

NOTE

KEEPING THE DOOR AJAR FOR FOREIGN PLAINTIFFS IN GLOBAL CARTEL CASES AFTER *EMPAGRAN*

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INTRODUCTION

In many ways, the Supreme Court’s opinion in *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*¹ raised more questions than it answered. Growing out

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1. 542 U.S. 155 (2004).

of the massive international vitamins cartel uncovered in the 1990s,² *Empagran* presented a scenario in which all parties were foreign and all conduct occurred abroad.³ Although it is “well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States,”⁴ *Empagran* presented the Court with the first truly foreign antitrust case. It involved not only foreign conduct, but also foreign plaintiffs complaining of injuries suffered abroad at the hands of foreign defendants.⁵ The case therefore appeared to present thorny questions about the proper construction of the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”)⁶ and the extent of the Sherman Act’s extraterritorial application.⁷

Instead of seizing this opportunity to clarify and definitively outline the extraterritorial scope of the Sherman Act, the Court carefully circumscribed its opinion to address only a particular and narrow subset of claims: those of foreign plaintiffs alleging an injury that arose *independently* from the injury inflicted upon the domestic market.⁸ Although the Court denied jurisdiction to such independent claims, it noted that the *Empagran* plaintiffs were also advancing a theory in which “the anticompetitive conduct’s domestic effects were linked to that foreign harm.”⁹ Under this theory, the cartel’s global scope and the fungible, easily transportable nature of vitamins meant that “without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and [plaintiffs] would not have suffered their foreign injury.”¹⁰

2. See Petition for Writ of Certiorari at 5, *Empagran*, 542 U.S. 155 (No. 03-724) (noting that cartel participants paid \$900 million in fines to the United States government, along with civil penalties outside the U.S. exceeding €855 million and civil settlements exceeding \$2 billion).

3. See *Empagran*, 542 U.S. at 160 (stating that “the question presented assumes that the relevant ‘transactions occur[ed] entirely outside U.S. commerce’”); see also Question Presented, *Empagran*, 542 U.S. 155 (No. 03-724), <http://www.supremecourtus.gov/qp/03-00724qp.pdf> (stating that “[t]he question presented is as follows: Whether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce”).

4. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

5. The Court in *Empagran* seemed particularly careful in repeatedly referencing *foreign* plaintiffs, possibly suggesting that its holding—denying jurisdiction for such foreign plaintiffs’ claims for injuries suffered abroad—would not apply to curtail the ability of *U.S. citizens* to sue for injuries sustained abroad. This nationality wrinkle, however, is beyond the scope of this Note, which will consider only the arguments relating to the availability of jurisdiction over the claims of foreign plaintiffs, the central issue in *Empagran* and a number of other recent cases.

6. 15 U.S.C. § 6a (2000).

7. See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 340 (D.C. Cir. 2003) (stating that the case required interpreting the FTAIA “to determine the jurisdictional reach of the federal antitrust laws”).

8. *Empagran*, 542 U.S. at 175 (stating that “[w]e have assumed that the anticompetitive conduct here independently caused foreign injury”).

9. *Id.* (emphasis added).

10. *Id.*

The Court therefore remanded the case to the D.C. Circuit with instructions to consider the viability of this theory in the first instance.¹¹

This Note analyzes how courts and commentators have evaluated this “linked global conspiracy”¹² theory that *Empagran* expressly left unresolved. Part I discusses the early, pre-*Empagran* decisions that struggled to make sense of both these claims and the FTAIA, a statute that one court described as “inelegantly phrased.”¹³ Part I then details the resulting circuit split that led to *Empagran* and analyzes the decision itself. Part II examines the developments following *Empagran* and charts courts’ increasingly overwhelming rejection of these linked global conspiracy claims, with the D.C. Circuit’s June 2005 decision in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd. (Empagran II)*¹⁴ leading the way. Part III then argues that this growing consensus against finding jurisdiction is incorrect. It contends that these decisions rely on little more than conclusory labels—terms such as “but-for” and “proximate cause.” Part III also argues that the FTAIA’s legislative history suggests that Congress *did* intend to confer jurisdiction in linked global cartel cases. Even if these cases ultimately do not belong in U.S. courts, there are more proper paths to their ouster, such as finding a lack of antitrust standing. Finally, Part III contends that in limited circumstances courts should find that foreign plaintiffs meet the requirements for both jurisdiction and antitrust standing.

I. THE “INELEGANTLY PHRASED” FTAIA, A BATTLE IN THE CIRCUITS OVER AN INDEFINITE ARTICLE, AND *EMPAGRAN*

Although Congress passed the FTAIA in 1982, largely to address perceptions that fear of antitrust liability was hindering American exporters in competing abroad against rivals unconstrained by competition laws in their own countries,¹⁵ the statute did not play a major part in antitrust litigation until recently. In the 1990s, “as the Antitrust Division intensified its enforcement

11. *Id.*

12. This Note will use the term “linked global conspiracy” or “linked global cartel” to refer to such claims. This Note will also analyze almost exclusively cases in which plaintiffs have alleged that the defendants engaged in global price-fixing cartels. Such cases seem both far more common and better suited to meeting the FTAIA’s jurisdictional requirements. Cases presenting different antitrust claims are considered only briefly, or not at all. *See infra* note 65.

13. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).

14. 417 F.3d 1267 (D.C. Cir. 2005).

15. *See* H.R. REP. NO. 97-686, at 4 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2489 (“It is an article of orthodoxy in the business community that the antitrust laws stand as an impediment to the international competitive performance of the United States . . . [and] that the antitrust laws hinder our export performance’”) (quoting Assistant Attorney General for Antitrust John Shenefield); *see also* Edward D. Cavanagh, *The FTAIA and Empagran: What Next?*, 58 SMU L. REV. 1419, 1420 (2005) (“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.”). The House Report also mentioned a second purpose of resolving “possible ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction.” H.R. REP. NO. 97-686, *supra*, at 5, *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2489.

efforts against international cartels that, in turn, spawned private treble-damages actions against foreign defendants,”¹⁶ the statute assumed a new prominence and a new role. Private follow-on actions, relating to prosecuted conspiracies involving heavy-lift marine barge services, international auction services, and vitamins, forced the Fifth,¹⁷ Second,¹⁸ and D.C. Circuit Courts of Appeals,¹⁹ respectively, to weigh in on how exactly Congress intended the FTAIA to affect federal courts’ jurisdiction over anticompetitive conduct occurring abroad.

As Judge Selya aptly observed in *United States v. Nippon Paper Industries Co.*,²⁰ the FTAIA is not a model of clarity.²¹ The FTAIA provides that:

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

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

(A) on trade or commerce which is not trade or commerce with foreign nations [*i.e.*, domestic trade or commerce], 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 [*i.e.*, on an American export competitor]; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.²²

As the Supreme Court noted, the FTAIA first sets out a general rule placing all non-import activity involving foreign commerce beyond the Sherman Act’s reach.²³ It then *returns* such conduct to the scope of the Sherman Act, but only if (1) the conduct has a “direct, substantial and reasonably foreseeable effect” on American domestic or import commerce, *and* (2) the conduct’s effect “gives rise to a [Sherman Act] claim.”²⁴ In other words, the Sherman Act only applies to conduct occurring abroad if that conduct exerts a direct, substantial, and reasonably foreseeable effect on US commerce.

16. Cavanagh, *supra* note 15, at 1423.

17. *See* Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001).

18. *See* Kruman v. Christie’s Int’l PLC, 284 F.3d 384 (2d Cir. 2002).

19. *See* Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 315 F.3d 338 (D.C. Cir. 2003).

20. 109 F.3d 1 (1st Cir. 1997).

21. *Id.* at 4 (describing the statute as “inelegantly phrased”); *see also* Empagran, 315 F.3d at 341 (D.C. Cir. 2003) (“We can find no ‘plain meaning’ in § 6a(2) of FTAIA.”).

22. 15 U.S.C. § 6(a) (2000); *see also* F. Hoffmann-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155, 161–62 (2004) (quoting the statutory language and adding material bracketed in text).

23. *Empagran*, 542 U.S. at 162.

24. 15 U.S.C. § 6(a) (2000).

Prior to *Empagran*, the contested questions were just who could bring such a claim and what kind of relation that person's claim would need to have to the domestic effect of the defendants' conduct. These questions required carefully interpreting § 6a(2), and specifically the phrase "gives rise to a claim." The first court of appeals to confront these questions was the Fifth Circuit, in *Den Norske Stats Oljeselkap As v. HeereMac v.o.f.*²⁵ In *HeereMac*, the court concluded "that a foreign plaintiff injured in a foreign marketplace must show that a substantial domestic effect on United States commerce 'gives rise' to its antitrust claim."²⁶ Next came the Second Circuit's decision in *Kruman v. Christie's International PLC*,²⁷ which adopted a very different approach. Because "Congress used the indefinite article ('a') rather than the definite article ('the')," the Second Circuit held that the statute should *not* be read as "requir[ing] that the 'effect give[] rise to the plaintiff's claim.'"²⁸ Finally, the D.C. Circuit sided with the Second Circuit's expansive reading in *Kruman*, ruling in *Empagran* that the words "a claim" meant merely that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court."²⁹ Therefore, the court held that "where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce."³⁰ The situation was ripe for the Supreme Court to resolve.

Despite the seemingly narrow and hyper-technical nature of the circuit split, disagreeing about the import of a single indefinite article in a cryptic statute,³¹ the issues at stake were much broader. The case appeared to present the Court squarely with questions about the extent of the Sherman Act's extraterritorial application. Indeed, when the Court granted certiorari, the question presented asked "[w]hether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce."³² The Court seemed set to pronounce the definitive word on a difficult issue that had proven vexing to U.S. courts for roughly a century.³³

25. 241 F.3d 420 (5th Cir. 2001).

26. *Id.* at 428–29 (emphasis added).

27. 284 F.3d 384 (2d Cir. 2002).

28. *Id.* at 400 (parentheses in original).

29. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003).

30. *Id.*

31. See Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels*, 72 U. CHI. L. REV. 265, 273–74 (2005) (describing the circuit split as a debate over whether "'a claim' mean[s] 'any claim,' or 'the plaintiff's claim'").

32. Question Presented at 1, *F. Hoffmann La-Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), <http://www.supremecourtus.gov/qp/03-00724qp.pdf>.

33. As the Fifth Circuit observed in *HeereMac*, "the federal courts have generally disagreed as to the extraterritorial reach of the antitrust laws and have employed assorted tests to determine the scope of the Sherman Act[, and] this body of case law is confusing and unsettled." *Den Norske Stats*

When the Court then issued its narrowly crafted opinion in *Empagran*—restricting the scope of its holding, denying jurisdiction, to cases alleging independently caused foreign injuries—it therefore not only dashed hopes for greater clarification in this area, but potentially sowed yet more confusion. In taking such care to limit the reach of its holding, the Court avoided one of the thornier issues implicated in the case, which it remanded for the D.C. Circuit to consider in the first instance.³⁴ That issue was how to treat claims asserting a linked global conspiracy in a fungible, easily transportable commodity. In such linked global conspiracies, the cartel’s successful operation requires maintaining a worldwide conspiracy such that plaintiffs might argue that their injuries abroad *were* connected to and caused by the effects of the conspiracy upon domestic commerce.

The Court took great care to “reemphasize” that its holding, denying jurisdiction, was confined to a scenario in which “price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse *foreign effect is independent* of any adverse domestic effect.”³⁵ Indeed, the Court used “independent” to modify injury, harm, effect, or cause at least twenty-four times in an opinion spanning approximately twenty U.S. Reporter pages.³⁶ If nothing else, it seemed the Court clearly intended to communicate that its opinion had not decided the fate of claims alleging interlinked global conspiracies. Nevertheless, some commentators have argued that *Empagran* contained a clear “blueprint” for how the D.C. Circuit should rule on remand and that the Court’s refusal to decide the global conspiracy issue “more likely” stemmed from the Court “simply giving the D.C. Circuit a roadmap to correct its error and save face.”³⁷

Whether or not the critics are correct, on its face *Empagran* simply held that the FTAIA denied subject matter jurisdiction under the Sherman Act to foreign plaintiffs complaining of an independently caused foreign injury. Invoking what it termed principles of “prescriptive comity” as one of the “main reasons” for its holding, the Court advocated a cautionary approach when “constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”³⁸

Oljeselskap AS v. HeereMac v.o.f., 241 F.3d 420, 423–24, 424 n.12 (5th Cir. 2001) (tracing the history of this unsettled issue through *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976), *Am. Rice, Inc. v. Ark. Rice Growers Co-op.*, 701 F.2d 408 (5th Cir. 1983), and *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)).

34. See *Empagran*, 542 U.S. at 175.

35. *Id.* at 164 (emphasis added).

36. See generally *id.*

37. Cavanagh, *supra* note 15, at 1437 (referring to remarks by former Assistant Attorney General John Shenefield).

38. *Empagran*, 542 U.S. at 164. The Court’s comity discussion, however, was not entirely persuasive. Traditionally, Courts have viewed comity and jurisdiction as different things, with comity serving as a discretionary tool allowing courts to evaluate international concerns on a case-by-case basis and to abstain from exercising jurisdiction when appropriate, a distinction the Court ac-

The Court also addressed concerns about deterrence, which played a leading role not only in plaintiffs-respondents' arguments and in the D.C. Circuit's decision, but also in the briefs of various amici arguing in support of reversal.³⁹ Plaintiffs and the D.C. Circuit reasoned that the added deterrence from accepting such foreign plaintiffs' claims would "help protect Americans against foreign-caused anticompetitive injury."⁴⁰ Meanwhile, the United States and numerous other governments submitted amici briefs arguing that allowing foreign plaintiffs to assert claims alleging foreign injuries could result in over-deterrence and threaten the effectiveness of their cartel-detection and enforcement activities.⁴¹ Over-deterrence could impair their various amnesty and leniency programs, which typically offer criminal amnesty to the "first party through the door"⁴² but which also guarantee an ensuing parade of civil plaintiffs claiming treble damages.⁴³ Allowing suits from foreign purchasers would simply swell the ranks of those civil plaintiffs, altering the calculus of risks for cartel members debating whether to avail themselves of leniency policies. Confronting this heated dispute, the Court essentially declared the question to be an empirical matter beyond its competence.⁴⁴

Having thus disposed of claims asserting independently caused foreign injury, the Court finally turned to the truly central issue in the case: global

knowledge. *See id.* at 168. The Court nonetheless determined that comity considerations, although normally a matter of judicial discretion to withdraw jurisdiction from cases otherwise properly brought before them, would be "too complex to prove workable" in the antitrust context because antitrust claims are often of a "legally and economically technical nature." *Id.*

Although national competition laws certainly differ in many respects, prohibitions against price-fixing and "hardcore" cartels are nearly universal. Petition for Writ of Certiorari at 23–24, *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, No. 05-541 (Oct. 26, 2005), 2005 WL 2844943. Whatever worries the Court had about complex and unworkable case-by-case comity analyses in less clear or universally recognized antitrust violations should have carried little weight in *Empagran*, perhaps one of the biggest and most blatant cartels of all time. After all, the Court could simply have adopted a comity-informed interpretation of the FTAIA that treated the extraterritorial scope of the Sherman Act somewhat differently depending on the nature of the violation alleged, or simply followed the more traditional notion of comity as a discretionary tool apart from the jurisdictional determination. *See, e.g., McBee v. Delica Co.*, 417 F.3d 107, 120 (1st Cir. 2005) ("[C]omity considerations . . . were properly understood not as questions of whether a United States court possessed subject matter jurisdiction, but instead as issues of whether such a court should decline to exercise the jurisdiction that it possessed.").

39. *See Empagran*, 542 U.S. at 168 (citing briefs filed by the governments of the Federal Republic of Germany, Canada, and the United States).

40. *Id.* at 174.

41. *See id.* at 169, 174.

42. *See, e.g.,* ANTITRUST DIV., DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY 2 (1993), available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm> (providing for leniency under various required conditions, including that "[t]he corporation is the first one to come forward [to the Department] . . . with respect to the illegal activity being reported").

43. *But see* Antitrust Criminal Penalty Enhancement & Reform Act of 2004, Pub. L. No. 108-237, tit. II, subtit. A, §§ 213–14, 118 Stat. 661, 666–68 (de-trebling damage liability for successful applicants to the Antitrust Division's Corporate Leniency Policy). In the wake of this new legislation, passed just weeks after the Court's decision in *Empagran*, such concerns about over-deterrence may no longer be as relevant.

44. *Empagran*, 542 U.S. at 174–75.

conspiracy claims in which the foreign “anticompetitive conduct’s domestic effects were linked to [the] foreign harm.”⁴⁵ The Court simply noted that plaintiffs were advancing an alternative linked global conspiracy theory—envisioning a global cartel where, without the harmful effect on U.S. commerce, the defendants could not have maintained their global price-fixing cartel and plaintiffs would not have suffered their foreign injury—and declined to address that theory.⁴⁶ Instead, the Court stated that “[t]he Court of Appeals may determine whether [plaintiffs] properly preserved the argument, and, if so, it may consider it and decide” the issue.⁴⁷

The Court’s parry, postponing the resolution of how to treat foreign injuries resulting from linked global cartels, left several commentators frustrated. One declared that “[t]his case about world cartels is a world class puzzlement,”⁴⁸ and another described the decision as “somewhat mystifying.”⁴⁹ Another scholar concluded that while “*Empagran* made abundantly clear that the United States is not the antitrust police force of the world,” because the “Court declined to address whether foreign plaintiffs may invoke the Sherman Act when a market is truly global[, c]ourts will now have to develop a workable definition of ‘intertwined effects’ for today’s interdependent world economy.”⁵⁰ As this Note’s next Part will demonstrate, however, in the wake of *Empagran* courts have almost uniformly *ignored* this task and failed to do anything more than reflexively dismiss such linked global conspiracy cases.

II. THE EMERGING POST-*EMPAGRAN* CONSENSUS: GLOBAL CONSPIRACY THEORIES FLUNK A PROXIMATE CAUSE TEST

Because *Empagran* explicitly left open the question of how to analyze claims asserting linked global conspiracies, several courts have already had to confront and answer this question. Although the early results suggested the possibility of another round of divided courts, 2005 and the first half of 2006 have seen an avalanche of cases and commentary adopting an anti-jurisdiction position, including one court that reconsidered and reversed its

45. *Id.* at 175.

46. *Id.*

47. *Id.* Of course, while the *Empagran* plaintiffs had not argued the global cartel theory before the court of appeals, the plaintiffs in *Den Norske* and *Kruman* seem to have done so. See Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT’L & COMP. L. REV. 205, 225 (2005) (noting that the auction market in *Kruman* was “truly global because sellers and buyers are the same worldwide” and that the “same can be assumed in *Den Norske* [which] concerned services for heavy lift barges; only seven existed and they were deployed worldwide”).

48. Ronald W. Davis, *Empagran and International Cartels—A Comity of Errors*, ANTI-TRUST, Fall 2004, at 58, 58.

49. Cavanagh, *supra* note 15, at 1430.

50. Wurmnest, *supra* note 47, at 227.

own earlier pro-jurisdiction ruling.⁵¹ This Part will briefly examine the relevant cases and analyze their reasoning, with Section II.A detailing the early cases and Section II.B discussing the D.C. Circuit's decision on remand in *Empagran II* and the emerging anti-jurisdiction consensus. Part III will then criticize this consensus and offer a different view.

A. *The Early Returns: Opening the Door to Linked
Global Conspiracy Claims?*

Roughly two months after the Court decided *Empagran*, a trio of courts issued decisions addressed to claims asserting that a linked global conspiracy theory sufficiently connected plaintiffs' foreign injuries to the foreign anticompetitive conduct's effect on the domestic market, thereby meeting the requirements for jurisdiction. All three decisions—*Sniado v. Bank Austria AG*,⁵² *BHP New Zealand Ltd. v. UCAR International, Inc.*,⁵³ and *MM Global Services. v. The Dow Chemical Co.*⁵⁴—rendered results that appeared to favor plaintiffs. Two offered outright support to such claims. While the other case denied jurisdiction, it contained language generally favorable to plaintiffs in linked global cartel cases.

That other case was *Sniado*, the first of the trio to be decided, and two aspects of the decision appear favorable to linked global conspiracy claims even though the court held that it lacked jurisdiction over this particular plaintiff's claims.⁵⁵ The plaintiff's linked global conspiracy claim in *Sniado* was both rather farfetched and raised for the first time only after the Supreme Court's opinion in *Empagran*.⁵⁶ Whether *Sniado* should even be read as truly rejecting a linked global conspiracy claim as a basis for jurisdiction is questionable, given that the case involved an exceptionally weak, and possibly not good-faith, version of theory.⁵⁷ *Sniado*'s complaint alleged that a price-fixing conspiracy among European banks forced him to pay, in Europe, supra-competitive fees to exchange Euro-zone currencies.⁵⁸ The Second Circuit noted that his complaint *did not* "allege that currency exchange fees in the United States reached supra-competitive levels, nor that but for the European conspiracy's effect on United States commerce, he

51. *In re Monosodium Glutamate Antitrust Litig.*, No. Civ. 00MDL1328, 2005 WL 2810682 (D. Minn. Oct 26, 2005) (granting defendant's Motion to Reconsider the court's earlier ruling, No. Civ. 00MDL1328, 2005 WL 1080790 (D. Minn. May 2, 2005)).

52. 378 F.3d 210 (2d Cir. 2004) (decided Aug. 5, 2004).

53. 106 Fed. App'x. 138 (3d Cir. 2004) (decided Aug. 9, 2004).

54. 329 F. Supp. 2d 337 (D. Conn. 2004) (decided Aug. 11, 2004).

55. *Sniado*, 378 F.3d at 213 (finding that the "amended complaint is facially insufficient to establish jurisdiction").

56. *Id.* at 212 (noting that "Sniado raises this alternative theory for the first time on remand from the Supreme Court").

57. Of course, at least one anti-jurisdiction commentator has seized on *Sniado* as illustrating another example of the anti-jurisdiction position. See Cavanagh, *supra* note 15, at 1437.

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

would not have been injured in Europe.”⁵⁹ Sniado’s complaint thus lacked any allegations of a negative effect upon U.S. commerce, and his theory bears only superficial resemblance to the linked global cartel theories found in other cases discussed in this Note. In addition, *Sniado* appears relatively favorable to linked global cartel claims in that the Second Circuit discussed causation simply in terms of a “but for” relationship: in finding that Sniado’s allegations did not meet a “but for” causation standard,⁶⁰ the court gave no indication that it would require a more stringent, proximate causation standard.⁶¹

The other two early cases, *BHP* and *MM Global Services*, both reached results more generally favorable to plaintiffs and maintained the possibility of jurisdiction for global conspiracy claims. In *BHP*, the Third Circuit noted plaintiffs’ argument that *Empagran* had left open the question of whether jurisdiction existed where plaintiffs could make “a preliminary showing . . . that the prices they paid [abroad] for graphite electrodes were linked to, and not ‘independent’ from, the raising of prices in the United States by defendants’ alleged global price-fixing cartel.”⁶² The court then remanded the case to the district court, stating that “[t]he 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.”⁶³ The Third Circuit could have declared that assertions of such a linked global conspiracy simply failed to satisfy the jurisdictional requirements of the FTAIA. Its willingness to allow plaintiffs a chance to develop a factual record to support their claims, therefore, seems mildly supportive. After remand, the parties settled in April 2006, following oral argument on motions to dismiss.⁶⁴ The last of the three early cases, *MM Global Services*, offered a full victory to plaintiffs asserting a slightly modi-

59. *Id.* at 213.

60. Black’s Law Dictionary defines “but-for cause” as “[t]he cause without which the event could not have occurred” and defines “proximate cause” as a “cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor.” BLACK’S LAW DICTIONARY 234 (8th ed. 2004).

61. *See Sniado*, 378 F.3d 210. Of course, *Sniado* did not adopt any specific causation standard, and the Second Circuit could still have adopted a proximate cause standard in a later case. That the court never once referenced proximate cause and discussed causation purely in “but-for” terms offers at least some indication that the court viewed the causation inquiry at the jurisdiction stage in “but for” terms.

62. *BHP N.Z. Ltd. v. Ucar Int’l, Inc.*, 106 Fed. App’x. 138, 142–43 (3d Cir. 2004).

63. *Id.* at 143.

64. E-mail from James Martin, Attorney for All Plaintiffs-Appellants in *BHP N.Z. Ltd. v. Ucar Int’l, Inc.*, Nos. 01-3329, 01-3340, & 01-3991, to Author (Oct. 1, 2006, 15:28:51 EDT) (on file with author). During that oral argument, Judge Shapiro seemed receptive to the linked global cartel theory and skeptical of the growing anti-jurisdiction trend. Transcript of Oral Argument at 61–64, *In re Graphite Electrodes Antitrust Litigation*, No: 2:10-md-1244-NS (E.D. Pa. argued Apr. 3, 2006) (“[T]here’s strength to [the linked global cartel] argument, it’s very understandable. . . . I found the [D.C. C]ircuit court[’s] analysis of but for and proximate cause somewhat confusing.”) (on file with author).

fied interlinked global theory.⁶⁵ Judge Covello of the District of Connecticut “conclude[d] that the plaintiffs have sufficiently satisfied the requirements of the FTAIA” and “the court had subject matter jurisdiction” to hear the linked global cartel claim.⁶⁶

After these opinions, no court rendered a decision on this issue for nearly nine months, until May 2005, when Judge Magnuson of the District of Minnesota embraced a linked global conspiracy theory in *In re Monosodium Glutamate Antitrust Litigation (MSG I)*.⁶⁷ Noting both the plaintiffs’ linked global conspiracy argument and that the Supreme Court’s *Empagran* decision “expressly declined to address the issue presented in this case,” Judge Magnuson then attached significance to *Empagran*’s citation to a 1977 decision from the Southern District of New York.⁶⁸ In that case, *Industria Siciliana Asfalti, Bitum, S.p.A. v. Exxon Research and Engineering Co.*,⁶⁹ the district court held “that it had subject matter jurisdiction to decide a Sherman Act claim based on a foreign injury suffered by a foreign company.”⁷⁰ Furthermore, in *Empagran* the “Supreme Court expressly noted that the foreign injury in *Industria Siciliana* was ‘inextricably bound up with . . . domestic restraints of trade, and that the plaintiff was injured . . . by reason of an alleged restraint of our domestic trade.’”⁷¹ Judge Magnuson therefore concluded that this “[r]eference to *Industria Siciliana* indicates that subject matter jurisdiction exists when a plaintiff shows that its foreign injury arose from the domestic effect of the defendant’s conduct.”⁷²

Judge Magnuson next evaluated arguments addressing the level of causation required to support jurisdiction. The defendants “argue[d] that the ‘gives rise to’ language in § 6a(2) requires that Plaintiffs show that they were injured directly and immediately by the effect on United States commerce,” and that the plaintiffs’ global conspiracy theory amounted to “but-for causation [that] cannot meet the requirements of the FTAIA.”⁷³ Judge

65. The alleged anticompetitive conduct in this case involved an international resale price maintenance scheme, which distinguishes it from the typical facts of the global price-fixing cartel cases considered in this Note and accounts for its shorter treatment. *MM Global Servs. v. Dow Chem. Co.*, 329 F. Supp. 2d 337, 340 (D. Conn. 2004) (noting plaintiff’s allegations of a resale price maintenance conspiracy). Similarly, this Note will not consider *Advanced Micro Devices, Inc. v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litigation)*, No. MDL 05-1717-JJF, CIV. A. 05-441-JJF, 2006 WL 2742297 (D. Del. Sept. 26, 2006), which brought the FTAIA’s jurisdictional questions before the court in the context of a section 2 monopoly maintenance claim, likewise distinguishable from the other linked global conspiracy cases in which the alleged conduct is an international price-fixing scheme.

66. *MM Global Servs.*, 329 F. Supp. 2d at 343.

67. *In re Monosodium Glutamate Antitrust Litig.*, No. Civ. 00MDL1328, 2005 WL 1080790 (D. Minn. May 2, 2005).

68. *MSG I*, 2005 WL 1080790, at *3.

69. No. 75 Civ. 5828, 1977 WL 1353 (S.D.N.Y. Jan 18, 1977).

70. *MSG I*, 2005 WL 1080790, at *3.

71. *Id.* (citing *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 171–72 (2004)).

72. *Id.*

73. *Id.*

Magnuson disagreed. Noting that the plaintiffs' complaint alleged "that their injury was inextricably intertwined with the injury Defendants inflicted on the United States market" because "Plaintiffs would have obtained MSG . . . from the United States market at competitive prices" had the cartel not affected prices in the United States, Judge Magnuson stated that "[t]hese allegations aver a far more direct causal relationship . . . [than] other cases where the plaintiffs allegedly suffered foreign injury independent of domestic harm."⁷⁴

Judge Magnuson also rejected the defendants' comity-based arguments.⁷⁵ Reasoning that because "the *Empagran* court limited its invocation of comity to cases where 'foreign conduct . . . causes *independent* foreign harm and that foreign harm alone gives rise to the plaintiff's claim,'" those policy concerns were "not present in this case, where Plaintiffs allege that the foreign harm they suffered was inextricably related to the anti-competitive conduct's effect on domestic commerce."⁷⁶

Finally, after brushing aside the defendants' argument that the plaintiffs lacked antitrust standing, Judge Magnuson concluded that "Plaintiffs have craftily plead the Amended Complaint to allege a claim based upon the alternative theory recognized by the United States Supreme Court" in *Empagran*.⁷⁷ Denying the defendants' motion to dismiss, he issued an additional Order that the "parties shall conduct discovery exclusively relating to the alleged nexus between the domestic effects of Defendants' anti-competitive [conduct] and Plaintiffs' alleged harm."⁷⁸ The *MSG I* opinion provided by far the most thorough analysis of the linked global conspiracy question left open in the wake of *Empagran*, and it offered a decidedly pro-jurisdiction answer.

B. *Empagran II: The D.C. Circuit Slams the Door on Foreign Plaintiffs*

The initial trend favoring foreign plaintiffs came to an abrupt end just weeks after Judge Magnuson's opinion in *MSG I* when the D.C. Circuit issued its opinion in *Empagran II*⁷⁹ on remand from the Supreme Court. In a brief, four-page opinion, the D.C. Circuit flatly rejected the plaintiffs' linked global conspiracy argument for jurisdiction. The court described plaintiffs' claims as painting a "plausible scenario" that "super-competitive prices in the United States might well have been a 'but-for' cause of [their] foreign

74. *Id.* at *4-5.

75. *Id.* at *5-7.

76. *Id.* at *6.

77. *Id.* at *8.

78. *Id.* at *8.

79. *Empagran, S.A. v. F. Hoffman-Laroche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005). The D.C. Circuit issued this decision June 28, 2005.

injury.”⁸⁰ The court then merely asserted that “‘but-for’ causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anticompetitive conduct within the FTAIA,” because the “statutory language—‘gives rise to’—indicates a direct causal relationship, that is, proximate causation.”⁸¹ Therefore, the “mere but-for ‘nexus’ the [plaintiffs] advanced in their brief” could not satisfy the FTAIA and support jurisdiction.⁸² Noting the Supreme Court’s “prescriptive comity” analysis in *Empagran*, the court also reasoned that “read[ing] the FTAIA broadly to permit a more flexible, less direct standard than proximate cause would open the door to . . . interference with other nations’ prerogative” to maintain their own competition regimes.⁸³

Finally, in a single paragraph, the court applied its new “proximate cause” standard to the case. Stating that the plaintiffs’ but-for theory “establishe[d] only an indirect connection between the U.S. prices and the prices they paid when they purchased vitamins abroad,” the court concluded that “[i]t was the foreign effects of price-fixing outside of the United States that directly caused or ‘g[ave] rise to’ [the plaintiffs’] losses when they purchased vitamins abroad at super-competitive prices.”⁸⁴ Thus, the court divined a “proximate cause” standard from the “gives rise to” language in FTAIA. It then did little more than summarily label the plaintiffs’ allegations as stating mere “but-for” or “indirect” causation, which failed to meet the “direct causal relationship” requirement of the new “proximate cause” standard.

The D.C. Circuit’s decision in *Empagran II* marked a clear turning point. Since then, every court to confront a linked global conspiracy claim has denied jurisdiction. This count *includes* Judge Magnuson, who, four months after *Empagran II*, granted a Motion to Reconsider his prior decision, which he then reversed.⁸⁵ These four post-*Empagran* cases—*eMag Solutions LLC v. Toda Kogyo Corp.*,⁸⁶ *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*,⁸⁷ *In re: Monosodium Glutamate Antitrust Litigation (MSG II)*,⁸⁸ and *In re Dynamic Random Access Memory Antitrust Litigation (DRAM)*⁸⁹—are discussed below.

Although the plaintiffs in *eMag* advanced particularly strong and detailed claims about defendants’ linked global conspiracy in the market for

80. *Id.* at 1270.

81. *Id.* at 1270–71.

82. *Id.*

83. *Id.* at 1271.

84. *Id.*

85. *In re: Monosodium Glutamate Antitrust Litig.*, No. Civ.00MDL1328, 2005 WL 2810682 (D. Minn. Oct. 26, 2005).

86. No. C 02-1611, 2005 WL 1712084 (N.D. Cal. July 20, 2005).

87. No. 03 Civ. 10312, 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005).

88. No. Civ.00MDL1328, 2005 WL 2810682 (D. Minn. Oct. 26, 2005).

89. No. C. 02-1486, 2006 WL 515629 (N.D. Cal. Mar. 1, 2006).

magnetic iron oxide (“MIO”), the court nonetheless denied jurisdiction. The *eMag* plaintiffs made the same arbitrage-style arguments as the plaintiffs in *Empagran* and *MSG*—contending that “if defendants’ conspiracy had not inflated U.S. prices, [they] would not have been injured because lower American prices would have driven down international prices overall”⁹⁰—but they added a new twist as well. These plaintiffs pointed out that “because they had already bought some MIO in American commerce and could have purchased the rest of their MIO from the U.S. market had it remained competitive,” they would “have been particularly well-suited to replace purchases of MIO in purely foreign commerce with purchases of MIO in American commerce.”⁹¹ Their complaint did more than simply posit an interlinked, fluid global market where buyers theoretically chased the best price across borders; it claimed that their own buying patterns proved the existence of such a market. Therefore, these plaintiffs argued that they should recover both for their purchases in the U.S. market *and* for their purchases abroad.⁹²

The court was not persuaded. Noting the D.C. Circuit’s holding in *Empagran II*, the court “[fou]nd that plaintiffs’ theory of ‘but-for’ causation . . . is not sufficient to support a claim under the Sherman Act and is inconsistent with the ‘gives rise to a claim’ language of the FTAIA.”⁹³ Puzzlingly, the court then reasoned that

plaintiffs’ proposed theory—pleading a global marketplace where inflated prices in the United States facilitated inflated prices abroad—would . . . allow any foreign plaintiff who suffered harm abroad as a result of a foreign conspiracy to gain access to the U.S. courts and treble damages by making unsupported allegations of a global marketplace with the possibility of arbitrage pricing, even where there are no allegations of a direct impact on U.S. commerce.⁹⁴

This argument ignores several key aspects of the case. First, plaintiffs did allege that the worldwide conspiracy had direct impact on U.S. commerce: they alleged that the defendants fixed the price of MIO *in the United States*.⁹⁵ Second, plaintiffs’ own purchasing patterns suggested that, had the conspiracy’s scope been less than worldwide, arbitrage in this global market would have been far more likely than a mere “possibility.”⁹⁶ Finally, the high likelihood of arbitrage, but for the conspiracy, supplied that necessary link

90. *eMag*, 2005 WL 171208, at *5.

91. *Id.* at *5, *4.

92. It should be noted that the defendants’ motion to dismiss, as well as the court’s denial of jurisdiction, only covered the purely foreign activity. *Id.* at *8 (noting that plaintiff *eMag USA* was “not a subject of this motion to dismiss”).

93. *Id.* at *6.

94. *Id.* at *8.

95. *Id.* at *1 (“[Plaintiffs] allege that defendants fixed the price of MIO throughout the world, including in the United States.”).

96. *Id.* at *4–5.

between the “domestic effect” in the U.S. market (artificially high prices) and the foreign injury (purchases abroad at artificially high prices). Thus, the domestic effect, by eliminating the possibility of arbitrage in American markets, truly did “give rise to” plaintiffs’ injuries abroad and should have sufficed to support jurisdiction in this case.

The court gave a second reason for its result, stating that holding otherwise “would require district courts to engage in complex[] fact-determinations of alleged linkages between foreign and domestic injuries.”⁹⁷ The court noted that such complex factual inquiries would fly in the face of the Supreme Court’s “admonition that FTAIA’s jurisdictional test should be capable of being applied ‘simply and expeditiously.’”⁹⁸

The unique facts before the court in *eMag*, however, offered an example of an easy and clear line to draw between cases in which jurisdiction would be improper and those in which jurisdiction should exist. Evaluating claims of linked global conspiracies might involve overly complex economic fact determinations. Thus, a court could properly exercise jurisdiction only where plaintiffs support their theory of an interlinked, arbitrage-ready global market with concrete evidence that, absent the alleged global conspiracy, cross-border replacement purchases would have been very likely. The *eMag* plaintiffs’ buying history would have provided that evidence, allowing jurisdiction in that case, and yet kept the jurisdictional door only narrowly ajar. Instead, the court simply followed the D.C. Circuit’s lead and dismissed the case, invoking proximate cause to declare that the plaintiffs’ alleged injuries were not “directly linked” to the “injury to U.S. commerce.”⁹⁹

In *Latino Quimica*, the next of these post-*Empagran* linked global conspiracy cases, Magistrate Judge Freeman was similarly “persuaded by the reasoning of the D.C. Circuit that ‘proximate’ causation” was the appropriate standard.¹⁰⁰ Most interesting in this opinion were Magistrate Judge Freeman’s strained efforts to distinguish the case before her from the pro-jurisdiction result reached in *MSG I*. Noting that the *MSG* plaintiffs “alleged that the defendants ‘included the United States in the cartel precisely to extract cartel profits from purchasers around the world without risk of arbitrage,’” she reasoned that “[t]hese allegations ascribe to the defendants deliberate conduct aimed at the United States” and that those claims were “a more direct causation allegation than Plaintiffs make in this case, where Plaintiffs allege a global price-fixing conspiracy, but do not allege that Defendants acted to control the U.S. MCAA [monochloroacetic acid] market for the purpose of furthering their scheme in the foreign markets in which Plaintiffs operated.”¹⁰¹ Magistrate Judge Freeman then stated that the instant “Plaintiffs merely rely on general market principles to allege that, in a

97. *Id.* at *8.

98. *Id.* (quoting *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004)).

99. *Id.* at 7–8.

100. *Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V.*, No. 03 Civ. 10312, 2005 WL 2207017, at *8 (S.D.N.Y. Sept. 8, 2005).

101. *Id.* at *13.

global market, an effect of anticompetitive conduct in one location . . . will cause a ripple effect . . . in others. The causal link . . . is simply too indirect to support this Court's subject matter jurisdiction."¹⁰²

It seems bizarre that jurisdiction might hinge on whether plaintiffs ensure that their complaint includes an allegation that defendants intended to cartelize the entire world and expressly included the United States to further this goal. Indeed, it seems more likely that Magistrate Judge Freeman was pushing aside contrary case law en route to following *Empagran II* and denying jurisdiction. Instead of conjuring up a difference without any apparent distinction, Magistrate Judge Freeman should have confronted *MSG I* on its merits, recognized the brewing conflict, and disagreed explicitly with *MSG I*.

Just weeks later, Judge Magnuson issued his opinion in *MSG II* and, like Magistrate Judge Freeman, he joined the queue of judges following *Empagran II* and all but ignored the reasoning of his own *MSG I* opinion.¹⁰³ In his short, three-page opinion, Judge Magnuson devoted three paragraphs to describing the D.C. Circuit's *Empagran II* holding that "the 'gives rise to' language in the FTAIA requires . . . a direct causal relationship between the domestic effects and the foreign injury."¹⁰⁴ Then, in a single paragraph, he disposed of the case. Noting that "[t]he theory Plaintiffs advance in this case is identical to that advanced in *Empagran [II]*," Judge Magnuson stated that he was "persuaded by the decision and reasoning" of *Empagran II*, that the "global price-fixing cartel theory establishes only an indirect relationship," and that jurisdiction did not exist because "Plaintiffs are unable to show that the domestic effect proximately caused their injuries."¹⁰⁵ Left wholly unaddressed were any of the reasons advanced for the pro-jurisdiction holding in *MSG I*, such as the import of the Supreme Court's citation to *Industria Siciliana* or the "direct causal relationship" Judge Magnuson had found between the domestic effect and the plaintiffs' injury abroad.¹⁰⁶

Finally, the Northern District of California in *DRAM*,¹⁰⁷ decided in March 2006, became the fourth member of the growing group of courts denying jurisdiction in the aftermath of *Empagran II*. The *DRAM* opinion fits the post-*Empagran II* trend: it wielded an array of labels such as "but for," "direct," and "proximate cause" to dispatch the case. Stating that the plaintiff's global cartel theory "constitute[s] no more than . . . 'but for' causation," the court employed a "'proximate causation' standard" to dismiss the claim as lacking jurisdiction because the plaintiff's foreign injury was not "directly linked to . . . the domestic effect."¹⁰⁸ Aside from these labels, the court in

102. *Id.*

103. *In re Monosodium Glutamate Antitrust Litig.*, No. Civ.00MDL1328, 2005 WL 2810682 (D. Minn. Oct. 26, 2005).

104. *Id.* at *2-3.

105. *Id.* at *3.

106. *Id.* at *3-5.

107. *In re Dynamic Random Access Memory Antitrust Litigation*, No. C. 02-1486, 2006 WL 515629 (N.D. Cal. Mar. 1, 2006).

108. *Id.* at *4-5.

DRAM offered essentially no analysis or argument why linked global cartels, which fix the price of an item in both foreign and domestic markets, fail to “directly link” foreign injuries to the harmful effects in domestic markets.

III. THE POST-*EMPAGRAN* CONSENSUS IS WRONG AND COURTS SHOULD HAVE JURISDICTION OVER FOREIGN PLAINTIFFS’ CLAIMS IN LINKED GLOBAL CONSPIRACY CASES

While courts now seem aligned in near unanimity against jurisdiction in linked global cartel cases, the immediate aftermath of *Empagran* appeared to offer foreign plaintiffs cause for optimism. Although the tide has turned against those early decisions, this Part argues that the growing anti-jurisdiction consensus is wrong. Section III.A criticizes the often conclusory and ill-reasoned use of proximate cause to dispose of foreign plaintiffs’ claims in global cartel cases, and outlines how courts should conduct the jurisdictional analysis. Section III.B argues that the FTAIA’s legislative history supports jurisdiction. Section III.C then suggests that antitrust standing doctrine offers more legally sound grounds on which to dismiss many of these linked global cartel cases, while Section III.D contends that foreign plaintiffs may satisfy the requirements for both antitrust standing and jurisdiction.

A. *The Post-Empagran Consensus Rests on an Unsound Use of Proximate Cause and Courts Should Find Jurisdiction Proper under the FTAIA*

In holding that they lack jurisdiction over foreign plaintiffs in linked global conspiracy cases, courts have generally invoked notions of proximate cause, but they have often used the concept only in a conclusory and unexamined manner.¹⁰⁹ The D.C. Circuit’s opinion in *Empagran II* epitomizes this flawed use of proximate cause. *Empagran II* did little more than summarily attach labels like “but-for” and “indirect” to the plaintiffs’ global conspiracy theory. For instance, the court illogically declared that plaintiffs’ theory “establishe[d] only an indirect connection between the U.S. prices and the prices they paid when they purchased vitamins abroad.”¹¹⁰ The plaintiffs, of course, did not assert only an “indirect connection” between prices abroad and prices in the United States. Rather, they asserted that those prices were identical, as a very “direct” result of defendants’ global cartel. Indeed, shortly before describing plaintiffs’ theory as “indirect,” the court expressly acknowledged their claim that defendants’ global cartel operated “by fixing a *single global price* for the vitamins and by . . . prevent[ing]

109. See *supra* Section II.B.

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

bulk vitamins from being traded between North America and other regions.”¹¹¹ Given these allegations, the court’s “indirect connection” statement is unreasonable.

The D.C. Circuit was not alone in adopting this faulty reasoning, as some of the briefing in *Empagran II* likewise reflected this view of proximate cause. In their amici brief, the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) argued that the “gives rise to a claim” language in the FTAIA should be read in light of the “traditional legal standard for causation in antitrust law,” and that therefore the “proper test is proximate causation.”¹¹² The DOJ and FTC then argued that because the FTAIA “focus[es] on the *domestic effect* rather than the challenged conduct as the basis for the plaintiff’s claim, [it] requires a specialized application of the principles of proximate causation—an application that turns on the concepts of directness and remoteness.”¹¹³

The DOJ and FTC’s causation analysis, emphasizing “the concepts of directness and remoteness,” conflicts with the Supreme Court’s analysis in *Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC)*,¹¹⁴ one of the cases heavily relied upon in their amici brief. In *AGC*, a case addressing the requirements of antitrust standing, the Court likened the difficulty of defining a precise test for antitrust standing to common-law judges’ “struggle . . . to articulate a precise definition of the concept of ‘proximate cause.’”¹¹⁵ Given this difficulty, the Court noted that previous cases provided a number of “factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.”¹¹⁶ Importantly, the Court rejected the use of simple labels such as remote, direct, or operative.¹¹⁷ Instead, the Court noted that “these labels may lead to contradictory and inconsistent results” and concluded that “courts should analyze each situation in light of the factors set forth” in the opinion.¹¹⁸ The Supreme Court’s *AGC* opinion shows that, contrary to the argument of the DOJ and FTC, causation and proximate cause analysis should not simply “turn[] on the concepts of directness and remoteness.”¹¹⁹ Instead, it should reflect a nuanced inquiry of each case’s

111. *Id.* at 1270 n.5 (emphasis added).

112. Brief for the United States and the Fed. Trade Comm’n as Amici Curiae Supporting Defendants-Appellees in Response to Court Order of Nov. 22, 2004 at 14, *Empagran*, 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115), available at <http://www.usdoj.gov/atr/cases/f207700/207757.htm>.

113. *Id.* at 17.

114. 459 U.S. 519 (1983).

115. *Id.* at 535–36 (footnote omitted).

116. *Id.* at 536–37.

117. *Id.* at 536 n.33.

118. *Id.*

119. Although *AGC* concerned antitrust standing, and not jurisdiction, it remains relevant. Because its criticism of label-heavy proximate cause analysis referenced common law judges’ struggle with proximate cause in the tort context, it would seem applicable in the jurisdictional context as well. At the jurisdictional stage, however, the primary relevance of *AGC*’s discussion of

“specific circumstances,” something lacking in *Empagran II* and the cases following it.

Linked global cartel cases present circumstances in which courts should find that the domestic effect of the defendants’ conduct “gives rise to” foreign plaintiffs’ claims, making jurisdiction proper under the FTAIA. In linked global cartel cases, foreign plaintiffs’ claims logically satisfy the FTAIA’s text and jurisdictional standard: by fixing prices worldwide, the defendants’ linked global cartel clearly exerts a direct, substantial, and reasonably foreseeable effect upon U.S. domestic commerce. Further, the harmful effect of supra-competitive prices in U.S. commerce prevents foreign plaintiffs from engaging in arbitrage, thereby causing their injury—purchases abroad at inflated prices—and giving rise to their claims.¹²⁰ As Judge Magnuson initially recognized, such “allegations aver a far more direct causal relationship between the domestic effect and Plaintiffs’ injury than . . . *Den Norske*, and other cases where the plaintiffs allegedly suffered foreign injury independent of domestic harm.”¹²¹ After all, “[d]irectness’ in the antitrust context means ‘close in the chain of causation,’ ”¹²² and the relevant links in the chain in global cartel cases are close indeed. The defendants’ conduct—price fixing—sets a single, supra-competitive price both in U.S. markets and abroad. The existence of supra-competitive prices in the U.S. market precludes arbitrage and condemns foreign plaintiffs to paying supra-competitive prices abroad. While certainly “judicial remed[ies] cannot encompass every conceivable harm that can be traced to alleged wrongdoing,” linked global cartel cases call for very little tracing and therefore do not represent a situation in which, because of reasons “‘of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.’ ”¹²³

B. The FTAIA’s Legislative History Supports Finding Jurisdiction

The FTAIA’s legislative history and background materials contain several passages strongly suggesting that Congress *did* intend to confer jurisdiction upon foreign plaintiffs in situations similar to those presented in the linked global cartel cases. Three passages in particular support this view.

proximate cause is simply to note the Supreme Court’s view that causation analysis should involve more than a series of labels. As argued *infra* in Section III.C, a full application of *AGC*’s factors to the facts in a typical linked global cartel case would likely deny antitrust standing to foreign plaintiffs.

120. See Sprigman, *supra* note 31, at 266–67 (arguing, prior to *Empagran II*, that the “D.C. Circuit should find that foreign and domestic injuries are connected, and, on that basis, allow the suit to proceed” and that “the *Empagran* decision, had it addressed the issues [in a linked global cartel case] squarely, would have found jurisdiction”).

121. *In re Monosodium Glutamate Antitrust Litig.*, No. Civ.00MDL1328, 2005 WL 1080790, at *5 (D. Minn. May 2, 2005).

122. *In re Ins. Antitrust Litig.*, 938 F.2d 919, 926 (9th Cir. 1991), *aff’d in part, rev’d in part on other grounds sub nom.* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

123. *AGC*, 459 U.S. at 536–37 & n.34 (quoting *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 351–52 (1928) (Andrews, J., dissenting)).

First, the House Report's discussion of deterrence weighs in favor of an expansive view of jurisdiction. Although Justice Breyer found that the various deterrence arguments battled to a draw in *Empagran*,¹²⁴ the legislative history suggests that Congress had already declared a victor. The House Report notes that there are "reasons for preserving the rights of foreign persons to sue under our laws when the conduct in question has a substantial nexus to this country," reasoning that "to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable solely to injured domestic persons."¹²⁵ The Report states that the FTAIA's domestic effects "test . . . does not exclude all persons injured abroad from recovering under the antitrust laws of the United States."¹²⁶ Admittedly, this portion of the House Report includes a citation to *Pfizer, Inc. v. Government of India*,¹²⁷ which considered only whether foreign purchasers (and, specifically, foreign government purchasers) could recover under U.S. antitrust law for purchases at inflated prices made *in the United States*.¹²⁸ Nonetheless, the broader language in the House Report shows that Congress was aware of, and seemingly approved, the idea that extraterritorial jurisdiction over foreign plaintiffs injured abroad would help deter cartels.

Second, the House Report's commentary under the heading "Type of Domestic Impact" indicates that Congress did intend to confer jurisdiction on foreign plaintiffs injured abroad by conduct that also harmed the domestic market. The Report notes that "the domestic 'effect' that may serve as the predicate for antitrust jurisdiction . . . must be of the type that the antitrust laws prohibit."¹²⁹ The Report then explains that this view of "effect" means that "a plaintiff would not be able to establish . . . jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company . . . when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind."¹³⁰ The implication, therefore, is that jurisdiction *would* be proper where anticompetitive conduct causes both the adverse effect in the domestic market and the plain-

124. *F. Hoffmann-Laroche v. Empagran, S.A.*, 542 U.S. 155, 174–75 (2004) (stating that the Court could not determine whether plaintiffs' "side of this empirically based [deterrence] argument or the enforcement agencies' side is correct").

125. H.R. REP. NO. 97-686, at 10, *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2495. While *Empagran* cited other portions of this House Report, it failed to consider this language. Indeed, it appears that the only two federal courts to have cited this language are the D.C. Circuit, in the original panel decision in *Empagran* finding jurisdiction, 313 F.3d 338, 356 (D.C. Cir. 2003), and the Second Circuit, in *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 403 n.10 (2d Cir. 2002).

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

127. 434 U.S. 308 (1978).

128. *Id.* at 309–10; H.R. REP. NO. 97-686, at 10, *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 ("Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.").

129. H.R. REP. NO. 97-686, at 11, *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2496.

130. *Id.*

tiff's extraterritorial injury. A second comment in this section of the House Report states this point even more clearly. Referencing the problems of an earlier draft, the Report notes that the bill was not

intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language . . . to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States.¹³¹

This language shows that Congress understood that it was opening the jurisdictional door to foreign plaintiffs seeking recovery for injuries suffered abroad due to linked global conspiracies. Neither *Empagran* nor any subsequent case appears to have confronted this language, and the failure to do so weakens the arguments against jurisdiction in linked global cartel cases because it does not pay proper heed to Congress's expressed intent.¹³²

Third, testimony from congressional hearings during the drafting stages of the FTAIA shows that Congress considered and rejected language that would have expressly limited recovery to persons injured *in the United States*. The Business Roundtable supported a rival version of the FTAIA that would have ensured that defendants faced "antitrust liability only to those persons injured within the United States by an antitrust violation."¹³³ As another witness put it, this proposed FTAIA language would have "thus ma[d]e clear that the American antitrust laws do not protect foreign buyers and businesses as they operate in their own home markets; competitive effects in foreign markets are the proper subject of foreign, not American, law."¹³⁴ Congress, however, did not enact this version of the FTAIA.¹³⁵ Instead, the

131. *Id.* at 11–12, as reprinted in 1982 U.S.C.C.A.N. 2487, 2496–97.

132. See Jodi Stanfield, Note, *Dependent Injury Based Claims: The Next Step in American Regulation of Antitrust*, 39 U.C. DAVIS L. REV. 1691, 1709–10 (2006) (arguing that *Empagran* "provided a disservice by not citing the House Report's text [on the issue of where the injured party must experience the impact of the illegal conduct] because other courts have used the same document to support a contrary conclusion" and that "the Court needed to explain why its reading of the House Report was different and more correct than the readings by these other courts").

133. *Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2326 Before the Subcomm. on Monopolies & Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 109, 106–13 (1981) [hereinafter *Hearing*] (statement of Martin F. Connor, Washington Corporate Counsel, General Electric Co., appearing on behalf of the Business Roundtable); see also *id.* at 114 (statement of Rep. Rodino, sponsor of H.R. 2326) (suggesting that the bill would "den[y] foreign purchasers protection of U.S. trade laws"); Sprigman, *supra* note 31, at 278 (noting that in enacting the FTAIA Congress rejected language that "would have prohibited suits by persons injured abroad").

134. *Hearing*, *supra* note 133, at 87 (statement of James R. Atwood, Formerly Deputy Assistant Secretary and Deputy Legal Advisor, U.S. Department of State); see also *id.* at 91 (noting that "foreign plaintiffs would be able to invoke American antitrust to frustrate" their domestic governments' policies under "expansive interpretations of the Sherman Act").

135. The version favored by the Business Roundtable consisted of the following language: the Sherman Act "shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the United States or has the effect of excluding a domestic person from trade or commerce with such foreign

enacted language was far broader, and Congress accompanied this language with a House Report explicitly stating that the enacted language “d[id] not . . . mean that the impact of the illegal conduct must be experienced by the injured party within the United States.”¹³⁶ In sum, the legislative materials behind the FTAIA contain ample support for reading the statute as reflecting Congress’s understanding that the statutory language conferred jurisdiction on foreign plaintiffs injured abroad.

*C. Antitrust Standing Doctrine Better Addresses Courts’
Reluctance to Hear Linked Global Cartel Cases*

As detailed throughout this Note, courts have hesitantly approached linked global conspiracy claims, often citing concerns about directness, remoteness, causation, or generally the appropriateness of an American antitrust remedy.¹³⁷ The doctrine of antitrust standing offers a better solution to these problems than does denying jurisdiction, especially given evidence in the FTAIA’s legislative history that jurisdiction may be proper in these circumstances.¹³⁸ This Section explains why antitrust standing provides a better solution.

While courts may have valid concerns about hearing these cases, adopting an overly strict jurisdictional analysis is not the proper solution. Although foreign plaintiffs’ linked global conspiracy claims seem logically to satisfy the FTAIA’s jurisdictional standard,¹³⁹ courts may yet feel some uneasiness about presiding over such entirely foreign suits. Courts should then address that discomfort through an analysis of antitrust standing, which “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.”¹⁴⁰ Using the *AGC* framework to analyze standing, courts would then consider factors such as whether the plaintiffs’ alleged injury “was the type the antitrust laws were intended to forestall.”¹⁴¹

Using the doctrine of antitrust standing to dispose of foreign plaintiffs, rather than relying on jurisdiction, would accord with arguments advanced

nation.” H.R. 2326, 97th Cong. § 2 (1981) (as reported by Subcomm. on Monopolies & Commercial Law of the H. Comm. on the Judiciary, Mar. 26, 1981).

136. H.R. REP. NO. 97-686 at 11–12, as reprinted in 1982 U.S.C.C.A.N. 2487, 2496–97.

137. See *eMag Solutions LLC v. Toda Kogyo Corp.*, No. C 02-1611, 2005 WL 1712084, at *8 (N.D. Cal. Jul. 20, 2005) (reasoning that a strict causation requirement is needed to exclude claims from foreign plaintiffs arising out of conduct having only a tenuous connection to U.S. commerce); see also *supra* Section III.A (discussing the emphasis on proximate cause in *Empagran II*).

138. See *supra* Section III.B.

139. See *supra* Section III.A.

140. Cavanagh, *supra* note 15, at 1440.

141. See, e.g., *Aramel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983)).

not only by commentators,¹⁴² but also frequently by defendants themselves.¹⁴³ Indeed, a few years prior to *Empagran*, at least one court adopted exactly this approach. In *Galavan v. Archer Daniels Midland Co.*,¹⁴⁴ which concerned the global citric acid cartel, the court stated it was “persuaded by the legislative history of the FTAIA . . . that subject matter jurisdiction is appropriate in this case.”¹⁴⁵ After finding jurisdiction, the court then analyzed and rejected the plaintiff’s claim under the doctrine of antitrust standing.¹⁴⁶ Noting that one of the *AGC* standing factors “requires the Court to inquire ‘whether plaintiff has suffered an injury of the type which the antitrust statute was intended to forestall,’” the court reasoned that “[a]lthough plaintiff was injured by the elevated prices of citric acid, its injury is not covered by the antitrust laws because plaintiff was ‘neither a competitor nor a consumer’ in the United States domestic market.”¹⁴⁷ This antitrust standing reasoning would have likewise supported dismissing the plaintiffs’ claims in cases like *MSG*, *DRAM*, and *Latino Quimica*, as none of those plaintiffs appears to have alleged that they had ever participated in the relevant United States markets.

If plaintiffs wind up losing either way, one might ask whether it makes any difference whether courts describe their inquiry as one examining “jurisdiction” or “antitrust standing,” but the difference matters for two reasons. First, as Section III.B argued, Congress apparently understood and accepted that jurisdiction could extend to foreign plaintiffs injured abroad; therefore, using the blunt tool of a stringent “proximate cause” jurisdictional analysis to dismiss *all* cases frustrates that congressional intent. Second, as Section III.D suggests, cases may exist in which foreign plaintiffs satisfy the requirements for both jurisdiction and antitrust standing, and the current approach thus would improperly dismiss their suits.

D. *May Foreign Plaintiffs Meet Both Jurisdictional and Antitrust Standing Requirements?*

This Note has argued that, contrary to the thrust of case law, linked global cartel cases meet the FTAIA’s jurisdictional requirements. It has also noted that antitrust standing doctrine would nevertheless work to bar many

142. *E.g.*, Cavanagh, *supra* note 15, at 1440–51 (arguing that, while jurisdiction might exist for these foreign plaintiffs, antitrust standing doctrine should bar their claims); S. Lynn Diamond, Note, *Empagran*, *The FTAIA And Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 *BROOK. J. INT’L L.* 805, 845–48 (2006) (same).

143. *E.g.*, *eMag Solutions LLC v. Toda Kogyo Corp.*, No. C 02-1611, 2005 WL 1712084, at *11–12 (N.D. Cal. July 20, 2005) (noting defendants’ standing arguments and that “[a]ntitrust standing is an issue separate from the jurisdictional question,” but declining to address them in light of the holding denying jurisdiction); *DRAM*, No. C. 02-1486, 2006 WL 515629, at * 5–6 (N.D. Cal. Mar. 1, 2006) (same).

144. No. C 97-3259, 1997 WL 732498 (N.D. Cal. Nov. 19, 1997).

145. *Id.* at *3.

146. *Id.* at * 3–4.

147. *Id.* at *4 (citations omitted).

such claims. This Section points to a narrow class of cases in which courts should find that foreign plaintiffs enjoy antitrust standing to pursue their linked global cartel claims. Putting the facts of *eMag* alongside the reasoning of *Galavan* shows how foreign plaintiffs might avoid dismissal of their claims.

Where foreign plaintiffs allege a pattern of “mixed-purchasing” from defendant-members of a global cartel, as the plaintiffs in *eMag* alleged,¹⁴⁸ their claims should meet both jurisdictional and antitrust standing requirements. Mixed purchasing means simply that at some point—perhaps even prior to the conspiracy’s formation or outside the statute of limitations period—plaintiffs have purchased the product in both foreign and domestic markets. A pattern of mixed purchasing adds yet more support to the argument that jurisdiction is proper, and also satisfies antitrust standing concerns.

First, when mixed-purchaser foreign plaintiffs seek full recovery in federal court in linked global cartel cases, courts should read the FTAIA as establishing jurisdiction for their claims for the reasons argued above in Sections III.A and III.B. But to the extent that courts remain reluctant to find jurisdiction in linked global cartel cases—perhaps insisting that linked global cartel theories and arbitration arguments simply do not state a cause proximately “giv[ing] rise to” a claim—a pattern of mixed purchasing ought to satisfy even the strictest of jurisdictional standards. A pattern of mixed purchasing allows plaintiffs to tell a particularly compelling story about how the defendants’ linked global cartel exerted a worldwide, interdependent effect that eliminated any possibility of arbitration and thereby gave rise to their claims. The plaintiffs’ own purchasing history would both offer proof that arbitration would likely have occurred absent the conspiracy and assuage courts’ concerns about the directness of the relationship between the foreign plaintiffs’ injuries and the harmful effect of the defendant’s conduct upon domestic commerce. Combined with the legislative history arguments in Section III.B, this mixed-purchasing story should have convinced the *eMag* court that the foreign plaintiffs satisfied the FTAIA’s jurisdictional requirements.¹⁴⁹

Second, antitrust standing doctrine should not bar recovery for mixed-purchaser foreign plaintiffs because the mixed-purchasing element would connect these foreign plaintiffs more closely with the domestic market such that their injuries would more likely be “of the type which the antitrust statute was intended to forestall.”¹⁵⁰ In *Galavan*, the court held that the plaintiff lacked standing because the “plaintiff was ‘neither a competitor nor con-

148. *eMag*, 2005 WL 1712084, at *4 (noting plaintiffs’ claims that because “they ‘bought MIO in American commerce’” they would “‘have been particularly well-suited to replace purchases of MIO in purely foreign commerce with purchases of MIO in American commerce, if the conspiracy had not affected” the prices of MIO in the United States).

149. It bears repeating that the defendants’ Motion to Dismiss, as well as the court’s denial of jurisdiction, only covered the purely foreign activity. *See id.* at *8 (noting that plaintiff *eMag* USA was “not a subject of this motion to dismiss”).

150. *Galavan*, 1997 WL 732498, at *4 (quotation omitted).

sumer' in the United States domestic market."¹⁵¹ However, plaintiffs with a history of mixed purchasing, like the *eMag* plaintiffs, *would* have been consumers in the U.S. domestic market at some point and therefore should satisfy antitrust standing requirements.¹⁵²

CONCLUSION

The Supreme Court's decision in *Empagran* left open far more questions than it answered. Chief among those questions was uncertainty about the ultimate fate of foreign plaintiffs' claims seeking recovery in federal court for injuries suffered abroad. This Note has offered a largely critical examination of how federal courts have responded to the issues left unresolved in *Empagran*. It has questioned the reasoning underlying the growing consensus view against jurisdiction, arguing that the FTAIA does in fact confer jurisdiction over linked global cartel cases. Further, while acknowledging the legitimate and weighty concerns motivating the majority view, it has suggested that antitrust standing doctrine offers a better solution to these problems than a blanket denial of jurisdiction. With few courts bucking the emerging consensus, it may be some time before these issues return to the Supreme Court, although in our increasingly globalized economy, it is unlikely that the Court will be able to avoid confronting them before too long. If or when the Court does return to these questions—even if its analysis bears no resemblance to the arguments in this Note—hopefully its reasoning will be far more rigorous than that seen in the courts so far.

151. *Id.* at *4 (citing *In re Ins. Antitrust Litig.*, 938 F.2d 919, 926 (9th Cir. 1991), *rev'd in part on other grounds*, *Hartford Fire Ins. v. California*, 509 U.S. 796 (1993)).

152. *See* *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 539 (1983) (denying standing and noting that the plaintiff "was neither a consumer nor a competitor in the market in which trade was restrained").

