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THE FTAIA AND *EMPAGRAN*: WHAT NEXT?

*Edward D. Cavanagh**

I. INTRODUCTION

IN *F. Hoffman-LaRoche Ltd. v. Empagran S.A. (Empagran I)*,¹ the Supreme Court, vacating the D.C. Circuit's ruling,² held that the Foreign Trade Antitrust Improvements Act ("FTAIA") precludes courts from exercising subject matter jurisdiction over antitrust claims by foreign plaintiffs who allege unlawful conduct that "significantly and adversely affects both customers outside the United States and customers within the United States,"³ if "the adverse foreign effect is independent of any adverse domestic effect;"⁴ that is, if "the conduct's domestic effects did not help to bring about that foreign injury."⁵ The narrowly crafted decision was tailored to the record facts, and the Court declined to undertake the kind of comprehensive statutory analysis that had led to a split in the circuits. The Court thus did not address the situation in which the alleged unlawful conduct creates domestic anticompetitive effects that help cause foreign injury, and the Court left the door open for the court of appeals to consider that argument on remand.⁶ How wide that opening is remains unclear. The uncertainty about the jurisdictional issue was exacerbated by the Court's refusal to address the issue of a foreign plaintiff's standing. In short, *Empagran I* raised new questions that the Supreme Court will soon have to address. The purpose of this article is to (1) analyze the Supreme Court's decision in *Empagran I* on the Sherman Act's extraterritorial reach; (2) discuss its likely impact on existing and future antitrust claims by foreign plaintiffs in American courts under the Sherman Act based on transactions abroad; and (3) examine whether foreign plaintiffs injured abroad have standing to sue in American courts under American law.

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1. 124 S. Ct. 2359 (2004) [hereinafter *Empagran I*].

2. *Empagran S.A. v. F. Hoffman LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *vacated*, 124 S. Ct. 2359 (2004).

3. *Empagran I*, 124 S. Ct. at 2366.

4. *Id.*

5. *Id.* at 2372.

6. *Id.* at 2370.

II. BACKGROUND

A. THE FTAIA PASSAGE

In order properly to construe the FTAIA, courts must first look at the statute in historical context. The FTAIA was enacted as part of the Export Trading Company Act of 1982,⁷ at a time when antitrust enforcement was largely but not exclusively an American institution. In the seventies and early eighties, there was concern in some quarters that American traders in the international arena, that is, American exporters, were at a competitive disadvantage vis-à-vis foreign rivals due to the constraints of the American antitrust laws.⁸ Since American traders were subject to antitrust constraints and foreign rivals were assumed not to be so constrained, either by American law or another jurisdiction's law, antitrust skeptics complained that American exporters competed with their hands tied.⁹ To address this perceived inequity, the FTAIA exempted export transactions from antitrust scrutiny, except if there was a "direct, substantial, and reasonably foreseeable effect" on United States foreign commerce, as well as transactions that were wholly foreign.¹⁰

During the same time period, foreign governments and foreign traders expressed concern that United States courts had overstepped their bounds and international norms by purporting to enforce United States laws in matters of foreign commerce.¹¹ These concerns came to a head in the late 1970s in the *Uranium* cases.¹² In 1976, Westinghouse, a manufacturer of nuclear reactors and a large purchaser and reseller of uranium, brought an antitrust action in the Northern District of Illinois against every major uranium supplier in the world, many of whom were based outside the United States, alleging a massive conspiracy to fix uranium's price and drive Westinghouse from the field.¹³ The foreign firms de-

7. *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 298-99 (3d Cir. 2002) (saying FTAIA is Title IV of the Export Trading Company Act); see Pub. L. No. 97-290, 96 Stat. 1233 (codified in scattered sections of 15 U.S.C.).

8. H.R. REP. NO. 97-686, at 4 (1982), reprinted in 1982 U.S.C.C.A.N. 2487; see *The "In" Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 498 (M.D.N.C. 1987) (saying FTAIA was passed in response to complaints from American firms that the antitrust laws impaired their ability to increase exports through aggressive competition or cooperation").

9. *The "In" Porters*, 663 F. Supp. at 498.

10. *Turicentro*, 303 F. 3d at 299; see also *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1102, 1105 (S.D.N.Y. 1984) ("Congress sought to place American-owned companies operating entirely abroad or in United States export trade on equal footing with their foreign-owned competitors by freeing them from the possibility of dual and conflicting antitrust regulation").

11. See *Commission on the International Application of the United States Antitrust Laws Act: Hearings on S. 432 Before the Comm. on the Judiciary*, 97th Cong. 1st Sess. 49, 61-71 (1981) (remarks of Lloyd Cutler); see also Donald I. Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INT'L L.J. 165 (1978); J.S. Stanford, *The Application of the Sherman Act to Conduct Outside of the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195 (1978).

12. *In re Uranium Antitrust Litig.*, MDL No. 342 (N.D. Ill.).

13. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 617 F.2d 1248, 1254-55 (7th Cir. 1978) (noting amici contentions that the Alcoa effects test was no longer the standard for the exercise of extraterritorial jurisdiction under the Sherman Act.).

faulted, but their governments, acting as surrogates, filed amicus briefs protesting the exercise of subject matter jurisdiction by United States courts over what they considered wholly foreign conduct.¹⁴

Rejecting the arguments of the amici, the Seventh Circuit upheld the decision that United States courts had jurisdiction over the foreign defendants.¹⁵ The Seventh Circuit's rationale on the jurisdictional issue is instructive; it observed that, historically, the "jurisdictional reach of the Sherman Act to conduct outside the United States was not favorably received" by the courts.¹⁶ But that narrow approach eroded over time, and in a line of cases culminating in the *Alcoa*¹⁷ decision, American courts upheld jurisdiction "so long as the intended effect of that conduct is prohibited by the [Sherman] Act."¹⁸ In the wake of *Alcoa*, the "effects" test was widely, but by no means universally, followed by other courts. Concerned that the *Alcoa* test did not adequately account for foreign states' interests, the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America Corp.*¹⁹ added a gloss to *Alcoa* by creating a jurisdictional rule of reason that required a comity-based balancing test and an analysis of domestic effects when assessing the reach of the antitrust laws over foreign defendants.

Applying a two-pronged test derived from *Alcoa* and *Timberlane*, the Seventh Circuit in *Westinghouse* asked (1) whether the trial court had subject matter jurisdiction; and (2) if so, whether that jurisdiction should have been exercised, taking into account comity and fairness considerations.²⁰ Concluding that the trial court did not abuse its discretion by exercising jurisdiction, the Seventh Circuit affirmed the decision below.²¹

The jurisdictional rule-of-reason approach that *Timberlane* espoused greatly complicated the jurisdictional analysis and rendered outcomes less predictable.²² In enacting the FTAIA, Congress sought to clarify the

14. *Id.*

15. *Id.* at 1256.

16. *Id.* at 1253.

17. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

18. *Westinghouse*, 617 F.2d at 1253.

19. 549 F.2d 597 (9th Cir. 1976).

20. *Westinghouse*, 617 F.2d at 1253.

21. *Id.* at 1256.

22. See, e.g., Gary E. Dyal, *The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines For Resolution Of Multinational Antitrust Dispute*, 6 Nw. J. INT'L L. & BUS. 1065, 1076-77 (1984):

The jurisdictional rule of reason [espoused by *Timberlane*] has not been consistently followed, which has given rise to further criticism, foreign and domestic, that United States jurisdictional rules are imprecise and unpredictable. The legitimacy of judicial adoption of the comity analysis has been questioned as an assumption of discretion requiring Congressional approval. A particularly poignant criticism is that institutional weaknesses inherent in the courts limit their ability to gather and assess the relevant evidence and to fairly evaluate the national interests revealed. In addition, other countries may be justifiably reluctant to divulge certain sensitive information through a private participant in a court proceeding, or without guarantees of confidentiality and use limitation. Standing alone, then, courts are simply not equipped to receive and evaluate evidence of economic policy

United States antitrust laws' reach and to provide a bright-line test for jurisdiction.²³ The FTAIA makes no reference to comity and while the legislative history²⁴ suggests the FTAIA does not preclude courts from invoking comity principles, the statute's silence on comity stands as an unequivocal rejection of the jurisdictional rule-of-reason approach.²⁵

Enacted as an exception to the Sherman Act, the FTAIA provides that:

Sections 1 to 7 of [title 15] 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 reasonable foreseeable effect—
 - (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- (2) such effect gives rise to a claim under the provisions of 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.²⁶

The FTAIA thus provides that the Sherman Act applies to conduct involving commerce with foreign nations if and only if²⁷

- (1) that conduct has a direct, substantial and reasonably foreseeable effect—
 - (A) on domestic commerce or on import commerce or

interests of other nations, with the consequence that the comity principle may frequently fail to achieve the desired equitable result. These problems are particularly troublesome in the context of private antitrust actions against foreign defendants, where there is no governmental participation to facilitate consideration of alternative state interests.

(internal citations omitted).

23. *United States v. LSL Biotechnologies*, 379 F.3d 672, 679 (9th Cir. 2004) (citing legislative history for the point that FTAIA was enacted “to more clearly establish when antitrust liability attaches to international business activities”); *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420, 421 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); *Ferromin Int’l Trade Corp. v. UCAR Int’l Corp.*, 153 F. Supp. 2d 700, 703 (E.D. Pa. 2001), *vacated on other grounds sub nom.*, *BHP N.Z. Ltd. v. UCAR Intern., Inc.*, 106 Fed. App’x 138 (3d Cir. 2004); *United Phosphorus Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1008 (N.D. Ill. 2001) (“Congress enacted the FTAIA as an amendment to the Sherman Act to clarify the extra territorial reach of the federal antitrust laws.”), *aff’d*, 322 F.3d 942 (7th Cir. 2003); see Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. REV. 2151, 2158 (2003).

24. H.R. REP. NO. 97-686, at 10, 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498.

25. *In re Ins. Antitrust Litig.*, 938 F.2d 919, 932 (9th Cir. 1991) (“it is only in an unusual case that comity will require abstention from the exercise of jurisdiction”), *aff’d in part, rev’d in part on other grounds sub nom.* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

26. 15 U.S.C. § 6a (2000).

27. See Cavanagh, *supra* note 23, at 2157.

- (B) on export commerce with foreign nations of a person engaged in export commerce in the United States; and
- (2) such effect gives rise to a claim under sections 1 to 7 of [the Sherman Act].

Put another way, the FTAIA carves out certain conduct—other than import commerce—involving trade or commerce with foreign nations.²⁸ It then “carves back in” that conduct if (1) the conduct has a “direct, substantial, and reasonably foreseeable effect” on the domestic commerce of the United States and (2) that domestic effect “gives rise to a claim” under the Sherman Act.²⁹ Again, the FTAIA itself does not illuminate either of the foregoing conditions’ meaning.

B. CASE LAW DEVELOPMENT

In its early years, the FTAIA lay largely dormant. In the mid-nineties, however, the statute became the focus of attention as the Antitrust Division intensified its enforcement efforts against international cartels that, in turn, spawned private treble-damages actions against foreign defendants. In this series of cases, a new class of claimant emerged—a plaintiff, typically foreign, suing foreign defendants on the basis of transactions consummated wholly outside the United States.³⁰ Foreign plaintiffs in the foregoing factual scenario face two significant hurdles in addition to those faced by all antitrust plaintiffs: (1) whether subject matter jurisdiction is stripped by the FTAIA and (2) whether foreign plaintiffs have standing.³¹

In turn, the FTAIA analysis focuses on two issues: (1) whether the conduct in question had a “direct, substantial, and reasonably foreseeable effect” on United States commerce and (2) whether that anticompetitive effect gives rise to a claim under the Sherman Act.³² As a threshold matter, it is unclear whether Congress, in enacting the FTAIA, intended to codify existing case law or intended to prescribe new standards for determining when the Sherman Act applies to foreign conduct.³³ Nevertheless, courts have had little trouble implementing the “direct, substantial, and reasonably foreseeable” standard.³⁴ They generally agree that the FTAIA application turns on the situs of anticompetitive *effects* and not on the situs of the offending *conduct*.³⁵ Courts also agree that participation by American firms in the alleged conspiracy does not itself establish

28. Salil Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 290 (2002).

29. *Id.*

30. See Cavanagh, *supra* note 23, at 2159-60.

31. *Id.*

32. 15 U.S.C. § 6a (2000).

33. Compare *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002) (saying FTAIA merely codifies existing law) with *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420, 421 (5th Cir. 2001) (saying FTAIA designed to clarify extra-territorial reach of the Sherman Act), *cert. denied*, 534 U.S. 1127 (2002).

34. See Cavanagh, *supra* note 23, at 2186-87.

35. *Kruman*, 284 F.3d at 395.

an anticompetitive effect in the United States.³⁶ At the same time, if a wholly foreign conspiracy targets the United States market, the requisite domestic effects will usually be found.³⁷ The plaintiff bears the burden of proving domestic effects, and mere intent to reduce competition in the United States is insufficient to meet the “effect” standard.³⁸

To prove “direct” effect, plaintiffs must prove a causal link between the wrongful conduct and the anticompetitive effect suffered in the United States.³⁹ An effect is “direct” if it results in higher prices in the United States or a reduction in United States output, including a reduction in imports.⁴⁰ An effect is also “direct” if there is significant diminution of competition in the United States marketplace.⁴¹ However, mere spillover effects within the United States caused by a conspiracy targeted exclusively at foreign markets are not sufficiently “direct” to satisfy the FTAIA.⁴² The anticompetitive effects on the domestic market must also be “substantial;” mere ripple effects felt in the United States as a result of anticompetitive conduct abroad are not sufficiently “substantial” to meet FTAIA requirements.⁴³

As a general matter, if a conspiracy is aimed at both domestic and foreign markets, courts are inclined to find the first prong of the statute satisfied.⁴⁴ On the other hand, if the conspiracy is aimed solely at foreign markets and excludes the United States, courts are less inclined to find that the FTAIA has been satisfied.⁴⁵ While it may be an overstatement to say that the construction of section 6a(1) is now “well-settled,” it is fair to say that construction of section 6a(2) is where the most significant battles have been fought.

The FTAIA’s second prong requires that the anticompetitive effect on domestic commerce “gives rise to a claim” under the Sherman Act.⁴⁶ Construction of the phrase “gives rise to a claim” in section 6a(2) has proven most troublesome for the courts and has led to a circuit split. In

36. *Id.*

37. See *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997).

38. *Dee-K Enterps., Inc. v. Heveafil Snd. Bhd.*, 299 F.3d 281, 292 (4th Cir. 2002), *cert. denied*, 539 U.S. 969 (2003).

39. *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (“an effect is ‘direct’ if it follows as an immediate consequence of defendant’s activity”); *Info. Res. Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 417 (S.D.N.Y. 2000); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1002, 1106-07 (S.D.N.Y. 1984) (finding no jurisdiction under the FTAIA when “the link between the defendants’ conduct abroad and the price. . . in the United States is far from apparent”).

40. *Ferromin Int’l Trade Corp. v. UCAR Int’l, Inc.*, 153 F. Supp. 2d 700, 705 (E.D. Pa. 2001), *vacated on other grounds sub nom.*, *BHP New Zealand Ltd. v. UCAR Int’l, Inc.*, 106 Fed. App’x 138 (3d Cir. 2004).

41. See *Coors Brewing Co. v. Miller Brewing Co.*, 889 F. Supp. 1394, 1397-98 (D. Colo. 1995).

42. *Eurim-Pharm GmbH*, 593 F. Supp. at 1106.

43. *Dee-K Enters., Inc.*, 299 F.3d at 292.

44. See *Den Norske Stats Oljeselskap As v. Heeremac, Vof*, 241 F.3d 420, 427 (5th Cir. 2001), *cert. denied*, U.S. 534 U.S. 1127 (2002).

45. *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 298-99 (3d Cir. 2002).

46. 15 U.S.C. § 6a (2000).

Den Norske Stats Oljeselskap As v. Heeremac Vof Statoil,⁴⁷ the Fifth Circuit took a narrow view of section 6a(2). Plaintiff, Den Norske Stats Oljeselskap As (“Statoil”), was a Norwegian company conducting business exclusively in the North Sea. Statoil sued the defendants, alleging that they had agreed to fix prices and allocate customers for heavy lift barge services in the Gulf of Mexico and that the conspiracy led to higher prices not only for purchasers of heavy lift-barge services in the Gulf of Mexico but also for American consumers.⁴⁸ Statoil further alleged that the market for heavy lift-barges services was global and that, due to the conspiracy in the Gulf of Mexico, it was forced to pay supracompetitive prices for heavy lift-barge services in the North Sea.⁴⁹ The majority found that the statute had not been satisfied because “the effect on United States commerce—in this case, the higher prices paid by United States companies for heavy lifting services in the Gulf of Mexico—must give rise to the claim that [plaintiff] asserts.”⁵⁰ That is, to come within the exception to the FTAIA and to permit the claim to go forward under the Sherman Act, the plaintiff needed to show that its injury stemmed from injury to the domestic market—higher prices for heavy lift-barge services in the Gulf of Mexico.⁵¹ Statoil could not show such an injury because the higher prices that American companies paid for heavy lift-barge services in the Gulf of Mexico did not give rise to Statoil’s claim that it had paid inflated prices for heavy lift-barge services in the North Sea.⁵²

On the other hand, the Second and D.C. Circuits both held that the FTAIA did not bar claims by foreign plaintiffs based on transactions occurring abroad. In *Kruman v. Christie’s International PLC*,⁵³ the Second Circuit, reversing the lower court, held that claims by successful bidders at Christie’s and Sotheby’s leading international-auction houses had engaged in a worldwide conspiracy to fix the amount of the seller’s commissions or buyer’s premiums could proceed under the Sherman Act, even though all transactions had been consummated outside the United States.⁵⁴ In so ruling, the Second Circuit held that (1) the FTAIA merely codified the prior law established in *National Bank of Canada v. Interbank Card Association*,⁵⁵ and (2) the trial court had erred in holding that plaintiffs suing on foreign transactions must show not only anticompetitive effects in the United States caused by the conspiracy but also that “effects giving rise to jurisdiction also are the basis for the alleged injury.”⁵⁶ Put another way, the trial court erred in ruling that only those

47. 241 F.3d at 426-29.

48. *Id.* at 426-29.

49. *Id.*

50. *Id.* at 427.

51. *Id.*

52. *Id.*

53. 284 F.3d 384, 384 (2d cir. 2002).

54. *Id.* at 389.

55. 666 F.2d 6 (2d Cir. 1981).

56. *Kruman*, 284 F.3d at 389-90.

plaintiffs who suffer injury from the unlawful conspiracy domestic effects might sue.

In *National Bank of Canada*, the Second Circuit had held that it is incumbent on a plaintiff suing on a foreign transaction “to make clear the linkage, if any, between the behavior objected to and any anticompetitive consequences to United States commerce” and that “only those injuries to United States commerce which reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation constitute effects sufficient to confer jurisdiction.”⁵⁷ Accordingly, the court in *Kruman* held that, under *National Bank of Canada*, “anticompetitive conduct directed at foreign markets” is regulated by the Sherman Act only if the conduct has the “effect” of causing “injury to domestic commerce by (1) reducing the competitiveness of a domestic market or (2) making possible anticompetitive conduct directed at domestic commerce.”⁵⁸ The court also concluded that subject matter jurisdiction existed under either prong of *National Bank of Canada*:

Conduct meeting the first prong of the *National Bank of Canada* test would clearly have an effect on domestic commerce and give rise to a claim under the Sherman Act because a plaintiff would have to show that such conduct was directed at both domestic and foreign markets and actually reduced the competitiveness of a domestic market. Moreover, conduct meeting the second prong would satisfy the requirements of subsection 2 of the FTAIA because it would have the effect on domestic commerce of making possible anticompetitive conduct that “gives rise to a claim” under the Sherman Act.⁵⁹

The appellate court further found that the trial judge erroneously construed section 6a(2) of the Sherman Act.⁶⁰ Like the Fifth Circuit, the trial court had held that, under section 6a(2), foreign plaintiffs must show both an anticompetitive effect on domestic commerce and that the same anticompetitive effect conferring jurisdiction serves as the basis of their claims.⁶¹ The Second Circuit found that the lower court’s construction of section 6a(2) was at odds with the statute’s plain meaning.⁶² The statute requires only that the anticompetitive effect in question gives rise to a claim; it is not necessary that the anticompetitive effect gives rise to *this particular plaintiff’s* claim.⁶³

The Second Circuit also ruled that the trial court’s construction of the FTAIA would erroneously “conflate the FTAIA with the Clayton Act.”⁶⁴ According to the Second Circuit, “[t]he substantive provisions of the Sherman Act determine what conduct by the defendant is actionable.

57. *Nat’l Bank of Canada*, 666 F.2d at 9.

58. *Kruman*, 284 F.3d at 399.

59. *Id.* at 401.

60. *Id.* at 396-401.

61. *Kruman v. Christie’s Int’l PLC*, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001).

62. *Kruman*, 284 F.3d at 400.

63. *Id.*

64. *Id.* at 397.

The Clayton Act determines what injury a plaintiff must suffer in order to bring suit.⁶⁵ The FTAIA is an amendment to the Sherman Act, and the Sherman Act prescribes substantive standards prohibiting certain conduct by defendants.⁶⁶ On the other hand, the Clayton Act deals with the plaintiff's right to sue or whether the plaintiff has suffered injury.⁶⁷ Thus, the FTAIA does not identify which plaintiffs may sue under the Clayton Act, and "it would be inappropriate" for courts to "graft" onto to the FTAIA the Clayton Act's injury requirement.⁶⁸ "Conduct" as used in the FTAIA refers only to acts that violate the Sherman Act.⁶⁹ The illegal conduct in *Kruman* was not the imposition of the overcharge abroad but rather the conspiracy's formation in the United States.⁷⁰

Nor, the court ruled, does section 6a(2) require that the anticompetitive effects that create subject matter jurisdiction also be the basis of plaintiff's injury.⁷¹ That interpretation would (1) be at odds with existing Second Circuit case law, when in fact the FTAIA was intended to codify that case law; (2) make jurisdiction turn on the issue of injury under the Clayton Act when the FTAIA deals only with the issue of conduct that violates the Sherman Act; and (3) effectively rewrite 6a(2) by changing "a claim" to "the claim."⁷² The Second Circuit concluded that the plaintiffs claimed sufficient effects on domestic commerce by alleging that the domestic price-fixing agreement could have succeeded only with the foreign price-fixing agreement.⁷³ The offending conduct could be described in two ways. One might characterize the illegal conduct in question as an agreement to fix prices in both the foreign and domestic markets.⁷⁴ The illegal conduct affects domestic commerce because it includes acts targeted at a domestic market. Alternatively, one may describe the offending conduct as an agreement to fix prices in a foreign auction market that made possible an agreement to fix prices in the domestic auction market.⁷⁵ Because the foreign agreements made domestic price-fixing agreements possible, the foreign agreements' effect gives rise to a claim under the Sherman Act. The Second Circuit concluded that the FTAIA's "unambiguous text" supported jurisdiction on the record before it.⁷⁶

In *Empagran*, the D.C. Circuit reached the same result as the Second Circuit but took another route to reach that result.⁷⁷ It acknowledged

65. *Id.* at 398.

66. *Id.*

67. *Id.*

68. *Id.* at 397.

69. *Id.* at 398.

70. *Id.*

71. *Id.* at 399.

72. *Id.* at 399-400.

73. *Id.* at 401.

74. *Id.* at 401.

75. *Id.*

76. *Id.*

77. *Empagran S.A. v. F. Hoffman LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *vacated*, 124 S. Ct. 2359 (2004).

from the outset that section 6a(2) “does not plainly resolve this case.”⁷⁸ It criticized the Fifth Circuit as being “overly rigid” in construing the FTAIA and criticized the Second Circuit for reaching “too far in its view of subject matter jurisdiction.”⁷⁹ Turning to the FTAIA’s legislative history, the D.C. Circuit noted that while there was some support for the Fifth Circuit’s position on section 6a(2) had some support, much of the legislative history supported the broader Second Circuit’s view.⁸⁰ The court also noted that Congress had cited *Pfizer Inc. v. India*⁸¹ with approval and had embraced the Supreme Court’s view that barring foreign claims could impair antitrust law’s deterrent function.⁸² The D.C. Circuit held that, under *Pfizer Inc.*, the exercise of subject matter jurisdiction was appropriate to preserve and enhance the deterrent function of the private treble-damages remedy.⁸³ The court observed that deterrence would be severely undermined if foreign plaintiffs were barred from American courts, leaving price-fixers free to use proceeds from foreign cartel activities to subsidize cartel behavior at home.⁸⁴ The rewards from the illicit foreign activities would more than offset any risk of liability for the domestic conspiracy.⁸⁵ Congress’s reliance in *Pfizer* in reporting on the FTAIA persuaded the D.C. Circuit that the legislative history, on balance, supported exercising jurisdiction in *Empagran*.⁸⁶

III. EMPAGRAN I

A. FTAIA JURISDICTION

The Supreme Court granted *certiorari* in *Empagran I* to resolve the circuit split on the FTAIA’s construction, specifically the extent to which the domestic-injury exception to the FTAIA’s general-exclusionary rule applied to the facts before the court.⁸⁷ However, those who had hoped for a definitive analysis of the FTAIA are likely to be disappointed. Justice Breyer’s narrowly crafted opinion vacating the D.C. Circuit’s decision to uphold jurisdiction made no attempt to parse the statute and held that the FTAIA precludes courts from exercising subject matter jurisdiction over antitrust claims by foreign plaintiffs alleging unlawful conduct that “significantly and adversely affects both customers outside the United States and customers within the United States,”⁸⁸ where “the adverse foreign effect is independent of any adverse domestic effect,”⁸⁹ that is, “the conduct’s domestic effect did not help bring about that foreign

78. *Id.* at 350.

79. *Id.* at 341.

80. *Id.* at 352-54.

81. 434 U.S. 308 (1978).

82. *Empagran S.A.*, 315 F.3d at 356.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Empagran I*, 124 S. Ct. 2359, 2364 (2004).

88. *Id.* at 2366.

89. *Id.*

injury.”⁹⁰

The Court’s rationale was two-fold. First, citing principles of prescriptive comity, the Court held that ambiguous statutes, such as the FTAIA, should ordinarily be construed so as to “avoid unreasonable interference with the sovereign authority of other nations.”⁹¹ While the Court acknowledged that applying American antitrust laws to foreign conduct could potentially interfere with a foreign nation’s ability to regulate its own commerce, the court nevertheless concluded that the Sherman Act may be invoked to the extent Congress sought to redress *domestic* anti-trust injury caused by foreign conduct.⁹² At the same time, the Court determined that it would be unreasonable to apply American antitrust law to foreign conduct, where, as here, the foreign conduct causes foreign injury independent of domestic injury, and that foreign injury alone gives rise to claims by foreign plaintiffs.⁹³ In such cases, American law may not supersede a foreign nation’s determination of to how to best protect its citizens.⁹⁴ Further bolstering its comity rationale, the Court cited amicus briefs filed by several foreign governments arguing that permitting foreign plaintiffs to invoke the treble-damages remedy “would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting the balance of competing considerations that their own domestic antitrust laws embody.”⁹⁵

Second, the Court found that no case decided before the FTAIA’s adoption supported exercising of federal jurisdiction on the record before it. The court also found that neither the FTAIA itself nor its legislative history supported construing of the FTAIA to expand the Sherman Act’s reach of in cases involving foreign commerce.⁹⁶ The Court specifically rejected plaintiffs’ argument that as long as the conduct at issue has domestic effects giving rise to “a claim” on behalf of someone—concededly not these plaintiffs—the FTAIA does not bar Sherman Act jurisdiction. Although the Court conceded that plaintiffs’ “reading [of the FTAIA] is the more natural reading of the statutory language,”⁹⁷ it nevertheless ruled that considerations of comity and history make clear that plaintiffs’ expansive reading of the FTAIA is inconsistent with the statute’s basic intent to limit rather than to expand the reach of the United States anti-trust laws in cases involving foreign commerce.⁹⁸ Accordingly, the Court found that defendant’s reading of the statute’s language is correct” and “that reading furthers the statute’s basic purpose, it reflects considerations of comity, and it is consistent with the Sherman Act history.”⁹⁹

90. *Id.* at 2372.

91. *Id.* at 2366.

92. *Id.*

93. *Id.* at 2367.

94. *Id.*

95. *Id.*

96. *Id.* at 2371.

97. *Id.*

98. *Id.* at 2372.

99. *Id.*

At the same time, the Court repeatedly emphasized that its holding was limited to the case's facts and addressed only those situations in which the anticompetitive conduct "independently caused foreign injury; that is, the conduct's domestic effects did not help bring about foreign injury."¹⁰⁰ The Court suggested, but did not decide, that American courts may have jurisdiction over foreign claims, if those claims are dependent upon, rather than independent of domestic harm.¹⁰¹ The issue whether there was any linkage between foreign injury and domestic harm caused by foreign conduct was left for the D.C. Circuit to decide on remand.

At first blush, the opinion, especially its invocation of comity as the principal ground for denying subject matter jurisdiction, is somewhat mystifying. After all, the FTAIA was enacted, at least in part, to clarify the circumstances in which United States antitrust laws would apply to foreign conduct by eliminating comity from the calculus. Only if one were present at the oral argument or had had an opportunity to review a transcript of the proceedings would the Court's tack make sense.

The Court seemed disinclined to entertain arguments dissecting the FTAIA. Justice Scalia made short-shrift of petitioner's argument that the requisite effect on the United States economy had not been established and invited argument on section 6a(2).¹⁰² Justice Souter quickly cut off that discussion by suggesting that "the textual argument [is] in—effect a—a draw" and that comity would be the proper mode of analysis, while at the same time recognizing that comity had not been raised.¹⁰³ Petitioners' counsel seized this opening and articulated the prescriptive comity argument that became the cornerstone of the Court's unanimous opinion.¹⁰⁴

The alternative holding, which also avoids detailed analysis of the FTAIA, proceeds in a classic syllogism. First, before the FTAIA, the foreign claims asserted in a suit would not be cognizable under the Sherman Act.¹⁰⁵ Second, in enacting the FTAIA, Congress did not intend to expand subject matter jurisdiction under the Sherman Act but rather to nar-

100. *Id.*

101. *Id.*

102. Transcript of Oral Argument at 10-11, *Empagran I*, 124 S. Ct. 2359 (No. 03-724), available at http://www.supremecourtus.gov/oral_argumentargument_transcripts/02-724.pdf.

103. *Id.* at 12-13.

104. *Id.* at 12-13. Counsel for defendants stated:

Mr. Shapiro: Well, there is a kind of comity that Justice Scalia referred to in the Hartford case that we think is raised here, and that is comity bearing—comity among nations, not judicial comity where the judges weigh various and sundry factors, but it's a rule of interpretation that—that discourages interpretations of law, where you have two interpretations that are available, you pick the interpretation that is most consistent with international law and which avoids antagonizing our allies and our trading partners. And that concept is very much before the court here, and I think it argues very much in favor of the narrower interpretation, particularly because Congress was expecting that wholly foreign transactions, that's the term used in the House Report, would be litigation in foreign nations, and—our—allies and trading partners.

105. *Empagran I*, 124 S. Ct. at 2371.

row it.¹⁰⁶ Therefore, because the claims asserted were not cognizable before the FTAIA's passage and because the FTAIA did not augment federal antitrust jurisdiction, the foreign claims at issue are not now cognizable in American courts.¹⁰⁷ By using this line of reasoning, the Court obviated the need to provide a detailed interpretation of the FTAIA generally, and it eliminated the need specifically to determine whether the phrase "a claim" in section 6a(2) should be read literally, as the plaintiffs had argued, or more narrowly as "this plaintiff's claim," as the defendants had argued. Still, the Court emphasized that one should not read literally the phrase "a claim."¹⁰⁸ As noted above, the Court did concede that plaintiffs' reading is "the more natural" one but ultimately held that considering comity and history demonstrates plaintiffs' broad construction of the FTAIA would conflict with the statute's intent.¹⁰⁹

After taking a somewhat circuitous route, the court thus comes down squarely on the Fifth Circuit's side and against the Second and D.C. Circuits in the FTAIA debates. That ruling, in turn, is consistent with most of district-court cases decided before *Kruman* and *Empagran*. Curiously, the Court chose not to factor into its decision the concession of the plaintiff's counsel that recovery by foreign plaintiffs under the United States antitrust laws would be barred if their home countries had credible antitrust regimes.¹¹⁰ Although that concession would not have been outcome determinative on the record before the Court, it is nevertheless of considerable significance on the issue of the reach of United States antitrust laws to foreign conduct.

B. STANDING

While the standing issue had been briefed by the parties in the Supreme Court and had been addressed in detail by the D.C. Circuit, the Supreme Court declined to reach that question. This is not surprising, for while standing is a threshold issue distinct from subject matter jurisdiction, most courts have found resolution of the FTAIA issue to be dispositive or, having dealt with the jurisdictional issue, remanded the case for further consideration of the standing question. Still, in the interest of efficiency and in order more fully to develop the law on the rights of foreign purchasers to sue under the United States antitrust laws, the Supreme Court could have and should have decided the standing issue. In deed, resolution of foreign claims under the standing doctrine may well prove less arduous than under the FTAIA. As more fully discussed

106. *Id.*

107. *See id.*

108. *Id.*

109. *Id.* at 2372.

110. Transcript of Oral Argument at 45-46, *Empagran I*, 124 S. Ct. 2359 (No. 03-724) ("We would reject claims from places like Australia and Canada and the like, that's right. If they have any sort of regime that they have decided to build up, if they've enacted into law, and it's a viable regime for vindicating interests. . ."), available at http://www.supremecourt.gov/oral_argument/argument_transcripts/03-724.pdf.

below,¹¹¹ standing principles and the related doctrines of antitrust injury and the direct purchaser rule preclude claims by foreign purchasers based on transactions that occur outside the United States.

IV. *EMPAGRAN II*

The Supreme Court directed the D.C. Circuit on remand to evaluate plaintiffs' alternate theory of Sherman Act jurisdiction that "because vitamins are fungible and readily transportable, without an adverse 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."¹¹² Plaintiffs articulated their argument as follows:

Because the appellees' product (vitamins) was fungible and globally marketed, they were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well. Otherwise, overseas purchasers would have purchased bulk vitamins at lower prices either directly from United States sellers or from arbitrageurs selling vitamins imported from the United States, thereby preventing the appellees from selling abroad at the inflated prices. Thus, the super-competitive pricing in the United States "gives rise to" the foreign super-competitive prices from which the appellants claim injury.¹¹³

The D.C. Circuit rejected plaintiffs' alternate argument.¹¹⁴ While noting that plaintiffs had made a plausible case of "but for" causation linking anticompetitive effects in the United States (higher prices for vitamins) to plaintiffs' foreign injury, the court ruled that "but for" causation "is simply not sufficient to bring anti-competitive conduct within the FTAIA exception."¹¹⁵ Rather, the statutory language—"gives rise to"—demands a direct causal relationship between anticompetitive effects in the United States and injury suffered abroad.¹¹⁶ Accordingly, the appropriate standard under the FTAIA is proximate cause.¹¹⁷

The court reasoned that a proximate-cause standard was consistent with principles of prescriptive comity relied on by the Supreme Court in *Empagran I* under which ambiguous statutes must be construed narrowly so as to "avoid unreasonable interference with the sovereign authority of the other nations."¹¹⁸ Permitting jurisdiction to turn on a more lenient "but for" test would be inconsistent with prescriptive comity and open the door to interference with the prerogative of other nations "to safe-

111. See, *infra* notes 129-206 and accompanying text.

112. *Empagran I*, 124 S. Ct. at 2372.

113. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267, 1270 (D.C. Cir. 2005) (citing appellants' brief at 15-21) [hereinafter *Empagran II*].

114. *Id.* at 1270-71.

115. *Id.* at 1271.

116. *Id.*

117. *Id.*

118. *Id.*

guard their own citizens from anticompetitive activity within their own borders.”¹¹⁹

The court then found that plaintiffs had failed to meet the proximate-cause standard.¹²⁰ First, while higher prices in the United States may have facilitated defendants’ anticompetitive scheme to raise prices to foreign buyers, that alone establishes at most “but for” causation.¹²¹ Plaintiffs had failed to allege that the United States effects of defendants’ conduct proximately caused plaintiffs’ harm.¹²² In so holding, the court further stated that it was not enough for the plaintiffs to allege a global market in vitamins; the FTAIA requires plaintiffs to show that “the U.S. effects of the [defendant’s] conduct give rise to their claims.”¹²³ In this case, it was the *foreign* effects of defendants’ foreign conduct that directly gave rise to plaintiffs’ claims.¹²⁴ Moreover, proof that defendants could foresee the anticompetitive effect of their illegal conduct in the United States or of foreign purchases does not establish the requisite proximate cause.¹²⁵ Nor would it make any difference if defendants’ anticompetitive acts were intended to manipulate United States trade.¹²⁶ Given that the foreign injury caused by defendants’ conduct and the United States effects of defendants’ conduct cannot be directly linked, the foreign injury was not “inextricably bound up” with United States restraints of trade.¹²⁷ Thus, the judgment below was affirmed.¹²⁸

V. WHAT NEXT?

A. THE FTAIA

In the wake of the Supreme Court’s ruling in *Empagran I*, the D.C. Circuit’s about-face in *Empagran II* on the issue of subject matter jurisdiction is not surprising. As former Assistant Attorney General John Shenefield observed some five months before the decision on remand, the framework for any decision in *Empagran II* had been embedded like the da Vinci Code in *Empagran I*.¹²⁹ Even though the Court in *Empagran I* expressly limited its opinion to situations in which the adverse foreign effect is independent of any adverse domestic effect, the same concerns that drove the *Empagran I* decision compelled the identical result in *Empagran II* under plaintiffs’ alternative theory of “but for” causation.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. John H. Shenefield, Address at the New York State Bar Association Antitrust Section (Jan. 27, 2005).

As discussed,¹³⁰ the Supreme Court denied subject matter jurisdiction in *Empagran I* on two grounds: (1) under principles of prescriptive comity, ambiguous statutes should be construed so as to avoid conflicts with foreign law; and (2) the Sherman Act would not have reached the conduct in question before the FTAIA's enactment, and because the FTAIA was certainly not intended to expand the antitrust law's reach, the Sherman Act is inapplicable to the same conduct after the FTAIA's enactment.

Prescriptive comity concerns apply equally under plaintiffs' alternative theory. At issue are transactions consummated abroad by foreign plaintiffs. For United States courts to assert jurisdiction over these claims under an admittedly ambiguous statute would be to supplant foreign nations in their primary role of protecting their consumers and create precisely the kind of "unreasonable interference with the sovereign authority of other nations" that the Supreme Court said should be avoided.¹³¹ Opening the courthouse doors to foreign purchasers would amount to an act of "legal imperialism"¹³² that Congress did not intend, and that would undermine the antitrust enforcement policies and remedies of foreign sovereigns.

Likewise, concern in *Empagran I* about an overly expansive construction of the FTAIA applies with equal force to *Empagran II*. Clearly, plaintiffs' alternative theory would expand antitrust jurisdiction, since they have cited no decisions that upheld Sherman Act jurisdiction over foreign transactions on their revamped "but for" theory *before* the FTAIA's enactment.¹³³ Given that the FTAIA was not intended to expand Sherman Act jurisdiction, the inescapable conclusion is that the FTAIA does not permit Sherman Act jurisdiction or plaintiffs' "but for" theory. Similarly, the fact that there may be some linkage between foreign and domestic markets does not address concerns expressed by the Supreme Court and by the Antitrust Division that allowing United States courts to entertain claims by foreign plaintiffs based on foreign transactions would discourage applications for amnesty and thereby undermine the deterrent function of antitrust by making it more difficult to detect antitrust violations.¹³⁴ In short, a "but for" standard of causation for subject matter jurisdiction under the FTAIA does not address concerns about (1) comity, (2) deterrence under the United States antitrust laws, or (3) international antitrust enforcement, all of which were central to the rationale in *Empagran I*.

130. See *supra* notes 87-99 and accompanying text.

131. *Empagran I*, 124 S. Ct. 2359, 2366 (2004).

132. *Id.* at 2369.

133. The Court of Appeals in *Empagran II* pointed out that plaintiffs "acknowledged at oral argument . . . [that] 'but for' causation between domestic effects and the foreign injury claim is simply not sufficient to bring anti-competitive conduct within the FTAIA exception." *Empagran II*, 417 F.3d at 1267.

134. Transcript of Oral Argument at 18-19, *Empagran I*, 124 S. Ct. 2359 (No. 03-724), available at http://www.supremecourtus.gov/oral_argument/argument_transcripts/03-724.pdf.

What, then, should the causation standard be? Again, *Empagran I* contains the clue, pointing in the direction of a proximate-cause test. The Court cited *Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Engineering Co.*,¹³⁵ in which the district court permitted an Italian plaintiff to sue an American defendant based solely on an injury suffered abroad. According to the district court, United States jurisdiction was proper in that case because plaintiff's foreign injury was "inextricably bound up with the domestic restraints of trade."¹³⁶ The district court also concluded that plaintiff "was injured by reason of an alleged restraint of our trade."¹³⁷ Clearly, the quoted language suggests a proximate cause standard rather than a "but for" test.

Moreover, FTAIA's language itself strongly suggests a proximate-cause standard.¹³⁸ First, section 6a(1) requires that the foreign conduct have more than some spillover impact on the United States—it requires a "direct, substantial and reasonably foreseeable effect" on domestic commerce.¹³⁹ Section 6a(2) provides that foreign conduct's United States effect "gives rise to" claims by foreign plaintiffs.¹⁴⁰ The effect on domestic commerce, then, must be the proximate cause of the foreign plaintiff's injury. The impact on domestic commerce must follow "as an immediate consequence of defendant's activity."¹⁴¹ Incidental "but for" linkage between foreign and domestic markets does not suffice.¹⁴²

135. No. 75 CIV. 5828-CSH, 1977 WL 1353 (S.D.N.Y. 1977). *Industria Siciliana Asfalti Bitumi* is an obscure, unreported district-court decision that has taken center-stage in the debate over the limits the FTAIA has placed on Sherman Act jurisdiction in matters involving foreign commerce. Plaintiff ISAB was an Italian oil refiner that sought engineering services in connection with the construction of its refinery. *Id.* at *1. ISAB received bids from two American firms, Universal Oil Products Co. ("UOP") and Exxon Research & Engineering Co. ("ERE"), a subsidiary of Exxon Corp. *Id.* ISAB alleged unlawful coercive reciprocal dealing by ERE. *Id.* at *2. ISAB claimed that even though UOP's bid was nearly a million dollars lower ERE's bid, it had nevertheless been coerced into accepting the higher bid to obtain a more beneficial refining contract with ERE. *Id.* ERE moved to dismiss on standing grounds, alleging that ISAB was neither a competitor nor a customer in the United States domestic market. *Id.* at *3.

The court denied the motion, noting that two competitive evils are associated with reciprocity: foreclosure of rivals in a given market and anticompetitive forcing of a product or service on the buyer that the buyer did not want or wanted on different terms. *Id.* at *3-11. The court found that when coercion is present, the legal distinction between these two types of antitrust injuries disappear because the anticompetitive forcing flows directly from foreclosure of the market, rendering the two types of injuries indistinguishable. *Id.* at *10. Thus, the foreign injury is "inextricably bound up with the domestic restraints of trade which have enabled the defendant to enforce the reciprocal transaction upon the plaintiff." *Id.* at 11.

136. *Id.* (emphasis added).

137. *Id.* at 12.

138. 15 U.S.C. § 6a (2000).

139. *Id.* § 6a(1).

140. *Id.* § 6a(2).

141. *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (citing *Republic of Arg. v. Weltover, Inc.* 504 U.S. 607, 618 (1992)).

142. Although no court before *Empagran II* addressed "but for" causation in the FTAIA context and *Empagran II* itself cites precious little case law, courts have repeatedly held that "but for" causation is insufficient as a matter of law to prove the fact of injury. Courts have articulated the causation standard many ways, including "material cause of the injury," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969), injury

Nor, under the FTAIA, does the existence of an allegedly “globalized” market for a price-fixed product conclusively establish United States jurisdiction over foreign transactions. The conspirators’ ability to maintain supracompetitive prices in the United States might have facilitated defendants’ scheme to charge supracompetitive prices abroad. Even if that was the case, plaintiffs have still established at most “but for” causation—an indirect link between price levels in the United States and prices actually paid abroad—rather than the direct connection that the statute contemplates. In any event, it would be unwise as a policy matter to force district courts on a case-by-case basis to “ramble through the wilds of economic theory”¹⁴³ to determine both whether and the degree to which particular foreign and domestic markets are interlinked.

Second, as a policy matter, proof that foreign and domestic markets are interlinked in some way does not establish that a particular foreign plaintiff’s claim arose from an adverse effect on United States domestic commerce. Rejecting the reasoning of the D.C. Circuit in *Empagran* and the Second Circuit in *Kruman*, the Supreme Court made clear that the foreign plaintiff must establish that the conspiracy’s effect on United States commerce caused its injuries, and it is not enough to show that the conspiracy had harmed someone (other than the plaintiff) in the United States.¹⁴⁴

In the end, the reasoning of the D.C. Circuit and the Second Circuit proves too much and would render jurisdictional limitations meaningless. A simple hypothetical demonstrates the flaw in these courts’ rationales. Assume there is a worldwide conspiracy to fix the price of vitamins. All the conspirators are foreign companies who sell vitamins in the United States and elsewhere throughout the world. A foreign plaintiff who purchased allegedly price-fixed vitamins abroad sues in the United States courts. If the effects in the United States “give rise” to the foreign plaintiff’s claim because the market is “globalized,” then the effects in Japan or Germany would also “give rise” to the same plaintiff’s claim in those countries. Defendants would then be subject to jurisdiction on this same claim in courts throughout the world. Such a result simply makes no sense because it would render international boundaries meaningless.¹⁴⁵

“not shown to be attributable to other causes,” *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), and “substantial” cause of the injury, *Motive Parts Warehouse v. Facet Enter.*, 774 F.2d 380, 389 (10th Cir. 1985). While the formulations vary, the bottom line is the same—the test for fact of injury is more rigorous than simple “but for” causation. See 2 PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶ 338a, at 317-21 (2d ed. 2000) (saying antitrust violation must be “substantial” and “material cause” of plaintiff’s injury).

143. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 n.10 (1972).

144. *Empagran I*, 124 S. Ct. 2359, 2371-72 (2004).

145. As the Court in *Empagran I* asked rhetorically: “[w]hy should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in [in] significant part by Canadian or British or Japanese or other foreign companies?” *Id.* at 2367.

In short, John Shenefield was right—the blueprint for the decision in *Empagran II* already existed in *Empagran I*. It seems implausible that a unanimous Court, after undertaking a detailed analysis of the policies underlying the FTAIA and after concluding that jurisdiction was lacking, would have remanded the matter to the circuit court with the expectation of a different result. Rather, it is more likely that the Supreme Court was simply giving the D.C. Circuit a roadmap to correct its error and save face.

The early returns support the Shenefield position. In *Sniado v. Bank Austria AG*,¹⁴⁶ the Second Circuit, after the Supreme Court's grant of certiorari and remand with instructions to review its earlier decision upholding jurisdiction in light of *Empagran*,¹⁴⁷ vacated its prior order and affirmed the district court's dismissal of the complaint. Plaintiff in *Bank Austria*, an American citizen, had alleged that (1) he had been charged supracompetitive fees to exchange Euro-zone currencies and (2) the excessive fees at issue, all of which had been paid in Europe, had been caused by an illegal price-fixing conspiracy among European banks.¹⁴⁸ Plaintiff sought to walk into United States court through the door left open in *Empagran* by arguing that his injury in Europe depended on the foreign conspiracy's effect on domestic commerce.¹⁴⁹ Nevertheless, the Second Circuit ruled that "plaintiff's amended complaint, liberally construed to the outer limits of reasonableness," failed to support his arguments for exercising jurisdiction.¹⁵⁰ Specifically, the complaint failed to allege that currency-conversion fees had reached supra-competitive levels in the United States.¹⁵¹ Nor did it allege that the foreign conspiracy's adverse effect on domestic commerce was the "but for" cause of his injury in Europe.¹⁵² The court also found that attempts to allege that the injury suffered in Europe depended on the foreign conspiracy's adverse effect on domestic commerce were "too conclusory to avert dismissal."¹⁵³ The court further pointed out that the district court was right to rule that, under section 6a(2) of the FTAIA, the foreign conspiracy's adverse effect on domestic commerce must give rise to this particular plaintiff's claim and not someone else's claim.¹⁵⁴

In *BHP New Zealand Ltd. v. UCAR International, Inc.*,¹⁵⁵ which involved an alleged worldwide cartel to fix prices and allocate territories for graphite electrodes, the Third Circuit, following *Empagran*, vacated a district court order that dismissed claims based on foreign purchases but upheld claims based on sales that had been invoiced in the United States.

146. 378 F.3d 210 (2d Cir. 2004).

147. *Bank Aus. AG v. Sniado*, 124 S. Ct. 2870, 2871 (2004).

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

149. *Id.*

150. *Id.* at 213.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 212.

155. 106 Fed. App'x. 138 (3d Cir. 2004).

The Third Circuit ruled that the district court, “should it deem it necessary or helpful, may give the parties the opportunity to present evidence as to whether the alleged anticompetitive conduct’s domestic effects were linked to the alleged foreign harm.”¹⁵⁶

On the other hand, the court in *MM Global Services, Inc. v. Dow Chemical Co.*¹⁵⁷ upheld Sherman Act jurisdiction in the wake of *Empagran I*. Plaintiffs, distributors of defendant’s chemical products to end-users in India, alleged that defendant imposed resale price maintenance on their sales in India to protect against price erosion in the United States and other countries.¹⁵⁸ Defendant sought dismissal, arguing that under *Empagran*, a foreign plaintiff must show that the anticompetitive effects on domestic commerce gave rise to their injuries, whereas in this case plaintiffs were arguing the opposite—that their foreign injuries had an effect on domestic commerce.¹⁵⁹ Misreading the Supreme Court, the district court agreed with the plaintiffs that nothing in *Empagran I* precluded Sherman Act jurisdiction over “domestic effects ‘flowing’ to and from foreign effects” and denied defendant’s motion to dismiss.¹⁶⁰

Sherman Act jurisdiction by foreign purchasers in foreign transactions was also upheld in *In re Monosodium Glutamate Antitrust Litigation*.¹⁶¹ In that case, plaintiffs alleged that defendants were part of a global conspiracy to fix the price of and allocate markets for monosodium glutamate (“Monosodium Glutamate”).¹⁶² Plaintiffs contended that the global conspiracy “exerted direct and substantial effects on United States trade and commerce” by inflating prices paid by purchasers in the United States.¹⁶³ Plaintiffs’ theory was essentially a carbon copy of that presented in *Empagran II*:

According to Plaintiffs, Defendants fixed United States prices and controlled United States markets not merely to capture cartel profits in the United States, but also to allow the cartel to be effective anywhere in the world. Because Monosodium Glutamate and nucleotides are fungible commodities, Defendants and their co-conspirators allegedly “knew that their conspiracy would not succeed unless they coordinated their prices and market shares in markets across the world.” Thus, Defendants allegedly included the United States in the cartel precisely to extract cartel profits from purchasers around the world without risk of arbitrage.¹⁶⁴

Plaintiffs’ alleged injury is that they purchased overpriced Monosodium Glutamate and nucleotides abroad because Defendants’ unlawful con-

156. *Id.* at 143.

157. 329 F. Supp. 2d 337 (D. Conn. 2004).

158. *Id.* at 339.

159. *Id.* at 342.

160. *Id.* at 342-43.

161. No. Civ. 00MDL1328(PAM), 2005 WL 1080790 (D. Minn. May, 2, 2005).

162. *Id.* at *1.

163. *Id.*

164. *Id.* (internal citations omitted).

spiracy prevented them from buying competitively priced Monosodium Glutamate and nucleotides from the United States.

In addition, plaintiffs alleged that their injuries abroad were “inextricably intertwined with the injury that defendants inflicted on the United States market” in that the supracompetitive prices paid in the United States were “directly and substantially linked with the prices plaintiffs paid” abroad and that defendants’ illegal conduct deliberately prevented plaintiffs from purchasing Monosodium Glutamate in the United States¹⁶⁵

Accepting all these allegations as true, the court upheld subject matter jurisdiction under the Sherman Act and declined to dismiss the complaint.¹⁶⁶ In ruling as it did, the court erred in at least four respects. First, as the D.C. Circuit held in *Empagran II*, allegations establishing that United States and foreign markets are interlinked on pricing establishes at most “but for” causation and fails to meet the more stringent proximate-cause standard that the statute requires.¹⁶⁷

Second, the court misconceived the meaning of the phrase “foreign injury that is inextricably bound up with domestic restraints of trade.”¹⁶⁸ The *Monosodium Glutamate* court used that phrase to mean simply that United States prices are interlinked with prices abroad.¹⁶⁹ Justice Breyer in *Empagran I* had something else in mind in using this terminology: foreign injury is inextricably bound up with domestic restraints of trade when the foreign conduct harms domestic plaintiffs and the adverse domestic effects directly cause the harm suffered by foreign plaintiffs.¹⁷⁰ In *Industria Siciliana Asfalti*, for example, the foreign injury was “inextricably bound up with domestic restraints of trade because a reciprocal tying agreement effected the exclusion of the American rival of one defendant [from Italy], resulting in higher prices [to the foreign plaintiffs].”¹⁷¹

Third, the court found that United States courts must entertain anti-trust claims of foreign plaintiffs to assure an adequate level of deterrence against international cartel behavior.¹⁷² That view is clearly at odds with the Supreme Court’s holding in *Empagran I* that, under principles of prescriptive comity, American courts should avoid potential interference with the sovereign authority of other nations.¹⁷³

Fourth, in upholding the complaint, the court in *Monosodium Glutamate* focused on the fact that the complaint alleged that foreign injury is “inextricably intertwined” with domestic injury and that the domestic anticompetitive effect and a direct causal relationship with foreign injury.¹⁷⁴

165. *Id.* at *4.

166. *Id.* at *1, 8.

167. *See id.* at *3.

168. *See id.*

169. *See id.*

170. *See Empagran II*, 417 F.3d 1267, 1268-69 (D.C. Cir. 2005).

171. *Id.*

172. *Monosodium Glutamate Antitrust Litig.*, 2005 WL 1080790, at *7.

173. *Empagran I*, 124 S. Ct. 2359, 2366 (2004).

174. *Monosodium Glutamate Antitrust Litig.*, 2005 WL 1080790, at *7.

While it is true that on a motion to dismiss a court should accept as true the allegations in the complaint,¹⁷⁵ it is also true that a court need not accept mere conclusory allegations not supported by underlying facts.¹⁷⁶ *Empagran I* dealt directly with the issue of subject matter jurisdiction; it was not a pleading case wherein one could cure defective allegations of jurisdiction simply by invoking a talismanic phrase. Were that the case, motions to dismiss would cease to be useful litigation tools. Courts may not honor form over substance in adjudicating Rule 12 motions.

B. STANDING

In addition to establishing subject matter jurisdiction, a foreign plaintiff suing on a foreign transaction must show that it has standing to prosecute an antitrust claim in federal court. The standing question is conceptually separate from the question of subject matter jurisdiction, and courts have recognized that a finding of subject matter jurisdiction does not foreclose a challenge on standing grounds.¹⁷⁷ Still, the standing issue in the context of foreign claimants has not received the attention it deserves. The case law on the standing of foreign plaintiffs to sue under the FTAIA is sparse, and it is noteworthy that the Supreme Court studiously avoided the issue in *Empagran I*.¹⁷⁸ The standing question is no less difficult than the issue of subject matter jurisdiction. Standing analysis requires that courts examine the fundamental goals and limits of antitrust enforcement to assure that the antitrust laws are used to address only those problems that Congress intended to resolve.¹⁷⁹ That task's complexity may explain why courts have generally been reluctant to tackle the standing issue and particularly why the Supreme Court and the D.C. Circuit declined to enter the fray in *Empagran I* and *Empagran II* respectively.

Like subject matter jurisdiction, standing is a threshold question in any antitrust suit. Antitrust standing is governed by section 4 of the Clayton

175. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

176. See, e.g., *Spanish Broad. Sys. v. Clear Channel Comm'n, Inc.*, 376 F.3d 1065, 1078 (11th Cir. 2004) ("Conclusory allegations that the defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief.") (internal quotations omitted).

177. *Empagran S.A. v. F. Hoffman LaRoche, Ltd.*, 315 F.3d 338, 357-58 (D.C. Cir. 2003), *vacated*, 124 S. Ct. 2359 (2004).

178. *Empagran I*, 124 S. Ct. at 2359. Similarly, the D.C. Circuit in *Empagran II* declined to address the standing issue. *Empagran II*, 417 F.3d 1267, 1267 n.4 (D.C. Cir. 2005).

179. In *HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877 (6th Cir. 1991), the Court stated:

Antitrust standing . . . is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws. The requirement of anti-trust standing ensures that antitrust litigants use the laws to prevent anticompetitive action and makes certain that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense. Antitrust laws reflect considered policies regulating economic matters. The antitrust standing requirement makes certain that the laws are used only to deal with the economic problems whose solutions these policies were intended to effect.

See AREEDA, *supra*, note 142, at ¶ 337, at 305-06.

Act,¹⁸⁰ which provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”¹⁸¹ Notwithstanding the Clayton Act’s breadth, courts have repeatedly held that the antitrust laws will not remedy all “foreseeable ripples of injury which may be shown to reach individual employees, stockholders or consumers.”¹⁸² In *Blue Shield of Virginia v. McCready*, the Supreme Court stated that an “antitrust violation may be expected to cause ripples of harm to flow through the Nation’s economy; but despite the broad wording of § 4, *there is a point beyond which the wrongdoer should not be held liable.*”¹⁸³ Accordingly, courts will not permit antitrust plaintiffs whose claims are derivative, remote, or consequential to proceed.¹⁸⁴

The key tasks in the standing investigation are locating the boundaries beyond which recovery will not be permitted and determining whether the particular antitrust plaintiff before the court falls outside those boundaries. Courts have struggled with these tasks. Over the years, the lower courts have developed several bright-line tests for antitrust standing. The earliest standard, created by the Third Circuit, was the direct-injury test, a tort-based proximate-cause rule.¹⁸⁵ Later, the Ninth Circuit introduced the “target area” test under which a plaintiff must show it was “within that area of the economy . . . endangered by a breakdown of competitive conditions” and that the illegal practices were aimed at it.¹⁸⁶ A similar standard, denominated the zone-of-interest test, was developed by the Sixth Circuit.¹⁸⁷ Rethinking its earlier standard, the Third Circuit introduced a multifaceted factual-matrix test in 1976.¹⁸⁸

Although the Supreme Court acknowledged these various standing tests, it declined to endorse any of them.¹⁸⁹ Nor did it provide any significant guidance on antitrust standing until its 1983 decision in *Associated General Contractors*.¹⁹⁰ In that case, the Court eschewed the litmus tests developed by various circuits and enunciated a multifaceted standard. The Court said that antitrust standing turns on an analysis of five factors: (1) the causal connection between the antitrust violation and the harm to

180. 15 U.S.C. § 15 (2000).

181. *Id.*

182. *See, e.g.,* *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970).

183. 457 U.S. 465, 476-77 (1982) (internal citations omitted) (emphasis added).

184. *Id.*

185. *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910).

186. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 362 (9th Cir. 1955) (internal quotations omitted); *see also* *Calderone Enters. Corp. v. United Artist Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

187. *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1148 (6th Cir. 1975).

188. *Cromar Co. v. Nuclear Materials Corp. & Equip.*, 543 F.2d 501, 506 (3d Cir. 1976).

189. *Blue Shield of Cal. v. McCready*, 457 U.S. 465, 477 n.12 (1982) (“We have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury.”).

190. *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983).

the plaintiff and whether the harm was intended; (2) the nature of the injury, including whether the plaintiff was a consumer or competitor in the relevant market; (3) the directness of the injury and whether the damages are too speculative; (4) the likelihood of duplicative recovery; and (5) whether there are more direct victims.¹⁹¹

In formulating this multifaceted test, the Court drew heavily on its earlier decisions in *Brunswick*¹⁹² and *Illinois Brick*.¹⁹³ In *Brunswick*, the Supreme Court held that to recover under the antitrust laws, a plaintiff must establish more than a violation of the antitrust laws and a causal nexus between that violation and the alleged injuries.¹⁹⁴ The plaintiff must prove “antitrust injury,” that is, “injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] acts unlawful.”¹⁹⁵ In *Brunswick*, plaintiffs were operators of bowling alleys who claimed that defendant’s acquisition of a defunct rival was unlawful and that because defendant had operated the defunct rival, plaintiffs made less money than they would have made but for the illegal acquisition.¹⁹⁶ The Supreme Court held that, even though defendants might have violated the antitrust laws and that violation might have injured plaintiffs, plaintiffs still could not recover because they had not suffered antitrust injury.¹⁹⁷ Plaintiffs’ profits did decline, but the decline was due to enhanced competition, not due to any conduct that violated the antitrust laws.¹⁹⁸

A corollary to the antitrust injury doctrine is that a party, to sue under the antitrust law, must show that it was a competitor or consumer in the market that the antitrust violation affected.¹⁹⁹ The antitrust laws are designed to “assure customers the benefits of price competition and . . . [to protect] the economic freedom of participants in the relevant market.”²⁰⁰ Consequently, if a plaintiff is neither a competitor nor a consumer in the market in which trade was restrained, it is outside the protection of the antitrust laws.²⁰¹

In addition, the third, fourth, and fifth factors in the *Associated General Contractors* standing formulation are borrowed from the Supreme Court’s decision in *Illinois Brick*.²⁰² There, the Supreme Court held that only those purchasing directly from price-fixers, and not others in the chain of distribution, may sue for treble damages under the Clayton

191. *Id.* at 537-44.

192. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

193. *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

194. *Brunswick Corp.*, 429 U.S. at 489.

195. *Id.* at 488.

196. *Id.*

197. *Id.* at 490.

198. *Id.*

199. *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983); *see Bhan v. NME Hosp., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1958).

200. *Galavan Supplements Ltd. v. Archer Daniels Midland Co.*, No. C 97-3259 FMS, 1997 WL 732498, at * 3 (N.D. Cal. 1997) (internal quotations omitted).

201. *Id.*

202. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 737 (1977).

Act.²⁰³ The Court observed that direct purchasers were the most efficient enforcers of the antitrust laws and, unlike indirect purchasers, would not be saddled with the enormous burden of tracing overcharges through the chain of distribution.²⁰⁴ In turn, limiting suits to direct purchasers would ease the burdens on the courts which would not have to deal with “massive evidence and complicated theories” that would increase the overall cost of antitrust litigation and reduce its net benefits.²⁰⁵ The Court also expressed reservations about permitting a class of purchasers remote from the wrongdoers to proceed when a directly affected group of plaintiffs existed.²⁰⁶ Finally, permitting indirect purchasers to sue would encourage plaintiffs to assert speculative damage claims and create the possibility of duplicative liability for defendants.²⁰⁷ At the very least, the fact finder would have to make a complex apportionment of damages.²⁰⁸

Applying the five-factor test to the record facts in *Associated General Contractors*, the Supreme Court concluded that the plaintiffs in that case lacked standing. At the same time, the Court recognized that a “number of other factors may be controlling” on the issue of antitrust standing.²⁰⁹ Thus, the standing requirement exists independently of any legal test, and it is important to remember that the goal of the standing analysis is to determine whether a particular plaintiff is outside the zone of protection of the antitrust laws and not the application of a test per se.²¹⁰ Other factors relevant to the standing analysis under *Associated General Contractors* include the core policy goals of the antitrust laws.²¹¹ The Sherman Act is intended to protect consumers and competitors participating in American markets.²¹² In enacting the FTAIA, Congress did not intend to enlarge the doctrine of standing to encompass foreign purchasers participating in foreign markets.²¹³

In addition, the Supreme Court in *Associated General Contractors* invites courts to consider the judicial burden imposed by “massive and complex damages litigation.”²¹⁴ Allowing foreign plaintiffs suing on foreign transactions to proceed in federal court rather than in a foreign venue would result in a massive number of foreign antitrust actions being filed in the United States. These foreign claims are likely to be supported by equally massive and complex foreign evidence.

203. *Id.* at 735.

204. *Id.*

205. *Id.* at 745.

206. *Id.*

207. *Id.* at 730.

208. *See Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983).

209. *Id.* at 538.

210. *See In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 716 (D. Md. 2001).

211. *Associated Gen. Contractors, Inc.*, 459 U.S. at 538.

212. *Id.*

213. H.R. REP. NO. 97-686, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N.

214. *Associated Gen. Contractors, Inc.*, 459 U.S. at 545 (citing *Illinois Brick Co. v. Illinois*, 432 U.S. 720, 737 (1977)).

The case law addressing standing of foreign purchasers is sparse. Whether a foreign plaintiff suing under the United States antitrust laws based on transactions abroad has standing presents a unique question. The usual antitrust standing question involves claims by a plaintiff whose antitrust injuries are derivative or remote. For example, a defendant's antitrust drives a company from the field. The company's employees, shareholders, creditors, and officers are all denied antitrust standing because their injury is derivative of that suffered by the company.²¹⁵ Accordingly, the company is the only victim with antitrust standing.

In foreign-purchaser cases, that sort of remoteness or derivativeness does not arise. Often, the foreign plaintiff purchases directly from the wrongdoers. In such cases, derivativeness or remoteness comes into play not because the foreign plaintiff is remote from the wrongdoer in the distribution chain but because the foreign plaintiff is not a participant in the United States market. Any injury suffered abroad is at best remote from, or indirectly linked to, the United States market.

Not all courts agree with the foregoing analysis. For example, the D.C. Circuit in *Empagran I*, upheld the standing of foreign plaintiffs buying outside of the United States:

the antitrust laws forbid the fixing of prices in foreign markets where that conduct harms United States commerce. Where defendants' global conspiracy harms United States commerce, the mere fact that the foreign purchasers bought vitamins solely in foreign markets does not mean that the foreign purchasers lack standing to sue.²¹⁶

In so ruling, the D.C. Circuit partly relied on its analysis of the FTAIA: "the arguments that have already persuaded us that . . . FTAIA allows foreign plaintiffs . . . to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here."²¹⁷ In particular, the court found that the House Report accompanying the FTAIA made no distinction between foreign and domestic consumers, as long as there is a direct, substantial, and reasonably foreseeable effect on domestic commerce: "foreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace, just as our citizens do."²¹⁸

That expansive reading of the FTAIA, however, was specifically rejected by the Supreme Court in *Empagran I*.²¹⁹ The Supreme Court emphasized that before the FTAIA's enactment, no cases supported the right of a foreign plaintiff involved in a foreign transaction to sue under the Sherman Act.²²⁰ The Court further observed that the FTAIA was not

215. See *Reibert v. Atl. Richfield Co.*, 471 F.2d 727 (10th Cir.), cert. denied, 411 U.S. 938 (1973).

216. 315 F.3d at 358.

217. *Id.* at 359.

218. *Id.* at 356 (quoting H.R. REP. NO. 97-686, at 10) (emphasis added).

219. *Empagran I*, 124 S. Ct. 2359, 2371 (2004).

220. *Id.*

intended to expand Sherman Act jurisdiction.²²¹ Given that the FTAIA did not extend the substantive coverage of the Sherman Act, it follows that the FTAIA cannot be read to expand the class of private plaintiffs with standing to sue for treble damages under the Clayton Act.²²² To the extent the D.C. Circuit's standing analysis derived from a similar analysis of the jurisdictional issues under the FTAIA, it does not survive the Supreme Court's ruling in *Empagran I*. For the same reason, the decision in *Monosodium Glutamate* upholding standing of foreign plaintiffs is at odds with the Supreme Court's ruling in *Empagran I* and is therefore erroneous. The plaintiffs in *Monosodium Glutamate* made the same "but for" argument as the plaintiffs in *Empagran I*.²²³ However, "but for" causation is not sufficient to confer standing.²²⁴ Nor does the fact that plaintiffs were "direct purchasers" of allegedly price-fixed goods confer standing.²²⁵ Plaintiffs in *Monosodium Glutamate* did not participate in the United States market and thus may not avail themselves of the United States antitrust laws' protections.²²⁶

In addition, the D.C. Circuit in *Empagran I* concluded that the foreign plaintiffs had standing under the *Associated General Contractors* test.²²⁷ The court concluded that foreign purchasers who had bought priced-fixed vitamins directly from defendants engaged in a global conspiracy had been injured within the meaning of the Clayton Act.²²⁸ The circuit court then found that the foreign purchasers were proper plaintiffs because none of the *Associated General Contractors* factors were disqualifying.²²⁹ That approach, however, is precisely the kind of knee-jerk standing analysis that *Associated General Contractors* sought to avoid.

First, the fact of injury merely begins and does not end the standing inquiry.²³⁰ Second, as discussed above,²³¹ the Court in *Associated General Contractors* acknowledged that other factors in addition to those specifically articulated in *Associated General Contractors* may control the standing analysis. The D.C. Circuit did not consider whether permitting foreign plaintiffs involved in foreign sales standing to sue would conflict with the core mission of the antitrust laws to preserve the freedom of domestic markets. Nor did the court account for the likelihood that its ruling will encourage a massive influx of foreign antitrust claims into federal courts that will clog dockets and bog down the federal civil-justice system.

221. *Id.*

222. *Id.*

223. *In re Monosodium Glutamate Antitrust Litig.*, No. Civ. COMDL1328(PAM), 2005 WL 1080790, at *8 (D. Minn. May 2, 2005).

224. *See supra* notes 187-204 and accompanying text

225. *See Monosodium Glutamate Antitrust Litig.*, 2005 WL 1080790, at *7.

226. *See supra* notes 208-09 and accompanying text.

227. *Empagran S.A. v. F. Hoffman LaRoche, Ltd.*, 315 F.3d 338, 358 (D.C. Cir. 2003).

228. *Id.*

229. *Id.* at 359.

230. *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983).

231. *See supra* notes 168-73 and accompanying text.

In upholding a foreign purchaser's standing to sue under the antitrust laws on a foreign transaction, both the D.C. Circuit in *Empagran I* and the trial court in *Monosodium Glutamate* are at odds with decisions reached in *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*²³² and *In re Microsoft Corp. Antitrust Litigation*.²³³ In *Galavan*, the court held that while the foreign plaintiff properly alleged subject matter jurisdiction under the FTAIA, it nevertheless lacked standing to sue under the Clayton Act.²³⁴ Even though the plaintiff claimed to have been injured by elevated prices of citric acid, it was outside the protection of the antitrust laws because it was "neither a competitor nor a consumer in the United States domestic market."²³⁵ The court reasoned that "Congress did not intend recovery under the antitrust laws by an individual who traded and was injured, entirely outside of United States commerce."²³⁶ The court stressed that the standing doctrine requires the antitrust plaintiff to show the alleged injury is related to defendant's anticompetitive behavior and, "as a corollary, that the injured party be a participant in the same market as the alleged malefactors."²³⁷

Nor could plaintiffs' complaint be saved by allegations that defendant's conduct had adversely impacted both the world-wide market and the United States domestic market.²³⁸ The court ruled that the "antitrust laws do not extend to protect foreign markets from anticompetitive effects."²³⁹ Since plaintiff purchased the citric acid outside the United States and was neither an importer nor exporter in trade with the United States, it was outside the antitrust laws' protection.²⁴⁰

In *In re Microsoft Corp. Antitrust Litigation*, Judge Motz embraced the reasoning of the *Galavan* court and, in dismissing the claims of foreign defendants on standing grounds, concluded that a plaintiff who has not participated in the United States domestic market may not claim the protection of the Sherman Act.²⁴¹

In addition, Judge Motz's analysis of the legislative history of the FTAIA is instructive on the standing issue. Careful analysis of that legislative history reveals that Congress did not intend to permit all foreign consumers injured by alleged antitrust violations to sue under the Sherman Act.²⁴² Although the legislative history says that foreign purchasers may be protected under the Sherman Act even if they "take title abroad and suffer injury abroad," nowhere does that same legislative history say

232. No. C 97-3259, 1997 WL 732498 (N.D. Cal. 1997).

233. 127 F. Supp. 2d 702 (D. Md. 2001).

234. *Galavan Supplements, Ltd.*, 1997 WL 732498, at *3-4.

235. *Id.* at *4.

236. *Id.* (quoting *De Atucha v. Commodity Exch., Inc.* 608 F. Supp. 510, 518 (S.D.N.Y. 1985)).

237. *Galavan Supplements, Ltd.*, 1997 WL 732498, at *4 (internal quotations omitted).

238. *Id.*

239. *Id.* (internal quotations omitted).

240. *Id.* at *4 n.2.

241. *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001).

242. *Id.* at 715.

that a foreign plaintiff may sue if it “actually makes the purchase abroad and does not otherwise participate in a [United States] market.”²⁴³

Thus, participation in the United States market is crucial to establishing antitrust standing:

Although this distinction may seem legalistic, it is significant. The concept that a purchaser may take title or suffer injury at a place different from the place where he engages in the sale transaction is well known to the law. However, by using language embodying that concept, the legislative history reflects that Congress was proceeding from the premise that, wherever title is taken or economic injury is suffered, at least some aspect of the sales transaction took place in the United States. Any doubt on that score is resolved the next-to-last quoted sentence which states that “[f]oreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.” Nothing is said about protecting foreign purchasers in foreign markets.²⁴⁴

I therefore have no difficulty in concluding that foreign consumers who have not participated in any way in the United States markets have no right to institute a Sherman Act claim. Accordingly, whether the issue is viewed as one of subject matter jurisdiction or standing, foreign purchasers who have not participated in the United States market may not sue under the antitrust laws.²⁴⁵

The late Professor Phillip Areeda has suggested the following framework for analyzing antitrust standing:

. . . clear thinking about standing usually begins with injury in fact, then with the theory by which that injury can be caused by alleged acts violating the antitrust laws, then with issues of proximity emphasized here, and, finally, with antitrust injury. In addition, the claimed damages must be reasonably measurable. . . .²⁴⁶

The first question under the Areeda framework is whether foreign plaintiffs purchasing abroad have in fact been injured. Foreign plaintiffs purchasing price-fixed goods from the alleged malefactors will invariably meet this test. However, as the Supreme Court pointed out in *Associated General Contractors*, “the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry.”²⁴⁷

The second question under the Areeda framework raises the issue of proximate cause. At first blush, it appears an open-and-shut case that foreign plaintiffs purchasing outside the United States market cannot show that illegal price fixing in the United States proximately caused their injury. Foreign plaintiffs seek to overcome this hurdle by claiming that their purchases were made and their injuries incurred in a “global

243. *Id.* (internal quotations omitted).

244. *Id.*

245. *Id.* at 716.

246. AREEDA ET AL., *supra* note 142, ¶ 339, at 338.

247. *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983).

market” that included the United States.²⁴⁸ Plaintiffs attempt to support their global-market argument by proffering an arbitrage theory, asserting that “defendants’ cartel would have been unsustainable if the United States had been excluded from it” because plaintiffs would have purchased vitamins either in the United States or from “arbitrageurs selling vitamins [that they had] imported from the United States.”²⁴⁹ Plaintiffs thus argue that they would not have been hurt “but for” the fact that the vitamin cartel included the United States. Therefore, the foreign plaintiffs urge that they have standing.

The “but for” argument is fatally flawed. The test for antitrust standing has always been proximate cause; the less rigorous “but for” causation standard has never been viewed as sufficient to confer standing.²⁵⁰ A plaintiff’s “but for” approach would open the United States courts to a flood of foreign claimants’ alleging that foreign restraints that injured them could not have occurred “but for” the worldwide conspiracy. It posits that vitamins have just one relevant “global market.” That is not the case, though. Any “global market” is an aggregation of national markets. Whether and the degree to which these national markets are interlinked to form one world-wide market depends on the amount of arbitrage activity; and that inquiry raises complex economic issues. As the Supreme Court stated in *Empagran I*, federal courts must be able to make threshold decisions about the applicability of antitrust statutes “simply and expeditiously” without a “legally and economically technical . . . enterprise” that may lead to lengthier and more expensive proceedings.²⁵¹ It is too difficult for the courts to assess the interconnection of national markets without resorting to speculation and guesswork. Any injury suffered by foreign plaintiffs abroad is simply too remote from the illegal conduct in the United States to allow for standing, because there are too many links between the illegal conduct in the United States and the foreign injury.²⁵² Simply put, a plaintiff’s theory of arbitrage is not sufficient to connect the dots to establish a defendant’s wrongdoing as the proximate cause of any injury to a foreign plaintiff cognizable under the antitrust laws.

On this issue, the *de Atucha*²⁵³ case is instructive. Plaintiff lost money speculating in silver futures on the London Metal Exchange.²⁵⁴ He claimed that his losses were due to the action of the Hunt brothers in the United States, who caused silver prices to rise and then to fall significantly by “dumping” their interests.²⁵⁵ Nevertheless, he sued various

248. See, e.g., *Galavan Supplements Ltd. v. Archer Daniels Midland Co.*, No. C 97-3259, 1997 WL 752498 (N.D. Cal. 1997).

249. Brief for the Plaintiffs, at 10, 20, *Empagran S.A. v. F. Hoffman LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003).

250. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477-78 (1982).

251. *Empagran I*, 124 S. Ct. 2359, 2369 (2004).

252. See AREEDA ET AL., *supra* note 142, ¶ 339a-b, at 326-27.

253. *de Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510 (S.D.N.Y. 1985).

254. *Id.* at 513.

255. *Id.* at 512.

American exchanges and clearinghouses alleging that they had failed to stabilize silver prices.²⁵⁶ Even though plaintiff had not traded in the United States, he alleged that the American prices and London prices were interdependent.²⁵⁷ The court denied standing:

[De Atucha]'s theory of antitrust injury depends upon a complicated series of market interactions between the two [silver markets]: the [United States market] in which defendants acted and the [London Metals Exchange] on which [de Atucha] allegedly sustained injuries. To establish a causal chain, the actions of innumerable individual decision-makers must be reconstructed. Indeed, to find antitrust damages in this case would engage the court in hopeless speculation concerning the relative effect of an alleged conspiracy in the [United States silver futures] market on the price of [LME silver forwards], where countless other market variables could have intervened to affect those pricing decisions.²⁵⁸

Third, concerns about the directness of a foreign plaintiff's injury are closely related to concerns about proximate cause. Foreign purchasers in *Empagran I* bought directly from the defendants.²⁵⁹ Accordingly, they are indirect not in the sense that they purchased from intermediaries but in the sense that a more efficient class of plaintiffs—United States purchasers—exists to enforce the antitrust laws. In *Empagran I* itself, domestic purchasers pursued defendants vigorously and obtained settlements in excess of two billion dollars.²⁶⁰ To permit foreign purchasers to sue in the face of the large number of domestic plaintiffs who have actually sued and recovered would be a form of economic piling-on and would be inconsistent with the rationale of *Illinois Brick*.²⁶¹

The same concerns are relevant when considering the standing of foreign plaintiffs suing on foreign transactions. Issues of economic linkage between national markets would complicate, weigh down, and prolong litigation. Domestic purchasers are better situated to sue because they need not show that linkage and hence lack the baggage that foreign plaintiffs would bring to American courtrooms. Moreover, permitting such foreign plaintiffs to sue would expose defendants to potentially massive amounts of liability, far beyond that contemplated by the antitrust laws, and would be speculative in nature.

Fourth, the foreign plaintiffs cannot prove antitrust injury. Foreign plaintiffs purchasing abroad are outside the protection of the antitrust laws because they are not competitors or consumers in marketplaces that the Sherman Act protects.²⁶² The Sherman Act protects participants in

256. *Id.*

257. *Id.* at 513-14.

258. *Id.* at 515-16 (internal quotations omitted).

259. *Empagran S.A. v. F. Hoffman LaRoche, Ltd.*, 315 F.3d 338, 342 (D.C. Cir. 2003).

260. Janet L. McDavid & Shane Anderson, *The Empagran Decision*, NAT'L L.J., July 12, 2004, at 12.

261. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 734 (1977).

262. *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C 97-3259 FMS,, 1997 WL 732498, at *4 (N.D. Cal. 1997).

the domestic and foreign commerce of the United States. Foreign purchasers buying abroad are by definition not participants in the domestic commerce of the United States.²⁶³ Similarly, foreign purchasers who are neither exporters nor importers in trade with the United States are not engaged in the foreign commerce of the United States.²⁶⁴ As the court in *de Atucha* observed, "Congress did not intend recovery under the anti-trust laws by an individual who traded, and was injured entirely outside of United States commerce."²⁶⁵

The D.C. Circuit in *Empagran I* reasoned that permitting foreign plaintiffs injured outside the United States to sue in American courts is justified because such suits will enhance deterrence.²⁶⁶ While that argument may have some visceral appeal, closely analyzing deterrence concerns casts considerable doubt on its validity. Deterrence may well be enhanced by adding more plaintiffs. More, however, is not necessarily better. As the Justice Department in its amicus brief before the Supreme Court pointed out, adding foreign plaintiffs may in fact lessen deterrence by discouraging defendants from self-reporting antitrust violations and then seeking amnesty.²⁶⁷ Although a grant of amnesty can shield the defendant of criminal prosecutions, it cannot bar private actions against that same person. Potentially massive civil liability, made even greater by the presence of foreign purchasers, may discourage self-reporting, which, in turn, may leave serious antitrust violations undetected.²⁶⁸ Similarly, the Supreme Court recognized that the deterrence argument cuts both ways but concluded that plaintiffs' position was unpersuasive: "the answer to the dispute is neither clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion."²⁶⁹

In short, the net effect of foreign suits on deterrence is at best uncertain. Even if deterrence were promoted by allowing foreign suits, there remains a serious question whether deterrence is even a proper concern in the standing calculus. The D.C. Circuit relied heavily on the *Pfizer* case²⁷⁰ when developing its standing analysis.²⁷¹ *Pfizer*, however, was not a standing case; the issue in that case was whether foreign governments were "persons" within the meaning of section 4 of the Clayton Act.²⁷² The Court's discussion of standing was limited to the proposition that a foreign entity buying in the United States should enjoy the same antitrust

263. *Id.*

264. *Id.* n.2.

265. *De Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 513 (S.D.N.Y. 1985).

266. *Empagran S.A. v. F. Hoffman LaRoche, Ltd.*, 315 F.3d 338, 355-57 (D.C. Cir. 2003).

267. See Brief for the United States and the FTC as Amici Curiae, *Empagran S.A.*, 315 F.3d 338, available at www.usdoj.gov/atr/cases/f205300/205386.htm.

268. *Id.*

269. *Empagran I*, 124 S. Ct. 2359, 2372 (2004).

270. *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978).

271. *Empagran S.A.*, 315 F.3d at 355-57.

272. *Pfizer, Inc.*, 434 U.S. at 309.

protection as other domestic purchasers.²⁷³ The D.C. Circuit's reliance on *Pfizer* to uphold suits by foreign purchasers *buying in foreign markets* is thus misplaced.

CONCLUSION

The foreign plaintiffs in *Empagran* fare no better under their “but for” theory than under their original theory. As a matter of law, “but for” causation is insufficient to establish subject matter jurisdiction under the FTAIA over claims by foreign plaintiffs arising abroad. Nor do foreign plaintiffs who do not participate in the United States market have standing to sue under the antitrust laws. The analyses in *Associated General Contractor*, *Brunswick* and *Illinois Brick*, limiting the class of plaintiffs who can sue under the antitrust laws, fit the *Empagran* case like a glove. Neither *Empagran I* nor *Empagran II* is likely to eliminate antitrust claims by foreign plaintiffs in United States courts. Nevertheless, the fact that the D.C. Circuit and the Second Circuit—once friendly turf for foreign plaintiffs—have both changed their tune in the wake of *Empagran I* bodes ill for foreign claimants.

273. *Id.* at 313-15.

