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Note

Extraterritoriality and the Unique Analogy Between Multinational Antitrust and Securities Fraud Claims

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NOTE

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INTRODUCTION

The interconnectedness of global economies and capital markets, as well as the prevalence of international trade, has significant implications for both domestic and international law and policy. As the U.S. Court of Appeals for the First Circuit acknowledged, "[w]e live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale."[1] These global reverberations can have adverse effects in numerous jurisdictions. The potential for distinctly foreign conduct to injure persons in both the United States and a foreign jurisdiction raises a question in two principal areas of U.S. law, antitrust and securities fraud: Does U.S. law apply to foreign plaintiffs' claims that originate from conduct occurring wholly outside of the United States that has adverse effects on domestic purchasers and markets?

In both the antitrust and securities fraud contexts, foreign plaintiffs, injured by foreign defendants in foreign territories, seek to bring claims arising under U.S. law in U.S. federal courts. I refer to the antitrust versions of these claims as "global market cases" because the alleged link between the foreign plaintiff's claim and the United States is the existence of a global market reaching across national boundaries.[2] In the securities context, I refer to these cases as "f-cubed cases" because they involve foreign investors bringing actions against foreign issuers concerning transactions taking place on a foreign exchange.[3] This Note contends that the two classes of claims are uniquely analogous in implicating the extraterritorial reach of U.S. law because both involve foreign plaintiffs seeking to establish jurisdiction in U.S. federal court on the grounds that their foreign injury is connected to an adverse U.S. domestic effect.

1. United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997).

2. For example, the "central economic reality" of the foreign plaintiffs' claim in the *Empagran* cases was that "because vitamins are fungible and traded globally, and because the United States occupies a major share of the global market, defendants' cartel would have been unsustainable if the United States had been excluded from it, and it would have been impossible to extract cartel profits from plaintiffs." Corrected Brief for Appellants at 10, Empagran S.A. v. F. Hoffman-La Roche, Ltd., 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115).

3. *See* Julie B. Rubenstein, Note, *Fraud on the Global Market: U.S. Courts Don't Buy It; Subject-Matter Jurisdiction in F-Cubed Securities Class Actions*, 95 CORNELL L. REV. 627, 628–29 (2010).

The Supreme Court of the United States most recently addressed the issue of extraterritorial application of U.S. antitrust laws in *F. Hoffman-La Roche Ltd. v. Empagran S.A.* (*Empagran I*).[4] The question in *Empagran I* was whether the so-called domestic exception of the Foreign Trade Antitrust Improvements Act (FTAIA),[5] which delineates extraterritorial application of the Sherman Act,[6] confers jurisdiction upon federal courts to foreign purchasers' antitrust claims alleging injury on account of foreign transactions. The domestic exception allows for the application of U.S. antitrust law to foreign conduct[7] that does not involve import trade or import commerce into the United States if such conduct can satisfy two prongs. First, the conduct must have a direct, substantial, and reasonably foreseeable effect on U.S. domestic trade or commerce. Second, this effect on U.S. domestic commerce must give rise to a claim under U.S. antitrust laws.

The Court in *Empagran I* found that the foreign plaintiffs' claims satisfied the first prong of the domestic exception because the actions of

4. 542 U.S. 155 (2004).

5. 15 U.S.C. § 6(a) (2006). The domestic exception in the FTAIA states that Sections 1 to 7 of 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, 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 right to a claim under the provisions of sections 1 to 7 of [Title 15], other than this section." *Id.* There has been considerable debate and confusion surrounding the correct interpretation of the FTAIA, which purports to govern the extraterritorial application of U.S. antitrust law. *See Empagran I*, 542 U.S. at 158 ("[The FTAIA operates by] setting forth a general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce . . . with foreign nations.' It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters." (internal citations omitted)). Observers' consensus is that much of this confusion is the result of the peculiar structure and wording of the statute. *See, e.g.*, Joshua P. Davis, *Supreme Court Review of the Foreign Trade Antitrust Improvements Act: A Case of a Misleading Question?*, 38 U.S.F. L. REV. 431, 432 (2004).

6. The FTAIA is the pertinent standard for whether U.S. antitrust law applies extraterritorially to a foreign claim. *See* Jordan A. Dresnick et al., *The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas and Abroad*, 40 U. MIAMI INTER-AM. L. REV. 453, 469 (2009) (referring to the FTAIA as the "relevant standard"); *see also* Edward Valdespino, Note, *Shifting Viewpoints: The Foreign Trade Antitrust Improvement Act, A Substantive or Jurisdictional Approach*, 45 TEX. INT'L L.J. 457, 458–59 (2009) ("From its nascent days to the present, the Foreign Trade Antitrust Improvement Act (FTAIA) has been viewed predominantly as a jurisdictional limitation to the Sherman Act rather than a limit on its substantive applicability. All of the circuits currently interpret the FTAIA as jurisdictional, and although the Supreme Court has not ruled on this issue specifically, in its *Empagran* decision the Court refers to the FTAIA in jurisdictional terms.").

7. Despite the statutory language "conduct involving trade or commerce . . . *with* foreign nations," the FTAIA applies to wholly foreign transactions and does not require a transaction in U.S. domestic commerce. *Empagran I*, 542 U.S. at 162–63.

the international cartel had a significant adverse effect on U.S. markets.[8] However, the Supreme Court went on to conclude that the FTAIA did not provide for subject-matter jurisdiction in this case because the foreign plaintiffs' claims against the foreign defendant were based on foreign injuries *wholly independent* of any effect on U.S. domestic commerce and thus did not give rise to a claim under U.S. law.[9] By narrowly construing the issue in *Empagran I*, the Court left a significant question unanswered: whether the FTAIA provides for subject-matter jurisdiction when a foreign injury *is* in some way dependent on the effect of alleged foreign antitrust activity caused to U.S. domestic markets.[10] The case was remanded to the U.S. Court of Appeals for the District of Columbia for consideration of this question.[11]

In *Empagran II*, the D.C. Circuit determined that there must be proximate causation in global market antitrust cases in order for these types of foreign injuries to give rise to a claim under U.S. antitrust law.[12] It summarily concluded that language in the FTAIA requires that the adverse domestic effect be a proximate cause of the plaintiff's injury.[13] More specifically, the D.C. Circuit concluded that "[t]he statutory language — 'gives rise to' — indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for 'nexus' the appellants advanced in their brief."[14] Unfortunately, this reasoning is cursory and inadequate. There is little support — in the case law, statutory text, or legislative history — for the proximate cause standard. On the reasoning that the D.C. Circuit provides, the proximate cause standard is not satisfactorily substantiated.

Nevertheless, this Note will argue that the D.C. Circuit ultimately reached the correct result. Specifically, this Note will draw on the judicial treatment of f-cubed securities fraud cases to support the D.C. Circuit's application of a proximate cause standard in global antitrust cases like

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8. *Empagran I*, 542 U.S. at 164 (explaining that "[t]he 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").

9. *Id.* at 169.

10. Professor Sprigman points out that "the Supreme Court's hypothetical will seldom, if ever, be relevant in a private antitrust action involving a multinational cartel" because "[i]n most instances . . . cartels dealing in products subject to arbitrage will be forced to reach a global agreement. And under these conditions, harm inflicted on U.S. markets cannot be 'independent' of foreign harm." Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. CHI. L. REV. 265, 275–76 (2005).

11. Empagran S.A. v. F. Hoffman-La Roche, Ltd. (*Empagran II*), 417 F.3d 1267 (D.C. Cir. 2005).

12. *Id.* at 1271.

13. *Id.* The relevant language is "gives rise to a claim" from the FTAIA. *See* 15 U.S.C. § 6(a) (2006).

14. *Empagran II*, 417 F.3d at 1271.

Empagran II. The similarity between the two types of cases justifies creating an analogy between global market antitrust claims and f-cubed securities fraud cases.

In order to develop this argument, this Note will begin in Part I by briefly discussing the general extraterritorial application of U.S. law. This Part will then review the history of extraterritorial application of U.S. antitrust and securities fraud law. From there, Part I will develop the analogy between global market antitrust cases and f-cubed securities fraud cases in more depth. After recounting this general background understanding, the Note will then demonstrate in Part II the inadequacy of the D.C. Circuit's decision in *Empagran II*. This Part will maintain that the grounds for the D.C. Circuit's adoption of the proximate cause standard cannot be pegged to either the text or legislative history of the FTAIA or to the Supreme Court's reasoning in *Empagran I*. Instead, as Part III will argue, the D.C. Circuit's decision can be justified by drawing on f-cubed securities fraud case rulings. In support of this argument, Part III will focus on both the Supreme Court's recent decision in *Morrison v. National Australia Bank Ltd.*,[15] which addresses the extraterritoriality of the Securities Exchange Act of 1934, and on lower courts' decisions that apply the domestic effects test to f-cubed securities fraud cases. Finally, Part IV will discuss comity concerns relevant to both global market antitrust cases and f-cubed securities cases and argue that these concerns justify a robust limitation on extraterritorial jurisdiction.

I. BACKGROUND

This Part seeks to understand the limits of extraterritorial application of U.S. antitrust law in the global economy. In addition to understanding the existing statutory law — the FTAIA — it is essential to examine the requirements underlying extraterritorial jurisdiction generally, with a particular focus on international law. It is also important to be familiar with the history of extraterritorial application of U.S. antitrust and securities fraud law in light of the purposes of their respective bodies of law. This Part explores these topics and then develops a unique analogy between global market antitrust and f-cubed securities fraud cases.

A. *International Law & Extraterritorial Jurisdiction*

International law has increasingly recognized the need for the application of domestic laws to foreign conduct that has substantial adverse domestic effects so that those effects may be redressed.[16] The

15. 130 S. Ct. 2869 (2010).
16. *See* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (2d Cir. 1945); *see also*

acceptance of extraterritorial jurisdiction has developed alongside the progression of dominant legal thinking, from classic legal thought and legal formalism to legal realism and pragmatism.[17] In addition, the "realit[ies] on the ground" — such as "the international cartel movement," which "created complex business relationships that crossed national borders" and "the pressure to regulate cross-border activity" — led to an expansion of "the geographic reach of domestic laws."[18] Today, there are five bases of domestic jurisdiction recognized in international law: nationality, effects, protective, universality, and passive personality.[19] Foreign plaintiffs bringing claims in global market antitrust and f-cubed securities fraud cases, where the relevant and substantial conduct occurs outside of the United States, typically seek to establish subject-matter jurisdiction based on the adverse U.S. domestic effects basis of jurisdiction.[20]

Given that "international law itself has come to acknowledge the propriety of certain assertions of jurisdiction beyond the territory of the regulating sovereign,"[21] Congress has responded to the increasing effects of globalization, such as those created by international trade and investment, by seeking to regulate foreign conduct.[22] To determine whether a piece of legislation is permissibly regulating foreign conduct, a court must consider two questions: (1) Whether Congress possesses the authority to impose national law beyond its territory; and (2) whether Congress intended that the statute apply extraterritorially.[23] The first

Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 268–69 (2006) (discussing extraterritoriality and the reach of U.S. jurisdiction); Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1471–72 (2008) ("Judge Hand injected the effects test into U.S. law with his landmark *Alcoa* opinion. In *Alcoa*, the Court held that the Sherman Act applied to foreign conduct impacting the United States, even when that conduct occurred abroad."). Contemporary analysis of extraterritorial jurisdiction derives from the traditional tenet of international law that each sovereign must respect other nations' exclusive authority to police within their territory. Buxbaum, *supra*, at 268.

17. Parrish, *supra* note 16, at 1468.

18. *Id.* at 1468–69.

19. *See* Wade Estey, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177, 181 (1997).

20. *See, e.g.*, *Empagran II*, 417 F.3d 1267, 1269 (D.C. Cir. 2005); *In re* The Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 9 (D.D.C. 2000).

21. Am. Bar Ass'n, Global Cyberspace Jurisdiction Project, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801, 1866 (2000).

22. Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 74 (1992) ("The growing significance of international trade and investment has increasingly led the United States and other nations to devote regulatory attention to conduct occurring abroad.").

23. United States v. Noriega, 746 F. Supp. 1506, 1512 (S.D. Fla. 1990) ("Where a court is faced with the issue of extraterritorial jurisdiction, the analysis to be applied is 1) whether the United States has the power to reach the conduct in question under traditional principles of international

prong of this test is typically easy to satisfy; Congress's power to enact legislation that applies outside the territory of the United States "is nearly unconstrained."[24] The question of congressional intent to apply U.S. law to conduct abroad is a complex inquiry, however, involving the purposes of the legislation, canons of statutory interpretation, and notions of prescriptive comity.

B. Extraterritorial Application of U.S. Antitrust Law

The extent to which U.S. antitrust law possesses an extraterritorial reach is reflected in the underlying purposes of the antitrust laws themselves. Congress passed the Sherman Act in 1890 to promote competition[25] and individual enterprise.[26] The Supreme Court has stated that the purpose of the Sherman Act is "to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, [and] to afford protection from the subversive or coercive influences of monopolistic endeavor."[27] To this end, the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[28]

The jurisdictional statute accompanying the Sherman Act — the FTAIA — indicates that "the purpose of U.S. antitrust laws is to protect

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law; and 2) whether the statutes under which the defendant is charged are intended to have extraterritorial effect.").The question presented by global market antitrust and f-cubed securities fraud cases — whether a U.S. court has authority to hear a foreign plaintiff's claim — involves subject-matter jurisdiction, a court's authority to issue a binding judgment and legislative jurisdiction, "a nation-state's authority to prescribe or regulate conduct." Parrish, *supra* note 16, at 1462. The court will have subject-matter jurisdiction over the foreign plaintiff's claim if the claim arises under federal law. 28 U.S.C. § 1331 (2006). Extraterritorial legislative jurisdiction exists when Congress regulates conduct occurring outside of its borders. Parrish, *supra* note 16, at 1462.

24. Parrish, *supra* note 16, at 1463; *see also* John W. Hamlin, Comment, *Exporting United States Law: Transnational Securities Fraud and Section 10(b) of the Securities Exchange Act of 1934*, 3 CONN. J. INT'L L. 373, 380 (1988) ("Courts have no power 'to declare null and void a statute adopted by Congress or a declaration included in a treaty merely on the ground that such a provision violates a principle of international law,' unless the statute or treaty violates the due process requirement of the Fifth Amendment." (quoting Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959))); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 881 (1989) ("The Constitution does not express any territorial limitation on the powers of Congress. For example, the power to regulate commerce with foreign nations, and to enact criminal laws necessary and proper to carry out the regulations of commerce, might well include laws that apply outside as well as within the territory of the United States, to aliens as well as to nationals.").

25. *See* United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966).

26. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 386 (1956).

27. Appalachian Coals v. United States, 288 U.S. 344, 359 (1933), *overruled on alternate grounds by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); *see also* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) (holding that the purpose of the antitrust laws "is to protect the public from the failure of the market").

28. 15 U.S.C. § 1 (2006).

American economic interests and not foreign interests."[29] Courts have thus made clear that, "[w]ith respect to foreign trade, equal treatment is not the primary concern of U.S. courts. Congress created antitrust laws for the protection of U.S. businesses and consumers, not for the protection of foreigners."[30] As such, when considering the extraterritorial application of U.S. antitrust laws, the requirement by courts that such application redresses harm to U.S. domestic consumers and markets comports with congressional intent.

The exact boundaries of the Sherman Act's reach, however, are murky, particularly where foreign conduct causes both foreign injury and domestic effects. At the time Congress enacted the FTAIA, courts had been applying different variations of a common law effects test for nearly four decades to determine whether U.S. antitrust laws applied extraterritorially.[31] Judge Learned Hand famously articulated the prevailing version of the effects test in *United States v. Aluminum Co. of America* (*Alcoa*).[32] Judge Hand concluded that "[o]verseas conspiracies properly were the subject of suit in a U.S. antitrust court 'if they were intended to affect imports and did affect them.'"[33] While the Supreme Court arguably accepted the *Alcoa* effects test in *Hartford Fire Insurance Co. v. California*,[34] other circuit courts have treated this situation differently.[35] For example, both the Third and Ninth Circuits applied a

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29. Valdespino, *supra* note 6, at 462 (contending that what the FTAIA means "in plain English is that the Sherman Act does not apply to conduct, foreign or domestic, unless that conduct has a direct, substantial, and reasonably foreseeable effect on domestic markets or on U.S. export opportunities").

30. Jodi Stanfield, Note, *Dependent Injury Based Claims: The Next Step in American Regulation of Antitrust*, 39 U.C. DAVIS L. REV. 1691, 1715–16 & nn.182–83 (2006) (citing *Empagran I*, 542 U.S. 155, 174–75 (2004)); *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) (noting that "American antitrust laws do not regulate the competitive conditions of other nations' economies"); Kruman v. Christie's Int'l, 284 F.3d 384, 393 (2d Cir. 2002) (stating that since *Alcoa*, "the focus in determining whether the antitrust laws govern conduct is the conduct's effect on the domestic market rather than the situs of the conduct itself"); H.R. REP. NO. 97-686, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2491.

31. Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 286 n.2 (2007) (stating that, "[p]rior to the FTAIA, extraterritoriality was governed by the 'effects test,' most prominently attributed to Judge Hand's opinion in *United States v. Aluminum Co. of America* (*Alcoa*)").

32. *Alcoa*, 148 F.2d 416, 444 (2d Cir. 1945).

33. Huffman, *supra* note 31, at 296–97 (quoting *Alcoa*, 148 F.2d at 444).

34. 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, 2154 (2003) ("Without specifically addressing the different standards which had percolated up through the circuit courts, the Supreme Court . . . clearly embraced the effects test."); *see also* Robert D. Paul, *Expanding Extraterritorial Application of U.S. Antitrust Laws: What Are the Borders?*, 16 INT'L L. PRACTICUM 122, 123 (2003) ("The *Hartford Fire* Court deemed it 'well established by now that the Sherman Act applies to foreign conduct that [1] was meant to produce and [2] did in fact produce some substantial effect in the United States.'").

35. Deborah J. Buswell, Note, *Foreign Trade Antitrust Improvements Act: A Three Ring*

modified version of the effects test that included considerations of comity in the analysis.[36] Out of concern "that the *Alcoa* test did not adequately account for the interests of foreign states, the Ninth Circuit . . . added a gloss to *Alcoa* by creating a jurisdictional rule of reason,"[37] and both the Ninth and Third Circuits "held that before a U.S. court heard an antitrust claim involving foreign conduct, the court must balance the interests of the United States in having the claim heard in its courts against the international comity ramifications of doing so."[38] As illustrated, the effects test "was refined over the thirty-seven years before the FTAIA was enacted, but during that process, confusion arose about its meaning and application."[39]

It is clear that the test that courts used to determine whether U.S. antitrust laws applied extraterritorially prior to the FTAIA retains significance.[40] In fact, the legislative history of the FTAIA suggests that Congress contemplated the effects test when enacting the statute.[41] Moreover, subsequent to congressional enactment of the FTAIA, the Supreme Court applied a common law effects test in *Hartford Fire* because "it was both 'unclear how [the FTAIA] might apply to the conduct alleged' and 'unclear . . . whether the Act's "direct, substantial, and reasonably foreseeable effect" standard amends existing law or merely codifies it.'"[42] The Court further concluded that "international comity would not counsel against exercising jurisdiction" where there is an express purpose to affect United States commerce and a substantial adverse domestic effect on commerce.[43] The Supreme Court's holding in

Circus — Three Circuits, Three Interpretations, 28 DEL. J. CORP. L. 979, 983 & n.37 (2003) (comparing the Second Circuit in Kruman v. Christie's Int'l, 284 F.3d 384, 394 (2d Cir. 2002), which "recogniz[ed] 'that an unmodified "effects test" is too broad in its regulation of conduct,'" with the Ninth Circuit in Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614–15 (9th Cir. 1976), which held "that the 'effects test' is only one factor to consider to support the exercise of extraterritorial jurisdiction").

36. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1296–98 (3d Cir. 1979); *Timberlane Lumber Co.*, 549 F.2d at 613.

37. Cavanagh, *supra* note 34, at 2154.

38. Huffman, *supra* note 31, at 298 (citing *Mannington Mills, Inc.*, 595 F.2d at 1297–98, and *Timberlane Lumber Co.*, 549 F.2d at 613).

39. *Id.* at 297 (referencing Cont'l Ore Co. v. United Carbide & Carbon Corp., 370 U.S. 690, 704–05 (1962)).

40. Huffman, *supra* note 31, at 294–98.

41. Valdespino, *supra* note 6, at 460 (quoting House Report 686 (1982) and stating that, "[s]ince the *Alcoa* decision, 'it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies'"); *see also* Huffman, *supra* note 31, at 294 (discussing the importance of *Alcoa* and the effects test).

42. Dresnick, *supra* note 6, at 468 (quoting Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.23 (1993)); *see also* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 9 (1st Cir. 1997) ("*Hartford Fire* definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States.").

43. *Hartford Fire*, 509 U.S. at 798.

Hartford Fire thus illustrates that the effects test continues to play an important role in the Court's determination of extraterritoriality under the FTAIA.

Most recently, the Supreme Court indicated its continued adherence to the common law effects test in *Empagran I* when it held that where the adverse foreign effect of foreign price-fixing conduct "is independent of any adverse domestic effect . . . the FTAIA exception does not apply (and thus the Sherman Act does not apply)."[44] The Court offered two reasons for this result. First, "the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce."[45] Specifically, the Court "found no significant indication that at the time Congress wrote [the FTAIA] courts would have thought the Sherman Act applicable in . . . circumstances" where foreign injury arises independent of any U.S. domestic effect.[46] Thus, the Court's first line of reasoning in support of its conclusion was that extraterritorial application of U.S. law to a foreign plaintiff's claim alleging wholly foreign conduct and injury would impermissibly expand the scope of application of U.S. antitrust law to foreign commerce.[47]

Second, the Supreme Court reasoned that courts should "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[48] This method of statutory construction "reflects principles of customary international law that (we must assume) Congress ordinarily seeks to follow"[49] and "helps the potentially conflicting laws of different nations work together in harmony — a harmony particularly needed in today's highly interdependent commercial world."[50] The Court noted the longstanding tradition of U.S. courts applying antitrust laws to foreign anticompetitive conduct and

44. *Empagran I,* 542 U.S. 155, 164 (2004).

45. *Id.* at 169.

46. *Id.*

47. To support its conclusion, the Court distinguished the claim in *Empagran I* (that there arose a foreign injury independent of U.S. domestic effect) from six cases in which U.S. law was applied extraterritorially, and declared that "no pre-1982 case provides significant authority for application of the Sherman Act *in the circumstances we here assume*." *Id.* at 173 (emphasis added); *see also* Huffman, *supra* note 31, at 286 n.1 (citing the Export Trade Company Act of 1982, Pub. L. No. 97–290, tit. IV, §§ 401–03, 96 Stat. 1233, 1246–47 (codified at 15 U.S.C. § 6a (2000))); Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 781 (1986) (noting that "[the] interests of the various states affected by a particular business practice are to be taken into account" when deciding if a court has jurisdiction).

48. *Empagran I*, 542 U.S. at 164 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963)).

49. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1)–(2) (1987)).

50. *Id.* at 164–65.

acknowledged that such application is "consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."[51]

Although the Court articulated sound policy arguments counseling against extraterritorial application of U.S. antitrust laws to redress injury independent of any domestic effect in *Empagran I*, it made clear throughout its opinion that it did not consider whether there would be subject-matter jurisdiction over the foreign plaintiff's claim if the plaintiff's injury were sufficiently connected to a U.S. domestic effect.[52]

C. Extraterritoriality & U.S. Securities Fraud Law

Like U.S. antitrust law, the purpose behind U.S. securities fraud law suggests that Congress intended extraterritorial application when necessary to protect domestic actors or domestic markets.[53] In enacting the antifraud provisions, "Congress' general purpose . . . was to protect domestic market investors and the domestic securities market, particularly in the wake of the stock market crash of 1929."[54] In order to secure the protection of the "public interest" and "investors," Section 10(b) of the Securities Exchange Act of 1934 (the antifraud provision) makes it unlawful to use "manipulative or deceptive device[s]" respecting "the purchase or sale of any security."[55] The statute, however, "provide[s] no

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51. *Id.* at 165.

52. The Supreme Court emphasized the limited scope of its ruling repeatedly throughout its decision in *Empagran I. See* 542 U.S. at 158–59, 164, 166 (stating "[w]e here focus upon anticompetitive price-fixing activity that . . . independently causes separate foreign injury"; "[t]he issue before us concerns (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim"; "we reemphasize that we base our decision upon . . . price-fixing conduct . . . [where] the adverse foreign effect is independent of any adverse domestic effect"; and "we . . . repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim*? We can find no good answer to this question.").

53. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2893 (2010) (Stevens, J., concurring) (finding that "Congress, in passing the Exchange Act, 'expected U.S. securities laws to apply to certain international transactions or conduct'" (quoting Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 19 (2007))).

54. Sidney G. Wigfall, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases: The Second Circuit's Extraterritorial Application of the Antifraud Provisions of the 1934 Exchange Act and Congressional Intent*, 5 TOURO INT'L L. REV. 233, 234 & n.6 (1994); *see also* 15 U.S.C. § 78b (2006).

55. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195–96 (1976) (quoting 15 U.S.C. § 78j). In addition, pursuant to § 10(b), the Securities and Exchange Commission promulgated Rule 10b-5. *See* 17 C.F.R. § 240.10b-5 (2010) ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make

indication as to when American federal courts have jurisdiction over securities law claims arising from extraterritorial transactions."[56] Unsurprisingly, "the legislative history of the securities act[] does little to illuminate Congress' intent in this area" as well.[57]

In light of this limited guidance from the text of the statute and its legislative history, the U.S. Court of Appeals for the Second Circuit applied an effects test in *Schoenbaum v. Firstbrook*,[58] reasoning "that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."[59] The court found that foreign fraud adversely affects the price of a firm's stock on the U.S. exchange, which thereby injures an American plaintiff, and accordingly held that this domestic effect was a sufficient basis for extraterritorial jurisdiction.[60]

The Second Circuit's adoption of a jurisdictional test based on domestic effects in *Schoenbaum*, which was supported by four decades of "general assent of its sister Circuits,"[61] set the stage for similar f-cubed securities fraud cases involving wholly foreign elements. Since then, many foreign plaintiffs have tried to argued "that when fraud occurring outside the United States causes harm in multiple jurisdictions — adversely affecting the U.S. securities markets as well as one or more foreign securities markets — then the effects within the United States

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any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.").

56. *In re* Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 757 (E.D. Va. 2004).

57. *Id*. (citing Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 29–30 (D.C. Cir. 1987)).

58. Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968).

59. *Id.* at 206; *see also* Finch v. Marathon Sec. Corp., 316 F. Supp. 1345, 1349 (S.D.N.Y. 1970) (discussing *Schoenbaum*); Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 91 (2003) (noting that U.S. courts have justified extraterritorial application of securities laws "as necessary to protect U.S. investors and the integrity of U.S. markets"). The Supreme Court recently overruled *Schoenbaum* and held that Section 10(b) of the Exchange Act applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Morrison*, 130 S. Ct. at 2884. The Court invoked the presumption against extraterritorial application and stated that "there is no affirmative indicated in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not." *Id.* at 2883.

60. *Schoenbaum*, 405 F.2d at 208. Though the Second Circuit in *Schoenbaum* was satisfied to apply the securities laws to redress adverse effects alleged by an American plaintiff, lower courts have rejected some domestic effects as insufficient to justify subject-matter jurisdiction. Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 475 (2009).

61. *Morrison*, 130 S. Ct. at 2891 (2010) (Stevens, J., concurring).

create a basis for jurisdiction over *all* claims arising out of that conduct."[62]

D. *The Analogy Between Global Market Antitrust & F-Cubed Securities Fraud Cases*

In both global market antitrust and f-cubed securities fraud cases, foreign plaintiffs seeking extraterritorial jurisdiction in U.S. courts have sought a form of effects-based jurisdiction. Global market antitrust cases involve claims in which plaintiffs seek to invoke the subject-matter jurisdiction of U.S. courts over wholly foreign injuries. For example, in the *Empagran* litigation, the plaintiffs were foreign purchasers of bulk vitamins.[63] They alleged that the foreign defendants engaged in a price-fixing conspiracy that artificially raised the price of vitamins in both foreign markets and the U.S. market.[64] Moreover, they claimed that their injuries, sustained as a result of the purchase of vitamins at supracompetitive prices in a foreign market, were directly related to similar injuries inflicted in the United States.[65] The plaintiffs alleged that the markets for vitamins in the United States and foreign countries actually operated like a single global market because the opportunity for arbitrage made it impossible for conspirators to maintain artificially inflated prices on a foreign market without also inflating prices in the United States.[66]

Claims by foreign plaintiffs in f-cubed securities fraud cases that involve substantially foreign conduct have followed a similar line of reasoning to that found in global market antitrust cases like *Empagran I*. Foreign plaintiffs who purchased the shares of a foreign company on a foreign exchange have alleged that, where the foreign company also registers and lists its securities on a U.S. exchange, the injury they sustained was directly connected to parallel adverse effects on the U.S. securities market.[67] The justification for this claim is that, because of

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62. Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 42 (2007).

63. Joint Appendix at 30–31, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

64. Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 5, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

65. *See* Appellants' Reply Brief at 7, Empagran S.A. v. F. Hoffman-La Roche Ltd., 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115).

66. *See* Respondents' Brief in Opposition at 2–3, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

67. *See* Kaufman v. Campeau Corp., 744 F. Supp. 808, 810 (S.D. Ohio 1990) ("Plaintiffs cite the unitary nature of the Canadian and domestic markets and the fact that defendants' stock was traded on an American exchange as bases for the exercise of jurisdiction over these claims."); *see also* McNamara v. Bre-X Minerals Ltd., 32 F. Supp. 2d 920, 925 (E.D. Tex. 1999) (finding that the

efficient capital markets, price distortions resulting from misinformation generated by fraud in a foreign country are directly connected to price distortions on U.S. markets.[68] Thus, plaintiffs in these kinds of f-cubed securities fraud cases argue that, despite the fact that the fraudulent activity occurred substantially (or wholly) in a foreign country, the foreign fraud resulted in substantial adverse domestic effects in the United States.

It should be noted that, although foreign plaintiffs in both global market antitrust cases and f-cubed securities fraud cases rely on an effects-based jurisdiction, the basis for such jurisdiction is derived from two different sources of law. In the antitrust context, plaintiffs can point to the FTAIA, which governs subject-matter jurisdiction in antitrust cases. Specifically, plaintiffs look to the domestic exception of the FTAIA, which creates jurisdiction as long as the foreign conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce and as long as that effect gave rise to the plaintiff's claim.[69] In the securities context, foreign plaintiffs claim jurisdiction based on the common law effects test, which "asks 'whether conduct outside the United States has had a substantial adverse effect on American investors.'"[70] Courts have defined "a 'substantial adverse effect' as fraud which has adversely affected specific United States investors or parties."[71]

The similar global dimensions and regulatory challenges of antitrust and securities fraud conspiracies further extend the analogy between the two situations. In both antitrust and securities fraud cases, plaintiffs assert that the foreign conduct at issue has global consequences that cause adverse U.S. domestic effects. The core of the argument is that, regardless of where the conduct underlying the conspiracy occurred, the effects of the schemes are realized worldwide. In the antitrust context, this effect comes from the fact that a cartel's actions often must cross national boundaries. The ultimate success of a price-fixing conspiracy depends on the cartel's ability to maintain prices in the relevant market, which, in today's globalized economy, often encompasses multiple domestic

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court lacked subject-matter jurisdiction because the Canadian plaintiffs failed to show that any defendant's conduct in the United States directly contributed to their losses).

68. *See* Choi & Silberman, *supra* note 60, at 476 ("When a corporation's shares are traded on an U.S. exchange as well as a foreign exchange, it might be argued that there is a harmful domestic effect if prices fall abroad, since falling prices abroad may cause securities traded on the U.S. exchange to fall as well. Such a domestic effect could be said to be the result of a global and efficient securities market.").

69. *See* 15 U.S.C. § 6(a) (2006).

70. *In re* Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 757 (E.D. Va. 2004) (quoting Robinson v. TCI/US West Commc'ns, Inc., 117 F.3d 900, 905 (5th Cir. 1997)).

71. *Id.*

markets at once.[72] In the securities context, the trans-border impact of securities fraud is a result of the free flow of information between countries and efficient capital markets; fraud that distorts the value of a firm's equity in a foreign market affects the price of that firm's shares in the U.S. market as well.

The fact that the aforementioned conduct can take place in one jurisdiction and still cause adverse effects in other nations is significant because, "[i]n our globalized economy, where one nation's citizens hurt another nation's citizens by economic acts against them, the purview of 'sovereignty' and of impermissible extraterritoriality has shrunk."[73] In worldwide price-fixing conspiracies and the commission of securities fraud, conspirators are able to evade the national regulations of one country, yet still injure consumers and investors (and consequently obtain value) in that country due to the nature of global markets. Put another way, the economic incentives facing global actors are transformed because a conspiracy can reach across territorial borders without suffering negative consequences within any borders. In the antitrust context, "insufficient regulation in some countries might create an incentive for continued anti-competitive behavior even in the countries that do regulate sufficiently."[74] Transnational securities transactions similarly implicate the regulatory interests of multiple nations[75] by virtue of a nation's province to protect its domestic purchasers and markets. The global nature of antitrust and securities fraud conspiracies creates a regulatory interest for multiple countries,[76] particularly "if under-enforcement in the

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72. Hannah L. Buxbaum, *Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 365, 365 (2004) (arguing that "the effectiveness of the respective cartels depend[s] on the linking of pricing behavior across countries"); *see also* 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, 832–33 (2006) (summarizing plaintiffs' argument that "[b]ecause the [defendants'] product (vitamins) was fungible and globally marketed, they were able to maintain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well").

73. Eleanor M. Fox, *The End of Antitrust Isolationism: The Vision of One World*, 1992 U. CHI. LEGAL F. 221, 234–35 (1992).

74. Buxbaum, *supra* note 72, at 365 (demonstrating that "the national enforcement strategies used to counter global cartels are linked").

75. *See* W. Barton Patterson, Note, *Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions*, 74 FORDHAM L. REV. 213, 213 (2005) (recognizing that "in a given transaction, up to four different nations may assert jurisdiction and application of their laws — the nations of the purchaser(s), seller(s), company, and stock exchange" (internal citations omitted)).

76. *See* Buxbaum, *supra* note 72, at 366–67 (arguing that a narrow interpretation of the second prong on the FTAIA domestic exception "would limit the availability of private actions in U.S. courts to plaintiffs whose injuries were suffered in a transaction on U.S. markets," and does not recognize "the potential regulatory interest . . . of countries other than the one in which a particular transaction occurred").

country on whose market the particular transaction occurred led to under-deterrence of cartel behavior overall, leaving a regulatory gap."[77]

Both the expansive nature of the global market interpretation of effects-based jurisdiction and the fact that the alleged unlawful conduct implicates the sovereign interests of multiple nations are concerns present in the antitrust and securities fraud contexts. The foreign claims at issue in both types of cases have tested the limits of extraterritorial jurisdiction. Because plaintiffs in each case have premised extraterritorial jurisdiction on very similar arguments, the two types of cases present a useful analogy. This analogy is helpful because it demonstrates how courts have dealt with the same question, the extraterritorial application of U.S. law to foreign injuries connected to U.S. domestic effects, in two distinct contexts. As Part II will show, in global market antitrust cases, current precedent provides an inadequate explanation for the lower courts' strict interpretation of the effects test. However, as Part III will show, lower courts' treatment of substantially the same question in f-cubed securities fraud cases supports limited jurisdiction in global market antitrust cases.

II. INADEQUATE REASONING OF THE D.C. CIRCUIT IN *EMPAGRAN II*

On remand in *Empagran II*, the D.C. Circuit addressed the question of whether the FTAIA provides for subject-matter jurisdiction over a foreign plaintiff's claim in a global market antitrust case when the plaintiff's foreign injury is dependent on the adverse effect of the foreign conduct on the U.S. domestic market. This Part demonstrates that the reasoning the D.C. Circuit provided in *Empagran II* inadequately supported its adoption of proximate cause as the relevant standard for jurisdiction over a foreign plaintiff's claim.

In reaching its decision, the court assessed the foreign plaintiff's "alternate theory" of subject-matter jurisdiction — that, because bulk vitamins were "fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangements and respondents would not have suffered their foreign injury."[78] The D.C. Circuit determined that "'but for' causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anti-competitive conduct within the FTAIA exception."[79] The court further

77. *Id.* at 367–68 (noting that the "potential for such gaps is most pronounced in the case of developing countries, where the lack of antitrust laws may leave anti-competitive conduct entirely unregulated").

78. *Empagran II*, 417 F.3d 1267, 1269 (D.C. Cir. 2005).

79. *Id.* at 1270–71.

held that the foreign plaintiff's injury must be proximately related to an adverse domestic effect.

In articulating its decision to adopt proximate causation as the standard for the second prong of the FTAIA's domestic exception, the D.C. Circuit's reasoning was very limited. The court cursorily stated, "[t]he statutory language — 'gives rise to' — indicates a *direct causal* relationship, that is, proximate causation, and is not satisfied by the mere but-for 'nexus.'"[80] In support of its conclusion, the court offered that its interpretation of the "statutory language accords with principles of 'prescriptive comity' — 'the respect sovereign nations afford each other by limiting the reach of their laws.'"[81] Additionally, the D.C. Circuit stated that "[t]o read the FTAIA broadly to permit a more flexible, less direct standard than proximate cause would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders."[82] Thus, the D.C. Circuit based its decision to adopt the proximate cause standard on two negative assertions, both of which the Supreme Court had emphasized in *Empagran I* as primary concerns, specifically when a foreign injury was wholly independent of any domestic effect.

The problem with the D.C. Circuit's focus on *Empagran I* stems from the fact that *Empagran I* and *Empagran II* address different underlying factual claims, with *Empagran I* involving a domestic effect *independent* of the foreign injury and *Empagran II* involving a domestic effect *dependent* on the foreign injury. While the D.C. Circuit based its decision to reject subject-matter jurisdiction over the dependent foreign injury on account of the same concerns that the Supreme Court emphasized, the two situations are distinct. The D.C. Circuit's decision should reflect these differences because they are central to the determination of whether U.S. antitrust laws can be applied extraterritorially under the FTAIA in cases like *Empagran II*.

The D.C. Circuit's reliance on the Supreme Court's application of the FTAIA to wholly independent foreign injury, as well as on the Court's considerations of prescriptive comity and deference to the prerogatives of other nations, is a weak foundation for its decision. Neither the text nor the legislative history of the FTAIA suggests that proximate causation is the requisite nexus between the plaintiffs' injury and the U.S. domestic effect. Additionally, concerns about the correct interpretation of the FTAIA in light of prescriptive comity and the desire to avoid interfering with the sovereign authority of other nations are different in cases where

80. *Id.* at 1271 (emphasis added).

81. *Id.* (quoting Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting)).

82. *Id.*

the foreign injury is dependent on the conduct's domestic effect on U.S. competition.

A. *Question of Redressing Domestic Effects*

Empagran II's first weakness is that it is not supported by the primary purpose of U.S. antitrust laws, which is to remedy domestic antitrust injury. The Supreme Court explained in *Empagran I* that where application of antitrust laws would not "redress *domestic* antitrust injury that foreign anticompetitive conduct has caused," such as in a case where the foreign injury is independent of a domestic injury, "the justification for that interference seems insubstantial."[83] U.S. courts have a stronger interest, however, in adjudicating a case and regulating conduct where the claim is connected to a domestic effect, namely to remedy the adverse effect on U.S. markets and consumers. As the Court recognized in *Empagran I*, "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."[84]

In *Empagran I*, the Court also acknowledged that while "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm," Congress made "an exception where that conduct also causes domestic harm."[85] The Court hinted that extraterritorial application of U.S. antitrust law may be justified if redressing a foreign injury can be causally linked to the amelioration of domestic harms.

Where a foreign plaintiff's claim is dependent on an adverse U.S. domestic effect, U.S. antitrust laws are available to deter future domestic injury. The legislative history of the FTAIA reveals that Congress recognized that "preserving the right of foreign persons to sue under [U.S. antitrust laws] when the conduct in question has a substantial nexus to this country" is "under some circumstances" necessary to preserve "the deterrent effect of United States antitrust laws."[86] Thus, if foreign anticompetitive conduct has a direct, substantial, and reasonably foreseeable effect on U.S. commerce, as well as a significant adverse effect on foreign consumers, closing the doors of federal court to foreign

83. *Empagran I*, 542 U.S. 155, 165 (2004) (referencing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987)).

84. *Id.* (citing United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945)).

85. *Id.* at 166.

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

consumers could compromise Congress's purposes for U.S. antitrust law.[87]

B. Dependent Foreign Injuries & International Comity

Second, the *Empagran II* court's unsubstantiated reference to international comity concerns is not enough to justify its holding because these concerns are arguably less applicable to the facts of this particular case. Though considerations of prescriptive comity and foreign sovereign prerogatives are relevant in both global market antitrust and f-cubed securities fraud cases,[88] these concerns carry significantly less weight where the foreign injury is dependent on a significant adverse domestic effect, and thus, adjudication of a foreign claim would help remedy domestic harm.[89] Conversely, where there are neither adverse effects on the United States nor illegal conduct occurring in the United States, extraterritorial application of U.S. law may be unreasonable in light of concerns of international comity.[90]

The Supreme Court held that application of U.S. antitrust laws to foreign conduct that causes wholly independent harm "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."[91] The Court noted that this risk was particularly great where foreign plaintiffs need only identify *any* effect on the United States resulting from the foreign conduct to obtain subject-matter jurisdiction under U.S. law.[92] Thus, the Court concluded, "principles of prescriptive comity counsel against" an interpretation of the FTAIA that would allow application of U.S. antitrust law to independent foreign injury.[93]

The risk of interference with foreign regulatory schemes is less significant where the foreign injury is causally related to a harmful domestic effect. This is especially the case because a causal connection between a foreign injury and a domestic effect is often a formidable

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87. *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, 210–11 (2005) ("It is common sense that in global commerce, a strict territoriality principle cannot adequately protect competition. It does not capture anticompetitive conduct occurring entirely abroad that affects a domestic market.").

88. *Empagran I*, 542 U.S. at 169; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987).

89. *See In re* Monosodium Glutamate Antitrust Litig., No. Civ. 00MDL1328, 2005 WL 1080790, at *4 (D. Minn. May 2, 2005) (stating that "the policy concerns reflected in *Empagran* [*I*] are not present in this case, where [p]laintiffs allege that the foreign harm they suffered was inextricably related to the anti-competitive conduct's effect on domestic commerce").

90. Fox, *supra* note 73, at 234–35.

91. *Empagran I*, 542 U.S. at 165.

92. *Id.* at 166–67.

93. *Id.* at 169.

hurdle that many potential foreign plaintiffs may be unable to overcome.[94] Therefore, by requiring some kind of dependent domestic effect, "the courts' restricted application of U.S. antitrust law would protect against undue infringement on other nations' comity interests."[95] While the D.C. Circuit's adoption of the proximate cause standard as the requisite link between the foreign plaintiff's claim and the adverse domestic effect would almost certainly allow fewer foreign plaintiffs into U.S. courts, the Supreme Court's general concern about the difficulty of case-by-case comity analyses cited by the D.C. Circuit does not specifically dictate this particularly stringent standard.

C. The Silent Language, Legislative History & Legal Precedent of the FTAIA

Finally, the legal precedent and legislative history cited by the Court in *Empagran I* do not mandate the proximate cause standard adopted in *Empagran II*. In refusing to find subject-matter jurisdiction over a foreign injury that is independent of U.S. domestic effect, the Supreme Court reasoned that applying the domestic exception of the FTAIA in such a case would be an expansion of the pre-1982 scope of the laws.[96] The Court noted in support of this holding that Congress did not intend to expand the extraterritorial boundaries of U.S. antitrust law beyond that which had already existed at the time of implementation of the FTAIA.[97]

Although the Court in *Empagran I* clearly justified its holding on legislative history, the D.C. Circuit in *Empagran II* did not provide specific support for its assumption that application of the domestic exception where the foreign injury was only a "but for" cause of the domestic effect would be an expansion beyond the Sherman Act's intended scope. The court's lack of specific support is particularly problematic because relevant authorities sustain conflicting conclusions. Some lower federal courts have held that "but for causation is not the type of direct causation contemplated by the FTAIA" and that an effect is "'direct' under the FTAIA if 'it follows as an immediate consequence of the defendant's activity' with no 'intervening developments.'"[98] At the

94. Stanfield, *supra* note 30, at 1719 ("Since a plaintiff would have to show that the foreign harm was caused by a domestic injury, dependent injury jurisdiction would be more difficult to achieve.").

95. *Id.* (citing Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 9, F. Hoffman-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724)).

96. *Empagran I*, 542 U.S. at 169 (stating that "the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce").

97. *Id.*

98. Valdespino, *supra* note 6, at 462–63 (quoting *In re* Intel Corp. Microprocessor Antitrust Litig., 452 F. Supp. 2d 555, 561 (D. Del. 2006)); *see also* United States v. LSL Biotechnologies,

same time, however, Congress clearly intended some foreign injuries to be within the province of the U.S. antitrust laws,[99] suggesting "that spillover effects in the domestic market are enough to meet the 'direct' requirement — a much more reasonable interpretation in today's vastly integrated global economy."[100] Meanwhile, the FTAIA itself is silent with respect to the standard of relatedness Congress intended to require between the U.S. domestic effect and the foreign injury, although it has been suggested that, had "Congress meant to include a second 'directness' requirement in the FTAIA, it could have required . . . that 'such effect *directly* gives rise to a claim.'"[101]

As demonstrated in this Part, the D.C. Circuit's reasoning in *Empagran II* provided inadequate support for its adoption of proximate causation as the relevant standard for the second prong of the FTAIA's domestic exception. Nevertheless, this Note argues in Part III that the D.C. Circuit's decision to limit subject-matter jurisdiction is correct and can be justified by drawing on the unique analogy between global market antitrust and f-cubed securities fraud cases.

III. SUPPORT FOR THE D.C. CIRCUIT'S PROXIMATE CAUSE STANDARD IN F-CUBED SECURITIES FRAUD CASES

Although the D.C. Circuit's opinion in *Empagran II* is both cursorily and summarily articulated, the court's ultimate decision is correct, especially if one compares this case to analogous f-cubed securities fraud cases. As will be illustrated below, federal courts have held that foreign plaintiffs may not bring claims under the Securities Exchange Act in securities fraud cases when only foreign parties and foreign transactions are involved.[102] These decisions reflect an underlying concern that there

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379 F.3d 672, 680–81 (9th Cir. 2004) (noting the Supreme Court's definition of "direct effect" in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992), as an effect that "follows as an immediate consequence of the defendant's activity").

99. House Report 686 indicates that, while Congress added language to the FTAIA requiring the U.S. domestic effect be the basis of the alleged injury, "this does not . . . mean that that impact of the illegal conduct must be experienced by the injured party within the United States. . . . It is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic . . . commerce of the United States." H.R. REP. NO. 97-686, at 11–12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2497.

100. Valdespino, *supra* note 6, at 462–63 (quoting H.R. REP. NO. 97-686, at 8–14).

101. Huffman, *supra* note 31, at 327.

102. *See* Kaufman v. Campeau Corp., 744 F. Supp. 808, 810 (S.D. Ohio 1990); Buxbaum, *supra* note 62, at 42–43 (stating that courts have commonly come to the conclusion that while the claims of investors "whose harm flowed from" U.S. domestic effects, "that is, investors who purchased on U.S. markets," will have subject-matter jurisdiction, such adverse domestic effects "do not automatically give rise to jurisdiction over the claims of investors whose harm flowed from effects outside the country"); *see also* Choi & Silberman, *supra* note 60, at 476 ("[W]e know of no court that has used the effects test to apply extraterritorial jurisdiction in an f-cubed case.").

are instances in which the relationship between the foreign injury and the domestic effect is not sufficient to justify extraterritorial application of U.S. securities fraud laws. Additionally, the Supreme Court recently closed the courthouse doors to foreign plaintiffs seeking to bring claims under Section 10(b).[103] The Court held that "only transactions in securities listed on domestic exchanges, and domestic transactions in other securities" give rise to a claim.[104]

These judicial refusals to find subject-matter jurisdiction in certain f-cubed securities fraud cases focus on two related lines of reasoning: Some rely on justifications similar to the Supreme Court's decision in *Empagran I*, while others are more analogous to the D.C. Circuit's reasoning in *Empagran II*. For example, as in *Empagran I*, some lower federal courts have dismissed foreign plaintiffs' claims in f-cubed securities fraud cases on the implicit assumption that the plaintiff's injury was independent of a U.S. domestic effect.[105] Other lower federal courts' reasoning in f-cubed securities fraud cases mirror the D.C. Circuit's decision in *Empagran II* instead and reflect a concern that the relationship between the foreign plaintiff's injury and the adverse domestic effect is insufficiently direct, rather than that the injury and effect are completely independent. It is these decisions that lend credible support for the D.C. Circuit's adoption of proximate cause as the relevant standard in *Empagran II*. This Part will explore both sets of f-cubed securities fraud cases in further depth in order to draw out the relevant analogy that can be made between these cases and global market antitrust claims.

A. Independence of Foreign Injuries & Adverse Domestic Effects

Some judicial decisions in f-cubed securities fraud cases find that there is no subject-matter jurisdiction because a foreign plaintiff's injury in these cases fails to be dependent on — or causally related to — adverse domestic effects in the United States. As Professor Buxbaum suggests, "[t]he difficulty foreign claimants face is that courts tend to view adverse effects on the U.S. markets as independent of any adverse effects occurring elsewhere."[106] This is often the case because courts "see a change in the price of a security on [a national exchange] as independent of a change in the price of that security on a foreign exchange."[107] This

103. *See supra* Part I.D.

104. Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2884 (2010).

105. It is important to note that the Supreme Court recently held that whether the Securities Exchange Act provides a cause of action to foreign plaintiffs suing foreign defendants for foreign conduct is a question of whether the foreign plaintiffs state claims for which relief can be granted rather than a question of subject-matter jurisdiction. *Morrison*, 130 S. Ct. at 2877.

106. Buxbaum, *supra* note 62, at 42.

107. *Id.*

position is also consistent with the argument of Professors Choi and Silberman that the courts' rejection of adverse domestic effects as a source of subject-matter jurisdiction for f-cubed plaintiffs reflects the courts' refusal to accept the notion of a worldwide market for securities.[108]

For example, the U.S. District Court for the District of Columbia held in an f-cubed securities fraud case, *In re The Baan Co. Securities Litigation*, that the fact that "the securities are traded on an American exchange . . . only indicates there might be greater and more pervasive generalized effects in the United States; it does not show that those effects are related to the claims of the foreign plaintiffs."[109] The plaintiffs in *Baan* had argued that the defendants' foreign conduct caused an adverse effect in the United States because the foreign defendants' shares were "trade[d] in tandem on the world's markets, and therefore the value of Baan's shares owned by United States residents was affected. More specifically, the shares owned by the American plaintiffs were affected."[110] The district court, however, responded that an effects test "only extends jurisdiction as to those American plaintiffs who are affected."[111] While trading foreign shares on a foreign exchange intensified any adverse U.S. domestic effect, this effect, as related to the foreign plaintiff's claim, was still too generalized. The *Baan* court thus implied that, regardless of the link between the foreign conduct and the domestic effect, in order for a foreign plaintiff to bring a claim, there must be a relationship between the domestic effects and the foreign plaintiff's injury. Though the court did not say that foreign plaintiffs could never establish a sufficient relationship to a domestic effect, it refused to find such a relationship even where the foreign firm's shares traded concurrently on a U.S. and foreign exchange.

A Pennsylvania district court similarly considered whether it had subject-matter jurisdiction over the claims of foreign purchasers under the Securities Exchange Act where the foreign plaintiffs' injuries stemmed from purchases on the London Stock Exchange. The court rejected jurisdiction over the "non-resident foreign purchasers of [foreign] shares," because such claims "cannot be premised on domestic 'effects' of foreign conduct."[112] The court reasoned that "[t]hese investors were not American investors, they did not purchase their securities on an American exchange, and they did not suffer the effects of [foreign] conduct within the United States. Therefore, there is no domestic effect of [the foreign] conduct in

108. Choi & Silberman, *supra* note 60, at 476.
109. *In re* The Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 11 (D.D.C. 2000).
110. *Id.*
111. *Id.*
112. Tri-Star Farms Ltd. v. Marconi, PLC, 225 F. Supp. 2d 567, 573 (W.D. Pa. 2002).

relation to these plaintiffs."[113] Thus, in this case as well, the court concluded that regardless of the significance of the domestic effect caused by the foreign conduct, such effect had no relation to the foreign plaintiff's injury.

The U.S. District Court for the Southern District of New York has also held that "[t]he effects test . . . has no bearing in an action involving the claims of foreign purchasers of a foreign company's securities on foreign exchanges."[114] This court disagreed with the claim that foreign purchasers "may piggyback on the harm caused by the alleged fraud to investors and markets in the United States and thus bring their claims in United States courts."[115] The use of the word "piggyback" suggests the court's concern with foreign investors bringing suit in the U.S. courts, without a particular connection to the jurisdiction, on the grounds that their injury is indirectly related to the claims of U.S. investors. The court reiterated this conclusion in a subsequent case, stating that "consideration of the effects test alongside the conduct test is unlikely to provide any additional benefit to foreign plaintiffs in a class action lawsuit who purchased a foreign company's stock on a foreign exchange."[116] Thus, the lower federal courts' emphasis on particularized harm, rather than general adverse effects, demonstrates a concern that there should be at least some connection between the foreign injury and the domestic effects.

B. Insufficiently Direct Relationship Between Foreign Injuries and Domestic Effects

A further exploration of f-cubed securities fraud cases also reveals that lower federal courts are concerned about more than just any type of relatedness between a foreign injury and an adverse domestic effect. Similar to the D.C. Circuit's *Empagran II* decision, federal courts in f-cubed securities fraud cases often stipulate that the relationship between the foreign plaintiff's injury and the U.S. domestic effect must be *sufficiently direct*. For example, some courts have reasoned that a foreign plaintiff cannot establish subject-matter jurisdiction where the foreign transactions have "only remote and indirect effects in the United States."[117] The Second Circuit held that such remote and indirect effects are not substantial.[118] Similarly, the U.S. District Court for the Eastern

113. *Id.*
114. *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 369 (S.D.N.Y. 2005).
115. *Id.*
116. *In re* SCOR Holding (Switz.) AG Litig., 537 F. Supp. 2d 556, 562–63 (S.D.N.Y. 2008); *see also* Cornwell v. Credit Suisse Grp., 666 F. Supp. 2d 381, 387 (S.D.N.Y. 2009) (quoting *In re SCOR Holding*).
117. N.S. Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996).
118. *Id.*

District of Virginia held that the effects test requires foreign conduct to have a substantial effect on "American investors" and noted that "[c]ourts have defined a 'substantial adverse effect' as fraud which has adversely effected [sic] specific United States investors or parties."[119]

An example of a successful application of the effects test is *Itoba Ltd. v. LEP Group*,[120] where the Second Circuit upheld subject-matter jurisdiction over a claim brought by a foreign plaintiff, a Bermuda-based, wholly owned subsidiary of a transnational holding company.[121] The foreign plaintiff in that case had purchased shares of the foreign defendant corporation on the London Stock Exchange.[122] The parent corporation, A.D.T. Limited (ADT), had shares "listed on the New York Stock Exchange and approximately fifty percent of its shareholders of record reside[d] in the United States."[123] The court based subject-matter jurisdiction on a combination of both the effects and conduct tests, but held significantly that the effects test could be met "where, although Itoba, ADT's wholly-owned subsidiary, was the *nominal* purchaser and owner of the . . . [fraud-effected] stock, it was ADT which financed the deal and which, with its shareholders, ultimately must bear the loss."[124] The court also noted that the harm was not "'simply . . . an adverse affect [sic] on the American economy or American investors generally.'"[125]

Itoba demonstrates that courts are willing to apply U.S. law to a foreign plaintiff's claim where the relationship between the foreign plaintiff and domestic effect is so direct that the foreign plaintiff essentially steps into the shoes of a domestic investor. The case thus leaves open the argument that, by virtue of the relationship between the foreign subsidiary plaintiff and the parent corporation's American equity owners, the injuries to American investors and to the foreign plaintiff are proximately related. Interpreted in this way, the *Itoba* holding specifically supports the D.C. Circuit's adoption of the proximate cause standard.

Notwithstanding the variety of underlying rationales for their holdings, courts have universally held that a foreign purchaser of foreign securities on a foreign exchange cannot establish subject-matter jurisdiction on the basis of just any domestic effect alone. Thus, in the securities context,

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119. *In re* Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 757 (E.D. Va. 2004).

120. 54 F.3d 118 (2d Cir. 1995), *abrogated by* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167 (2d Cir. 2008).

121. *Id.* at 120.

122. *Id.* at 121.

123. *Id.* at 120.

124. *Id.* at 124.

125. *Id.* (quoting Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (2d Cir. 1975)). In this case, the Second Circuit was asked "to look beyond the foreign status of the challenged plaintiffs, and to exercise jurisdiction over their claims if sufficient connections to local harms exist, so as to protect domestic shareholders and interests of United States securities markets." *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 370 (S.D.N.Y. 2005) (referring to *Itoba*, 54 F.3d at 124).

courts treat the question of subject-matter jurisdiction over a wholly foreign claim more strictly than courts in the antitrust context. This relatively strict treatment in the securities context supports the D.C. Circuit's adoption of proximate cause in the antitrust context, particularly in light of the fact that the two types of cases are so analogous to each other and implicate similar comity concerns.

IV. COMITY CONCERNS IN THE ANTITRUST & SECURITIES FRAUD CONTEXTS SUPPORT THE SAME EXTRATERRITORIAL TREATMENT

After the Supreme Court adopted the effects test in the antitrust context in *United States v. Aluminum Co. of America*,[126] "support . . . was less than immediate as many scholars viewed the approach as brutish and bullying, inviting conflicts with foreign sovereigns."[127] Similarly, lower federal courts have refused to use the effects test to find subject-matter jurisdiction over f-cubed securities fraud claims dealing with purely foreign conduct. This pattern of decisions reflects judicial reluctance to apply U.S. laws where doing so might offend traditional notions of comity or interfere with the prerogatives of other sovereign nations.[128] While a legitimate basis for jurisdiction, such as domestic effects, is a necessary prerequisite, it is not sufficient. In order for a U.S. court to exercise jurisdiction in a given case, such exercise must also be reasonable.[129] Determining whether assertion of jurisdiction in a given case is reasonable requires consideration of the particular conduct in question, as well as other factual circumstances.[130] In global market antitrust cases and f-cubed securities fraud cases, the reasonableness of jurisdiction is based on the U.S. domestic effects and their relationship to the foreign plaintiff's claim.

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126. *See supra* Part I.B.

127. James E. Ward, *"Is That Your Final Answer?" The Patchwork Jurisprudence Surrounding the Presumption Against Extraterritoriality*, 70 U. CIN. L. REV. 715, 720 (2002).

128. *See* Estey, *supra* note 19, at 189.

129. Fox, *supra* note 73, at 234–35 ("[C]onsistent with international law, subject matter jurisdiction would exist when there is harm to the regulating nation and when, under all the facts, the exercise of jurisdiction is not unreasonable. No essential core of sovereignty is then violated."). Courts' consideration of prescriptive comity involve an analysis of seven factors, delineated in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977). The seven factors include: (1) "the degree of conflict with foreign law or policy," (2) "the nationality or allegiance of the parties and the locations or principal places of businesses or corporations," (3) "the extent to which enforcement by either state can be expected to achieve compliance," (4) "the relative significance of effects on the United States as compared with those elsewhere," (5) "the extent to which there is explicit purpose to harm or affect American commerce," (6) "the foreseeability of such effect," and (7) "the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." *Id.* at 614.

130. Fox, *supra* note 73, at 234–35.

Though foreign conduct may cause both foreign injury and generalized U.S. domestic effects, a U.S. court will not hear a claim by a foreign plaintiff if the foreign injury is insufficiently related to any specific U.S. domestic effect. This standard is a product of judicial recognition that global markets inevitably reach into domestic affairs. The "increasing likelihood, intensity, and potential consequences of conflicts among states" caused by these interconnected markets make it much more likely that a flexible effects test would amplify problems associated with the effects test, since the result would be extending the test to predominantly foreign claims.[131]

Extraterritorial applications of both U.S. securities fraud and anti-competition laws thus threaten to create significant substantive and procedural conflicts with foreign sovereigns. Though a less demanding standard of causation can be found within the text of the FTAIA, its legislative history, and the Supreme Court's holding in *Empagran I*, the proximate cause standard is justifiable in light of the threats that extraterritorial application based on a global market theory poses to international comity.[132] Additionally, the escalating level of involvement by foreign plaintiffs in class action suits[133] and the growing development of foreign regulatory systems further bolster the courts' decisions not to hear foreign plaintiffs' claims where there is no direct relationship between the U.S. domestic effect and the foreign injury. This Part discusses these comity concerns, which are applicable to both transnational antitrust and securities fraud claims. While the United States has significant interests in applying its laws extraterritorially, there are many countervailing forces that justify a more limited approach.

A. The United States's Interests in Extraterritoriality

Before assessing the relevant comity concerns, it is important to first identify U.S. interests in the extraterritorial application of its laws. In the antitrust context, the United States has a legitimate interest in protecting domestic consumers and participants in domestic markets from anticompetitive behavior and in assuring them that U.S. antitrust laws are

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131. David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUS. J. INT'L L. 287, 298 (2004).

132. For example, the government of Japan asserted that "[g]iving foreign purchasers the right to damages for purely foreign market transactions undermines the important principle of comity, respect due to a sovereign nation," and equality amongst nation states. Brief for the Government of Japan as Amicus Curiae in Support of Petitioners at 2, 6, F. Hoffman-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724); *see also* Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 1, F. Hoffman-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

133. Brief for the Government of Japan as Amicus Curiae in Support of Petitioners, *supra* note 132, at 2, 6.

available to redress anticompetitive harms.[134] American consumers will not be "benefited by the maximum deterrent effect of treble damages" unless multinational corporations are prevented from offsetting their U.S. antitrust liabilities with "illegal profits they could safely extort abroad," thereby forcing them to "take into account the full costs of their conduct."[135] The threat to effective deterrence is particularly problematic for the United States, given its dominant position in the world market.[136]

The United States similarly has a justifiable interest in applying its antifraud provisions in order to protect the integrity of its securities markets and domestic investors.[137] It is the prerogative of the United States to guarantee to domestic and foreign investors of American businesses and securities markets that its antifraud laws are available to them.[138] If the primary purpose of U.S. securities laws is to "protect American investors and American markets,"[139] then "too restrictive an approach may render U.S. courts ineffective in addressing fraud in an increasingly global securities market."[140]As securities markets across the globe become more integrated, the "potential for fraudulent activity in connection with cross-border securities transactions" increases.[141] The threat to effective enforcement against fraud in the United States is particularly strong in light of the fact that many foreign nations have different views on what constitutes securities fraud.[142] Therefore, preventing fraud is important not only to protect domestic investors and

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134. *Empagran I*, 542 U.S. 155, 165 (2004).

135. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 315 (1978) (quoted in Buxbaum, *supra* note 16, at 259); *see also* D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 57 (2007) (noting that "at present companies seem to be under-deterred globally to put an end to hard-core cartel behavior").

136. Siddharth Fernandes, F. Hoffman-La Roche, Ltd. v. Empagran *and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide*, 20 CONN. J. INT'L L. 267, 316 (2005) (recognizing that "most cartels usually include the U.S. market, which represents a substantial share of the world market for many types of goods and services").

137. MCG, Inc. v. Great W. Energy Corp., 896 F.2d 170, 174 (5th Cir. 1990) (stating that "exercising jurisdiction may support Congress's intent, as expressed in the anti-fraud provisions of the securities laws, to elevate the standard of conduct in securities transactions" (internal citations omitted)); *see also* Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law,* 17 NW. J. INT'L L. & BUS. 207, 223 (1996) (discussing the potential problems stemming from investment in markets without antifraud protection).

138. Hamlin, *supra* note 24, at 411.

139. *In re* The Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 9 (D.D.C. 2000).

140. Perry S. Granof et al., *Ebb and Flow: The Changing Jurisdictional Tides of Global Litigation*, 21 N.Y. INT'L L. REV. 53, 65 & n.91 (2008) (citing *MCG, Inc.*, 896 F.2d at 175, and Grunenthal GmbH v. Hotz, 712 F.2d 421, 424–25 (9th Cir. 1983)).

141. Chang, *supra* note 59, at 99.

142. Buxbaum, *supra* note 16, at 299 (recognizing that "in the area of securities regulation . . . there is substantial diversity across jurisdictions").

markets, but also to prevent the United States from becoming a "'haven for . . . defrauders and manipulators' of foreign securities."[143]

The United States thus has legitimate reasons for applying its laws extraterritorially. In order to fulfill these objectives, the United States arguably also has a strong interest in applying its laws even to predominantly foreign transactions.

B. Foreign Nations' Interests in Limiting U.S. Extraterritoriality

Despite the United States's interest in extraterritorial application of its laws, one of the primary arguments against such application is that exercising jurisdiction would interfere with other nations' abilities to regulate the foreign conduct and injury in question because these nations offer "competing solutions to global problems."[144] There are important distinctions between the fundamental principles guiding the antitrust laws of the United States and those of other nations.[145] For example, while antitrust laws in the United States are "concerned largely with optimizing marketplace efficiencies by protecting against concerted actions to increase prices or reduce output," the European Commission has adopted "greater protections for smaller and mid-sized firms."[146] Additionally, German and Belgian laws provide exemptions for agreements that "contribute to improving the development, production, distribution, procurement, recycling or waste disposal of goods."[147] Meanwhile, many developing countries "strongly resist an international competition policy regime arguing that their nascent industries are not prepared for the international imposition of regimes modeled on U.S. or European economic traditions."[148] In light of these differences, U.S. federal courts typically maintain that any "conflict [between U.S. and foreign law], unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction over this [type of] dispute."[149]

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143. Chang, *supra* note 59, at 99 (quoting SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977)).

144. Buxbaum, *supra* note 16, at 294.

145. *See* Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 AM. U. INT'L L. REV. 343, 360 (2002).

146. *Id.*

147. Brief of the Governments of the Federal Republic of Germany and Belgium as Amicus Curiae in Support of Petitioners, *supra* note 132, at 12–13.

148. Epstein, *supra* note 145, at 360–61.

149. Born, *supra* note 22, at 47 (quoting Timberlane Lumber Co. v. Bank of Am., 749 F.2d 1378, 1384 (9th Cir. 1984)); *see also* Buxbaum, *supra* note 16, at 270 ("[T]he primary source of . . . conflict [between nations] is differences in *substance* between the law applied and the law of the other country or countries involved, particularly when conduct permitted where it occurred is prohibited where it has effect.").

While questions may be raised as to the extent of the substantive differences between U.S. antitrust and securities fraud laws and the regulatory schemes of other nations, it is still important for U.S. courts to give due consideration to any substantive conflicts and consequences that might arise from applying U.S. laws to events occurring in other jurisdictions.[150] Some nations have been "vocal in their displeasure with the United States's trend toward liberal extraterritoriality," adopting extreme measures such as blocking statutes, which enable their citizens to "disobey the extraterritorial application of other nations' laws or court orders."[151] In these instances, U.S. courts effectively put foreign citizens in an "intolerable position" by applying U.S. law when the foreign government's regulations differ substantively from U.S laws.[152]

Given the existing hostility toward the U.S. extraterritoriality movement, any substantive conflicts with other nations' laws should weigh heavily against extraterritorial application. However, adopting a policy of extraterritorial jurisdiction in some circumstances but not others, depending on the particular facts, regulatory scheme, or level of substantive conflict, would force courts to engage in a complex and costly evaluation of prescriptive comity on a case-by-case basis. This approach is similar to the one that the Supreme Court rejected in *Empagran I* and thus should be avoided altogether.[153]

Foreign nations also cite differences in litigation procedures as causing significant interference with their sovereign prerogatives.[154] Differences in procedure often reflect divergent views and substantive disagreements on the appropriate means to redress unlawful conduct and on the relevant

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150. *See* Derek N. White, *Conduct and Effects: Reassessing the Protection of Foreign Investors from International Securities Fraud*, 22 REGENT U. L. REV. 81, 106–07 (2009) (stating that, in the context of competition regulation, "the various national interests are likely to be in total opposition" and, in the context of securities fraud, extraterritorial application of U.S. provisions "has been less contentious than attempts to apply other areas of U.S. law or regulations to foreign situations"). *But cf.* Fox, *supra* note 73, at 228 (recognizing that "some principles [of competition regulation] enjoy common acceptance by nations"); Joel P. Trachtman, *Recent Initiatives in International Financial Regulation and Goals of Competitiveness, Effectiveness, Consistency and Cooperation*, 12 NW. J. INT'L L. & BUS. 241, 294 (1991) (recognizing that even if a foreign sovereign also "has a similar goal of deterring fraud, it may have a different definition of fraud" and that "the foreign country may have a countervailing regulatory goal: to avoid having its securities markets become subject to the additional costs of compliance with U.S. disclosure standards").

151. Gregory K. Matson, Note, *Restricting the Jurisdiction of American Courts over Transnational Securities Fraud*, 79 GEO. L.J. 141, 166–67 (1990).

152. *Id.* at 167.

153. *See Empagran I*, 542 U.S. 155, 168 (2004).

154. Professor Fox points out that "[U.S.] antitrust law entails important features that are not widely shared; e.g., criminal actions, jail terms, private treble damage actions, jury trials, extensive pretrial discovery, class actions, and contingent fees," which "are often considered draconian by other nations . . . and have led to tensions sometimes erupting in debates on extraterritoriality." Eleanor M. Fox, *Competition Law*, *in* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 419, 422 (2d ed. 2008).

goals of regulations. For example, the Federal Republic of Germany and Belgium opposed U.S. extraterritorial application of antitrust laws in *Empagran I* because they fundamentally disagreed with the use of private litigation as an appropriate "means to pursue public regulatory goals."[155] Foreign nations also cite the opportunity to seek treble damages and multiple damages awards in the United States[156] as a primary source of conflict between their laws and those of the United States.[157] Furthermore, the United States makes class actions available to injured parties, encouraging suits where individual plaintiffs would not have sufficient incentive to file a claim by themselves. Some foreign nations do not allow class action suits and instead have alternative procedures to deal with large-scale violations, such as the "model case" approach in Germany or a Group Litigation Order in England.[158] Other nations offer class action lawsuits, but they follow different standards of liability and a loser-pays rule for litigation costs.[159] Thus, the availability of U.S. procedures, such as "treble damages, cost rules that are generous to plaintiffs, contingency fees, and class actions," which are particularly attractive to plaintiffs, "will lead [foreign] plaintiffs and their attorneys to pursue actions in U.S. rather than [foreign] courts."[160] This not only creates the risk that U.S. judicial resources will be increasingly spent remedying predominantly foreign injuries, but it also "risks killing the development of private enforcement in Europe" and in other regions.[161]

As a result of the procedural differences stemming from the U.S. exercise of extraterritorial application of its laws, some foreign nations have taken retaliatory measures against U.S. procedural rules by enacting "'blocking' or 'clawback' statutes."[162] Some of these nations have

155. Buxbaum, *supra* note 16, at 295 (referencing Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, *supra* note 132, at 13).

156. The Clayton Act specifically provides for treble damages in a civil claim brought for Sherman Act violations. 15 U.S.C. § 15 (2006).

157. Buxbaum, *supra* note 72, at 372–73. Japan, Canada, Germany, and Belgium (like many other countries) do not allow for the trebling of private antitrust damages. Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 14, F. Hoffman-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724); Brief of the Governments of the Federal Republic of Germany and Belgium as Amicus Curiae in Support of Petitioners, *supra* note 132, at 11; Brief for the Government of Japan as Amicus Curiae in Support of Petitioners, *supra* note 132, at 8. In contrast, European states generally limit damages for infringement of antitrust law to compensatory damages. Wurmnest, *supra* note 87, at 214 n.43.

158. Choi & Silberman, *supra* note 60, at 486–88.

159. *Id.* at 487–88.

160. Margaret Bloom, *Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remedies? A Post-*Empagran *Perspective From Europe*, 61 N.Y.U. ANN. SURV. AM. L. 433, 445–46 (2005).

161. *Id.* at 446.

162. Wurmnest, *supra* note 87, at 214 & n.45 (explaining that "'blocking statutes' prohibit national authorities from co-operating in extraterritorial pre-trial discovery proceedings and from

justified these protective statutes on the grounds that extraterritorial application of U.S. antitrust laws has the potential to conflict with their amnesty programs,[163] because "potential leniency applicants would weigh the benefits (amnesty) against the costs (civil liability) before leaving a cartel."[164]

These retaliatory measures are problematic in multiple ways. They "interfere[] with U.S. regulatory objectives" and "'destroy[] a spirit of cooperation and common purpose in solving international economic problems.'"[165] Maintenance of international cooperation is critical to the ultimate achievement of a larger transnational regulatory scheme equipped to tackle future conflicts specific to the global market.

These interference and comity concerns raised by the differences in procedural systems are similar in both the antitrust and securities fraud contexts. Many of the problematic procedures, such as treble damages, class action provisions, and extensive discovery rules, are available in both antitrust and securities fraud actions. Given that the extraterritorial application of U.S. law to f-cubed securities and global market antitrust cases would inherently involve the application of U.S. procedural rules, the ensuing procedural conflicts between U.S. and foreign courts, like substantive conflicts, impermissibly threaten to interfere substantially with foreign nations' prerogatives.

C. Additional Comity Concerns

Extraterritorial application of U.S. laws to foreign plaintiffs' claims poses additional concerns that support the D.C. Circuit's strict holding. For example, a liberal effects-based jurisdictional policy could increase the cost of transnational transactions with American purchasers and

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enforcing treble damages awards" and "'claw-back statutes' give defendants in U.S. antitrust actions a cause of action to 'claw back' from the (former) plaintiff any excess over actual damages paid in a treble damages judgment").

163. *Id.* at 215 (referencing Brief for the Government of Canada as Amicus Curiae Supporting Reversal, *supra* note 157, at 11–16; Brief of the Governments of the Federal Republic of Germany and Belgium as Amicus Curiae in Support of Petitioners, *supra* note 132, at 29–30; and Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners at 9–13, F. Hoffman-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724)). The amnesty programs traditionally operate by giving the "first company to provide decisive information about a cartel and cooperate fully with the authorities . . . amnesty from fines and criminal prosecution." *Id.* at 214–15.

164. *Id.* at 215.

165. Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 857 (2009) (quoting Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 324); *see also* Bloom, *supra* note 160, at 451 ("If European purchasers buying outside the United States have recurring access to U.S. antitrust treble damages remedies, European leniency programs and private enforcement will both suffer. As a result, cartels and other anticompetitive behaviour would be likely to increase in Europe.").

businesses because there would be an increased risk of exposure to U.S. regulations. In the securities markets, to avoid this and associated higher costs, "foreign issuers may simply restrict their offerings to investors who are not residents of the United States."[166] This could lead to a reduction in capital mobility, which would be "harmful to all parties in the market."[167]

Foreign retaliation in response to the United States's application of its laws to foreign claims could also impose significant transaction costs on American companies.[168] For example, "[i]n the wake of globalization, many American corporate defendants have significant assets throughout the world . . . and corporations increasingly need to avail themselves of business opportunities worldwide to remain competitive in a global market."[169] Because many American companies own assets located in foreign countries, they are vulnerable to foreign judgments. Increased incidences of foreign retaliatory legislation and suits could increase the risk of liability, and therefore the cost of operation, for American companies doing business in foreign countries.

A final significant policy problem with courts generously applying U.S. law to foreign claims is that extraterritorial laws are "inherently undemocratic."[170] As Professor Parrish points out, "[u]nder basic democratic principles and norms, government must rest upon the consent of the governed" and "[o]utsiders may not dictate the law to a political community that has not consented to it."[171] Professor Buxbaum agrees, stating that "[t]he expansion of jurisdictional rules that necessarily accompanies the use of national courts" to regulate international disputes "disturbs the order that jurisdictional law brings to the international community — in ways that, to foreign states and many observers, appear as violations of the international law."[172] An extraterritorial jurisdiction policy that appears hegemonic and could threaten the international order would ultimately serve neither U.S. interests in protecting domestic purchasers and markets nor the greater interest in international stability and accord.

Though the United States has justified interests in applying its laws extraterritorially to protect its consumers and markets, the interests of foreign sovereigns in adjudicating these claims are correspondingly strong. On balance, these countervailing forces justify a limited approach to U.S. extraterritoriality.

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166. Choi & Guzman, *supra* note 137, at 225.
167. *Id.*
168. *See* Parrish, *supra* note 165, at 858.
169. *Id.*
170. Parrish, *supra* note 16, at 1483.
171. *Id.*
172. *See* Buxbaum, *supra* note 16, at 304.

CONCLUSION

Courts addressing the question of foreign plaintiffs suing foreign defendants based on foreign harm in U.S. federal court have tailored their analyses to broad normative questions. Some of these issues concern notions of international comity, such as whether the dispute would be "rightfully resolved in the courts of another land."[173] Other courts address different concerns, such as whether "Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to" redressing the foreign injury.[174] Courts ask these questions because the underlying purpose of applying U.S. antitrust and securities fraud laws extraterritorially is to protect domestic purchasers and markets.

In the context of transnational securities fraud, where a foreign plaintiff brings a claim based on wholly foreign parties, conduct, and harm, the Supreme Court has held that foreign plaintiffs do not state a claim under Section 10(b) of the Securities Exchange Act.[175] Prior to this decision, lower courts also generally concluded that allowing jurisdiction over these types of foreign claims was not necessary to protect domestic investors or domestic markets. Thus, foreign plaintiffs' claims in f-cubed securities fraud cases, premised solely on a general adverse domestic effect, have been strictly denied.

In the antitrust context, the scope and applicability of U.S. law to foreign claims based on domestic effects is less clear. This is largely because of the existing confusion regarding the correct interpretation of the FTAIA. In *Empagran I*, the Supreme Court declined to answer whether U.S. antitrust laws applied to claims of foreign injury based on a global market effects theory. However, the D.C. Circuit held on remand that a foreign plaintiff's injury must be proximately caused by an adverse domestic effect. Though the D.C. Circuit's decision to adopt a proximate cause standard is ultimately right, it was insufficiently substantiated.

The fact that courts consider the question of subject-matter jurisdiction in f-cubed securities fraud cases lends support for the D.C. Circuit's decision. In these cases, courts have universally held that a foreign plaintiff may not obtain subject-matter jurisdiction in a claim based solely on the adverse domestic effect of foreign conduct. This decision is based both on an assumption that the foreign injury and the domestic effect are

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173. Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 10 (2d Cir. 1979).

174. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008) (quoting Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998), which quotes Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975)).

175. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877, 2884 (2010).

unrelated and on an implicit rejection of the argument that worldwide efficient capital markets are a justifiable foundation for jurisdiction.

Concerns of comity and interference with the sovereign prerogatives of foreign nations are prevalent in the courts' consideration of extraterritorial application in both U.S. antitrust and securities fraud cases, given the substantial risk of substantive and procedural conflict between the laws of the U.S. and other jurisdictions. In addition, other consequences resulting from the expansion of the reach of U.S. laws — such as the international community's perception of the United States as an imperialistic legal hegemon, the risk of retaliatory measures exercised by foreign nations in response, and the resulting increased transaction costs for American companies doing business internationally — further justify a conservative approach to U.S. extraterritorial application of its laws. Though the outer boundaries of extraterritoriality under U.S. antitrust law, like the language of the FTAIA, are not clearly defined, a limited approach is well supported and justified.