Of course, that says nothing about the emphasis on deterrence concerns, which only can be justified by looking outside the text of the FTAIA. Also, prescriptive comity doctrine is not a tool for parsing statutory language. It speaks generally to the need to avoid offending foreign sovereign authority. A principled approach to interpretation could respect prescriptive comity doctrine while placing the comity concern in the only appropriate box in the statutory scheme. That box is Section 4, not the FTAIA.

c. Reconciling Hartford Fire

The Court's failure to overrule *Hartford Fire*, even while adopting a broader definition of the comity consideration, is further evidence that the Court relied in fact on a prudential standing inquiry. *Hartford Fire* defined the comity consideration narrowly as a subject-matter jurisdiction question.¹⁸³ It rejected the importation by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*,¹⁸⁴ of comity questions as part of the effects test.¹⁸⁵ After *Hartford Fire*, commentators and courts generally understood comity

¹⁸³ As the First Circuit recently has noted, "[t]he *Hartford Fire* Court also held that comity considerations, such as whether relief ordered by an American court would conflict with foreign law, were properly understood not as questions of whether a United States court possessed subject matter jurisdiction, but instead as issues of whether such a court should decline to exercise jurisdiction that it already possessed." *McBee v. Delica Corp.*, 417 F.3d 107, 120 (1st Cir. 2006) (citing *Hartford Fire*, 509 U.S. at 797-798 & n.24); *id.* at 121 ("comity considerations are properly analyzed not as questions of whether there is subject matter jurisdiction, but as prudential questions of whether that jurisdiction should be exercised").

¹⁸⁴ 549 F.2d 597 (9th Cir. 1976).

¹⁸⁵ See *Hartford Fire*, 509 U.S. at 798 ("international comity would not counsel against exercising jurisdiction in the circumstances alleged here").

concerns to preclude a finding of subject-matter jurisdiction only where a direct conflict existed between the foreign sovereign's laws and the laws of the United States.

The *Empagran* Court effected an about-face on the comity rationale. For example, *Empagran* approved the comity analysis from *Timberlane*.¹⁸⁶ The about-face can be justified by reference to standing principles, which explanation also reconciles *Empagran* with *Hartford Fire*. *Hartford Fire* stated a narrow comity analysis for subject-matter jurisdiction purposes, explicitly leaving for another day the prudential question.¹⁸⁷ *Empagran* broadened the comity principle as a prudential matter.

III. PRUDENTIAL STANDING ANALYSIS DEFINES THE *EMPAGRAN* EXCEPTION

Since the Supreme Court's opinion in *Empagran*, courts have treated the *Empagran* exception as a question of the degree of nexus between the effect on domestic U.S. commerce alleged and the harm suffered by the plaintiff in foreign commerce. The simple proximate cause analysis, though, is notoriously slippery.¹⁸⁸ Lacking a clear statement of decision principles, the *Empagran* exception has produced as much confusion as existed prior to *Empagran*.¹⁸⁹ The correct approach is to treat proximity of the causal nexus between domestic U.S. effects and foreign harm as one part of an updated antitrust standing inquiry.¹⁹⁰

¹⁸⁶ See *Empagran*, 542 U.S. at 173 (describing *Timberlane* as "a leading contemporaneous lower-court case").

¹⁸⁷ *Hartford Fire*, 509 U.S. at 799 ("We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.").

¹⁸⁸ See *Blue Shield v. McCready*, 457 U.S. at 477 (noting the indefiniteness of the proximate cause inquiry). E.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (1928) (Cardozo, C.J.); *id.* at 101 (Andrews, J., dissenting).

¹⁸⁹ See 2 Waller, *Antitrust & Am. Bus. Abroad*, *supra*, § 13.23 (noting that questions remain open after *Empagran* and the exception is being tested in a wave of new litigation).

¹⁹⁰ Cf. *Associated General Contractors*, 459 U.S. at 532, 540 (considering proximate cause as an element of the standing inquiry).

A. *The Indeterminate Proximate Cause Analysis*

On remand in *Empagran II*, the D.C. Circuit defined the *Empagran* exception as a proximate cause analysis.¹⁹¹ It noted the language of the FTAIA required that an effect on U.S. commerce “give rise to” a claim. That language “indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for ‘nexus’ the appellants advanced.”¹⁹² Initially, why “gives rise to” equates to proximate cause is not clear. The D.C. Circuit cited no authority for that proposition, which the plaintiffs had conceded.¹⁹³

The *Empagran II* court’s proximate cause analysis would be difficult to replicate reliably. Under that standard, the D.C. Circuit concluded plaintiffs’ world-wide conspiracy argument, supported by the arbitrage concern, “demonstrates at most but-for causation.”¹⁹⁴ The causal connection was not proximate apparently because two sets of fixed prices were involved—the fixed prices in domestic U.S. commerce that facilitated price-fixing in foreign commerce, and the

¹⁹¹ 417 F.3d 1267, 1270-1271 (“The statutory language—“gives rise to”—indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for ‘nexus’ the appellants advanced in their brief.”)

In *OSRecovery, Inc. v. One Groupe Int’l, Inc.*, 354 F. Supp. 2d 357 (S.D.N.Y. 2005), the district court considered a complaint seeking to apply the RICO statute extraterritorially. Despite the absence from the RICO scheme of a statute like the FTAIA, the court relied on the effects test from the antitrust scheme to hold that the U.S. effect of conduct must “directly cause[]” a foreign plaintiff’s loss for the law to apply extraterritorially. *Id.* at 367. The private right of action provision in the RICO statute often has been interpreted in keeping with the interpretation of Clayton Act section 4. See *Holmes v. SIPCO*, __.

¹⁹² *Id.* at 1271.

¹⁹³ *Empagran II*, 417 F.3d at 1270-1271 (“the statutory language—‘gives rise to’—indicates a direct causal relationship, that is, proximate causation”); *id.* at 1270 (plaintiffs’ concession). In fact, the FTAIA contains a textual clue that “gives rise to” does not imply the kind of directness requirement the D.C. Circuit, since followed by a handful of district courts, saw fit to impose. The first element of the FTAIA analysis requires a demonstration that conduct have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce, import commerce, or certain types of export commerce. 15 U.S.C. § 6a(1). See *supra* nn. 72-87 and accompanying text (analysis of the FTAIA). But the second element requires only that the effect “gives rise to a claim” under the antitrust laws. 15 U.S.C. § 6a(2). The statute lacks any requirement of a direct relationship between the effect and the plaintiff’s claim.

¹⁹⁴ *Empagran II*, 417 F.3d at 1271.

fixed prices in foreign commerce that actually caused the plaintiffs' injury.¹⁹⁵ However, whether the *Empagran* plaintiffs were harmed by downstream effects of price fixing in domestic U.S. commerce or by a unitary worldwide price-fixing scheme that also injured U.S. plaintiffs is little more than a semantic question. It is not clear what about the worldwide price-fixing scheme alleged leads to an indirect and merely but-for, rather than a direct and proximate, causal nexus in *Empagran*.¹⁹⁶ A second problem with the *Empagran II* court's analysis is that it fails to heed the comity and deterrence principles that underlie the Supreme Court's *Empagran* opinion.

Other courts following the D.C. Circuit's lead have engaged in similarly indeterminate analyses of proximate versus but-for causation. A magistrate judge in the Southern District of New York, in *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, held that plaintiffs' claims did not meet the *Empagran* exception.¹⁹⁷ In that case, plaintiffs' counsel conceded the application of the D.C. Circuit's proximate causation rule.¹⁹⁸ Interestingly, the court—citing *Associated General Contractors* and *Blue Shield v. McCready*—grounded the proximate cause standard in “antitrust principles requiring that an antitrust injury-in-fact be caused directly by a defendant's conduct,”¹⁹⁹ not in an analysis of the Supreme Court's opinion in *Empagran*.

¹⁹⁵ *Ibid.*

¹⁹⁶ The Supreme Court denied certiorari. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 126 S. Ct. 1043 (2006).

¹⁹⁷ 2005-2 Trade Cas. ¶ 74, 974, 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005). Plaintiffs had alleged that “unlawful price fixing and market allocation conduct had adverse effects in the United States and in other nations that caused injury to Plaintiffs in connection with their foreign MCAA purchases.” *Latino-Quimica-Amtex S.A.*, 2005-2 Trade Cas. ¶ 74, 974, 2005 WL 2207017, at *9. Other allegations stated that “Defendants['] and their co-conspirators' illegal contract, combination and conspiracy to harm U.S. and world commerce directly injured Plaintiffs.” *Ibid.* (quoting the complaint). See also *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006-1 Trade Cas. ¶ 75, 163, 2006 WL 515629, at *4-*5 (N.D. Cal. March 1, 2006) (holding that allegations of a worldwide conspiracy “[w]ithout more * * * constitute no more than the ‘but-for’ causation that the *Empagran* cases find objectionable”).

¹⁹⁸ *Id.* at *8.

¹⁹⁹ *Ibid.* (citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 (1982), and *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 532-524 (1983)).

Although the *Latino Quimica-Amtex* complaint lacked allegations of an arbitrage capability, the court also denied plaintiffs leave to amend their complaint to include allegations, supported by an economic expert, of a worldwide ripple effect of price-fixing in U.S. commerce.²⁰⁰ The magistrate judge held plaintiffs' alleged "causal link * * * [was] simply too indirect to support" a finding of subject matter jurisdiction.²⁰¹

Another case dismissing for failure to meet the *Empagran* exception shows how difficult—perhaps impossible—it will be for foreign plaintiffs to meet the proximate cause standard once a court has determined to apply it. In *eMag Solutions LLC v. Toda Kogyo Corp.*, the court dismissed claims also relying on arbitrage allegations.²⁰² "They contend that if defendants' conspiracy had not inflated U.S. prices, the foreign plaintiffs would not have been injured because lower American prices would have driven down international prices overall, including through arbitrage * * *."²⁰³ The plaintiffs in *eMag Solutions* specifically alleged they were prepared to engage in arbitrage to end-run fixed prices, but fixed prices in domestic U.S. commerce prevented their doing so.²⁰⁴ The district court nonetheless held the foreign plaintiffs had not alleged a proximate causal connection. It is difficult to imagine what more the *eMag Solutions* plaintiffs could have done to allege proximate cause.

²⁰⁰ *Id.* at *13.

²⁰¹ *Id.* at *12-*13 (citing *Empagran*, 417 F.3d 107; *MM Global Services*, 329 F. Supp. 2d 337; and *In re Monosodium Glutamate Antitrust Litigation*, 2005-1 Trade Cas. ¶ 74, 781).

The *Latino Quimica-Amtex* court held that "nothing in these allegations even suggests that Plaintiffs' injuries were directly, or proximately, caused by the domestic effect of Defendants' alleged conspiracy." *Ibid.* The dismissal in *Latino Quimica-Amtex* currently is on appeal to the Second Circuit.

²⁰² *eMag Sol'ns LLC v. Toda Kogyo Corp.*, 2005 WL 1712084, at *4, *5 (N.D. Cal. 2005).

²⁰³ *Id.* at *6.

²⁰⁴ Plaintiffs "would have been particularly well-suited to replace purchases * * * in purely foreign commerce with purchases * * * in American commerce, if the conspiracy had not affected the prices * * * in American commerce." *Id.* at *4 (quoting the third-amended complaint).

eMag Solutions may be a demonstration that the *Empagran* exception, if defined by proximate cause, is illusory.²⁰⁵

By contrast with these decisions, a district court in Connecticut in *MM Global Services, Inc. v. The Dow Chemical Co.*²⁰⁶ held that allegations raising the same arbitration concern as the worldwide conspiracy allegations in *Empagran* were sufficient to meet the *Empagran* exception.²⁰⁷ Plaintiffs alleged the defendants sought to “ensure that prices charged by the plaintiffs to end-users in India for products would not cause erosion to prices” in the United States.²⁰⁸ There is no apparent distinction between the allegations in *MM Global* and the allegations held elsewhere not to meet the *Empagran* exception.²⁰⁹

A district court in Minnesota, in *In re Monosodium Glutamate Antitrust Litigation (MSG)*,²¹⁰ initially interpreted the *Empagran* exception consistently with the District of Connecticut in *MM Global*. Foreign plaintiffs’ allegations of a worldwide conspiracy to fix the prices of fungible, globally marketed products survived a

²⁰⁵ *eMag* lends support to Professor Cavanagh’s conclusion that the Supreme Court in *Empagran* left the D.C. Circuit on remand no choice but to dismiss the plaintiffs’ claims. See Cavanagh, 58 S.M.U. L. Rev., *supra*, at 1437.

²⁰⁶ 329 F. Supp. 2d 337 (D. Conn. 2004).

²⁰⁷ *Id.* at 342.

²⁰⁸ *Id.* at 340 (quoting the amended complaint).

²⁰⁹ The only identifiable difference between the allegations in *MM Global* and the reasoning in *Empagran* is that the *MM Global* plaintiffs alleged that “[a]s a direct and proximate result” of the defendant’s conduct, harm was felt. *Id.* at 342 (quoting the complaint). An allegation that something was the proximate cause is an allegation of a legal conclusion, not of fact. See *Latino Quimica-Amtex*, 2005 WL 2207017, at *13 (“[w]ithout the factual predicate to support these allegations, however, they cannot be read to plead the requisite causal link between the conspiracy’s domestic effect and Plaintiffs’ foreign claim”). But the proximate cause allegations in *MM Global* did not relate to a connection between an effect on U.S. commerce and harm in India, as most courts’ understanding of the *Empagran* exception requires. The complaint alleged merely the harm felt in India was “the result of such effect on competition” in the United States. *MM Global Services*, 329 F. Supp. 2d at 342 (quoting the complaint). But see *eMag Solutions*, 2005 WL 1712084, at *7 (“the district court in *MM Global* never discussed whether ‘but-for’ causation is the appropriate standard” and noting that “the case did not concern “purely foreign commerce”).

²¹⁰ 2005-2 Trade Cas. ¶ 75,022, 2005 WL 2810681 (D. Minn. Oct. 26, 2005).

motion to dismiss.²¹¹ But demonstrating the confusion that reigns since *Empagran*, the *MSG* court reconsidered its holding.²¹² It was “persuaded by the decision and reasoning of the District of Columbia Circuit Court of Appeals” in *Empagran II*.²¹³ The *MSG* court held on reconsideration a worldwide conspiracy allegation established at best but-for, not proximate, cause, and that *Empagran* required the latter.²¹⁴

B. Applying Standing Doctrine to Define the *Empagran* Exception

A workable definition of the scope of the *Empagran* exception is reached by treating it as a question of the antitrust standing doctrine, modified to encompass the considerations recognized in *Empagran*. To be sure, the *Empagran* Court noted the difficulty of case-by-case analysis when it stated a bright-line rule governing suits by plaintiffs injured in wholly foreign commerce.²¹⁵ But the bright-line rule, and the admonition that case-by-case analysis was impractical, applied to the Court’s narrow holding interpreting the FTAIA. The Court expressly did not purport to define how lower courts should apply the *Empagran* exception.

What is important about the *Empagran* exception is just that—it is an exception to the limitation on extraterritorial reach imposed by the FTAIA. Undefined, the exception could be limitless—courts in theory could consider *any* claim of a nexus to an effect in U.S. commerce to be sufficient,²¹⁶ or it could be meaningless—courts in theory could require a nexus to a domestic effect so strong that no

²¹¹ *Id.* at *1-*2 (citing *In re Monosodium Glutamate Antitrust Litig.*, 2005-1 Trade Cas. ¶ 74,781, 2005 WL 1080790 (D. Minn. May 2, 2005)).

²¹² *In re MSG*, 2005-2 Trade Cas. ¶ 75, 022, 2005 WL 2810681 (D. Minn. Oct. 26, 2005).

²¹³ *Id.* at *3.

²¹⁴ *Ibid.* *MSG* has been appealed to the Eighth Circuit. See Notice of Appeal, *In re Monosodium Glutamate Antitrust Litigation*, 00-MDL-1328 (D. Minn.) (filed Nov. 23, 2005).

²¹⁵ See *Empagran*, 542 U.S. at 168. See also Cavanagh, 58 S.M.U. L. Rev. at 1436 (calling the approach “unwise as a policy matter”).

²¹⁶ The holding of the District of Connecticut in *MM Global*, accepting a mere allegation that foreign harm was “the result of” an effect in U.S. commerce, might be thought to be an example of a nearly unlimited definition of the *Empagran* exception.

wholly foreign harm would qualify.²¹⁷ All that *Empagran* made clear is that the narrow bright-line rule it espoused did not define the exception.²¹⁸ But the decision principles that led the Court to an understanding of the FTAIA also should assist a principled understanding of the *Empagran* exception. Those principles best are accommodated in a prudential standing analysis.²¹⁹

1. Reasons for Relying on a Prudential Standing Analysis

Prudential standing doctrine has strong arguments to recommend it. A primary accolade is that the doctrine is the most consistent with the structure of the U.S. antitrust regime.²²⁰ Although the subject matter jurisdiction question under the FTAIA remains essential to determining what *conduct* is cognizable in a U.S. antitrust court, the standing inquiry tells a court which *plaintiff* can complain about that conduct.²²¹ Another is that the standing inquiry is malleable and subject to common-law development. It is thus an appropriate, and

²¹⁷ See, e.g., *eMag Solutions*, 329 F. Supp. 2d 337.

²¹⁸ See *Empagran*, 542 U.S. at 175.

²¹⁹ Case-by-case analysis of a range of factors is the hallmark of the *Associated General Contractors* analysis. See *Associated General Contractors*, 459 U.S. at 531-533 (antitrust standing is a common-law analysis). See also *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 95 (3d Cir. 1986) (“In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will govern in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.”); *Bravman v. Bassett Furniture Indus.*, 552 F.2d 90, 99 (3d Cir. 1977) (“§ 4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all § 4 standing problems”); *deAtucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510, 514 (S.D.N.Y. 1985) (interpreting the Court’s standing authorities as requiring case-by-case analysis of the *Associated General Contractors* factors).

²²⁰ Related to this structural argument is the fact that whether extraterritoriality is treated as a standing or as a subject-matter jurisdiction analysis, a private plaintiff necessarily must satisfy the standing inquiry to establish its right to sue under Clayton Act § 4. If courts first conduct a proximate cause inquiry to determine the reach of their subject-matter jurisdiction under the FTAIA, that same inquiry will be part of the standing analysis that will follow. See, e.g., *Den Norske Stats Oljeselskap v. HeereMac VOF*, 241 F.3d 420, 431 n.32 (5th Cir. 2001) (noting that because the FTAIA analysis was not met, the standing analysis necessarily would fail). Respecting the structure of the antitrust laws limits that redundancy.

²²¹ See *supra* n. 26, nn. 30-50 and accompanying text.

the only appropriate, repository of new concerns such as the comity and inverse deterrence concerns that came to the fore in *Empagran*.²²² Those rationales cannot be fit neatly into the proximate cause inquiry followed by courts after *Empagran*.²²³ They also have no textual basis in any of the antitrust statutes.

Vis-a-vis subject matter jurisdiction, antitrust standing doctrine has all of the procedural advantages of permitting early dismissal of suits.²²⁴ It adds to those benefits the substantial procedural benefit of waivability (which subject-matter jurisdiction lacks).²²⁵ Early dismissal is especially important in the realm of extraterritorial antitrust enforcement because of both comity concerns and over-deterrence concerns. First, comity concerns regularly are recognized to exist not just in the case of U.S. courts imposing actual liability in situations in which foreign sovereigns have regulatory interests, but also in the case of actors being required to submit to U.S. regulatory procedures, including judicial proceedings, where foreign sovereign regulation is implicated.²²⁶ Second, over-deterrence concerns increase the further in litigation suit is permitted to proceed before the resolution of a dispositive motion. The very expense of defending against massive antitrust litigation usually causes defendants to seek settlement regardless of the merits of the claims and sometimes with little regard to the likelihood of the plaintiffs' success in trial.²²⁷

²²² See *McBee v. Delica Corp.*, 417 F.3d 407, __ (1st Cir. 2005).

²²³ Tellingly, neither *Empagran II*, nor any of the other courts analyzing the *Empagran* exception as a proximate cause inquiry, have even tried to analyze the comity and inverse deterrence rationales when considering the scope of the exception.

²²⁴ See *Verizon Corp. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, __ (2004) (Stevens, J., concurring) (noting that a court should begin by analyzing standing); *Hairston v. Pac-10 Conference*, 101 F.3d 1315, 1320-1321 (9th Cir. 1996) (Trott, J., concurring) (noting that standing analysis is a preliminary inquiry).

²²⁵ See Fed. R. Civ. P. 12 (Rule 12(b)(1) arguments of a lack of subject-matter jurisdiction can be raised at any time in litigation).

²²⁶ Cf. 28 U.S.C. §§ 1601-1608. A common example of bare judicial proceedings alone giving rise to comity concerns is the Foreign Sovereign Immunities Act (FSIA) context. Courts repeatedly have held that immunity under the FSIA is immunity from suit, not just from liability. Although the analyses under the FSIA and FTAIA are not related, as a matter of the first principles comity question the FSIA analysis is instructive.

²²⁷ See Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989); Paul J. Stancil, *Atomism and the Private Merger Challenge*, 78 Temple L. Rev. 949 (2005).

Waivability helps to realize the goal of optimization. Waiver of a ground for dismissal is a recognition that the benefits to the defendant and to the court system of dismissal decrease the longer a defendant in litigation waits to seek it.²²⁸ The waiver doctrine also recognizes that at some point, the investment in litigation by the plaintiffs and by the court system has reached a level that warrants respect. When the harm to the plaintiff from dismissing the case on procedural grounds exceeds the benefit to the defendant from its dismissal, it makes sense to refuse dismissal on grounds of waiver.

2. Updating Antitrust Standing With Considerations from *Empagran*

The prudential standing inquiry developed under interpretations of Section 4 does not appropriately capture the costs and benefits of private extraterritorial enforcement, which now are understood to include (1) international comity ramifications of extraterritorial enforcement,²²⁹ and (2) harm to the public enforcement regime under the inverse deterrence rationale. These must be included in a modern analysis of which plaintiff is best situated to sue.²³⁰ Doing so will

²²⁸ For example, if the comity or over-deterrence concern implicates the very fact of a defendant's being required to submit to discovery, once discovery has been completed or substantially completed, that harm has been fully wrought. The benefit of dismissal no longer includes the benefits of avoiding expensive and burdensome discovery and of avoiding being required unfairly to submit to the U.S. antitrust regulatory scheme.

²²⁹ One example of the greater importance of foreign sovereign interests in the modern era is the increased attention given by foreign governments to decisions by the U.S. Supreme Court and the increased involvement as *amici curiae* in Supreme Court litigation. In 1983, ___ briefs were filed by foreign government *amici* in the Supreme Court, and no foreign government *amici* were permitted to present oral argument. In 2005, ___ foreign government briefs were filed, and the government of the Bahamas was permitted to argue in *Spector v. Norwegian Cruise Lines*. Rigorous empirical analysis of this issue is appropriate to determine the actual impact of foreign governmental interest on the decision analyses of U.S. courts.

²³⁰ The ability of standing analysis to accommodate changing realities is one of its great strengths. See, e.g., *McBee v. Delica Co.*, 417 F.3d 107, ___ (1st Cir. 2005) (relying on antitrust extraterritoriality decisions because they reflect consideration of circumstances not considered in earlier Lanham Act decisions).

enable tailoring of antitrust remedies to serve the essential deterrence and compensation goals of antitrust.²³¹

a. New Emphasis on Comity Concerns

The *Empagran* Court admonished that litigation must not go forward if foreign comity concerns militated sufficiently strongly against it.²³² The rule following *Empagran* is that some safeguard must be in place. As in the domestic enforcement sphere, with regard to extraterritorial enforcement, courts cannot rely on private plaintiffs to self-select and not bring suit because of diplomatic concerns.²³³ A modified prudential standing analysis permits courts to decline to hear cases that, based on their developed common-law experience, should not be cognizable. This flexible analysis of comity concerns can take account of changing circumstances horizontally—with regard to which foreign sovereign is in question, and vertically—over time.

The *Empagran* litigation is a prime example of the benefits of malleability in the invocation of foreign comity concerns. Consider first horizontal variation. At issue in *Empagran* were foreign sovereigns with which the United States has diplomatic ties. The comity analysis for other foreign sovereigns might differ.

The degree to which comity concerns are implicated by extraterritorial enforcement also depends on the nature of that sovereign's economic regulation. *Empagran* raised comity concerns with regard to four foreign sovereigns—Australia, Ecuador, Panama and the Ukraine—whose antitrust regulation, or lack of regulation, was threatened with preemption if the foreign plaintiffs' claims were permitted to go forward in U.S. court under U.S. law.²³⁴ Scholars analyzing *Empagran* have ignored the fact that those countries did not appear in the litigation raising comity concerns. The concerns

²³¹ Cf. William H. Page, 37 *Stan. L. Rev.*, *supra*, at 1450-1452 (arguing that standing optimizes remedies in the domestic enforcement context).

²³² *Empagran*, 542 U.S. at 173-175.

²³³ See *supra* notes 62-64 and accompanying text (noting private plaintiffs' incentives to sue in U.S. courts).

²³⁴ See *Empagran*, 542 U.S. at 159.

came, instead, from others such as Britain, Canada, Germany, and Japan—major U.S. trading partners with robust antitrust regulation.²³⁵ The U.S. government, the parties, and other *amici* also advanced comity arguments, primarily in the contexts of U.S. allies with sophisticated antitrust laws.²³⁶ Neither scholarly nor judicial analysis has considered the extent to which the comity concerns that were advanced were relevant to the particular sovereign nations whose antitrust regulation—or lack thereof, in the case of Ecuador²³⁷—supposedly were threatened with being undermined.

In *Hartford Fire*, the Court observed that some types of extraterritorial jurisdiction of U.S. economic regulation do not undermine foreign sovereigns' efforts to regulate their own domestic commerce.²³⁸ The Court asked only whether U.S. regulation actually conflicted with regulation by foreign sovereigns. Because it did not, extraterritorial jurisdiction was found.²³⁹ There may be a good explanation why foreign *amici* in *Empagran* were limited to those nations with sophisticated antitrust regulation. Sovereign nations without such regulation may be ill-inclined to oppose assistance by U.S. courts in maintaining competitive conditions in their own domestic commerce. At a minimum, a court should explore this question in an individual case before assuming the *Empagran* approach applies to a particular foreign sovereign.²⁴⁰

²³⁵ See *supra* n. 12 and accompanying text (describing *amicus* involvement of Canada, Germany, Belgium, the United Kingdom, Northern Ireland, the Netherlands and Japan).

²³⁶ But see Cert.-Stage Brief of the Chamber of Commerce of the United States as *Amicus Curiae*, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, No. 03-724, at 15-17 (making arguments in the specific context of Australia).

²³⁷ Ecuador does not have an antitrust enforcement regime. See Bruce M. Owen, *Competition Policy in Latin America*, John M. Olin Program in Law and Economics Working Paper 268, at 63 (2003) (table listing Latin American competition policies and enforcement agencies).

²³⁸ *Hartford Fire*, 509 U.S. at 798-799.

²³⁹ *Id.* at 799.

²⁴⁰ Apart from Australia, which has taken active efforts to oppose U.S. antitrust courts' extraterritorial jurisdiction (see, e.g., 1 Spencer W. Waller, *Antitrust & Am. Business Abroad* § 4.17 (3d ed. 1997) (noting Australia's "blocking statute")), the foreign sovereigns at issue in *Empagran* have not demonstrated an aversion to extraterritorial jurisdiction. Ecuador does not have an antitrust scheme at all. See *supra* n. 239.

The temporal “vertical” analysis of comity considerations is not constant either. For any one foreign sovereign, U.S. diplomatic policy toward that country is not unchanging. Legal rules developed based on the comity analysis on day zero might not be relevant on day one.²⁴¹ The same applies with regard to changing economic regulations worldwide. The advent of antitrust regulations in foreign countries in recent decades has been a much remarked phenomenon.²⁴² Justification for extraterritorial application of U.S. antitrust laws will decrease as that development continues and other sovereigns’ regulations become more sophisticated. Conversely, should there be a slowing or setback in that development, the need for extraterritorial enforcement of U.S. antitrust laws might increase. Few analyses demand the flexibility of common law analysis so much as does the comity question.

b. New Understanding of the Inverse Deterrence Rationale

The inverse deterrence rationale had not been part of the extraterritoriality analysis before *Empagran*. In *Empagran*, not only was the U.S. Department of Justice’s leniency policy discussed, foreign governments as *amici* advanced their own amnesty policies

²⁴¹ A sufficient example of such temporal change is Iran. Iran was a plaintiff in *Pfizer Corp. v. Government of India*, 434 U.S. 308 (1978), and was held in 1978 to be a “person” permitted to sue under the antitrust laws. See *id.* at 309, 318. Today, Iran is a part of what the Bush administration has declared the “axis of evil” and is a designated state sponsor of terror. See President George W. Bush, State of the Union Address (2002) (“States like [Iran, Iraq and North Korea] *** constitute an axis of evil ** *.”), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (visited Aug. 3, 2006). For Iran’s status as a state sponsor of terrorism, see *State Sponsors of Terrorism* (Table), available at <http://www.state.gov/s/ct/c14151.htm> (visited Aug. 3, 2006). The Court in *Pfizer* noted that it remains “within the exclusive power of the Executive Branch to determine which nations are entitled to sue.” 434 U.S. at 320; see also *id.* at 310 n.1 (referencing nations, including Vietnam, whose suits were not permitted because the governments were not recognized by the U.S. government).

²⁴² See William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 St. John’s L. Rev. 361, 361-363 (2000); Makan Delrahim, *Remarks, supra*, at 2 (“there are nearly 100 jurisdictions with antitrust laws of one sort or another, from Albania to Zambia”).

as giving rise to inverse deterrence concerns.²⁴³ The Supreme Court gave substantial deference to these arguments.

Like the comity concerns discussed above, the inverse deterrence rationale is not static. Analysis of the inverse deterrence concern depends on, at a minimum, changing Executive Branch enforcement policy. The Department of Justice's amnesty program is a matter of prosecutorial discretion, not statute or even administrative regulation. It can be altered—limited or expanded—through mere executive fiat.²⁴⁴ It did not exist in 1982 when the FTAIA was enacted.

Other external effects of the rationale are the prevalence, or lack thereof, of major cartel behavior. Cartelization has not been a consistent phenomenon historically.²⁴⁵ Notably, scholarship demonstrates that 1982 was during a nearly half-century lull in the prevalence of multinational cartels.²⁴⁶ The specific issues of worldwide interdependence that the *Empagran* litigation has raised were not well understood at the time the FTAIA was enacted.

c. Seeking Optimization of Remedies

In the modern framework, the optimization goals are best accomplished through a standing rationale extended into the extraterritorial enforcement sphere. The modified prudential standing analysis will permit antitrust courts efficiently to implement the policies recognized in *Empagran* in a manner to avoid over-deterrence and under-deterrence (comprised in part of inverse deterrence) concerns.

²⁴³ See *Empagran*, 542 U.S. at 168; Brief of the Federal Republic of Germany as *Amicus Curiae*, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, S. Ct. No. 03-724, at 28. Foreign sovereigns increasingly are using leniency or amnesty programs as part of a “carrot and stick” approach to anti-cartel enforcement. See Deputy Assistant Attorney General Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions*, 20th Annual Nat’l Inst. on White-Collar Crime 2 (March 2, 2006) (*Charting New Waters*), available at <http://www.usdoj.gov/atr/public/speeches/214861.pdf>.

²⁴⁴ Cf. Max Huffman, Book Review, *Broken Trusts* . . .

²⁴⁵ Connor, *Private International Cartels*, *supra*, at 1-2 (describing ebbs and flows in cartel activity).

²⁴⁶ *Id.* at 1 (describing the “inter-war period”).

Over-deterrence concerns also arise in the context of private extraterritorial enforcement. Concern for liability far disproportionate to the effect of conduct on U.S. commerce—like the concerns discussed above for false positives in substantive causes of action—risks deterring potential antitrust defendants from engaging in conduct that is economically beneficial domestically.

The concern for over-deterrence due to excessive liability has three manifestations in the context of extraterritoriality. One is an extension of the notion of a false positive. The concerns for false positives become more compelling when the liability that may be imposed is based on claims by a world-wide plaintiff class.

A related concern is that of overlapping regulation. A defendant subject to treble damages liability in a U.S. antitrust court for foreign harm might also be subject to liability in the courts of a foreign sovereign for that same harm.²⁴⁷ This especially might occur if overreaching by U.S. plaintiffs and courts encourages retaliatory exercises in extraterritorial regulation by foreign sovereigns.

The third manifestation of the over-deterrence concern in the extraterritoriality context is that conduct that harms competition in a foreign market might be beneficial, or neutral, to competition in domestic commerce. Permitting suit by a plaintiff injured in foreign commerce does nothing to remedy harm suffered in U.S. commerce, but it chills conduct that is desirable in U.S. commerce. An example of this third manifestation of over-deterrence would be a course of price-fixing conduct in a foreign market used to fund pro-consumer price-cutting in U.S. commerce. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,²⁴⁸ plaintiffs argued that price fixing by defendants in the Japanese market was used to fund below-cost pricing in U.S. markets. Under that scheme, regulators and

²⁴⁷ See Richard A. Epstein & Michael S. Greve, *Introduction: The Intractable Problem of Antitrust Jurisdiction*, in *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* 1, 22 (Richard A. Epstein & Michael S. Greve, eds. 2004) (noting concerns for an “n-front war in countless and often hostile jurisdictions”); Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in *Competition Laws in Conflict*, *supra*, at 31, 45 (“the [effects] doctrine has the potential to generate jurisdictional conflicts among the many countries where a given merger or cartel practice may have an effect”).

²⁴⁸ 475 U.S. 574 (1986).

consumers in Japan might be concerned about the alleged price-fixing conduct in that location, but U.S. consumers gained from the alleged antitrust violations. Courts in the United States should not be concerned about harm overseas that is pro-competitive domestically.²⁴⁹

In the specific context of export commerce, the FTAIA expressly implements the policy of avoiding over-deterrence. Under section 6a(1)(B), an “effect” that can give rise to antitrust liability in export commerce must be an effect on the business of U.S. exporters.²⁵⁰ An effect on export commerce that harms foreign purchasers is explicitly excluded.²⁵¹

The opposite concern, and one that motivates plaintiff-friendly decisions in the extraterritoriality analysis, is that of under-deterrence.²⁵² The under-deterrence concern has two manifestations—the traditional concern for liability that is insufficient to deter harmful conduct, and the recently-recognized inverse deterrence concern.

The traditional manifestation, which the Supreme Court recognized in *Pfizer Corp. v. Government of India*,²⁵³ is that regulatory gaps decrease the downside risk of liability for global cartels.²⁵⁴ The degree to which this concern is appropriate in the modern day is subject to debate. A much remarked phenomenon

²⁴⁹ Cf. Easterbrook, *Rachet*, *supra*, 60 Tex. L. Rev. at 708-709 (arguing that predation is not a concern unless the predator can recoup its losses incurred in predation).

²⁵⁰ 15 U.S.C. § 6a(1)(B) (“conduct has a direct, substantial and reasonably foreseeable effect * * * on export commerce with foreign nations of a person engaged in export commerce in the United States”). See 1 Waller, *Antitrust and Am. Bus. Abroad*, *supra*, § ___ (describing the FTAIA’s coverage of exporters).

²⁵¹ One might argue under the *expressio unius* canon this narrow concern for U.S. exporters proves a broader concern for foreign harm outside the context of export commerce. However, no such argument has been made or accepted.

²⁵² See *Pfizer Corp. v. Gov’t of India*, 434 U.S. 308, 315 (1978). Cf. *McBee v. Delica Co.*, 417 F.3d 107, 119 (1st Cir. 2005) (“In both the antitrust and the Lanham Act areas, there is a risk that absent a certain degree of extraterritorial enforcement, violators will either take advantage of international coordination problems or hide in countries without efficacious antitrust or trademark laws, thereby avoiding legal authority.”).

²⁵³ 434 U.S. 308 (1978).

²⁵⁴ See *Pfizer Corp.*, 434 U.S. at 315. See also Connor, *Buxbaum*, 5 German L. Rev., *supra*, at 1096-1097 (noting arguments that “aggregate global sanctions against hard-core cartels are insufficient to deter price-fixing”).

since *Pfizer Corp.* was decided in 1978 is the development of antitrust agencies worldwide,²⁵⁵ and a recent paper by an antitrust division official notes that “[a]ntitrust authorities throughout the world have become increasingly aggressive in investigating and sanctioning cartels.”²⁵⁶ The result of that change may be that material regulatory gaps are limited.²⁵⁷ Also, strong questions exist whether a U.S. antitrust court should be concerned if the remedy under U.S. law fails sufficiently to deter anticompetitive conduct in wholly foreign commerce. So long as the deterrence and compensation functions are served in domestic commerce, that a cartel realizes profits in the aggregate is a problem for foreign sovereigns. It is even possible that such a *laissez-faire* attitude toward unregulated foreign markets will result in sophisticated cartels directing their conduct only at the regulatory gaps—perhaps even, as alleged in *Matshushita*, with the effect of funding vigorous competition in U.S. markets.

The second under-deterrence manifestation is the particular concern recognized in *Empagran*. A negative externality of broad private enforcement is, paradoxically, decreased future cartel enforcement. The massive civil liability to private plaintiffs risks overbearing the benefits available to a would-be informant from the Department of Justice’s amnesty program. They are unlikely to disclose participation, which has the effect of cementing cartels.²⁵⁸ Like the over-deterrence concerns addressed above, the inverse

²⁵⁵ See William E. Kovacic, 74 *St. John’s L. Rev.*, *supra*, at 361-363; Delrahim, *Remarks, supra*, at 2. Although some have argued “anti-cartel enforcement is too difficult for agencies that are relatively new to antitrust enforcement,” others maintain that view is inaccurate, and that anti-cartel enforcement should be the primary focus of new regulatory regimes. Barnett, *Presentation, supra*, at 4. See also *id.* at 4-5 (arguing for international coordinated efforts in criminal enforcement); Epstein & Greve, in *Competition Laws in Conflict, supra*, at 1 (noting “multiple (and proliferating) antitrust authorities”).

²⁵⁶ Hammond, *Charting New Waters, supra*, at 2 (March 2, 2006). See also Barnett, *Presentation, supra* at 4.

²⁵⁷ Cf. Paul Stephan, *Against International Cooperation*, in *Competition Laws in Conflict: Antitrust Jurisdiction in a Global Economy* 66, 76 (Richard A. Epstein & Michael S. Greve, eds. 2004) (noting attention to the possibility of “soft harmonization” of antitrust laws, defined as establishing baseline levels of antitrust regulation to which sovereigns may aspire).

²⁵⁸ This is something akin to a “mutually assured destruction” principle.

deterrence concern becomes all the more relevant when litigation involves worldwide plaintiff classes.

3. Applying the Updated Standing Analysis to the *Empagran* Exception

Courts deciding whether claims of foreign harm can be brought in U.S. antitrust courts post-*Empagran* can apply the modified *Associated General Contractors* framework to the extraterritoriality problem. Application of these factors in the extraterritoriality arena was undertaken two decades ago in *deAtucha v. Commodity Exchange, Inc.*²⁵⁹ In that case, an Argentinian plaintiff who purchased silver on the London Metals Exchange sought to sue in a U.S. antitrust court.²⁶⁰ The plaintiff alleged harm resulting from the infamous effort by the Hunt brothers to monopolize the silver market.²⁶¹ The court noted both that the injury suffered was causally remote from effects in U.S. commerce, and that domestic plaintiffs were available to vindicate the deterrence concern.²⁶² The court denied standing.²⁶³

a. Antitrust Injury in Extraterritorial Application

In extraterritorial application, the antitrust injury question is whether the U.S. antitrust laws exist to remedy the particular foreign harm. This has two facets—is the harm, regardless of locale, harm cognizable by the U.S. antitrust scheme? Assuming it is, the second question is whether harm in that location is a matter of concern under the U.S. antitrust laws. After *Matsushita*, the answer to the second question seemingly was a clear “no.” In that case, price fixing in Japan was not within the purview of a U.S. antitrust court. *Matsushita* appears to be a specific application of the general rule that the antitrust laws exist to protect American, not foreign,

²⁵⁹ *deAtucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510, 514-518 (S.D.N.Y. 1985).

²⁶⁰ *deAtucha*, 608 F. Supp. at 513.

²⁶¹ *Ibid.*

²⁶² *Id.* at 518.

²⁶³ *Ibid.*

commerce.²⁶⁴ According to the district court in *deAtucha*, “Congress did not contemplate recovery under the antitrust laws by an individual who traded, and was injured entirely outside of United States commerce.”²⁶⁵

However, both *Matsushita* and *deAtucha* involved circumstances that undermined arguments that U.S. antitrust policy was an appropriate vehicle to protect the plaintiffs. In *Matsushita*, the injury was accompanied by benefits to U.S. consumers—much like the supposed harm in *Brunswick Corp.*²⁶⁶ In *deAtucha*, the plaintiff’s injury was incurred in a wholly foreign market regulated by its own antitrust schemes. Under *Empagran*, the door remains open to claims of foreign harm not undermined by those infirmities and that meet the *Empagran* exception.

Supporting such an argument would be facts tending to establish a sufficiently proximate causal relationship—like the allegations in *eMag Solutions* of present intent and ability to engage in geographic arbitrage to end run foreign fixed prices. Other relevant evidence would speak to whether the particular foreign sovereign’s antitrust scheme—or lack thereof—would be adversely affected. Such evidence might be testimony by experts in the particular foreign scheme, or *amicus* participation by the U.S. Department of State or the foreign government. Facts bearing on the under-deterrence and inverse-deterrence rationales would be relevant. For example, evidence that the defendant specifically aimed its conduct at the foreign market because of the lack of regulation would demonstrate a need for a U.S. court to regulate that conduct. Evidence as to whether the particular sovereign had its own amnesty program (like

²⁶⁴ See *deAtucha*, 608 F. Supp. at 517 (citing *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 314 (1978), and 21 Cong. Rec. 2456 (1890) (statements of Senator Sherman (referring to the “interests of the United States”)); 2 Waller, *Antitrust & Am. Bus. Abroad*, *supra*, § 13:23 (“Congress has stated that [the Sherman Act] was intended, first, to protect the competitive health of U.S. markets * * * and second * * * to protect export opportunities for American-based firms.”).

²⁶⁵ *Id.* at 518.

²⁶⁶ See *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 394 (2d Cir. 2002) (“If conduct affecting foreign markets has a substantial but beneficial effect on our markets, such conduct does not implicate the concerns of the antitrust laws.”).

Germany) and whether the U.S. program was threatened with being undermined by this action would be important.

b. Directness in the Extraterritorial Context

The *Illinois Brick* element requires the plaintiff be a direct purchaser to have standing to sue for an antitrust violation. According to recent scholarship analyzing *Empagran*, “[i]n foreign-purchaser cases,” the indirect-purchaser sort of remoteness “does not arise. Often, the foreign plaintiff purchases directly from the wrongdoers.”²⁶⁷ The indirectness at play is instead a function of the first element: antitrust injury. The foreign purchaser’s claim to antitrust injury is derivative of the claim of a purchaser in the domestic market. In that sense, every foreign purchaser is an “indirect purchaser” because its purchase does not give rise to a claim. Instead, its right to sue depends on the existence of an effect in U.S. commerce causing harm to a different plaintiff, and a sufficiently direct link between that effect and the foreign purchaser’s harm. According to the court in *deAtucha*, the *Illinois Brick* “indirect purchaser” analysis “is not an issue” in a case dealing with foreign purchasers but lacking “innocent middlemen.”²⁶⁸

No need exists to write the indirect purchaser rule out of the antitrust standing analysis in the extraterritoriality context. Certainly cases might arise in which a foreign purchaser buys from a foreign distributor that in turn had paid artificially high prices due to a price-fixing cartel. The concerns for duplicate recovery on which *Illinois Brick* is based are as strong here as in the case of domestic commerce. In this case, the foreign indirect purchaser’s harm is remote both because its harm is derivative of some harm felt in U.S. commerce, and because its harm is derivative of the distributor’s harm. Such a case should be subjected both to the antitrust injury analysis and to the *Illinois Brick* analysis. Another indirect purchaser situation might arise that does not implicate the antitrust injury question. A foreign plaintiff that purchases from a domestic

²⁶⁷ Cavanaugh, *supra*, 58 S.M.U. L. Rev. at 1444.

²⁶⁸ *deAtucha*, 608 F. Supp. at 514.

distributor of products made by a foreign manufacturer does suffer harm in U.S. commerce, so can show antitrust injury. It nonetheless is prevented from suing as an indirect purchaser.

c. Remaining Standing Factors

The other plaintiff factor asks whether a plaintiff suffered harm in domestic commerce and is thus better situated than the foreign plaintiff before the court to vindicate the purposes of the antitrust laws. If there is no other plaintiff, or if the other plaintiff cannot be relied on to bring suit on its own behalf, it may be necessary to permit even a less-than-ideal foreign plaintiff to sue.²⁶⁹

Under the interpretation of the FTAIA that prevailed in the Supreme Court's *Empagran* opinion, a plaintiff suffering wholly foreign harm relies on effects in domestic commerce to support its right to sue. If the domestic effects have resulted in injury to other potential plaintiffs, the other plaintiffs will be available to sue to vindicate the purposes of the antitrust laws.²⁷⁰ When a domestic plaintiff exists, the possibility of a suit also by the foreign plaintiff raises the specters of over-deterrence and inverse deterrence.²⁷¹ But if the domestic plaintiff does not exist, it may be appropriate to permit a foreign plaintiff to sue over wholly foreign harm despite tenuous antitrust injury allegations.²⁷²

²⁶⁹ Cf. *Pfizer Corp. v. Government of India*, 434 U.S. 308, 315 (1981) (justifying a cause of action for foreign plaintiffs in part by the necessity of filling the deterrence purposes of the antitrust laws); *Blue Shield of Virginia v. McCreedy*, 457 U.S. 465, 472-473 (1982) (reading *Pfizer Corp.* for the proposition that broadly interpreting the class of persons entitled to sue under Section 4 vindicates the deterrent purposes of the antitrust laws).

²⁷⁰ According to the *deAtucha* court, "individuals who traded on United States exchanges and who may have suffered injury * * * are an identifiable class of persons whose claims [can] 'vindicate the public interest.'" *deAtucha*, 608 F. Supp. at 518. In *deAtucha*, as in *Empagran*, claims by domestic purchasers were proceeding in the Southern District of New York. See *id.* at 518 n.21 (citing cases).

²⁷¹ See *supra* nn. 65-66 and accompanying text (discussing the "over-deterrence" concerns for chilling useful conduct through excess potential liability); *supra* nn. 68-71 and accompanying text (discussing the paradoxical "inverse deterrence" concern that arises when excessive liability hardens cartels and makes detection more difficult).

²⁷² See *deAtucha*, 608 F. Supp. at 518 (noting the importance of deterrence rationales).

The manageability factor primarily raises the question whether the claims before the court will be so numerous, and raise such difficult issues because of the geopolitical ramifications, that they would overwhelm the U.S. court system. If so, they risk raising the costs of enforcement to the defendant and to the court system to a degree that it exceeds the benefits of enforcement.²⁷³ It is the sheer number of potential plaintiffs with strong incentives to bring suit in U.S. antitrust courts²⁷⁴ seeking U.S. remedies that causes concern. But if the numbers of plaintiffs prove not to be massive—*e.g.*, if only one potential plaintiff exists, and that plaintiff suffered harm in foreign commerce—the manageability concern favors permitting suit.²⁷⁵

Like the manageability concern, the dangers of duplicate recovery and complex damages apportionment increase as does the number of plaintiffs. Worldwide plaintiff classes thus present particular concerns due to the sheer number of potential plaintiffs. A separate problem is that where a foreign purchaser's right to sue is derivative of a domestic plaintiff's right, the likelihood of duplicate recovery and complex apportionment increases. Finally, the concern for complexity is heightened when one considers the range of different economic systems worldwide.

CONCLUSION

In *Empagran*, the Supreme Court drew only a narrow bright-line rule. The exception to that rule, for any wholly foreign harm with a sufficient nexus to a domestic U.S. effect, has engendered substantial confusion, a state heightened by the Court's failure adequately to prescribe an approach to implementing the *Empagran* exception. The proximate cause inquiry courts have settled on is neither doctrinally supportable nor procedurally workable.

²⁷³ See Cavanagh, 58 S.M.U. L. Rev., *supra*, at __ (noting that “massive and complex damages litigation” will involve “equally massive and complex foreign evidence”) (quoting *Associated General Contractors*, 459 U.S. at 545).

²⁷⁴ As noted above, the U.S. system and body of substantive antitrust law have many features that make them more plaintiff-friendly than most, if not all, foreign systems and legal schemes. See *supra* nn. 2-6 and accompanying text.

²⁷⁵ Cf., *e.g.*, *deAtucha*, 608 F. Supp. at 514.

This article offers a solution. The well-established and regularly applied prudential antitrust standing analysis is readily imported, with modifications from *Empagran*, into the extraterritoriality framework. Applying standing doctrine extraterritorially, courts should examine the elements of the *Associated General Contractors* framework to determine whether the particular plaintiff is well situated to vindicate the purposes of the antitrust laws. Modified for extraterritorial application, the analysis includes consideration of comity and inverse-deterrence rationales that have become relevant since *Empagran*.

Although analyzing these considerations might be new experience for courts schooled in the pre-*Empagran* antitrust extraterritoriality analysis, a body of common law thinking will develop to assist courts in balancing the policies of deference to foreign sovereign regulation; deference to U.S. government enforcement; concerns for protecting plaintiffs and under-deterrence; concerns for over-deterrence; and other costs and benefits associated with antitrust enforcement.²⁷⁶ The standing analysis will permit courts the flexibility they require to adjust for changing understandings of those policies and other factors perhaps not yet recognized. As the question how to define the *Empagran* exception works its way through the courts, and perhaps back to the Supreme Court, the approach outlined here promises consistent and doctrinally correct decisions.

²⁷⁶ Common law analysis is a well-recognized feature of the antitrust scheme. Then-professor Easterbrook noted:

The Sherman and Clayton Acts authorized the Supreme Court to invent and enforce a law of restraint of trade in the common law fashion. The Court has consistently drawn on the common law tradition. The common law evolves as circumstances change and learning grows.

Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 *Tex. L. Rev.* 705, 706 (1982).