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# **Private Antitrust Law Enforcement in Cases with International Elements**

Volumes 1 and 2

Volume 1

**Alen Balde**

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School of Law  
College of Social Sciences  
University of Glasgow

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## Abstract

The Supreme Court of the United States consented in its *Empagran* decision that the foreign antitrust injury that is in a dependency relationship with anticompetitive effects (antitrust injury) in the U.S. is to be litigated before the U.S. courts.

Since this decision antitrust law litigation in an international context does not depend merely on anticompetitive effects in the U.S., but also on the relationship between anticompetitive effect and (foreign) private antitrust injury. This is something that was not present in pre-*Empagran* cases. The Supreme Court did not provide conditions on the basis of which the relationship between anticompetitive effects and private antitrust injury could be classified as one of dependency. This means that the Supreme Court left the determination of these conditions to lower U.S. courts.

The lower U.S. courts, instead of attempting to determine these conditions, have made foreign private antitrust injury even more difficult to litigate before the U.S. courts. There are three factors that contributed to this development in U.S. case law: the understanding of the *Empagran* litigation; the understanding of the nature of the international context, and U.S. courts taking a pro-active role in delivering their decisions for which the reasoning is difficult to understand. The greatest obstacle that post-*Empagran* U.S. courts have placed in front of private antitrust litigants is the requirement that instead of 'dependency connection' there should be 'direct causation' between anticompetitive effects in the U.S. and litigated (foreign) private antitrust injury.

This thesis considers the existing theoretical and practical problems of the current analytical framework under which antitrust violation is analysed in an international context. The thesis introduces the new legal concept of a 'transborder standard'. This is necessitated by the starting position of this thesis that a factual situation under adjudication cannot be only either 'domestic' or 'foreign', but can also be 'transborder'. The introduction of the transborder standard to the existing theoretical framework enables (and requires) the analysis of the factual situation under adjudication in its integrity, bearing in mind also the purpose of private antitrust law enforcement and the right of private parties to be compensated for suffered antitrust injury.

The transborder standard provides a framework to analyse antitrust claims brought before the U.S. courts by those private parties who satisfy their private antitrust injury outside the U.S. At the same time, the transborder standard does not enable private litigants to take advantage of simultaneous antitrust litigation before U.S. courts and the courts of non-U.S. countries.

'Transborder standard' is a new legal concept. Nevertheless, the existing system of U.S. antitrust law enforcement does support it and, consequently, the transborder standard can be directly applied.

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The period of my studies at the University of Glasgow has not been limited to conducting research in relation to this thesis. I took the opportunity to get involved in wider research and academic community that is present within the university. That is why I would like also to thank the University of Glasgow for making this opportunity possible. In addition to this, the University of Glasgow offered me the privilege to learn, develop, and gain knowledge and skills that go way beyond the ones related to the PhD studies.

## **Author's Declaration**

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature \_\_\_\_\_

Printed name \_\_\_\_\_

# Chapter 1: Introduction

## 1 The Scope and Aim of the Thesis

The thesis submits that, following the U.S. Supreme Court's decision in *Empagran*,<sup>1</sup> private antitrust law enforcement in situations with non-U.S. elements requires a different approach in adjudication compared with what was in place before *Empagran*. Thus the primary aim of this thesis is to identify and theorise a new legal concept, 'transborder standard'; that is, to propose a new legal categorisation to enable parties in private antitrust law claims to litigate before U.S. courts where the injury was suffered outside U.S. territory.

It is submitted that prior to *Empagran* U.S. courts did not recognize transborder antitrust situations as a relevant legal category.<sup>2</sup> Prior to *Empagran*, U.S. courts narrowed the process of adjudication to the protection of antitrust effect and antitrust injury that occurred only within the national territorial borders of the U.S. Where U.S. courts had to adjudicate a situation that also involved anticompetitive effects in non-U.S. markets and/or foreign antitrust injury, and/or foreign nationals who collaterally suffered antitrust injury, and/or where U.S. nationals contributed to the existence of an antitrust violation extending beyond the national territorial borders of the U.S., the U.S. adjudicating courts appear not to have given weight to these 'foreign' elements.

The U.S. Supreme Court decision in *Empagran* recognized the possibility of the existence of a transborder antitrust situation. This transborder antitrust situation extends the object of antitrust law protection so that more private antitrust suits can be brought before the U.S. courts. This means that non-U.S. nationals who suffer foreign antitrust injury in situations where elements of antitrust violations and anticompetitive effect extend beyond U.S. territorial borders can obtain compensation and other benefits under U.S. antitrust law.

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<sup>1</sup> *F. Hoffmann-La Roche Ltd. et al., v Empagran S.A. et al*, 542 U.S. 155 (June 14, 2004).

<sup>2</sup> See below for a definition of 'transborder'.

Post-*Empagran* litigants who bring a private antitrust suit before U.S. courts in a situation where non-U.S. elements are present have to overcome two hurdles before they can be awarded compensation in the form of antitrust damages. First, they have to satisfy the test of antitrust law subject matter jurisdiction.<sup>3</sup> Second, they have to litigate their antitrust case in a way that will fulfil the necessary requirements (elements) of the private antitrust enforcement claim before an adjudicating court can decide on the merits.

The thesis therefore analyses: a) changes to antitrust law subject matter jurisdiction; b) changes to private antitrust law enforcement that enable protection under the U.S. antitrust law for affected litigants in transborder antitrust situations that arise from *Empagran*; and c) changes in the analytical framework to be applied to transborder factual situations.

- a) Traditionally, the jurisdiction of the U.S. courts derives from the primary concern of anticompetitive effects within the U.S. national market. Interests of private parties, regardless of their nationality, who suffer antitrust injury in connection to these anticompetitive effects, are of no concern. Furthermore, this approach to antitrust law subject matter jurisdiction is unsuitable when addressing modern commercial practices where the elements of anticompetitive conduct (antitrust violation) and anticompetitive effects exist, simultaneously and interdependently, both within the national territory of the U.S. and elsewhere. This thesis categorises this type of commercial practice as transborder.<sup>4</sup>
- b) Private antitrust law enforcement was introduced by the U.S. Congress and developed by the U.S. courts to enforce U.S. antitrust law. U.S. antitrust law is concerned with the protection of the U.S. market and those who suffer antitrust injury within this market. Litigants who invoke the protection of private antitrust law enforcement have to prove the existence of anticompetitive effect, antitrust injury, causation, and satisfy standing (and directness) tests. Following *Empagran*, it is submitted that the U.S. Supreme Court may be willing to provide

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<sup>3</sup> As described below.

<sup>4</sup> See Chapter 5 for a detailed definition of transborder and for the conditions that distinguish transborder commercial practices from international ones.

remedies for damages suffered outside the U.S., irrespective of the nationality of the litigants. Therefore, it is crucial to reconsider the elements of private antitrust enforcement in this new environment.

- c) At present, the analytical framework within which U.S. courts and academics analyse factual situations that involve antitrust elements<sup>5</sup> of a transborder character consists of only two categories: ‘domestic’<sup>6</sup> and ‘foreign’.<sup>7</sup> In certain situations, analysing factual situations merely through the lenses of ‘domestic’ and ‘foreign’ may result in a distortion of reality and, consequently, lead to conclusions that may be difficult to support. This is likely to happen in factual situations where the antitrust elements are not purely ‘domestic’ or ‘foreign’. Therefore, this thesis submits that there is a need for an additional legal concept that the thesis terms the ‘transborder standard’.

In the present thesis, these three points form a single connected object of inquiry. However, traditionally, private enforcement of antitrust law and issues concerning subject matter jurisdiction are presented and analysed separately by courts and commentators. The originality of the thesis lies in the argument that these should be considered as one, with the addition of a ‘transborder standard’ to the analytical framework.

## 2 The Contextual Background

There are several reasons why this thesis is topical and important: a) new developments in case law, namely the U.S. Supreme Court’s decision in *Empagran*; b) confused reasoning within U.S. case law and academic literature; and c) the development by other jurisdictions, in particular the EU, of their own private enforcement of antitrust law. Therefore, courts in both the U.S. and elsewhere may well have to adjudicate on the same transborder antitrust situation.

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<sup>5</sup> These elements can be subjective (e.g. nationality of litigants) or objective (e.g. anticompetitive conduct, antitrust effects, or antitrust injury).

<sup>6</sup> Antitrust elements located within the national territory of the U.S.

<sup>7</sup> Antitrust elements located outside the national territory of the U.S.

## **2.1 New Developments in Case Law**

This thesis considers the decision of the U.S. Supreme Court in *Empagran* to be of fundamental importance for the thesis. As observed above, this decision has led to changes in antitrust law subject matter jurisdiction and in the purpose and essential elements of private antitrust law enforcement. It is submitted that the U.S. Supreme Court in *Empagran* made it possible to talk about private enforcement of antitrust law within a transborder context.

## **2.2 Confused Reasoning of U.S. Case Law and Academic Literature**

U.S. case law and relevant literature on the topic of this thesis have been found to be neither consistent nor coherent, which impacts on theoretical research and analysis. Consequently, the lack of clarity may prevent private litigants from obtaining an antitrust award. Thus the present thesis plays an important role in identifying the reasons for these inconsistencies and providing a solution as to how private parties may efficiently litigate their antitrust injuries in the future where some of the factual elements have taken place outside the U.S.

## **2.3 Non-U.S. Jurisdictions Developing Own Rules for Private Enforcement of Antitrust Law**

For a long time, private antitrust law enforcement was limited to U.S. courts. The situation has, however, changed significantly with the adoption of antitrust regimes in various countries around the world, many of which actively promote private antitrust enforcement in parallel with the more traditional public enforcement. There are no international treaties, agreements, guidelines, or initiatives that govern private enforcement antitrust litigation in situations where multiple jurisdictions are involved.

Thus it is timely to focus on private antitrust litigation before the U.S. courts where the claim is for an injury suffered outside the territory of the U.S. It is

important to establish the conditions under which private plaintiffs may succeed with their claims before U.S. courts when elements of the claim have taken place outside U.S. territory.

## **3 Research Questions and Methodology**

### **3.1 Research Questions**

Given the contextual background and aims of the thesis, two main research questions have been identified as follows:

- Whether U.S. case law and/or relevant literature provide a reasoning on which litigants can litigate their foreign private antitrust injuries before U.S. courts; and
- Whether a theoretical concept or framework can be devised which adequately addresses factual situations where private plaintiffs suffer antitrust injury outside the U.S. in relation to an antitrust violation operating simultaneously on both sides of the U.S. territorial border.

### **3.2 Research Method**

The method adopted in this thesis is the traditional black-letter-law approach. There are two reasons for taking this approach. Firstly, the development of U.S. antitrust law has been entrusted to U.S. courts; therefore, it is impossible to understand U.S. antitrust law without carrying out an analysis of U.S. case law. Secondly, given that it was a case, *Empagran*, which triggered the motivation for the present thesis, an analysis of the development of U.S. case law on granting jurisdiction to private parties seeking to litigate their antitrust injuries before U.S. courts is central to the objective of the thesis. *Empagran* has also influenced the structure of the thesis and conditioned the nature of the proposed novel concept of a transborder standard; as such, without a black-letter-law approach it would be impossible to identify the essence and scope of the thesis.

This means that the research is based on an analysis of U.S. case law and a critique of the relevant literature. This separate analysis of the relevant literature is an unusual feature of the methodology chosen but necessary to answer the second research question. The scope of the literature analysis is determined by the research question itself, that is, whether existing literature on U.S. private antitrust law enforcement, on subject matter jurisdiction of U.S. antitrust law, on the *Empagran* case itself, and on post-*Empagran* case law provides an analytical framework to address antitrust violations that are of a transborder nature and where litigants who have suffered private antitrust injury outside the U.S. seek to obtain remedies before the U.S. courts.

The unusual nature of the literature analysis, namely the search for an existing answer to a research question, required the analysis to be carried out in a separate chapter rather than combined with the analysis of case law.<sup>8</sup> This enabled three facts to be established: that there is a gap in the literature, that the literature is inconsistent, and that there is further inconsistency between the literature and case law.

In addition to the black-letter-law approach, this thesis also uses systematic and critical analytical approaches. These methodologies were applied to both case law and literature analyses.

The systematic analysis enabled the compatibility of a particular issue, argument, reasoning or outcome to be understood in the context of the system of private antitrust law enforcement in general. The justification of the methodology lies in the fact that it leads directly to one of the conclusions put forward in the present thesis.<sup>9</sup>

This thesis will conclude that in factual situations where litigants litigate their foreign private antitrust injury before the U.S. courts, the application of transborder standard will not allow the adjudicating court to decide on subject matter jurisdiction without taking into consideration the goal and nature of private antitrust law enforcement, and vice versa.

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<sup>8</sup> Chapter 4.

<sup>9</sup> See Chapter 6, section 3.4 and 4.3.



The critical analysis approach was employed in every single chapter of this thesis. It is submitted that without this methodology it would not have been possible to understand a wide range of issues: the U.S. courts' decisions; their reasoning; the inconsistency in U.S. case law; the arguments put forward in the literature; the inconsistency in the literature; and the contribution that U.S. courts, litigants, and academics have made to the development of antitrust enforcement.

### 3.3 Selection of Cases

The reasons for undertaking this research<sup>10</sup> as well as its aims<sup>11</sup> require a particular type of methodology. It was explained above that the predominant type of methodology chosen for the research presented here is the black-letter-law approach.

This type of methodology requires a specific explanation as to how the cases were selected for analysis.

Not all U.S. cases are relevant to the present research project. The only category of U.S. cases relevant to the project is where the antitrust litigation took place before U.S. courts,<sup>12</sup> and the factual situation was such that not all elements took place on U.S. territory.<sup>13</sup>

Analysis of the *Empagran* litigation,<sup>14</sup> post-*Empagran* case law,<sup>15</sup> and pre-*Empagran* case law<sup>16</sup> shows that an understanding of the law cannot be determined by focusing merely on the judgments of the U.S. Supreme Court and/or Courts of Appeals. The analysis undertaken for this thesis has not found any U.S. court judgment where the adjudicating court relied solely upon or cited merely from judgments of the Courts of Appeals or the U.S. Supreme Court. The

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<sup>10</sup> See section 2.

<sup>11</sup> See section 1.

<sup>12</sup> Regardless of the level of the U.S. court that delivered the judgment (see analysis that follows).

<sup>13</sup> See n.5.

<sup>14</sup> See Chapter 2, section 3.

<sup>15</sup> See Chapter 3, subsection 4.1.

U.S. courts searched for guidance and made reference to U.S. cases (either as a source of precedent or *obiter dicta*) without attributing significance to the level of the U.S. court that delivered the judgment and to elements of district or appellate circuit where judgment was delivered.<sup>17</sup>

Therefore, the challenge was to decide how many judgments had to be analysed to have a sufficient number of cases to carry out the analysis. The selection was quite labour-intensive because there does not exist any particular searching engine (formula) that would identify all the relevant antitrust cases where all or some of the factual elements took place outside the territory of the U.S. and would be relevant to answer the research questions.<sup>18</sup> The present thesis stands on the proposition<sup>19</sup> that case law cannot be properly understood without remaining cognisant of the fact that any change in a factual situation may lead to a different legal outcome.

Therefore, the research undertaken for this thesis was not limited merely to the grounds and the reasoning upon which the U.S. courts based their decisions,<sup>20</sup> but also considered the facts of each case.<sup>21</sup> The analysis of the factual situations of the selected cases highlighted the factually novel situation in *Empagran*<sup>22</sup> as well as the consistency of U.S. case law.<sup>23</sup>

## 4 Structure

The nature of the present thesis, that is, the proposed new legal concept of a transborder standard, as well as the confused contextual background under

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<sup>16</sup> See Chapter 6, subsection 2.2., 3.2., and Chapter 7, subsection 3.

<sup>17</sup> It should be noted that under the U.S. legal system an adjudicating court in one district (or court of appeals in one circuit) is not bound by judgments delivered by courts in other districts (appellate circuits) even in relation to the same legal question.

<sup>18</sup> See description above.

<sup>19</sup> See explanation on critical analysis above.

<sup>20</sup> See *supra* n.15 and 16.

<sup>21</sup> See Chapter 3, subsection 4.2., and Chapter 6, subsection 2.1.

<sup>22</sup> See Chapter 6, subsection 2.1.3.1., and section 5.

<sup>23</sup> The question of the consistency of pre-*Empagran* case law is of no relevance to the thesis and that is why Chapter 6 does not include explicit analysis of this issue. However, the question of consistency will be analysed with regard to post-*Empagran* cases (see Chapter 3, sections 4, 5, and 6).

which the research questions have been identified, require various kinds of analysis to be undertaken. The thesis also requires a structure that enables it to be developed, chapter-by-chapter, towards its ultimate aim, namely the theorization of the concept of a ‘transborder standard’.

The thesis will focus first on the *Empagran* litigation (Chapter 2), and will explain in depth various aspects of the litigation before the Supreme Court and the Courts of Appeals which are relevant to the development of the thesis: the factual situation; the arguments or submissions that were pleaded in the various courts involved in the litigation; the arguments or submissions that may be considered useful for future litigation; the issues that were resolved and those that remained unanswered; and how the *Empagran* litigation can be understood, what is the remit of outcome of litigation, and why the decision and outcome of litigation are not necessarily the same.

Chapter 3 offers an analysis of the post-*Empagran* case law to establish the extent to which issues left unanswered by *Empagran* were addressed and developed by the U.S. courts. This chapter also considers whether there is a consensus in the understanding of the decisions and reasoning of the *Empagran* courts, and whether U.S. courts have elaborated further on the approach to be adopted when the litigation before the U.S. courts concerns a foreign private antitrust injury. The latter issue is, of course, central to the thesis.

Chapter 4 focuses on the relevant literature to examine the extent to which academic writers and commentators understand the importance of *Empagran* and post-*Empagran* litigation and whether, in the light of this development, they address private antitrust litigation in a transborder context.

Chapter 5 then addresses the unanswered question as to whether, and under what conditions, a private litigant who has suffered injury outside U.S. territory may recover damages before U.S. courts. In this chapter, therefore, a new legal concept of ‘a transborder standard’ is introduced and theorised. The concept is distinct from concepts like ‘transnational’ or ‘transterritorial’, and, in particular, opposite to extraterritoriality. This chapter demonstrates the uniqueness of the concept and the way in which a transborder standard addresses legal and practical requirements. Furthermore, this chapter sets out

how the transborder standard adds to the existing theoretical framework. The transborder standard concept overcomes the theoretical and practical problems of the existing analytical framework, which is grounded in the dichotomy of categorising elements of the litigation as either ‘domestic’ or ‘foreign’. Such a categorisation was adequate when markets were not interconnected and when few countries provided systems for private antitrust litigation. Markets have now fundamentally changed how they operate: market operators are no longer constrained by territorial boundaries, and therefore a new concept is required.

Once the new transborder standard has been explained, the thesis will apply the concept to relevant pre-*Empagran* case law in Chapter 6 to demonstrate how the new concept might change existing legal analysis. This chapter will examine how cases with international elements were decided, what differences the application of the transborder standard would have made to the final decision, and also the extent to which pre-*Empagran* cases can be relied upon as an authority for foreign private injury.

The next stage of the research tests the compatibility of the new proposed transborder standard with the existing system of antitrust law enforcement (Chapter 7). This thesis pays particular attention to developing a new legal concept that will not merely provide an answer to the unresolved question of *Empagran*, but will also remain compatible with the existing system of U.S. antitrust law enforcement. In addition, some exemplar questions will be identified which a U.S. court may consider when asked to adjudicate foreign private antitrust injuries.

The final chapter, Chapter 8, is an overview of the outcomes elaborated in preceding chapters of this thesis, which concludes with the application of the transborder standard to *Empagran* itself. The starting point of the thesis was the *Empagran* litigation; therefore, it is appropriate that the thesis should end by considering whether the application of a transborder standard to the facts of *Empagran* would have affected the reasoning of the second Court of Appeals and the outcome.

## Chapter 2: *Empagran*

### 1 Introduction

The Supreme Court decision in *Empagran* was presented in the previous chapter as one that opens up the possibility of change in the approach to private antitrust law adjudication in situations where non-U.S. elements are present. In particular, this arises where the situation can be categorised as ‘transborder’<sup>1</sup> in its nature.

In other words, the significance of the Supreme Court decision in *Empagran* cannot remain unnoticed, as it has the potential to open doors to a different approach to transborder litigation in the area of antitrust law enforcement. In particular, it is submitted that the Supreme Court decision permits the possibility of applying the ‘alternative theory’<sup>2</sup> claim in a situation where anticompetitive conduct causes anticompetitive effect and antitrust injury that are present in both the U.S. and non-U.S. markets.

The possibility of an ‘alternative theory’ claim with acknowledgement of the existence of situations that are transborder in their nature makes the Supreme Court decision in *Empagran* an exciting contribution to the development of antitrust law. It could also be argued that the Supreme Court decision in *Empagran* may potentially be seen as a radical change as regards how antitrust cases are litigated, their factual situations analysed, precedents applied, and decisions of adjudicating courts formulated.

It is submitted in this thesis that the *Empagran* litigation demonstrates confusion by different courts at different levels in their approach, requiring clarification of the decision reached by the Supreme Court itself. Part of this confusion may have arisen from the Supreme Court never being the master of facts, but dealing only with questions of law. This distinction between the court that is the final

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<sup>1</sup> See Chapter 1, section 1 for the definition and Chapter 5, section 2 for the explanation of the term ‘transborder’.

<sup>2</sup> See below.

master of the facts and the court that is the final master of the law may shed some light on whether the outcome in *Empagran* is the result primarily of the particular facts of the case or, alternatively, a ruling of generally applicable law formulated by the Supreme Court. However, irrespective of how convincing and acceptable the outcome of *Empagran* may be for the litigants, it can be argued that the Supreme Court did not provide sufficient guidance on how to litigate and adjudicate similar factual situations in the future.

*Empagran* was litigated before a District Court,<sup>3</sup> twice before the Court of Appeals,<sup>4</sup> and once before the Supreme Court<sup>5</sup>. These three courts reached different decisions. It appears that, at each level, the courts examined and adjudicated upon a different issue, making it very difficult to connect them together substantially. This number of decisions makes the understanding of the sequence of the litigation even more challenging, since similar arguments<sup>6</sup> were used before each of the adjudicating courts.

It was mentioned in the previous chapter, and it will be further argued in this chapter, that the Supreme Court in *Empagran* recognised the transborder antitrust situation as a relevant legal category. It is submitted that this was done by not rejecting the ‘alternative theory’ claim.<sup>7</sup> Nevertheless, the Supreme Court did not go beyond stating that:

- The Court of Appeals may determine whether the respondents (plaintiffs before the District Court and Court of Appeals, i.e. non-U.S. purchasers) were correct to maintain the argument of ‘alternative theory’ claim;

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<sup>3</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360 (D.D.C. June 7, 2001). There is another District Court judgment in *Empagran* litigation: *Empagran S.A., v. F. Hoffman-LaRoche Ltd.*, 453 F.Supp.2d 1 (D.D.C.2006). This judgment is not relevant to the present chapter.

<sup>4</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C.Cir.2003) and *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005). The Court of Appeals reached two other decisions in the process of the *Empagran* litigation. These decisions deal with issues of allegation, pleading, and presentation of a litigating claim: *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2004 WL 1398217 (C.A.D.C. June 21, 2004); *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337 (D.C.Cir.2004).

<sup>5</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

<sup>6</sup> For the analysis see sections below.

<sup>7</sup> See below.

- In a situation where non-U.S. purchasers properly preserved the argument of the ‘alternative theory’ claim, the Court of Appeals may consider this argument;
- In a situation where the Court of Appeals considers this ‘alternative theory’ argument, the Court of Appeals may also decide this related (alternative) claim.<sup>8</sup>

The Supreme Court did not expand extensively on the context of this ‘alternative theory’. The Supreme Court first made it clear that it assumed that anticompetitive conduct had independently caused the foreign injury, thereby concluding that the domestic effects of the conduct (effects in the U.S.) had not helped to bring about the foreign injury (injury outside the U.S.).<sup>9</sup> Nevertheless, the Supreme Court demonstrated awareness that the non-U.S. purchasers (respondents before the Supreme Court, who were the plaintiffs before the District Court and Court of Appeals) had argued the facts to support the alternative theory claim in the lower courts. The Supreme Court acknowledged that the non-U.S. purchasers had argued that their injury outside the U.S. (foreign injury) was dependent on harm within the U.S., since the domestic effects of the anticompetitive conduct’s domestic (within the U.S.) effects were linked to the foreign (outside the U.S.) harm.<sup>10</sup> Therefore, the Supreme Court worded the alternative claim for the Court of Appeals to consider as follows:

*“...because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e. higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury. They add that this “but for” condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA’s exception.”<sup>11</sup>*

The Supreme Court ruled that, assuming that the foreign antitrust injury is independent of U.S. antitrust effects, the U.S. courts do not have subject matter

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<sup>8</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,175 (2004).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

jurisdiction. Therefore, the reasoning behind the Supreme Court decision, as presented in the judgment, does not provide sufficient guidance for adjudication purposes in the future where transborder elements are present.

## 2 Facts

U.S. and non-U.S. manufacturers and distributors of vitamins formed an antitrust cartel under which they divided the global market and fixed prices of the vitamin products they were selling. The members of the cartel operated both in the U.S. and in non-U.S. markets. This meant that manufacturers and distributors sold the vitamins both in U.S. and in non-U.S. markets. This global cartel caused the prices of the vitamins they were selling to be inflated. This inflated price was charged also by the non-U.S. sellers who sold vitamins to non-U.S. buyers in markets outside the U.S.

The facts of the *Empagran* case relevant for the present thesis are the following.<sup>12</sup> Some non-U.S. purchasers of vitamins bought vitamins from non-U.S. sellers in a market outside the U.S. and the vitamins were delivered to buyers outside the U.S. The non-U.S. buyers filed an antitrust suit against the U.S. and non-U.S. members of the global cartel in the U.S. District Court of Columbia alleging that, because of this global antitrust cartel, they had suffered antitrust injury and were therefore entitled to treble damages and injunction relief.

In accordance with existing precedents, the District Court<sup>13</sup> dismissed their claim for lack of subject matter jurisdiction.<sup>14</sup> The District Court reasoned that the antitrust law of the U.S. was concerned only with anticompetitive effects within the U.S. market; therefore, there was no ground on which U.S. antitrust law could compensate antitrust harm that took place outside the U.S.

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<sup>12</sup> The litigation originally involved U.S. purchasers of vitamins as well, but this class of plaintiffs was later directed to separate litigation. See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360 (D.D.C. June 7, 2001); *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C.Cir.2003).

<sup>13</sup> N.3.

<sup>14</sup> The District Court also decided on the issue of standing for U.S. purchasers of vitamins, and on the plaintiff's claims under foreign and customary international law. These questions are not relevant to this chapter.



The non-U.S. buyers lodged an appeal against the District Court's decision. The Court of Appeals<sup>15</sup> did not limit its reasoning to existing antitrust case law, instead deciding the appeal on wider grounds. The Court of Appeals considered it important first to provide an interpretation of the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a,<sup>16</sup> enacted by Congress in 1982. Under this legislation, wholly foreign conduct can be actionable before the U.S. courts under the condition that this conduct causes a direct, substantial and reasonably foreseeable effect within the U.S. If this effect gives rise to a claim, then this foreign anticompetitive conduct may be also actionable by a private antitrust suit before U.S. courts.

The Court of Appeals had to decide on the correct interpretation of the provisions of the FTAIA. By the time the Court of Appeals considered *Empagran*, two other Courts of Appeals in two other circuits<sup>17</sup> had already interpreted the FTAIA (on the relationship between effects and injury), but the two interpretations were inconsistent. The crux of the matter was discerning the appropriate relationship between anticompetitive effects in the U.S. and antitrust injury that would entitle a private party to bring an antitrust suit in the U.S. Under one interpretation,<sup>18</sup> only antitrust injury that is based on (derives from) the anticompetitive effects in the U.S. enables a private litigant to bring the case within the jurisdiction of the U.S. courts. Under the other interpretation,<sup>19</sup> a specific link between the anticompetitive effects in the U.S.

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<sup>15</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C.Cir.2003).

<sup>16</sup> The text of FTAIA provides, in full:

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

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

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

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

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

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

<sup>17</sup> *Den Norske Stats Oljeselskap As, v. HeereMac Vof*, 241 F.3d 420 (5th Cir.2001); *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir.2002).

<sup>18</sup> *Den Norske Stats Oljeselskap As, v. HeereMac Vof*, 241 F.3d 420 (5th Cir.2001).

<sup>19</sup> *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir.2002).

and antitrust injury is not required. On this basis, as soon as anticompetitive conduct causes an anticompetitive effect in the U.S. market, everyone who suffers antitrust injury (in the U.S. or abroad) due to this anticompetitive conduct can bring an antitrust suit before the U.S. courts.

The Court of Appeals in *Empagran* did not accept either the interpretation of the FTIA provision on the appropriate relationship between anticompetitive effects within the U.S. market and antitrust injury formulated by the Court of Appeals in *Den Norske*,<sup>20</sup> or the interpretation on the relationship between anticompetitive effects within the U.S. market and antitrust injury provided by the Court of Appeal in *Kruman*.<sup>21</sup> Instead, the Court of Appeals in *Empagran*<sup>22</sup> introduced a completely new interpretation of the FTIA provision on the nature of the required link between anticompetitive effects within the U.S. market and antitrust injury. Under this new interpretation, the anticompetitive conduct has to cause anticompetitive effect in the U.S. market and there has to be someone in the U.S. who suffers or may suffer antitrust injury. Where there is or there may be someone who suffers antitrust injury in the U.S., only then can private parties who are established outside the U.S. and suffer antitrust injury outside the U.S. bring a private antitrust suit before the U.S. courts in relation to the same anticompetitive conduct, and potentially recover damages.

The Court of Appeals then applied this new interpretation of the FTIA act to the facts under adjudication. The price-fixing activity of vitamin manufacturers and producers affected prices in the U.S. (prices were higher because of the conspiracy). Therefore, the Court of Appeals decided that non-U.S. buyers had subject matter jurisdiction. The Court of Appeals found support for its decision in the legislative history<sup>23</sup> of the FTIA and in the policy of deterrence.<sup>24</sup>

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<sup>20</sup> See n.18.

<sup>21</sup> See n.19.

<sup>22</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,341,350-352 (D.C.Cir.2003).

<sup>23</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,352-355 (D.C.Cir.2003).

<sup>24</sup> The court explained that the policy reasons as to why foreign plaintiffs should be entitled to sue are to: deter violators, deprive them from the fruits of their illegality, prevent violators escaping full liability for their illegal actions, prevent the lessening of the deterrent effect of the antitrust laws, and prevent members of the cartel conducting their business within the U.S. and in non-U.S. countries in a way that affects U.S. consumers with the expectation that the illegal profits of the members of the cartel could safely extract in non-U.S. countries would offset any liability to

After the Court of Appeals decided that it had subject matter jurisdiction, it also decided on the issue of standing. The Court found that the non-U.S. buyers also had standing.<sup>25</sup>

The vitamin manufacturers and distributors petitioned against the Court of Appeals decision to the Supreme Court, which granted them certiorari.

The Supreme Court assumed<sup>26</sup> that the non-U.S. buyers were litigating their foreign antitrust injury as the result of independent anticompetitive conduct that took place outside the U.S. The Supreme Court assumed that the non-U.S. conduct caused anticompetitive effects outside the U.S. and that these effects outside the U.S. were independent from the anticompetitive effects in the U.S.

The assumption that the foreign antitrust injury in *Empagran* was caused by non-U.S. conduct and non-U.S. effects, and that the non-U.S. injury is independent of the conduct and effects in the U.S, had already been made by the first Court of Appeals.<sup>27</sup> The Supreme Court followed<sup>28</sup> the Court of Appeals' way of constructing the arguments, but with one important difference.

For the Court of Appeals,<sup>29</sup> a decision on whether the foreign antitrust injury was independent or linked to the anticompetitive effects within the U.S. was irrelevant in respect of the interpretation of the FTAIA provision. Under the Court of Appeals' interpretation of the FTAIA,<sup>30</sup> the foreign antitrust injury can be litigated before U.S. courts in a situation where the same anticompetitive

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plaintiffs within the U.S. (citing *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978)). In support of the deterrence argument, the court also cited the dissenting opinion in *Den Norske Stats Oljeselskap As, v. HeereMac Vof*, 241 F.3d 420 (5th Cir.2001), under which foreign plaintiffs should be allowed to sue as this would protect U.S. consumers by deterring perpetrators from engaging in global cartels that harm U.S. markets. Otherwise, the cartel could remain profitable and undeterred because profits gained in non-U.S. markets would subsidize the anticompetitive activity in the U.S. This means that despite liability arising in the U.S., a global cartel would enable profit gained in non-U.S. markets to sustain monopoly prices in the U.S.

<sup>25</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 357-359 (D.C.Cir.2003). The District Court did not make any assumption on facts under adjudication.

<sup>26</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 155, 175 (2004).

<sup>27</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 160 (2004).

<sup>28</sup> For the fact that the Supreme Court made the same assumption see n.8.

<sup>29</sup> N.15.

<sup>30</sup> See above.

conduct causes antitrust injury to someone within the U.S. As soon as someone who suffers antitrust injury within the U.S. exists, a person who suffers antitrust injury outside the U.S. can also bring a private antitrust claim before the courts of the U.S. The relationship between anticompetitive effects and antitrust injury within the U.S. and antitrust injury outside the U.S. is irrelevant to the Court of Appeals' interpretation of the FTAIA. This means that the plaintiffs are allowed to litigate before the U.S. courts antitrust injury that they suffer outside the U.S. irrespective of whether this injury outside the U.S. is independent or dependent of the anticompetitive effects and anticompetitive injury within the U.S. Therefore, the fact that the Court of Appeals assumed that plaintiffs in the *Empagran* litigation suffered antitrust injury outside the U.S. that was independent from anticompetitive effects and injury within the U.S. did not have any relevance to the outcome of the litigation at the Court of Appeals level. Under the Court of Appeals' interpretation of the FTAIA provision, a private plaintiff who suffers antitrust injury outside the U.S. can have the antitrust suit heard by the U.S. courts irrespective of whether the antitrust injury outside the U.S. is independent or dependent on the anticompetitive effects and antitrust injury within the U.S. This means that the assumption made by the Court of Appeals, i.e. that antitrust injury outside the U.S. was caused by anticompetitive conduct outside the U.S. and that anticompetitive injury outside the U.S. was independent from the anticompetitive effect and antitrust injury within the U.S., was not relevant to its final decision. The plaintiff in the *Empagran* litigation would have his private antitrust suit for the antitrust injury suffered outside the U.S. heard by U.S. courts irrespective of this assumption.

In other words, the assumption discussed above and made by the Court of Appeals had no impact on the outcome of the appeal. Although this assumption was irrelevant to the Court of Appeals' interpretation of the FTAIA provisions (and the outcome of the litigation), this was not for the case with the Supreme Court's<sup>31</sup> own interpretation of the FTAIA provisions, and its final decision in the *Empagran* litigation.

The Supreme Court applied the same assumption as the Court of Appeal, i.e. that the plaintiff suffered antitrust injury outside the U.S. that was caused by

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<sup>31</sup> N.5.

the anticompetitive conduct outside the U.S.; that this antitrust injury suffered outside the U.S. was independent from the anticompetitive effects within the U.S., and that the antitrust injury suffered outside the U.S. was independent of the antitrust injury suffered within the U.S. The question as to whether the antitrust injury suffered outside the U.S. was independent of the anticompetitive effects and the antitrust injury within the U.S. was crucial to the Supreme Court's reasoning and judgment. The Supreme Court ruled on the question of the circumstances under which a claimant can litigate independent foreign harm before the U.S. courts relying on the FTAIA provisions, finding no ground on which to support the possibility that independent foreign anticompetitive harm could be litigated in the U.S. The Supreme Court based its reasoning on principles of statutory construction,<sup>32</sup> FTAIA text, legislative history<sup>33</sup> and comity<sup>34</sup>. The Supreme Court could not find any support for its decision in the policy of deterrence.<sup>35</sup>

Therefore, in relation to independent foreign injury, the Supreme Court held that courts in the U.S. do not have subject matter jurisdiction to adjudicate on independent foreign antitrust injury.

The Supreme Court did not address, and therefore did not provide guidance on, the issue that actually caused non-U.S. purchasers of vitamins to initiate the *Empagran* litigation. The litigants did not claim that their foreign antitrust injury was independent from the anticompetitive conduct and anticompetitive effects within the U.S. They claimed that a global antitrust cartel existed whose existence and anticompetitive conduct had created anticompetitive effects in the U.S., thereby making foreign antitrust injury possible. If they proved the facts, then it would follow that a U.S. court would have competence (i.e.

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<sup>32</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,164-165 (2004) (construing ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations, determining what reflects principles of customary international law and prescriptive comity).

<sup>33</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,169-173 (2004).

<sup>34</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,165-169 (2004).

<sup>35</sup> See *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,174-175 (2004) where the Supreme Court of the United States stated that it is not possible to provide a clear answer or empirical support for the argument as to whether priority should be given to deterrence over amnesty-seeking incentives.

subject matter jurisdiction) to award damages for antitrust injury suffered outside the U.S.

The Supreme Court did not decide on these claims. Private plaintiffs presented this connection between anticompetitive effects in the U.S. and their private antitrust injury in their private antitrust claim that both Courts of Appeals as well as the Supreme Court in the *Empagran* litigation named as ‘alternative theory’ claim. The Supreme Court did not rule on the ‘alternative theory’ claim,<sup>36</sup> neither rejecting nor accepting the validity of the alternative theory approach. This is evident from the fact that the Supreme Court vacated the decision to the Court of Appeals and referred the case back to the Court of Appeals to decide on the ‘alternative theory’ claim.<sup>37</sup>

It could be argued that the Supreme Court, by requesting the Court of Appeals to consider arguments on the ‘alternative theory’ claim, was willing to extend the competence of U.S. courts to transborder antitrust actions. The thesis argues that where antitrust injury is litigated under the ‘alternative theory’ approach, a radical rethinking of the existing dichotomy between domestic (U.S.) and foreign (non-U.S.) anticompetitive conduct and effect is required since the ‘alternative theory’ challenges this dichotomy. Transborder antitrust actions cannot be presented, understood, and analysed correctly if they are considered only within the existing dichotomy of U.S. and non-U.S. anticompetitive conduct and effect as far as the issues of anticompetitive conduct, anticompetitive effects, and antitrust injury are concerned. The ‘alternative theory’ approach requires a formulation of reasoning around a completely new category of anticompetitive conduct and anticompetitive effects when considering the facts. For the purposes of the present thesis, this new category of anticompetitive conduct and effects is classified as transborder.<sup>38</sup>

The ‘alternative theory’ claim was raised by the non-U.S. purchasers of vitamins before the District Court and preserved before the Court of Appeals<sup>39</sup> and the Supreme Court, but it has not been decided upon. In constructing this

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<sup>36</sup> See above.

<sup>37</sup> N.8.

<sup>38</sup> See Chapter 1, section 1 and Chapter 5, section 2.

<sup>39</sup> See n.8.

alternative theory claim, the non-U.S. purchasers argued that their foreign injury was not independent of the adverse domestic effect, but dependent on it. The domestic anticompetitive effect was present in the higher prices charged in the U.S. The higher prices in the U.S. market enabled the international price-fixing arrangements to be maintained, and these prices caused the non-U.S. purchasers to suffer foreign injury. This link between the anticompetitive conduct's effects in the U.S. and foreign harm was termed by the non-U.S. purchasers as 'but-for' conditions.

When the case was referred back to the Court of Appeals,<sup>40</sup> the Court rejected the 'alternative theory' and denied jurisdiction. The Court of Appeals followed the interpretation of the FTAIA provision that had been previously formulated by the Court of Appeals in *Den Norske*.<sup>41</sup> The Court of Appeals held that non-U.S. purchasers need to demonstrate that the U.S. effects of the conduct of the cartel give rise to their claim in order to satisfy the tests for subject matter jurisdiction. This means that the Court of Appeals reaffirmed the interpretation of the FTAIA provision and therefore the test of subject matter jurisdiction established by *Den Norske*<sup>42</sup> decision.

This was a surprising position to take in *Empagran* for two reasons. Firstly, this type of link between anticompetitive effects in the U.S. and foreign injury, for the purpose of establishing subject matter jurisdiction, was previously rejected by the same Court of Appeals<sup>43</sup> in the earlier *Empagran* case. However, the Court of Appeals<sup>44</sup> in the second *Empagran* case accepted the *Den Norske* ruling as a valid ground for establishing subject matter jurisdiction without elaborating on adequate reasons upon which it was based. Secondly, the Supreme Court had specifically asked the Court of Appeals to rule on the 'alternative theory' claim,

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<sup>40</sup> *Empagran S.A. v. F. Hoffman–LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005).

<sup>41</sup> See n.18.

<sup>42</sup> Ibid.

<sup>43</sup> N.15.

<sup>44</sup> N.40.

and had not asked the Court of Appeals to determine which of the three existing<sup>45</sup> interpretations of the provision of the FTAIA should be followed.

One possible explanation as to why the Court of Appeals changed its reasoning may be found in the fact that the non-U.S. purchasers acknowledged<sup>46</sup> that ‘but-for’ causation is not enough to obtain jurisdiction under the FTAIA. The Court of Appeals stated that instead of ‘but-for’ causation there should be a direct causal relationship, that is, proximate causation, between anticompetitive effects in the U.S. and foreign injury.

The Court of Appeals did not explain the difference between ‘but-for’ and proximate causation. The only explanation that can be inferred from the Courts of Appeals’ reasoning is that, under proximate causation, anticompetitive effects in the U.S. market have to cause the inflated foreign prices directly. This means that the foreign injury has to derive from the U.S. anticompetitive effect. In a situation where U.S. anticompetitive effects only facilitate foreign prices to be inflated, i.e. foreign injury, there is only ‘but-for’ causation. Even this possible explanation on the required type of causation is confusing.

The non-U.S. purchasers pleaded facts before the District Court, the Court of Appeals and the Supreme Court, which supports an ‘alternative theory’ claim.<sup>47</sup> According to the pleaded facts, effects in the U.S. market caused the foreign inflated prices in a sense that foreign prices would not be possible without anticompetitive effects within the U.S. market. When the Court of Appeals was asked by the Supreme Court to decide on the ‘alternative theory’ claim possibility, the Court of Appeals decided that foreign inflated prices, which resulted in the injury, were caused by effects outside the U.S. market.<sup>48</sup>

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<sup>45</sup> *Den Norske Stats Oljeselskap As, v. HeereMac Vof*, 241 F.3d 420 (5th Cir.2001), or *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir.2002), or *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C.Cir.2003).

<sup>46</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267,1270 (D.C.Cir.2005).

<sup>47</sup> See n.45.

<sup>48</sup> See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267,1271 (D.C.Cir.2005).



There is a strong case for arguing that this decision of the Court of Appeals on the ‘alternative theory’ claim is a misinterpretation of the ‘alternative theory’ as it was originally pleaded and preserved.<sup>49</sup>

The Court of Appeals<sup>50</sup> decided that only the anticompetitive effects outside the U.S. caused prices outside the U.S. to be inflated, and that inflated prices outside the U.S. represent the antitrust injury for which the plaintiffs in the *Empagran* litigation were seeking damages before the U.S. courts. The Court of Appeals did not explain in its judgment how it had reached the conclusion that the effects outside the U.S. were the only reason why plaintiffs in the *Empagran* litigation had suffered antitrust injury. The conclusion reached by the Court of Appeals is not supported by the facts as pleaded and preserved by the plaintiffs in *Empagran* litigation,<sup>51</sup> and the Court of Appeals did not explain why it did not accept these facts as pleaded and preserved by the plaintiffs. The Court of Appeals did not rely on alternative facts or analysis in support of its decision that the alleged global cartel caused separate anticompetitive effects in the U.S. market and separate anticompetitive effects outside the U.S. market, and that only the anticompetitive effects outside the U.S. market caused antitrust injury to the plaintiffs (non-U.S. purchasers).

It can be argued that not only did the Court of Appeals<sup>52</sup> reject the ‘alternative theory’ claim by holding that proximate causation is required between anticompetitive effects in the U.S. market and foreign antitrust injury, but also misinterpreted the substance of the ‘alternative theory’ as pleaded and preserved by the non-U.S. purchasers of the vitamin products. It is possible that the decision on the ‘alternative theory’ may have been different if the Court of Appeals had decided on the facts.

To sum up, the Court of Appeals rejected the ‘alternative theory’ claim and required proximate causation between anticompetitive effects within the U.S. market and foreign antitrust injury to exist for an adjudicating court to grant

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<sup>49</sup> Decisions that ruled on this issue are: *Empagran S.A. v. F. Hoffman LaRoche, Ltd.*, 2004 WL 1398217 (C.A.D.C. June 21, 2004) and *Empagran S.A., et al., v. F. Hoffman-LaRoche, Ltd., et al.*, 388 F.3d 337 (D.C.Cir.2004).

<sup>50</sup> N.40.

<sup>51</sup> See above.

subject matter jurisdiction in a situation where foreign antitrust injury was litigated before the U.S. courts. This thesis argues that the Court of Appeals took this decision without considering all the facts as alleged by the non-U.S. purchasers of vitamin products, and without providing an analysis in support of the decision.

Only after the Court of Appeals had already formulated its decision did the Court, in the same judgment, add two reasons to justify or support its decision. The first reason was the principle of prescriptive comity.<sup>53</sup> The second reason was to refrain from interfering with other nations' prerogative to safeguard their own citizens from anticompetitive activity within their own borders.<sup>54</sup>

It is submitted that neither of these reasons can be used in support of the Court of Appeals' decision. These two issues do not relate to the facts of the particular case and do not provide an answer to the completely new type of antitrust situation that has emerged, i.e. where a global antitrust cartel causes antitrust injuries within the U.S. and non-U.S. markets and where antitrust injuries outside the U.S. market cannot exist without the anticompetitive effects within the U.S. market. The analysis in respect of these matters is presented in the sections below and in the next chapter.

### 3 Reasoning in the *Empagran* Litigation

The previous section presented the factual framework of the *Empagran* litigation. The focus of this section was to demonstrate the following: the nature of the anticompetitive conduct, who the litigants were, the issues that required adjudication, and the decisions by the courts at different levels. The challenging

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<sup>52</sup> N.40.

<sup>53</sup> N.48, citing dissenting opinion in *Hartford Fire Insurance Co., et al., v. California et al.*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) in *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

<sup>54</sup> N.48.

reasoning of the Supreme Court<sup>55</sup> and the confusing decision of the Court of Appeals<sup>56</sup> were also noted.

The importance and the extent of the *Empagran* litigation cannot be fully understood by merely focusing on the courts' rulings, i.e. on those statements within the judgments where the adjudicating courts formulated their decisions. There are three reasons why the analysis in the *Empagran* litigation has to consider wider aspects and not simply focus on the courts' rulings:

- 1) The Courts' rulings were the result of the judges following an analytical structure to reach their decisions (i.e. arguments/reasons and the chronological order in which these arguments/reasons are presented and elaborated). This analytical structure might not necessarily address facts as they happened in reality. It was explained above that the Court of Appeals<sup>57</sup> and the Supreme Court<sup>58</sup> elaborated their decisions based on an assumption, and that this assumption might not necessarily be in conformity with reality. Another problem with the analytical structure is that it is the result of the engagement, active role, and perception of the litigants as well as the adjudicating courts. The analysis in this section will show that the way litigants and courts formulated their arguments in *Empagran* had a crucial impact on how the decisions were formulated.
- 2) The *Empagran* litigation raised a novel question for the courts. The courts were asked to decide on the interpretation of §6a(2) of the FTAIA<sup>59</sup> and whether this statutory provision enables a non-U.S. national who suffers antitrust injury outside the U.S., in transactions that take place outside the U.S., to bring a private antitrust lawsuit before the U.S. courts and obtain remedies for this foreign antitrust injury. The analysis in this section will show that the litigants and the courts construed the answer to this novel question through an analogy with the existing law. The analysis in this section will explain that such an analogy is not always appropriate.

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<sup>55</sup> N.5.

<sup>56</sup> N.48.

<sup>57</sup> N.15.

<sup>58</sup> N.5.

- 3) The outcome of the *Empagran* litigation provides a clear answer only in a specific type of factual situation, i.e. where foreign antitrust injury (antitrust injury suffered outside the U.S.) is independent from anticompetitive effects felt within the U.S. In this situation the foreign antitrust injury cannot be litigated before the U.S. courts. This outcome is the result of the analytical structure chosen by the courts, mentioned under (1) above. This section will analyse this analytical structure and identify the arguments raised throughout the *Empagran* litigation, and it will establish the extent to which they may be used in future litigation. In addition, this section will identify situations that have not been decided by the *Empagran* litigation, and neither has guidance been provided as to how to address them.

Thus, this section will present the *Empagran* litigation by using a matrix that will highlight not only issues that have been decided, but also issues that have been left unresolved. The matrix will also show whether the litigants or courts were the masters of argumentation, how litigants and courts formulated support for their arguments, and how litigants' and courts' arguments changed as the litigation progressed.

This section will be divided into two subsections in accordance with the chosen matrix.

The first subsection will explain what issues were litigated throughout the *Empagran* litigation; the arguments upon which the issues were litigated; which of the issues were approved by the courts; how the courts construed their reasoning and on what grounds; whether arguments used by the litigants and the courts were clear, convincing, and persuasive; and which of the decided issues and arguments used throughout the *Empagran* litigation retain plausibility for future litigation.

The second subsection will provide a brief summary of which issues the *Empagran* litigation resolved and which issues were left unresolved or were not considered. Each issue that was considered in the *Empagran* litigation is

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<sup>59</sup> See n.16.

analysed in a separate part of the first subsection. Each of these parts contains an in-depth analysis of arguments and reasoning related to the specific issue, and provides a critique of how the litigants and the courts construed the arguments and decisions. In addition, each of these parts also presents the questions to which the *Empagran* litigation did not provide an answer. Consequently, the purpose of this second subsection is not to repeat conclusions presented already in the first subsection. Instead, the focus will be on making a clear distinction between issues on which the *Empagran* litigation can serve as a valid source of authority should those issues arise in future litigation (i.e. clear and decided issues), and issues that still require a judicial decision (i.e. unresolved issues). This distinction between decided and unresolved issues is important for future litigation.

### **3.1 Issues Litigated in *Empagran***

This subsection will address the issues that were litigated throughout the *Empagran* litigation. This will be done by dividing the *Empagran* litigation into separate sections which were relevant for the litigants or the courts in formulating an argument or taking decision.

The *Empagran* litigation arose because the plaintiffs suffered foreign antitrust injury and there was no single, undisputed, binding case law on the interpretation of the relevant provisions of the FTAIA and, consequently, no guidance existed as to how to establish subject matter jurisdiction for the U.S. courts to hear the case.

This subsection will show that, in the end, the adjudicating courts in the *Empagran* litigation did not limit themselves to delivering judgment only on the interpretation of the FTAIA provision (subsection 3.1.7.), but actually shaped the structure of the *Empagran* litigation (subsection 3.1.6). The courts did this either by modifying the factual situation or by determining in abstract the questions upon which they decided to adjudicate.

Nevertheless, the adjudicating courts considered throughout the *Empagran* litigation the factual situation and the arguments presented by the litigants

which required the adjudicating courts to expand the number of issues upon which they were required to adjudicate.

As the anticompetitive conduct was performed by a global (international) cartel, the adjudicating courts were required to decide whether the existence of the global cartel itself was sufficient to grant jurisdiction to the U.S. courts (subsection 3.1.2). The plaintiffs argued that the U.S. courts should establish subject matter jurisdiction in a situation concerning a global cartel because it is fair that the perpetrators should be punished. This is why the adjudicating courts had to rule on the fairness issue as well (subsection 3.1.3).

The plaintiffs and the defendants were foreigners (non-U.S. citizens). The plaintiffs had established a commercial relationship with the defendants by concluding a transaction (the purchase of vitamins) outside the U.S. Therefore, the adjudicating courts had to decide whether the place where the transaction had been concluded was relevant to establishing subject matter jurisdiction of the U.S. courts (subsection 3.1.1), and whether the plaintiffs could establish the existence of the anticompetitive conduct merely by relying on transactions they had concluded with the defendants, or the plaintiffs were required to prove the existence and functioning of a (global) cartel (subsection 3.1.5).

As the *Empagran* litigation was a private antitrust law enforcement action, the adjudicating courts had to address the issue of standing and other issues pertinent to a private antitrust litigation (subsection 3.1.4). Consequently, it is submitted that it would not have been surprising for the aims of antitrust law and the goals of private antitrust law enforcement to be considered. Unfortunately, the adjudicating courts analysed only the aim of deterrence that exists within the domestic context and is perceived as one of the goals of private antitrust law enforcement. It will be argued in subsection 3.1.9 below that the deterrence aim was used merely as an argument in reaching decisions on other issues. Without jeopardising the analysis that follows, deterrence was used as argument in reaching a decision on granting standing and on expanding subject matter jurisdiction. No court in the *Empagran* litigation used deterrence as a goal of private antitrust law enforcement that entitles private parties to protection.

The facts and arguments supporting the claim in the *Empagran* litigation were novelties for which U.S. case law could not serve as precedent. Therefore, the plaintiffs proposed a new approach to demonstrate how antitrust injury that exists due to the operation of a global cartel can be litigated before the U.S. courts. That is why both Courts of Appeals as well as the Supreme Court were expected to rule and provide guidance on the alternative theory as another way to establish subject matter jurisdiction (subsection 3.1.10).

In each of the following subsections of this thesis, the focus will be on the arguments that the litigants provided in support of their position and on the arguments that the courts, at the various stages of the litigation, used in constructing their decisions. These arguments will be analysed, and commentary will be offered on whether the decisions reached by adjudication courts can be supported, or whether they raise problems and questions that require answers.

Analysis presented hereafter in subsection 3.1. is considered necessary for the purpose of establishing a clear ambit on the extent to which it is possible to cite decisions delivered in *Empagran* litigation as valid and undisputed precedents for future litigation.

### ***3.1.1 Transactions in which Injured Parties are Involved***

This subsection presents the reasoning of the adjudicating courts in the *Empagran* litigation and discusses the relevance of the place where transactions between plaintiffs and defendants were concluded to injured plaintiffs obtaining remedies before the U.S. courts.

Throughout the *Empagran* litigation, the place of the transactions between plaintiffs and defendants were considered by the adjudicating courts in respect of two legal issues: subject matter jurisdiction and standing. The issue of standing is analysed in subsection 3.1.4 below and therefore will not be discussed here.

In the previous section it was stated that transactions (the purchase of vitamins) between the plaintiffs (buyers) and the defendants, or their co-conspirators,

took place outside the U.S. The plaintiffs paid inflated prices for the vitamins they purchased through these transactions. The inflated prices caused the antitrust injury for which a remedy was sought before the U.S. courts.<sup>60</sup>

The fact that the transactions were concluded outside the U.S. was important before the District Court,<sup>61</sup> as the defendants argued that this alone should suffice for the Court to decide that U.S. courts lacked subject matter jurisdiction.

The defendants considered the place of the transactions as crucial, and constructed their argument against the existence of subject matter jurisdiction based on this point. The defendants' argument before the District Court was that the transactions lacked any direct connection to U.S. commerce.<sup>62</sup> The defendants argued that, in order to obtain subject matter jurisdiction, the plaintiffs had to sustain injuries in U.S. commerce (i.e. the transactions should take place within the U.S.) and that the injuries had to be direct, substantial, and reasonably foreseeable results of anti-competitive conduct by the defendants.<sup>63</sup>

The District Court accepted the defendants' argument that the plaintiffs had been injured in transactions that lacked direct connection with the U.S. commerce.<sup>64</sup> There are two problems with the District Court's conclusion.

- Firstly, the court did not explain why the plaintiffs had subject matter jurisdiction only if injured in transactions that took place within the U.S.
- Secondly, the court did not explain why the transactions that the plaintiffs concluded outside the U.S. were lacking direct connection with U.S. commerce.

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<sup>60</sup> See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,357,358 (D.C.Cir.2003).

<sup>61</sup> N.3.

<sup>62</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,1 (D.D.C. June 7, 2001).

<sup>63</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,2 (D.D.C. June 7, 2001).

<sup>64</sup> *Ibid.*



Therefore, it can be concluded that an open question remains, as the District Court did not explain under what conditions transactions that took place outside the U.S. may still be directly connected with U.S. commerce.

It is submitted that this reasoning of the District Court, where no further elaboration of its decision was provided, is the result of the District Court's perception that subject matter jurisdiction within the area of antitrust law can be granted only to remedy anticompetitive effects felt within the U.S. Otherwise, there would be no need for the District Court to concentrate its reasoning on explaining the test of jurisdiction, based on anticompetitive effects within the U.S.<sup>65</sup> This conclusion cannot be invalidated by the fact that the District Court acknowledged the existence of FTAIA<sup>66</sup> and cited the District Court's judgment in the *Kruman*<sup>67</sup> case.

Referring to the *Kruman*<sup>68</sup> case, the District Court stated the following:

*"...Court would certainly have jurisdiction to provide redress for injuries suffered in consequence of overt acts in furtherance of the conspiracy, such as the imposition of fixed prices, that occurred in the United States, because those acts would both have occurred and have had effects here..."*<sup>69</sup>

and then continued:

*"...but this Court would only have jurisdiction over plaintiffs' alleged injuries, which were suffered in consequence of overt acts that occurred outside this country, if those acts, either individually or perhaps collectively had direct, substantial and reasonably foreseeable effects within the United States that caused the injuries seeking redress here."*<sup>70</sup>

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> *Kruman v. Christie's Intern. PLC*, 129 F.Supp.2d 620 (S.D.N.Y.2001).

<sup>68</sup> Ibid.

<sup>69</sup> N.63.

<sup>70</sup> Ibid.

The difference between these two passages is that the first one refers to anticompetitive activities taking place within the U.S., whereas the second one refers to anticompetitive activities taking place outside the U.S. The District Court explained that in the first situation, subject matter jurisdiction is present for both reasons, i.e. because anticompetitive conduct and anticompetitive effects are present within the U.S. In the second situation, subject matter jurisdiction is present only where the anticompetitive conduct that takes place outside the U.S. causes required anticompetitive effects within the U.S.

In the latter passage, the District Court tries to provide an explanation of the required connection between anticompetitive effects within the U.S. and antitrust injury,<sup>71</sup> but this part is irrelevant to the understanding of the District Court's position on the relevance of the place of transaction to the granting of subject matter jurisdiction.

The *Kruman*<sup>72</sup> case, upon which the District Court relied in reaching its decision, was consequently changed by the Court of Appeals in *Kruman*.<sup>73</sup> This means that the District Court's reasoning on the relevance of the place where transactions were concluded might potentially be different.

Nevertheless, it cannot remain unnoticed that the District Court placed relevance on the fact that the transactions were concluded outside the U.S. This is evident from the following passage:

*“The problem here is that although plaintiffs generally allege that the defendants' price fixing behaviour had direct, substantial, and reasonably foreseeable effects on U.S. commerce.... they propose to bring this action only on behalf of domestic and foreign purchasers who directly purchased Class Vitamins from defendants or their co-conspirators for delivery outside the United States. Plaintiffs have not alleged that the precise*

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<sup>71</sup> See subsection 3.1.7.1 in this chapter.

<sup>72</sup> N.67.

<sup>73</sup> N.19.

*injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case.”*<sup>74</sup>

This passage explains two important facts about the District Court’s reasoning. Firstly, irrespective of the fact that the District Court acknowledged the existence of FTAIA, the District Court still evaluated the subject matter jurisdiction by relying on the test of subject matter jurisdiction within the area of antitrust law (i.e. anticompetitive effects within the U.S.) applied by the U.S. courts.<sup>75</sup> Secondly, this passage suggests that the District Court concluded that transactions (purchases) have to take place within the U.S. and that this is the only way that injuries and anticompetitive effects can co-exist within the U.S.

The position of both Courts of Appeals in the *Empagran* litigation on the relevance of the issue of the place of transactions to granting subject matter jurisdiction differs from the decision reached by the District Court.

The first Court of Appeals<sup>76</sup> did not explicitly rule on the significance of the place of transactions for the granting subject matter jurisdiction. Nevertheless, its position may be inferred from the reasoning used in construing its interpretation of FTAIA and requiring a relationship between anticompetitive effects within the U.S. and antitrust injury.<sup>77</sup>

The Court of Appeals cited with approval the following passage from legislative history on which, among other grounds, the Court of Appeals based its reasoning to reach its final decision:

*“The conduct has requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad”, quoting also the passage from Pfizer<sup>78</sup> that “Foreign purchasers should enjoy the*

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<sup>74</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,3 (D.D.C. June 7, 2001).

<sup>75</sup> See Chapter 6, subsection 3.2.1.

<sup>76</sup> N.15.

<sup>77</sup> See subsection 3.1.7.2 in this chapter.

<sup>78</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

*protection of our antitrust laws in the domestic marketplace, just as our citizens do.*<sup>79</sup>

This passage mentions “purchasers taking title abroad” and “suffering economic injury abroad”, i.e. the two points that may be interpreted as addressing a factual situation similar to the one in the *Empagran* litigation where transactions were concluded outside the U.S. As mentioned above, the Court of Appeals did not rule explicitly on the issue of the place of the transactions, although this would have been possible. The reason is unknown, but one plausible explanation is that the focus of the Court of Appeals was on elaborating the new interpretation of FTAIA and new subject matter jurisdiction test that was, in the end, beneficial for the plaintiff.<sup>80</sup> Therefore, due to the fact that the Court of Appeals<sup>81</sup> granted subject matter jurisdiction to the plaintiff despite the plaintiffs having suffered antitrust injury in relation to the transactions that the plaintiffs had concluded outside the U.S., it can be inferred that in the Court of Appeals’ view, the place where transactions are concluded does not affect the plaintiffs’ possibility to obtain remedies for the foreign antitrust injury before the U.S. courts.

The position of the second Court of Appeals,<sup>82</sup> i.e. the one that adjudicated the *Empagran* litigation after referral from the Supreme Court,<sup>83</sup> is clearer on the issue of the relevance of the place where transactions are concluded.

The Defendants argued that on the basis of §6a(2) provision of the FTAIA, private plaintiffs can be granted subject matter jurisdiction only for “*injuries that arise in U.S. commerce*”<sup>84</sup> and attributing relevance to “*situs of the transaction and*

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<sup>79</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,354-355 (D.C.Cir.2003).

<sup>80</sup> See subsection on relationship between anticompetitive effects and antitrust injury.

<sup>81</sup> N.15.

<sup>82</sup> N.40.

<sup>83</sup> N.5.

<sup>84</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267,1269 (D.C.Cir.2005).

*resulting injuries*”<sup>85</sup> in contrast to “*situs of the effects of the allegedly anti-competitive conduct giving rise to the appellants’ [i.e. the plaintiffs’] claims.*”<sup>86</sup>

The Court of Appeals rejected the defendants’ argument with the following passages:

“This interpretation has no support from the text of the statute, which expressly covers conduct involving “trade or commerce with foreign nations.” 15 U.S.C. § 6a(1)(A)”<sup>87</sup>

and

“...legislative history makes clear that the FTAIA’s “domestic effects” requirement “does not exclude all persons injured abroad from recovering under the antitrust laws of the United States.” H.R.Rep. No. 97-686, at 17a”.<sup>88</sup>

In summary, this subsection addressed the part of the factual situation in the *Empagran* litigation focusing on the plaintiffs having suffered antitrust injuries in relation to buying vitamins outside the U.S. Both Courts of Appeals’ judgments, (the first one implicitly, the second one explicitly) provide sufficient ground for understanding the courts’ position that the place where the private plaintiff concludes the transaction cannot be perceived on its own as an obstacle to the granting of subject matter jurisdiction.

Therefore, for the purpose of further analysis in the chapters that follow,<sup>89</sup> it is important to bear in mind that the decision in the *Empagran* litigation can serve as case law precedent in determining that private plaintiffs who suffer foreign antitrust injury can bring a private antitrust suit before the U.S. courts and obtain remedies even in those situations where they, as parties to transactions, concluded these transactions outside the U.S.

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Including the chapter on transborder enforcement standard. See Chapter 5, section 2.

### 3.1.2 *The Global Nature of Anticompetitive Conduct*

The factual situation in the *Empagran* litigation is that the defendants formed and operated a global price-fixing cartel. This fact was not disputed either by litigants or by adjudicating courts at any level.

The question this subsection will analyse is whether this global nature of antitrust cartels is sufficient on its own to grant private plaintiffs subject matter jurisdiction of the U.S. courts. In other words, the question is whether private plaintiffs who suffer foreign antitrust injury can bring their private antitrust suit before the U.S. courts and obtain remedies merely by arguing that they suffered their antitrust injury in relation to the global antitrust cartel.

This question has not been decided by case law that precedes the *Empagran* litigation. This means that the *Empagran* litigation is the first example where private plaintiffs attempted to obtain the subject matter jurisdiction the U.S. courts by arguing that their antitrust injury had occurred due to global anticompetitive conduct.

The plaintiffs before the District Court proposed this completely new test to establish subject matter jurisdiction. The plaintiffs argued that to establish subject matter jurisdiction it is enough to establish that the defendants were engaged in anticompetitive conduct that was of global nature. In the plaintiffs' view, in a situation where the defendants' conduct is global, the location of anticompetitive effects is irrelevant.

The District Court summarized the plaintiffs' novel approach to the subject matter jurisdiction test in the following passage:

*"... Jurisdictional nexus is provided solely by the global nature of the defendants' conduct. In plaintiffs' view, the territorial effect of that conduct is irrelevant".*<sup>90</sup>

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<sup>90</sup> N.74.

The District Court rejected the plaintiffs' position, and as a reason for its decision stated that the existing case<sup>91</sup> law did not support it. The District Court then continued:

*“Allegations of a worldwide conspiracy do not suffice under the applicable caselaw to establish the necessary direct, substantial and reasonably foreseeable effect on U.S. commerce required to establish this Court's jurisdiction”.*<sup>92</sup>

Again, the District Court cited case law<sup>93</sup> in support of this decision. However, in one of the cited cases<sup>94</sup> the factual situation and the issue of controversy were different than in the *Empagran* litigation, the decision in another cited case<sup>95</sup> was later rejected, and the decision in the remaining cited case law<sup>96</sup> was under appeal to the Court of Appeals.<sup>97</sup> In the *Empagran* litigation, the precedents have one common characteristic, i.e. that to grant subject matter jurisdiction of the U.S. courts there need to exist anticompetitive effects within the U.S.<sup>98</sup>

It is submitted that there are two problems with the plaintiffs' argumentation for a new type of subject matter jurisdiction.

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<sup>91</sup> The District Court cited *Kruman v. Christie's Intern. PLC*, 129 F.Supp.2d 620 (S.D.N.Y.2001); *National Bank of Canada v. Interbank Card Ass'n.*, 666 F.2d 6 (2d Cir.1981); *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875 (W.D.Wis.2000), and *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071 (S.D.N.Y.1988) in support of its decision (see *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,3 (D.D.C. June 7, 2001). Comparing factual situations and decisions in these cases and in the *Empagran* litigation, the only two cited cases that shed any light on the District Court decision are *National Bank of Canada v. Interbank Card Ass'n.*, 666 F.2d 6 (2d Cir.1981), where it is explained that the subject matter jurisdiction of the U.S. courts is based on anticompetitive effects within the U.S. and not on anticompetitive conduct. The same rule of reasoning was presented to exist in *In re Copper Antitrust Litig.*, 117 F.Supp.2d 875, 887 (W.D.Wis.2000).

<sup>92</sup> N.74.

<sup>93</sup> *Lantec, Inc. v. Novell, Inc.*, 2000 U.S.Dist.LEXIS 19905 (D.Utah 2000); *Kruman v. Christie's Intern. PLC*, 129 F.Supp.2d 620 (S.D.N.Y.2001); *Den Norske Stats Oljeselskap As, v. HeereMac Vof*, 241 F.3d 420 (5th Cir.2001).

<sup>94</sup> *Lantec, Inc. v. Novell, Inc.*, 2000 U.S.Dist.LEXIS 19905 (D.Utah 2000).

<sup>95</sup> *Kruman v. Christie's Intern. PLC*, 129 F.Supp.2d 620 (S.D.N.Y.2001) in *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir.2002).

<sup>96</sup> N.18.

<sup>97</sup> N.15.

<sup>98</sup> See Chapter 6, section 3.2.1.

- Firstly, the plaintiffs did not explain why the location of anticompetitive effects is no longer relevant.
- Secondly, the plaintiffs did not provide any arguments as to why a U.S. court should have subject matter jurisdiction when courts from another country may be equally suitable to have subject matter jurisdiction over alleged global antitrust cartels.

The issue of the global nature of anticompetitive conduct being sufficient to grant subject matter jurisdiction of the U.S. courts was not raised further in the *Empagran* litigation. Without jeopardising the analysis that follows in other subsections below,<sup>99</sup> the decisions reached by the first<sup>100</sup> and the second<sup>101</sup> Court of Appeals and by the Supreme Court<sup>102</sup> indicate that subject matter jurisdiction of the U.S. courts cannot exist without a specific type of connection between the suffered antitrust injury and anticompetitive effects within the U.S.

In conclusion, the analysis in this subsection has demonstrated that private plaintiffs cannot litigate their foreign antitrust injuries before the U.S. courts merely by stating that they suffered these injuries as a consequence of the existence and the functioning of a global antitrust cartel. The global nature of antitrust cartels does not exempt the private plaintiffs from having to prove the existence of anticompetitive effects within the U.S.<sup>103</sup> and the required type of relationship between anticompetitive conduct and antitrust injury.

### **3.1.3 Fairness in Adjudicating Anticompetitive Conduct**

This subsection has to be read in conjunction with the previous subsection on the global nature of anticompetitive conduct. This is because fairness is the only explanation that the plaintiffs provided in support of their proposed new test on

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<sup>99</sup> See subsection 3.1.1. and subsection 3.1.10. in this chapter below.

<sup>100</sup> N.15.

<sup>101</sup> N.40.

<sup>102</sup> N.5.

<sup>103</sup> See subsections 3.1.7. and 3.1.10 of this chapter below.



how to establish subject matter jurisdiction, i.e. that alleging the global nature of anticompetitive conduct is sufficient to establish subject matter jurisdiction.

Therefore, the issue of fairness became relevant to the whole area of subject matter jurisdiction. In other words, the question that this subsection will analyse is whether relying on fairness on its own is sufficient to establish subject matter jurisdiction of the U.S. courts.

The plaintiffs presented the fairness argument before the District Court by arguing that the scope of U.S. antitrust laws should be expanded “*in order to compensate plaintiffs for defendants' acknowledged wrongdoing.*”<sup>104</sup>

The District Court rejected the plaintiffs' fairness argument as being sufficient basis for the formulation of a new test for subject matter jurisdiction by stating that “[p]laintiffs may... have a remedy against... defendants abroad.”<sup>105</sup>

The fairness argument was not raised or litigated further in the *Emparan* litigation.

Despite the fact that the issue of fairness was argued only before the District Court, it may be still worth commenting on it, as it is possible that it may be raised in future litigation.

There are, however, two problems with the plaintiffs' argument.

- Firstly, the plaintiffs raised the argument of fairness without providing any explanation of whether, in general, there is scope for fairness within the area of antitrust law.<sup>106</sup>

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<sup>104</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,4 (D.D.C. June 7, 2001).

<sup>105</sup> *Ibid.*

<sup>106</sup> If the plaintiffs had conducted research on the goals of antitrust law and on the purpose of private antitrust law enforcement, they would have noticed that the argument of fairness could not be sustained in the way they framed it. For the explanation that antitrust is economic and not moral enterprise and thus not having moral content see Herbert Hovenkamp, *The Antitrust Enterprise: Principles and Execution* (Cambridge, Massachusetts, USA: Harvard University Press, 2005), 47.

- The second problem with the fairness argument is that it touches on the basic question of antitrust law, i.e. whether the enforcement of antitrust law is needed because it is fair or because it is the law and therefore has to be enforced. This was the question that the adjudicating courts had to consider in the initial stages<sup>107</sup> of the development of antitrust law.<sup>108</sup>

The way in which the District Court rejected the fairness argument is unclear.

- Firstly, the District Court rejected the fairness argument by relying on foreign remedies. The District Court did not explain in what way the foreign remedies justified the rejection of a fairness argument. Therefore, the District Court's statement raises the following questions:
  - Is the existence of foreign remedies in the abstract sufficient to reject the fairness argument, or should the plaintiffs have an actual or foreseeable possibility of obtaining remedies abroad?
  - Why is the existence of foreign remedies more relevant than the existence of anticompetitive effects within the U.S. in rejecting the fairness argument?
  - Why is it not possible to establish subject matter jurisdiction of the U.S. courts despite the existence of foreign remedies?
- Secondly, the District Court could have rejected the fairness argument along the lines presented above based on the weakness of the plaintiffs' presentation of the argument of fairness, i.e. in relation to the goals of antitrust law, or to the purpose of private antitrust enforcement, or with the argument of the historical development of antitrust law where it was

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<sup>107</sup> This was the stage where the adjudicating courts were confronted with the problem of interpreting the provisions of the Sherman Act, i.e. the choice between literal and reasonableness interpretation.

<sup>108</sup> Again, if plaintiffs had researched the history of antitrust law development, they might not have been tempted to raise the fairness argument in the *Empagran* litigation.

established<sup>109</sup> that there is no place for a fairness argument in antitrust law.

In conclusion, the analysis in this section indicates that the District Court rejected the fairness argument in formulating the test of subject matter jurisdiction but the reasons for rejecting the argument lack clarity and raise some questions. The reasons for the District Court's decision were not considered further in the *Empagran* litigation. Therefore, it is submitted that the fairness argument may be raised again in the future.

### 3.1.4 Standing in a Situation of Foreign Antitrust Injury

A private plaintiff has to satisfy, in addition to other elements,<sup>110</sup> the requirements of standing in order to obtain compensation<sup>111</sup> for any suffered antitrust injury.<sup>112</sup> The nature of the element of standing is controversial.<sup>113</sup> This

<sup>109</sup> N.106. See also Hans B. Thorelli, *The Federal Antitrust Policy; Origination of an American Tradition* (Stockholm, Sweden: George Allen & Unwin Ltd., P.A. Norstedt & Söner, 1954), 445-58; William Letwin, *Law and Economic Policy in America; the Evolution of the Sherman Antitrust Act* (Edinburgh University Press, 1966), 167-81.

<sup>110</sup> In a situation there exists antitrust violation (this is compulsory element, William Breit and Kenneth G. Elzinga, "Private Antitrust Enforcement: The New Learning," *Journal of Law and Economics* 28, no. 2 (1985), 419), plaintiffs need to prove antitrust injury, causation, extent of damages (Comment, "Antitrust Enforcement By Private Parties: Analysis of Developments in the Treble Damage Suit," *The Yale Law Journal* 61, no. 6 (1952); Thomas E. Kauper and Edward A. Snyder, "An Inquiry Into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared," *The Georgetown Law Journal* 74 (1986); Comment, "Government Judgments as Evidence in Private Anti-Trust Proceedings: Section 5 of the Clayton Act," *Illinois Law Review* 46, no. 5 (1951); Laishley P. Jr. Wragg, "Private Suits Under the Sherman Act: The New Injury-to-competitors Test," *Wayne Law Review* 7 (1961)). Plaintiffs need to prove that their antitrust injury was caused by anticompetitive effects of antitrust violation (Joseph Bauer, "The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing," *University of Pittsburg Law Review* 62 (2001), 441.) and that they are not better off because of antitrust violation (Breit and Elzinga, "28 J.L. & Econ. 405," 430-32).

<sup>111</sup> For the standing requirements with regard to interim remedies within the area of antitrust law see Randolph S. Sherman, "Antitrust Standing: From Loeb to Malamud," *New York University Law Review* 51, no. 3 (1976); Daniel Berger and Roger Bernstein, "An Analytical Framework for Antitrust Standing," *The Yale Law Journal* 86, no. 5 (1977); Stephen Calkins, "Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System," *Georgetown Law Journal* 74(1986); Comment, "61 Yale L.J. 1010."

<sup>112</sup> The analysis of whether private plaintiffs have fulfilled the requirement of standing is conducted prior to the adjudicating court's consideration of the merits of the private antitrust suit.

<sup>113</sup> Different tests exist to analyse antitrust standing (Bauer, "62 U. Pitt. L. Rev. 437," 442; Clifford A. Jones, *Private Enforcement of Antitrust Law in the EU, UK, and USA* (New York, US: Oxford University Press, 1999), 159-73; John J. Flynn, "Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos," *Antitrust Law Journal* 49 (1980), 1597). It means there does not exist uniform workable test for antitrust standing analysis (Comment, "Fifty Years of Sherman Act Enforcement," *The Yale Law Journal* 49, no. 2 (1939), 269,273). In addition,

notwithstanding, standing remains a valid requirement within the area of private antitrust law.

Therefore, the purpose of this subsection is to analyse how the adjudicating courts in the *Empagran* litigation shaped the standing requirement in a situation where foreign private plaintiffs claim compensation for antitrust injury they have suffered outside the U.S.

The issue of standing was litigated in *Empagran* before the District Court<sup>114</sup> and before the first Court of Appeals<sup>115</sup>. The second Court of Appeals<sup>116</sup> did not provide any view on the issue of standing. Nevertheless, the second Court of Appeals provided an explanation of the relationship between subject matter jurisdiction and standing.

The issue of whether foreigners have standing was argued before the District court. In other words, the issue of standing was focused on the question whether non-U.S. nationals can bring a private antitrust suit before the U.S. courts.<sup>117</sup>

The District Court did not decide on the issue of the standing of the foreign plaintiffs who litigated their foreign antitrust injury before the U.S. courts because there was no need to do this.<sup>118</sup> The reason why the District Court did not find any need to rule on the issue of standing was that the plaintiffs were

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different adjudicating courts may apply the same antitrust standing test in different ways (Berger and Bernstein, "86 Yale L.J. 809," 810; Flynn, "49 Antitrust L.J. 1593," 1598). There exists some attempts of making coherent framework within which to analyse antitrust standing (Max Huffman, "A Standing Framework for Private Extraterritorial Antitrust Enforcement," *SMU Law Review* 60, no. 1 (2007); Berger and Bernstein, "86 Yale L.J. 809"; Milton Handler, "The Shift From Substantive to Procedural Innovations in Antitrust Suits – the Twenty-Third Annual Antitrust Review," *Columbia Law Review* 71, no. 1 (1971)). These attempts have not resorted to be successful (William H. Page, "The Scope of Liability for Antitrust Violations," *Stanford Law Review* 37 (1985); Richard B. Tyler, "Private Antitrust Litigation: The Problem of Standing," *University of Colorado Law Review* 49 (1978)).

<sup>114</sup> N.3.

<sup>115</sup> N.15.

<sup>116</sup> N.40.

<sup>117</sup> It is appropriate to mention that another question was raised before the District Court which related to domestic purchasers having standing [see *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,5-6 (D.D.C. June 7, 2001)]. Due to the fact that the standing of domestic purchasers was not the issue that was relevant before the Court of Appeals [*Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, (D.C.Cir.2003); *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005). [*F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004)] it is not an issue that requires particular consideration.

<sup>118</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,5 (D.D.C. June 7, 2001).

not granted subject matter jurisdiction over their claim.<sup>119</sup> The same requirement, i.e. that the issue of standing can be litigated only after the requirement of subject matter jurisdiction is satisfied, can also be derived from the Court of Appeals'<sup>120</sup> decision after the Supreme Court<sup>121</sup> referred the case back to the Court of Appeals.

Therefore, conclusion of the District Court and the Court of Appeals<sup>122</sup> on the issue of standing was that it can be assessed only if the foreign plaintiffs, who bring a private antitrust law suit before the U.S. courts, satisfy the requirements of subject matter jurisdiction.

The plaintiffs argued before the District Court that foreigners have standing if two conditions are satisfied: firstly, if the alleged anticompetitive conduct has the requisite impact on U.S. commerce, and secondly, if the plaintiffs' injuries occur in a global market and this global market necessarily includes U.S. commerce.<sup>123</sup> They relied on the *Transor*<sup>124</sup> case to support this argument.

The defendants before the District Court argued that in order to have standing, the plaintiffs have to have been injured in U.S. commerce, otherwise they fall outside the class of persons whom the Sherman Act is designed to protect.<sup>125</sup> The defendants formulated the argument by reference to the *In Porters*<sup>126</sup> case, relying specifically on the part of the judgment where the court stated that "*the concerns of the antitrust laws is the protection of American consumers and American exporters, not foreign consumers or producers.*"<sup>127</sup> The problem remains that it is not clear how the defendants transformed the stipulation in the *In Porters*<sup>128</sup> case as to the protection being based on 'nationality' (i.e. only

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<sup>119</sup> Ibid.

<sup>120</sup> N.84.

<sup>121</sup> N.5.

<sup>122</sup> N.40.

<sup>123</sup> N.118.

<sup>124</sup> *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 738 F.Supp. 1472 (S.D.N.Y.1990).

<sup>125</sup> N.118.

<sup>126</sup> *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494 (M.D.N.C.1987).

<sup>127</sup> N.118 citing *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494,499 (M.D.N.C.1987).

<sup>128</sup> N.126.

U.S. nationals are protected) into the protection being based on ‘location of injury’ (i.e. only for those who are injured in the U.S. commerce). This means that in the defendants’ view, only plaintiffs who had suffered injuries in transactions that were concluded in the U.S. had standing.

As mentioned above, the District Court did not decide on the issue of standing. Therefore, the judgment of the District Court does not provide any guidance as to which of the litigants’ arguments is correct.

Standing was an important issue to be decided by the Court of Appeals. The defendants raised the issue of lack of standing with the purpose of dismissing the private antitrust suit should the Court of Appeals grant subject matter jurisdiction to private plaintiffs for their foreign antitrust injury.<sup>129</sup>

With regard to the conditions that private plaintiffs have to fulfil to satisfy the requirement of standing, the Court of Appeals stated:

*“To meet the constitutional requirements of standing under the Clayton Act, an antitrust plaintiff must establish “injury-in-fact or threatened injury-in-fact caused by the defendant’s alleged wrongdoing.”*<sup>130</sup>

In support of this position, the Court of Appeals cited the *Andrx Pharms*<sup>131</sup> case and the *Associated Gen. Contractors*<sup>132</sup> cases.

The Court of Appeals’ statement approved the plaintiffs’ explanation of the requirement of ‘injury-in-fact’ and ‘antitrust injury’. In this regard, the plaintiffs cited the *Atlantic Richfield*<sup>133</sup> and *Brunswick*<sup>134</sup> cases. The Court of

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<sup>129</sup> See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,357 (D.C.Cir.2003).

<sup>130</sup> *Ibid.*

<sup>131</sup> *Andrx Pharmaceuticals, Inc. v. Biovail Corp. Intern.*, 256 F.3d 799 (D.C.Cir.2001).

<sup>132</sup> *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

<sup>133</sup> *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 495 U.S. 328, 110 S.Ct. 1884, 1891, 109 L.Ed.2d 333 (1990).

<sup>134</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

Appeals concluded that *“The foreign purchasers have constitutional standing.”*<sup>135</sup>

There are three problems with the Court of Appeal’s conclusion.

- Firstly, the Court of Appeals focused on ‘constitutional standing’. The requirements that a private plaintiff has to fulfil to be granted constitutional standing are not exactly the same as antitrust law standing requirements.<sup>136</sup>
- Secondly, the Court of Appeals, in reaching its conclusion, relied on case law that regulated the requirements of antitrust standing within the domestic context. In that case law, all the litigants had U.S. nationality and the antitrust injury was domestic (i.e. suffered within the U.S.).
- Thirdly, the Court of Appeals stated that ‘foreign purchasers’ have standing. This conclusion does not provide an explanation to whether the reasoning behind the decision is that all foreigners have standing (i.e. nationality does not matter for the purposes of standing) or that all foreign antitrust injury can be litigated before U.S. courts (i.e. the place where antitrust injury is suffered does not matter).

With regard to the issue of standing, the Court of Appeals ruled that the plaintiffs have to be ‘proper plaintiffs’ to be granted standing. The Court of Appeals stated:

*“In addition [to antitrust injury], we must consider the following additional... factors to determine whether appellants are “proper plaintiffs”: “the directness of the injury, whether the claim for damages is ‘speculative,’ the existence of more direct victims, the potential for duplicative recovery and the complexity of apportioning damages.”*<sup>137</sup>

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<sup>135</sup> N.129.

<sup>136</sup> See Chapter 6, subsection 4.2.4.

<sup>137</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,358 (D.C.Cir.2003).

The Court of Appeals determined the above stated requirements of standing by making a reference to the *Associated Gen. Contractors*<sup>138</sup> and the *Andrx Pharms*<sup>139</sup> cases.

The Court of Appeals then evaluated whether these requirements of standing were satisfied in the *Empagran* litigation and concluded that: 1) injury had been direct, 2) the claims for damages were not speculative, and 3) there was no risk of duplicative recovery or complex damage apportionment.<sup>140</sup> The Court of Appeals reached this conclusion on the basis that:

*“The foreign plaintiffs allegedly purchased vitamins at inflated prices directly from the defendants, and their injury arose from defendants’ alleged conspiracy to inflate prices”.*<sup>141</sup>

The Court of Appeals’ rationale in establishing the requirements of standing in a situation of private plaintiffs litigating foreign antitrust injury is problematic.

- Firstly, mentioning antitrust injury as one of the requirements of antitrust standing brings into question whether the adjudicating court is aware of the distinction between antitrust injury and antitrust standing.<sup>142</sup> The Court of Appeals explained the element of antitrust injury by reference to the *Brunswick*<sup>143</sup> and *Zenith Radio*<sup>144</sup> cases. In these two cases antitrust injury was domestic and the factual situation in these two cases is not comparable to the *Empagran* situation.

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<sup>138</sup> N.132.

<sup>139</sup> N.131.

<sup>140</sup> N.137.

<sup>141</sup> Ibid.

<sup>142</sup> See n.113 and Chapter 6, subsections 4.2.3. and 4.2.4. Compare with Section of Antitrust Law American Bar Association, *Proving Antitrust Damages; Legal and Economic Issues* (American Bar Association, 1996), 6. For explanation of antitrust injury see Robert Pitofsky, “Antitrust in the Next 100 Years,” *California Law Review* 75 (1987), 313; Bauer, “62 U. Pitt. L. Rev. 437,” 439; William E. Kovacic, “The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/harvard Double Helix,” *Columbia Business Law Review* 2007, no. 1 (2007), 56. For explanation of antitrust standing see Page, “37 Stan. L. Rev. 1445”; Elizabeth T. Lear, “Federalism, Forum Shopping, and the Foreign Injury Paradox,” *William and Mary Law Review* 51, no. 1 (2009); Charles A. Sullivan, “Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action,” *Seton Hall Law Review* 14 (1983).

<sup>143</sup> N.134.



- Secondly, the requirements of antitrust standing as presented by the Court of Appeals were developed for domestic private antitrust law litigation purposes and have not been formulated with consideration of foreign antitrust injury. Therefore, it is worth noting that the Court of Appeals did not deem it relevant to question whether the different nature of antitrust injury (i.e. foreign antitrust injury) required a modified approach to the issue of antitrust standing.

Thus the defendants' objection to the Court of Appeals' conclusion that the plaintiffs have standing has to be considered as welcome. The defendants' objection required the Court of Appeals to evaluate the elements of standing within the factual context of anticompetitive conduct, anticompetitive effect and antitrust injury that extend beyond the territorial borders of the U.S.

The defendants argued that “[h]undreds of U.S. plaintiffs, as well as a class of domestic purchasers, who have sued the defendants”<sup>145</sup> were more appropriate plaintiffs than the plaintiffs in the *Empagran* litigation and for this reason the plaintiffs should not have been granted standing.

The Court of Appeals responded to this argument by stating that

*“...domestic plaintiffs have not been harmed more directly by foreign effects of conspiracy than foreign purchasers”*<sup>146</sup>

and that the defendants

*“...do not suggest that domestic plaintiffs can seek to recover for the same injury as foreign plaintiffs suffered.”*<sup>147</sup>

The Court of Appeals' reasoning was that foreign antitrust injury may be attributed to (i.e. caused by) different/separate type of anticompetitive effects from those that cause domestic antitrust injury. This difference in

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<sup>144</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

<sup>145</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,359 (D.C.Cir.2003).

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

anticompetitive effects that cause antitrust injury means that the source of directness of antitrust injury may be different for domestic antitrust injury and foreign antitrust injury. Therefore, both the plaintiffs, i.e. those who suffer domestic antitrust injury and those who suffer foreign antitrust injury, may simultaneously satisfy the requirement of standing<sup>148</sup> and litigate their private antitrust suit for antitrust injury that is specific to them.

In support of the decision that private plaintiffs who suffer foreign antitrust injury do fulfil the requirement of directness and, therefore, are appropriate plaintiffs, the Court of Appeal relied also on the policy of deterrence.

The Court of Appeals stated in this regard that

*“...the foreign plaintiffs play an important role in the deterrence of the global conspiracy, a role that cannot be filled adequately by the domestic plaintiffs alone”.*<sup>149</sup>

The use of deterrence in the regulation of antitrust standing is a surprising approach to be taken by the Court of Appeals. There are two reasons why the approach relying on deterrence in deciding the issue of antitrust standing may be problematic.

- Firstly, the policy of deterrence is not used in elaborating the issue of antitrust standing in a situation where the litigated antitrust injury is of domestic nature.<sup>150</sup>
- Secondly, the Court of Appeals does not explain the relationship between the element of deterrence and other elements used as requirements to be fulfilled before antitrust standing is granted. In a situation where deterrence is attributed greater relevance compared to other established

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<sup>148</sup> See *ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> It is important to emphasise that within the domestic context, standing is perceived as an obstacle that courts have introduced in private antitrust enforcement cases. One of the arguments used in support of this view is that limiting the chances of private plaintiffs to succeed in a private antitrust suit by requiring the private plaintiff to fulfil requirements of standing is to undermine one of the purposes of private antitrust law enforcement, i.e. to deter anticompetitive conduct. See n.113.

elements in adjudicating the issue of standing, these other elements lose significance. In a situation where deterrence is the most prominent or the only element in adjudicating the issue of standing, this may result in an outcome where every single private party who is affected by anticompetitive conduct can bring a private antitrust suit before the U.S. courts. Such an outcome would certainly not be in conformity with the purpose of antitrust laws and with the aims of private antitrust law enforcement.<sup>151</sup>

The Court of Appeals' ruling on the issue of standing is not questionable only because of the failure to analyse the particularities in litigating domestic and foreign antitrust injury before granting standing. It is also problematic that the Court of Appeals did not explain the difference between the requirements that a private plaintiff has to satisfy to be granted subject matter jurisdiction and those that a private plaintiff has to satisfy to be granted standing.

This confusion as to the difference in requirements for establishing subject matter jurisdiction and standing is evidenced by the way the defendants argued that the plaintiffs lacked standing as well as the Court of Appeals' response to these arguments.

The defendants argued that the private plaintiff does not have standing to litigate foreign antitrust injury before the U.S. courts because antitrust laws prohibit price fixing only in U.S. commerce and not in markets where the plaintiffs in the *Empagran* litigation purchased the products (i.e. in outside the U.S.).<sup>152</sup>

The Court of Appeals rejected the defendants' argument by stating:

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<sup>151</sup> See Herbert Hovenkamp, "Antitrust's Protected Classes," *Michigan Law Review* 88 (1989); Spencer Weber Waller, "The Incoherence of Punishment in Antitrust," *Chicago-Kent Law Review* 78, no. 1 (2003), 211; John C. Jr. Coffee, "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working," *Maryland Law Review* 42, no. 2 (1983), 215, 218.

<sup>152</sup> N.137.

*“The antitrust laws do not merely forbid price-fixing in U.S. commerce, but rather forbid price-fixing that harms U.S. commerce”*<sup>153</sup>

and then continuing:

*“...antitrust laws forbid the fixing of prices in foreign markets where that conduct harms U.S. commerce”*.<sup>154</sup>

These two sentences demonstrate that the Court of Appeals applied the same rationale to the purposes of standing as to establishing subject matter jurisdiction, i.e. that the antitrust law of the U.S. applies when anticompetitive conduct causes anticompetitive effects within the U.S.

The use of subject matter jurisdiction rationale to decide the issue of standing is suggested also by the selection and use of case law precedents that the Court of Appeals cited in taking such a position on standing. The Court of Appeals relied on the *Laker*<sup>155</sup> and *Alcoa*<sup>156</sup> cases where the controversial issue was the subject matter jurisdiction and not the element of standing. The Court of Appeals formulated its decision on standing by making reference also to the *Pfizer*<sup>157</sup> case, where the Supreme Court stated that foreigners have the right to a remedy under U.S. antitrust law. The Supreme Court in the *Pfizer* case did not formulate this statement for the purposes of determining standing. In addition, the factual situation in the *Pfizer* case was different from the one in *Empagran* case. Private plaintiffs in the *Empagran* case litigated antitrust injury that is considered as foreign, while in the *Pfizer* case plaintiffs litigated antitrust injury that was domestic, i.e. suffered in the U.S.

The same type of confusion with regard to whether the issues of subject matter jurisdiction and standing are separate and require different types of rationale arises from the following statement:

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C.Cir.1984).

<sup>156</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir.1945).

<sup>157</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 588, 54 L.Ed.2d 563 (1978).

*“...where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here” [in the *Empagran* litigation].*<sup>158</sup>

Furthermore, the above statement raises two additional questions.

- Firstly, is FTAIA really the statute that regulates, in addition to subject matter jurisdiction, the issue of standing?<sup>159</sup>
- Secondly, is it possible to use analysis conducted with the purpose of reaching a decision on subject matter jurisdiction as sufficient on its own also for delivering a decision on standing?

To understand the position of the Court on Appeals on standing in a situation where private plaintiffs litigate foreign antitrust injury, it is important to make a reference to the following conclusion reached by the Court of Appeals:

*“Where defendants’ global conspiracy harms U.S. commerce, the mere fact that the foreign purchasers bought vitamins solely in foreign markets does not mean that the foreign purchasers lack standing to sue.”*<sup>160</sup>

To understand the meaning of this statement, it is important to consider the statement in sections:

- a.) Anticompetitive conduct is global conspiracy;
- b.) Anticompetitive effects that conduct under a.) above causes are such that the global conspiracy harms U.S. commerce. This means that in the factual

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<sup>158</sup> N.137.

<sup>159</sup> See Chapter 3.

<sup>160</sup> N.137.

situation that is the object of analysis, anticompetitive effects are present within the U.S.;<sup>161</sup>

c.) Purchasing, i.e. concluding transactions that injured private plaintiffs took place outside the U.S.

d.) Purchasers were of non-U.S. nationality

In a situation where the conditions under (a) and (b) above are met, the plaintiffs cannot be refused to be granted standing merely because of the fact that private plaintiffs concluded transactions outside the U.S. Therefore, the place where transactions are concluded does not have an impact on deciding the issue of standing. In addition to this, it could be inferred from the statement that the nationality of the plaintiffs has no impact on obtaining standing.

In conclusion, private plaintiffs have to satisfy the requirement of standing also in situations where they are of non-U.S. nationality, and when they suffer antitrust injury outside the U.S. due to transactions they concluded outside the U.S. It is submitted that the judgments of the District Court and of the two Courts of Appeals are authority for the conclusion that standing becomes relevant only after private plaintiffs are granted subject matter jurisdiction to litigate their antitrust injuries before the U.S. courts.

Furthermore, the adjudicating courts construed the standing requirements that plaintiffs in the *Empagran* litigation were expected to fulfil by relying on standing requirements that were developed by the U.S. courts for domestic situations (i.e. for litigants that were of the U.S. nationality and where the antitrust injury was suffered within the U.S.). Moreover, the anticompetitive conduct that causes violation of the U.S. antitrust law was not exactly the same as the one that was litigated in *Empagran*, i.e. of global (international) nature.

Therefore, it is submitted that the standing requirements have to be evaluated to what extent the international context may change their substance. The Court

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<sup>161</sup> Therefore, the requirements of subject matter jurisdiction (under the 'old' test) and the first of the requirements under FTAIA (the 'new' test) are satisfied.

of Appeals<sup>162</sup> has relied on the argument of deterrence and effect within the U.S. in reaching the decision on standing but neither of these arguments has any role in adjudicating standing in a domestic context. In addition to this, the Court of Appeals<sup>163</sup> concluded that both private plaintiffs (i.e. those who suffer domestic antitrust injury) and those who suffer foreign antitrust injury can be considered proper plaintiffs. In this regard, the Court of Appeals explained that both categories of plaintiffs can suffer antitrust injury that is directly caused by anticompetitive conduct and, therefore, both categories of plaintiffs can litigate their claim and obtain compensation for the antitrust injury they suffered. This reasoning means that the category of private plaintiffs who are entitled to litigate antitrust injury before the U.S. courts is extended. Therefore, the question remains whether the definition of antitrust injury, as provided by the U.S. courts for domestic purposes,<sup>164</sup> has to be altered in the international context.

### ***3.1.5 Determination of Anticompetitive Conduct***

The discussion in the subsections above addressed the importance of the existence of anticompetitive effects within the U.S. The last subsection, i.e. the one on standing, addressed the relevance of the antitrust injury. None of the above sections has considered the question as to what constitutes anticompetitive conduct in violation of U.S. antitrust law which the private plaintiffs have to demonstrate in order to prove that they suffered antitrust injury at the hands of the defendants.

The subsection above explained that private plaintiffs could not obtain subject matter jurisdiction merely by stating that they suffered antitrust injury in relation to a global (international) cartel<sup>165</sup> and that they can be granted subject

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<sup>162</sup> N.15.

<sup>163</sup> Ibid.

<sup>164</sup> See n.142.

<sup>165</sup> See the subsection on global nature of anticompetitive conduct, where it was explained that private plaintiffs have to allege also the presence of anticompetitive effect within the U.S. and establish the required relationship between these anticompetitive effects within the U.S. and the antitrust injury they have suffered.

matter jurisdiction of the U.S. court in a situation where transactions in which private plaintiffs suffered antitrust injury were concluded outside the U.S.

The present subsection focuses on the factual elements in which the defendants were involved which have to be proven in order to satisfy the requirement that there should exist anticompetitive conduct.

The question of what constitutes anticompetitive conduct was raised by the litigants before the Court of Appeals. The plaintiffs argued “*that the relevant conduct is the “massive international cartel, exercising global market power”*”,<sup>166</sup> whereas defendants argued “*that the relevant conduct is solely the market transactions between them and the foreign plaintiffs overseas*”.<sup>167</sup>

The distinction between the plaintiffs and the defendants in terms of the elements of defendants’ activity which should constitute anticompetitive conduct mirrors the litigants’ submissions as to the test for subject matter jurisdiction.

The plaintiffs argued that the U.S. courts should have subject matter jurisdiction in every situation where the antitrust cartel has an international (global) nature.<sup>168</sup> The defendants argued that the only part of the antitrust cartel that is relevant to deciding the issue of subject matter jurisdiction of U.S. court is the place where the transactions between the plaintiffs and the defendants took place.<sup>169</sup>

Therefore, in a situation where the defendants’ view on what constitutes anticompetitive conduct prevails, this would result in the U.S. courts having subject matter jurisdiction only in those situations where transactions in which private plaintiffs suffered antitrust injury took place within the U.S. Consequently, this would result in foreign injuries not being able to be litigated before the U.S. courts. The defendants before the Court of Appeals followed the

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<sup>166</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,344 (D.C.Cir.2003).

<sup>167</sup> *Ibid.*

<sup>168</sup> See subsection 3.1.2. of this chapter above.

<sup>169</sup> See subsection 3.1.1. of this chapter above.



logic that the District Court<sup>170</sup> sustained, i.e. that transactions between plaintiffs and defendants constitute anticompetitive conduct.

The Court of Appeals took the opposite view to the District Court and preferred the position taken by the plaintiffs.<sup>171</sup> In support of its position, the Court of Appeals referred to the *Kruman*<sup>172</sup> and *Den Norske*<sup>173</sup> cases. Both cases support a 'broader definition of anticompetitive conduct', i.e. that anticompetitive conduct is cartel and not transactions.

In conclusion, the analysis provided in this subsection explains that for private parties who suffer antitrust injury it is not sufficient to allege that they suffered their antitrust injuries because they concluded transactions with the defendants. Limiting allegations to transactions that the plaintiffs concluded with the defendants will not benefit plaintiffs. The *Empagran* litigation shows that private plaintiffs are expected to prove that the defendants' activities constitute anticompetitive conduct by alleging and proving the existence (operation) of an antitrust cartel.

The requirement that only by proving the existence of an antitrust cartel will adjudicating courts be able to classify the defendants' activity as anticompetitive conduct may potentially place an immense burden on private parties. This is particularly likely in situations where the antitrust cartel is global. In this type of situation private parties may conclude transactions and suffer injury, but they may be unable to gather all the data necessary to prove the operation of a global antitrust cartel. This may well present a difficult (or even impossible) task to complete.<sup>174</sup>

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<sup>170</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,2-3 (D.D.C. June 7, 2001).

<sup>171</sup> N.166.

<sup>172</sup> N.19.

<sup>173</sup> N.18.

<sup>174</sup> Despite the fact that it may be difficult for private plaintiffs to prove the global nature of a cartel, private plaintiffs will be willing to undertake such task only if the global nature of the cartel will show the real nature of the transactions they concluded with defendants. These transactions, when analysed individually, may be legal, but when analysed in relation to the functioning of a global cartel, they may become illegal.

### **3.1.6 Determining the Relevant Element of Controversy**

The purpose of this subsection is different from the other subsections in this chapter. The other subsections present facts, issues, and conclusions that were litigated before the adjudicating courts in the *Empagran* litigation. Therefore, these subsections are substantial, i.e. they provide rules and arguments that can be used by litigants and courts in future litigation.

In contrast, this subsection is precautionary. Its purposes are threefold:

- a.) It argues that adjudicating courts played an active role throughout the *Empagran* litigation. It will demonstrate that the courts did not merely adjudicate the issues presented to them, but they were actively raising other issues to which the courts then provided answers (i.e. decisions).
- b.) It explains the extent to which factual situations in the *Empagran* litigation were determined. In other words, this subsection explains that decisions (rulings) delivered by the adjudicating courts are limited to the factual situations that the courts themselves actively established with the purpose of deciding how judicial power should be exercised. These conditions or situations may not necessarily be the same as in the *Empagran* situation. In addition to this, the conditions and situations on which adjudicating courts delivered their opinion are not the only ones that may be present in reality.
- c.) It acts as a reminder that for all the following subsections to be correctly understood, it is important to bear in mind the active and questionable activity of the adjudicating courts in delivering their decision.

#### **3.1.6.1 The Activity of the District Court**

The District Court formulated the main question to decide as follows:

*“The critical question in this case is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise*

*unconnected with the United States a remedy under our antitrust laws.”*<sup>175</sup>

Comparing this question with allegations presented by the litigants before the District Court, no explanation can be found as to why the District Court stated that transactions in which plaintiffs were injured were “unconnected with the United States”. In the subsections above it was explained how this question influenced the arguments put forward by the litigants and by the all *Empagran* courts in deciding the issue of subject matter jurisdiction,<sup>176</sup> and the issue of what constitutes anticompetitive conduct.<sup>177</sup>

### **3.1.6.2 The Activity of the first Court of Appeals**

The first Court of Appeals undertook a similar way of determining the issue of controversy. The first Court of Appeals formulated the question in the following way:

*“The precise issue presented in this appeal is whether the “gives rise to a claim” requirement under §6a(2) of FTAIA authorizes subject matter jurisdiction where the defendant's conduct affects both domestic and foreign commerce, but the plaintiff's claim arises only from the conduct's foreign effect.*

*In other words, the question is whether FTAIA precludes actions under the Sherman Act unless a plaintiff shows that the injuries it seeks to remedy arise from the anticompetitive effects of the defendant's conduct on U.S. commerce; or, alternatively, is it enough for a plaintiff to show that the anticompetitive effects of the defendant's conduct on U.S. commerce give rise to an antitrust claim under the Sherman Act by someone, even if not the plaintiff who is before the court”.*<sup>178</sup>

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<sup>175</sup> N.63.

<sup>176</sup> See subsections 3.1.1. and 3.1.2. of this chapter above.

<sup>177</sup> See subsection 3.1.5. of this chapter above.

<sup>178</sup> N.166.

There are two problems with the first Court of Appeals' formulation of the question that requires a decision.

- Firstly, the first Court of Appeals does not explain and the judgment does not provide any grounds for the first Court of Appeals' statements 1) that the antitrust cartel produces anticompetitive effects in the U.S. and foreign countries and that these anticompetitive effects in the U.S. and foreign countries are not connected; 2) that the plaintiffs' claim (i.e. plaintiffs suffering antitrust injury) results only from anticompetitive effects in foreign countries.

In a situation that the first Court of Appeals did not formulate the question in such a way, the following questions might become relevant:

- Under what conditions is it possible to decide whether the anticompetitive effects that exist in different countries and are caused by an international (global) antitrust cartel are independent or are interconnected in a way that one cannot exist without the other?
  - In a situation where an international (global) antitrust cartel causes anticompetitive effects in different countries and these effects are interconnected in a way that one cannot exist without the other (i.e. transborder<sup>179</sup>), is it possible to formulate a private antitrust suit in such a way that the antitrust injury arises from such anticompetitive effect?
- Secondly, the first Court of Appeals' predetermination that the plaintiffs' claim (based on a foreign antitrust injury) arose only out of the anticompetitive effect which took place in the foreign country (i.e. foreign anticompetitive effect is isolated from anticompetitive effects in other countries, including the U.S.) influenced the Court of Appeals' perception of the alternative (possible) interpretations of the FTAIA. The problem is that the first Court of Appeals did not explain why the FTAIA

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<sup>179</sup> For the detailed definition of transborder effects see Chapter 5, section 2.

can only be interpreted in two ways - either that the antitrust injury has to arise out of anticompetitive effects which occurred in the U.S. or that the foreign antitrust injury can be litigated before the U.S. courts under the condition that anticompetitive conduct causes anticompetitive effects within the U.S. and someone within the U.S. may also bring a private antitrust claim out of the same anticompetitive conduct.

### 3.1.6.3 The Supreme Court Case

The Supreme Court was also clear as to the focus of its decision. The Supreme Court stated:

*“We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury.”*<sup>180</sup>

The Supreme Court divided the key issue into three segments; namely,

*“...The 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.”*<sup>181</sup>

There is nothing wrong with the adjudicating court determining the issues it is expected to resolve. The problem arises where the issues as determined by the Supreme Court do not appear to adequately address the allegations, the facts as found by the District Court, and the reasoning of prior judgments. There are three problems with the Supreme Court's determination of the core issues which it decided required adjudication.

- Firstly, the Supreme Court referred to the anticompetitive conduct (i.e. anticompetitive price-fixing activity) as being “in significant part foreign”. The problem with this classification is that it does not correspond to the plaintiffs' allegations and to the facts that were

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<sup>180</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,158 (2004).

<sup>181</sup> *F. Hoffman-LaRoche, Ltd., v. Empagran S.A.*, 542 U.S. 155,159,162 (2004).

pleaded before the District Court<sup>182</sup> and before the first Court of Appeals.<sup>183</sup> The litigants and both lower courts accepted the conduct to have taken place by a global (international) cartel and it was not at any point mentioned that this cartel was “in significant part foreign”. In addition to this, classifying the cartel as “in significant part foreign” does not even correspond to the Supreme Court’s factual ground that the Supreme Court uses in explaining the issues of concern. The Supreme Court explained factual grounds as: “...*this case involves vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States...*”.<sup>184</sup>

- Secondly, it is not clear how and on what grounds the Supreme Court classified this global (international) cartel to be “in significant part foreign”. The Supreme Court did not explain any of the following: what elements make this cartel global; which elements of this cartel makes it ‘foreign’ and which make it ‘domestic’, and should the different elements be balanced to classify the cartel as ‘foreign’ or ‘domestic’?
- Thirdly, there is no explanation as to why the Supreme Court limited its adjudication to a situation where the foreign antitrust injury is independent. The only explanation that the Supreme Court gave as a reason for formulating the key issue in the manner it did was that the members of this cartel around the World fixed prices and this “...[lead] to higher vitamin prices in the United States and independently [lead] to higher vitamin prices in other countries...”.<sup>185</sup> Neither the litigants nor lower courts, i.e. the District Court<sup>186</sup> and the first Court of Appeals<sup>187</sup>, had mentioned or determined that the foreign antitrust injury that was litigated in the *Empagran* litigation was “independent” from domestic injury. In addition to this, the Supreme Court did not explain the conditions under which a foreign antitrust injury can be classified as

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<sup>182</sup> N.3.

<sup>183</sup> N.15.

<sup>184</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,159 (2004).

<sup>185</sup> Ibid.

<sup>186</sup> N.3.

<sup>187</sup> N.15.

“independent”. Classifying a foreign antitrust injury without providing reasoning and conditions under which a foreign antitrust injury can be considered as ‘independent’ is problematic for future litigants and future adjudicating courts. Therefore, it is submitted that the classification of an antitrust injury as ‘independent’ or ‘dependent’ (transborder<sup>188</sup>) remains an open question.

The only explanation as to why the Supreme Court formulated the central issue in this manner can be found in the following quotation:

*“...question [i.e. issues of controversy] presented assumes that the relevant “transactions occur[ed] entirely outside U.S. commerce.”<sup>189</sup>*

It is important to note that the Supreme Court interpreted the relevant FTAIA provision and formulated the test for subject matter jurisdiction on the basis of an assumed factual situation. Is it possible that the Supreme Court’s judgment did not address the actual factual situation of the *Empagran* litigation? The answer to this question cannot be found in the following statement by the Supreme Court’s:

*“Respondents have never asserted that they purchased any vitamins in the United States or in transactions in United States commerce.”<sup>190</sup>*

If the Supreme Court based its reasoning and decision on this particular assumption then it is submitted that the Supreme Court’s decision has to be rejected in full.

In general, it is difficult to oppose the decision that where the foreign antitrust injury is independent from the anticompetitive effects within the U.S., then subject matter jurisdiction cannot be granted.<sup>191</sup> The problem arises where the foreign antitrust injury is classified as independent only because the transaction concluded between the parties took place outside the U.S.

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<sup>188</sup> For the explanation see Chapter 5, subsection 2.1.

<sup>189</sup> N.27.

<sup>190</sup> Ibid.

<sup>191</sup> See subsection 3.1.7. of this chapter below.

It is submitted that the transaction having taken place outside the U.S. cannot be a conclusive factor on its own to establish whether foreign antitrust injury is independent from the anticompetitive effects within the U.S. In addition, considering merely the place where the transactions are concluded in determining the nature of foreign antitrust injury fails to take into account the particularities of a global (international) cartel and its impact on the extent of anticompetitive effects and antitrust injury. Last but not least, the Supreme Court's assumption that "*transactions occur[ed] entirely outside U.S. commerce.*"<sup>192</sup> is inconsistent with some of its other conclusions. The Supreme Court also stated that "*...anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury...*".<sup>193</sup> Thus, it is submitted that by classifying anticompetitive conduct as foreign only to a "*significant*" extent, and accepting that this anticompetitive conduct caused also "*some domestic*" antitrust injury, cannot lead to the conclusion that transactions outside the U.S. have to be evaluated without considering their relationship with anything that took place within the U.S.

Unfortunately, the Supreme Court did not assume only that "*relevant transactions occur[ed] entirely outside U.S. commerce.*"<sup>194</sup> More significant is the assumption:

*"...that the foreign effect, i.e., higher prices in Ukraine, Panama, Australia, and Ecuador, was independent of the domestic effect, i.e., higher domestic prices."*<sup>195</sup>

The above critique is based on the argument that the Supreme Court made assumptions on three factual situations:

1. That the transactions between the plaintiffs and the defendants occurred entirely outside U.S. commerce;

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<sup>192</sup> N.27.

<sup>193</sup> N.180.

<sup>194</sup> N.27.

<sup>195</sup> Ibid.



2. That anticompetitive effects outside the U.S. are independent from anticompetitive effects within the U.S.;
3. That antitrust injury outside the U.S. (foreign antitrust injury) is independent from the anticompetitive effects within the U.S.

The Supreme Court's interpretation of the relevant FTAIA provision for the purpose of formulating the test for subject matter jurisdiction was based on the above three factual assumptions. Thus the Court ruled that

*"...exception<sup>196</sup> does not apply where the plaintiff's claim rests solely on the independent foreign harm."<sup>197</sup>*

Therefore, the problematic aspect of the Supreme Court's judgment is that the test it provided for establishing the subject matter jurisdiction is based on a factual situation which does not correspond to the *Empagran* situation. The Supreme Court stated as a justification for the basis of its decision that the Court of Appeals<sup>198</sup> had made the same assumption<sup>199</sup>. Unfortunately, there are two problems with relying on the Court of Appeals<sup>200</sup> in this situation.

- Firstly, the first Court of Appeals has never made such an assumption.<sup>201</sup>
- Secondly, even if the first Court of Appeals had made such an assumption, the assumption would have had no significant impact on the first Court of Appeals' decision. The first Court of Appeals' decision would be the same irrespective of this assumption.<sup>202</sup> This is because of the type of interpretation of the FTAIA provision and the wording of the subject matter jurisdiction test<sup>203</sup> that the first Court of Appeal formulated.

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<sup>196</sup> I.e. that the Sherman Act applies in a situation where direct, substantial and reasonably foreseeable effect on domestic commerce gives rise to a claim.

<sup>197</sup> N.184. See subsection on the relationship between anticompetitive effects and antitrust injury.

<sup>198</sup> N.15.

<sup>199</sup> The Supreme Court admitted it by itself. See n.27.

<sup>200</sup> N.15.

<sup>201</sup> This type of assumption does not derive from the first Court of Appeals' judgment.

<sup>202</sup> N.199.

<sup>203</sup> See subsection 3.1.7. of this chapter below.

Therefore, the outcome for the plaintiffs before the Court of Appeals would remain the same irrespective of the assumption.

In contrast, the Supreme Court's factual assumptions are crucial in determining the right of and outcome for private plaintiffs to litigate their foreign antitrust injury before the U.S. courts. Due to the fact that the plaintiffs' suffered foreign antitrust injury was assumed to be independent from the anticompetitive effects within the U.S., the private plaintiffs in the *Empagran* litigation were refused subject matter jurisdiction. Thus they were denied the possibility of litigating in the U.S. and eventually of obtaining compensation for their foreign antitrust injury. It is a central argument of this thesis that the outcome for the private plaintiffs in the *Empagran* litigation would have been different if the Supreme Court had had a different factual situation upon which to formulate the test.

#### 3.1.6.4 The Judgment of the Second Court of Appeals

The reason why the second Court of Appeals had to re-adjudicate the plaintiffs' claim was that the Supreme Court vacated the first Court of Appeals' decision and remanded the *Empagran* case to the second Court of Appeals. The second Court of Appeals was asked to consider whether:

*“...foreign purchasers [i.e. the plaintiffs] properly preserved their alternative argument that foreign injury was not in fact independent of domestic effects and, if so, could consider and decide related claim.”*<sup>204</sup>

Consequently, the question remains whether the second Court of Appeals considered the question referred by the Supreme Court correctly. It is submitted that the plaintiffs' alternative claim was the crucial issue in the *Empagran* litigation. Therefore, the issue of an alternative claim (i.e. an alternative theory of subject matter jurisdiction) is considered in subsection 3.1.10.<sup>205</sup>

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<sup>204</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,155 (2004).

<sup>205</sup> See subsection 3.1.10. of this chapter below.

Nevertheless, for the sake of completeness, it is important to state whether and to what extent the second Court of Appeals actively predetermined its judgment by the manner in which it formulated the question.

The second Court of Appeals actively intervened in the formulation of the questions it was asked to adjudicate by the Supreme Court. The Court formulated the questions in the following manner:

1. Instead of considering the alternative claim as presented by the first Court of Appeals and by the Supreme Court, the second Court of Appeals focussed on the issue of causation between anticompetitive effects in the U.S. and antitrust injury.<sup>206</sup>
2. Without providing any explanation,<sup>207</sup> and despite the fact that the Supreme Court appeared to propose the opposite,<sup>208</sup> the second Court of Appeals stated that ‘but-for’ causation between domestic anticompetitive effects and antitrust injury is not enough to establish jurisdiction; there has to be direct and proximate causation.<sup>209</sup>
3. Despite the plaintiffs’ arguments to the contrary, the second Court of Appeals’ interpretation of the facts was that the plaintiffs’ antitrust injury had been caused only by foreign anticompetitive effects, i.e. that the foreign anticompetitive effects were not connected to the anticompetitive effects in the U.S.<sup>210</sup> On the basis of these facts, the second Court of Appeals interpreted §6a(2) FTAIA<sup>211</sup> and so determined the outcome of the *Empagran* litigation.

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<sup>206</sup> See n.46.

<sup>207</sup> Apart from the fact that the plaintiffs acknowledged this.

<sup>208</sup> See n.8.

<sup>209</sup> See *Empagran S.A. v. F. Hoffman–LaRoche, Ltd.*, 417 F.3d 1267,1270,1271 (D.C.Cir.2005).

<sup>210</sup> See n.48.

<sup>211</sup> For the analysis proving that this Court of Appeals’ interpretation of the FTAIA provision is highly questionable and, therefore, difficult to sustain, see the subsection on the relationship between anticompetitive effects and antitrust injury.

### 3.1.6.5 Conclusion

The analysis and discussion presented above demonstrate that the rulings provided by the adjudicating courts cannot be properly understood without understanding two facts: firstly, the facts and arguments put forward by the litigants, and secondly, whether a decision is an answer to the facts and allegations presented before the court or whether a decision is based on assumptions formulated by adjudicating courts.

The importance of the above discussion is that it demonstrates that the adjudicating courts played an active role in reformulating the issues and the facts in a manner not presented by the litigants. Thus, the second Court of Appeals was able to ignore the Supreme Court's offer to develop an alternative claim which might enable a transborder kind of litigation to be heard by U.S. courts. Adjudicating courts can perform this active role either in formulating the main question that requires adjudication or by using assumptions in formulating their decision.

This subsection also has very practical implications for future litigation. The *Emparan* litigation cannot be properly understood without knowing:

1. The extent of the adjudicating courts' decisions;
2. The arguments that the adjudicating courts used in support of their decision, and
3. The factual situations for which the adjudicating courts provide guidance.

### 3.1.7 *The Relationship between Anticompetitive Effects and Antitrust Injury*

Under what conditions, if at all, can a foreign antitrust injury be compensated before U.S. courts? This is indeed the question to which the *Empagran* litigation should have provided an answer. The purpose of this section is to analyse

whether the adjudicating courts in the *Empagran* litigation provided a clear, simple, and undisputable answer to this question.

In the era before the *Empagran* litigation, it was commonly accepted that the jurisdiction of the U.S. courts within the areas of antitrust law is established on the existence of anticompetitive effects within the U.S. This test of subject matter jurisdiction has been modified and developed over time.<sup>212</sup> The fact is that prior to the *Empagran* litigation, knowledge, understanding and relevant case law on subject matter jurisdiction of U.S. courts did not consider the conditions and the suitability of U.S. courts to adjudicate over foreign antitrust injury. The element of foreign antitrust injury was not an element of the subject matter jurisdiction analysis.<sup>213</sup>

Therefore, the *Empagran* litigation represents an important step in the development of subject matter jurisdiction in the field of antitrust law. The *Empagran* litigation was an opportunity for the U.S. courts to find a modern solution to how subject matter jurisdiction<sup>214</sup> may be established.

As explained at the beginning of the section 2 of this chapter, the *Empagran* litigation started because private plaintiffs asked the District Court to interpret §6a(2) of the FTAIA.<sup>215</sup> The District Court and subsequently both Courts of Appeals as well as the Supreme Court were asked to provide an answer to whether this statutory provision enables non-U.S. nationals, who suffer antitrust injury outside the U.S. in transactions that take place outside the U.S., to bring a private antitrust suit before the U.S. courts and obtain remedies for the suffered foreign antitrust injury.

The *Empagran* litigation shows how the same statutory provision can be interpreted in three different ways, i.e. by the plaintiffs, by the defendants, and by the adjudicating courts. It is submitted that even the adjudicating courts were not consistent in their interpretation of the relevant FTAIA provision. Therefore, this subsection will be divided into five parts. The first four of them

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<sup>212</sup> See Chapter 6, subsection 3.2.1.

<sup>213</sup> See Chapter 6, subsection 3.2.

<sup>214</sup> See subsection 3.1.1. of this chapter above.

<sup>215</sup> For the statutory text of this provision see n.16 in section 2 of this chapter.

will present the positions of each of the adjudicating courts on how the FTAIA provision should be interpreted and what is consequently the test for subject matter jurisdiction that private plaintiffs have to satisfy to have their foreign antitrust injury litigated before the U.S. courts. The fifth part will provide the conclusion.

### **3.1.7.1 Before the District Court**

In the subsections above, it was explained that litigation before the District Court contributed to the understanding of the decision delivered by the adjudicating courts in the *Empagran* litigation with regard to the issues of:

- Whether the location where transaction is concluded is relevant to the establishing of subject matter jurisdiction;
- Whether it is sufficient for private plaintiff to allege a global nature of anticompetitive conduct to be granted subject matter jurisdiction of the U.S. courts, and
- Whether the fairness argument can be used with the purpose of expanding the subject matter jurisdiction of the U.S. courts.

The purpose of this subsection is to analyse whether the District Court delivered the interpretation of the FTAIA and explained what type of relationship between anticompetitive effects within the U.S. and foreign antitrust injury has to exist to establish the subject matter jurisdiction of the U.S. courts.

It seems that the District Court did not place the issue of interpretation of the FTAIA provision at the centre of its adjudication process. This argument is based on the question that the District Court classified as critical:

*“The critical question in this case is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise*

*unconnected with the United States a remedy under our antitrust laws.”*<sup>216</sup>

The District Court provided the answer to this question.<sup>217</sup> What this subsection will analyse is whether the District Court provided its explanation of the FTAIA provision on the relationship between anticompetitive effects within the U.S. and claimed antitrust injury.

The District Court stated:

*“...plaintiffs must... allege that the injuries they seek to remedy “arise” from an anticompetitive effect of defendants’ conduct on U.S. commerce... In other words, the effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws.”*<sup>218</sup>

The interpretation of this decision can best be extracted from the relationship between the plaintiffs’ argument that

*“Congress intended only to limit recovery under the FTAIA to conduct that had some domestic effect and that it did not intend to limit the Court’s jurisdiction to cases where plaintiffs’ injuries involved those domestic effects.”*<sup>219</sup>

*“Congress allowed the entire range of conduct with some domestic effect to be actionable, and did not limit courts to injuries tied to these effects.”*<sup>220</sup>

and the District Court’s response:

*“However, plaintiffs cite no caselaw to support this argument and the caselaw cited by defendants strongly refutes this contention... Plaintiffs’*

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<sup>216</sup> N.63.

<sup>217</sup> See subsection 3.1.2. of this chapter above.

<sup>218</sup> N.62.

<sup>219</sup> N.104.

<sup>220</sup> Ibid.

*brief relies almost exclusively on these types of linguistic arguments, as well as several quotations from the dissents of cases cited by defendants.”*<sup>221</sup>

On the basis of these passages from the District Court’s judgment, it can be concluded that the District Court requires that in order for antitrust injury to be litigated before the U.S. courts, the defendants’ anticompetitive conduct must cause anticompetitive effects within the U.S. and these anticompetitive effects within the U.S. must directly cause (i.e. be the grounds or source of) antitrust injury.

The District Court explained the reasons why it delivered such a decision. On the basis of the critical evaluation of these reasons it could be submitted that this decision of the District Court on the interpretation of the FTAIA provision cannot be sustained.

- Firstly, the District Court cited in support of its decision the decision that the District Court had reached in the *Kruman*<sup>222</sup> case. Any argument based on the District Court’s *Kruman* case is problematic for two reasons. Firstly, the District Court’s *Kruman* case was rejected by the Court of Appeals’ *Kruman*<sup>223</sup> case. Secondly, the District Court’s *Kruman* case rationale is based on the fact that anticompetitive conduct consists of transactions concluded by private parties and not an antitrust cartel formed and operated by the defendants.<sup>224</sup>
- Secondly, due to the fact that the District Court in the *Empagran* litigation relied on the District Court’s *Kruman* case to formulate its decision, the explanation of the FTAIA provision presented by the District Court in the *Empagran* litigation is affected by the fact that the District

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<sup>221</sup> Ibid.

<sup>222</sup> N.67.

<sup>223</sup> N.19.

<sup>224</sup> See subsection 3.1.5. of this chapter above.



Court placed significant importance on the fact that the plaintiffs concluded the transactions outside the U.S.<sup>225</sup>

- Thirdly, the District Court in the *Empagran* litigation considered as relevant the fact that there did not exist case law that could support the plaintiffs' view. This argument on the part of the District Court is rather difficult to understand, in particular as the *Empagran* litigation raised a novel type of legal question that could not be decided by any U.S. court in the past.
- Fourthly, the District Court in the *Empagran* litigation did not elaborate why the linguistic interpretation of the FTAIA provided by the plaintiffs could not be sustained.
- Finally, the District Court in the *Empagran* litigation stated that the plaintiffs' arguments relied on quotations from dissent of case cited by defendants. What is missing is an explanation on the part of the District Court of what these case law precedents were and why the quotations from these case law precedents could not be re-evaluated before the District Court.

To conclude, the District Court in the *Empagran* litigation established the subject matter jurisdiction test in a way that anticompetitive effects in the U.S. had to be the grounds or source of antitrust injury to establish the subject matter jurisdiction of the U.S. courts. The District Court based its decision on grounds that cannot be sustained. Therefore, it is crucial to establish what other adjudicating courts throughout the *Empagran* litigation decided on the required connection between the anticompetitive effects within the U.S. and antitrust injury.

### 3.1.7.2 Before the first Court of Appeals

The plaintiffs argued that anticompetitive effects and antitrust injury are separate issues to be litigated. Therefore, there is no need to establish any

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<sup>225</sup> See n.170.

connection between the litigated antitrust injury and anticompetitive effects for the purposes of subject matter jurisdiction. The plaintiffs argued that the existence of anticompetitive effects within the U.S. is sufficient to grant subject matter jurisdiction to the U.S. courts. The argument that plaintiffs put forward in support of foreign antitrust injury being litigated before U.S. courts was that this foreign injury was caused by the same anticompetitive conduct as the ones that caused anticompetitive effects within the U.S.

The plaintiffs relied on two arguments in support of their position. Firstly, they argued for the interpretation<sup>226</sup> of the relevant FTAIA provision that anticompetitive effects within the U.S. did not need to be the basis on which foreign antitrust injury arose. Secondly, they relied on the Court of Appeals' *Kruman*<sup>227</sup> case where the adjudicating court had interpreted the relevant FTAIA provision so that antitrust violation would be sufficient to establish the subject matter jurisdiction of the U.S. courts.

The defendants were consistent throughout the *Empagran* litigation that foreign injuries could not be litigated before the U.S. courts. The defendants argued before the District Court<sup>228</sup> and before the first Court of Appeals<sup>229</sup> that for antitrust injury to be litigated before U.S. courts, the antitrust injury had to arise from the anticompetitive effects within the U.S. They argued that the antitrust injury had to be caused within U.S. commerce. In support of their position that antitrust injury had to arise out of anticompetitive effects within the U.S. defendants relied on the *Den Norske*<sup>230</sup> case.

The first Court of Appeals rejected the plaintiffs' interpretation of the relevant FTAIA provision.<sup>231</sup> The Court of Appeals explained that the existence of antitrust injury in the U.S. was required, in addition to antitrust violation,<sup>232</sup> for private

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<sup>226</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,341,348,349 (D.C.Cir.2003).

<sup>227</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,350 (D.C.Cir.2003); *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir.2002).

<sup>228</sup> See subsection 3.1.1. of this chapter above.

<sup>229</sup> See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,348 (D.C.Cir.2003).

<sup>230</sup> n.18.

<sup>231</sup> n.227.

<sup>232</sup> "[T]he existence of a Sherman Act violation does not depend on whether anyone has actually suffered an injury" *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 315 F.3d 338,351

plaintiffs to bring an antitrust suit and seek treble damages<sup>233</sup> in the U.S. The first Court of Appeals confirmed that the existence of antitrust injury is not required in two situations; a) when the plaintiff brings an antitrust action seeking prospective injunctive relief, and b) when the Government enforces the Sherman Act, as the Government can enforce antitrust laws even when no private plaintiff claims actual or threatened injury.<sup>234</sup>

After this explanation, the first Court of Appeals ruled that:

*“We hold that the words “a claim” in subsection 2 of FTAIA refer to a private action, not merely a government action to enforce the Sherman Act. In other words, “giv[ing] rise to a claim” means giving rise to someone’s private claim for damages or equitable relief.”*<sup>235</sup>

There is nothing to disagree with the Court of Appeals’ interpretation of the FTAIA. The first Court of Appeals then continued:

*“To satisfy this requirement, the plaintiff must allege that some private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant’s violation of the Sherman Act.”*<sup>236</sup>

This statement is also the test to establish subject matter jurisdiction formulated by the first Court of Appeals. There are three problems with this conclusion on the interpretation of the relevant FTAIA provision.

- Firstly, this interpretation of the FTAIA provision does not follow the logic of private antitrust law enforcement. This means that in a situation where there are several private parties who suffer antitrust injury due to the same antitrust violation, each of the private parties who decides to bring a private antitrust suit has to satisfy the requirements for the private

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(D.C.Cir.2003). In support of this statement the court listed *Kruman v. Christie’s International PLC*, 284 F.3d 384 (2d Cir.2002); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir.1989), and quoted from the literature.

<sup>233</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,351 (D.C.Cir.2003).

<sup>234</sup> See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,351,352 (D.C.Cir.2003).

<sup>235</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,352 (D.C.Cir.2003).

<sup>236</sup> *Ibid.*

suits to be heard. A private party cannot bring a private suit by relying on other private parties meeting the legal requirements.

- Secondly, the Court of Appeals does not provide an explanation of what type of connection has to exist between the private party who suffers foreign antitrust injury and the other *“private person or entity [who] has suffered actual or threatened injury as a result of the U.S. effect”*.
- Thirdly, the Court of Appeals established the requirement of a connection between foreign antitrust injury and the existence of other potential private litigants. Therefore, under the Court of Appeals’ interpretation, there is no need for any connection to exist between foreign antitrust injury and anticompetitive effects within the U.S. Even in a situation where someone interprets the Court of Appeals’ decision in a way that a connection should exist between foreign injury and anticompetitive effects within the U.S., the Court of Appeals’ interpretation does not provide any guidance on the nature of this connection.

The first Court of Appeals then provided facts that were subsumed under the Court of Appeals’ interpretation of FTAIA requirements explained above:

*“In the instant case, the conspiracy’s U.S. effects did allegedly injure and did give rise to the claim of some private entities -namely the domestic plaintiffs who filed suit along with the foreign plaintiffs against the vitamin companies”*.<sup>237</sup>

The first Court of Appeals’ interpretation (i.e. of the FTAIA provision and the factual situation) causes further problems.

- Firstly, the first Court of Appeals did not explain whether other injured private parties have to bring their private antitrust suit in this way to enable the private party who suffers foreign antitrust injury to be granted subject matter jurisdiction, or is it sufficient that there may exist other private parties who suffer antitrust injury irrespective of whether these private parties also bring a private antitrust action. In such a situation

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<sup>237</sup> Ibid.

(i.e. where there is the requirement of the existence of these other private plaintiffs; that is, plaintiffs that have not suffered foreign private antitrust injury) bringing a private antitrust case means that the plaintiffs have to have suffered actual antitrust injury. Thus, in relation to bringing a private antitrust claim with this requirement, the following questions arise:

- How is it possible for a private plaintiff who suffers foreign antitrust injury to find out whether such an injured U.S. party exists?
  - How should the U.S. courts decide on subject matter jurisdiction in a situation where a private plaintiff suffers foreign antitrust injury and a domestic private plaintiff does not bring private antitrust suit before the U.S. courts?
- Secondly, the first Court of Appeals does not explain what is meant by ‘domestic plaintiff’. It is not clear whether the private parties who suffered antitrust injuries have to be exclusively U.S. nationals. Is it sufficient that private parties with non-U.S. nationality have suffered antitrust injury in the U.S.?
- Thirdly, the first Court of Appeals’ interpretation of the relevant FTAIA provision can be regarded as superfluous, since the first Court of Appeals did not provide an explanation as to why a distinction has to be made between ‘someone who is injured is domestic’ and ‘someone who is injured is foreign’. The Court of Appeals did not explain how it is sufficient to have someone within the U.S. who suffers antitrust injury allowing someone who suffers foreign antitrust injury to bring a private antitrust suit before the U.S. court. The Court of Appeals’ reasoning raises three questions, all of which are impossible to answer.
- Why did the first Court of Appeals connect the subject matter jurisdiction for foreign antitrust injury to be litigated before the U.S.

courts to the antitrust injury suffered within the U.S. (by domestic nationals<sup>238</sup>)?

- Why did the first Court of Appeals not require instead a relevant connection between foreign antitrust injury and anticompetitive effects within the U.S.?
- How is it possible that the first Court of Appeals did not consider attributing any relevance to the nature of the connection between domestic and foreign antitrust injury?

The litigants, i.e. the plaintiffs and the defendants, had found support for their position on how the FTAIA provision should be interpreted<sup>239</sup> in its legislative history. The first Court of Appeals did not accept the submissions presented by the litigants.<sup>240</sup> The first Court of Appeals merely stated that:

*“...legislative history as a whole supports the less restrictive interpretation of FTAIA that would allow plaintiffs injured by the conduct's foreign effects to bring suit even where the conduct's U.S. effects do not give rise to the plaintiff's claim”.*<sup>241</sup>

This quotation from the judgment is important as it shows that in the first Court of Appeals' view, foreign antitrust injury can be litigated before the U.S. courts and that there is no need for a connection between anticompetitive effects within the U.S. and foreign antitrust injury.

Furthermore, the following passage from the Court of Appeals' judgment does not provide any explanation as to why the first Court of Appeals found it

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<sup>238</sup> It was explained in subsection 3.1.4 of this chapter above that the Court of Appeals' judgment does not provide a clear answer to whether the nationality of private plaintiffs who suffer antitrust injury within the U.S. is one of the requirements that has to be satisfied for granting subject matter jurisdiction in a situation where foreign antitrust injury is to be litigated before U.S. courts.

<sup>239</sup> See n.235.

<sup>240</sup> *“...[T]here is much in the legislative history that supports the less restrictive view of FTAIA's jurisdictional reach. There are isolated statements that are consistent with the restrictive view, but they are never offered to denigrate or exclude the less restrictive view of the statute.”* Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338,355 (D.C.Cir.2003).

<sup>241</sup> N.235.

relevant to connect foreign antitrust injury only to antitrust injury within the U.S.:

*“...nothing in this passage<sup>242</sup> restricts that reach to suits only by the domestic plaintiffs injured by the conduct's spillover effects. Admittedly, nothing in this passage explicitly allows suits by plaintiffs injured abroad by a “world-wide shortage or artificially inflated world-wide price” rather than by the domestic spillover effects. But we think that given the clear concern here with the conduct that creates the world-wide shortage or price inflation that in turn creates domestic spillover effects, it would be counter-intuitive and arbitrary to read Congress to intend to limit jurisdiction to only the subset of claims brought by plaintiffs injured by the spillover effects of the conduct at issue. Since the same conduct injures both foreign plaintiffs and domestic plaintiffs, and it is clearly the conduct that Congress aims to reach with our antitrust laws, it is reasonable to read Congress as envisioning suits by any plaintiffs who would enable our antitrust laws to reach and deter that conduct.”<sup>243</sup>*

This extract from the judgment suggests that the first Court of Appeals favoured an extension of the ambit of potential private litigants who may be allowed to bring a private antitrust suit, and that the Court's purpose was to target anticompetitive conduct that not only causes injury to foreign private plaintiffs, but also causes anticompetitive effects within the U.S., and injures private parties within the U.S.

Another passage from the legislative history that the first Court of Appeals cited in support of its interpretation of the relevant FTAIA provision is:

*“The conduct has requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad”,* quoting also the passage from *Pfizer*<sup>244</sup> that *“Foreign purchasers should enjoy the*

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<sup>242</sup> The first Court of Appeals here refers to a passage from legislative history.

<sup>243</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,354 (D.C.Cir.2003).

<sup>244</sup> N.78.

*protection of our antitrust laws in the domestic marketplace, just as our citizens do.*"<sup>245</sup>

The problem with this quotation is that the first Court of Appeals did not explain the connection between these statements and the facts of *Empagran*.

The above quotation emphasizes the requirement of the existence of anticompetitive effects within the U.S. In addition to this, transactions that took place in the *Pfizer* case, on which the plaintiff based its antitrust claim, took place in the U.S.; that is, the plaintiff in *Pfizer* suffered domestic antitrust injury despite being a non-U.S. national. The quotation also refers to: "purchasers taking title abroad"; "suffering economic injury abroad"; "protection of foreign purchasers", and "protection in domestic market place". The first Court of Appeals<sup>246</sup> did not place any relevance on these issues and did not provide any explanation as to how these issues were relevant or how they had been used in interpreting the relevant FTAIA provision and in the formulation of the subject matter jurisdiction test in the *Empagran* litigation.

Instead, the first Court of Appeals referred to *Pfizer* expressly in the following manner:

*"The less restrictive interpretation of the "gives rise to a claim" language of FTAIA, allowing suits by foreign plaintiffs injured by the foreign effects of a global conspiracy, serves "the United States' narrow interest in vigorous domestic competition" better than the restrictive interpretation disallowing such suits".*<sup>247</sup>

The first Court of Appeals' statement is surprising as it came unexpectedly (i.e. it does not follow from the chronology or reasoning) and the *Pfizer*<sup>248</sup> case did not mention "foreign effects" and "global conspiracy". More importantly, this quotation does not shed any light of the first Court of Appeals' formulation of the subject matter jurisdiction test in a way that foreign antitrust injury can be

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<sup>245</sup> N.79.

<sup>246</sup> N.15.

<sup>247</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,356 (D.C.Cir.2003).

<sup>248</sup> N.78.



litigated before the U.S. courts in a situation where there exists some domestic antitrust injury that is/may be<sup>249</sup> litigated before U.S. courts.

Nevertheless, the Court of Appeals gave important consideration to the policy of deterrence. Deterring anticompetitive conduct was given priority over the, at that time still relevant, requirement of anticompetitive effects within the U.S. to grant subject matter jurisdiction.<sup>250</sup> The Court of Appeals presented the argument in favour of priority of deterrence over the anticompetitive effects within the U.S. causing foreign antitrust injury. The Court of Appeals did so by relying on the *Pfizer*<sup>251</sup> and *Kruman*<sup>252</sup> judgments, on the dissenting opinion in *Den Norske*<sup>253</sup>, and on legislative history<sup>254</sup>.

The problem with relying on the argument of deterrence in establishing the test for subject matter jurisdiction is that the Court of Appeals did not make any comparison or distinction in respect of factual differences and issues between the *Empagran* case and the other cases (*Pfizer*,<sup>255</sup> *Kruman*,<sup>256</sup> and *Den Norske*<sup>257</sup>). *Pfizer*<sup>258</sup> was not a case where the issue of interpretation of FTAIA provisions for the purposes of establishing a test for subject matter jurisdiction was at issue. *Kruman*<sup>259</sup> and *Den Norske*<sup>260</sup> are two cases where the Courts of Appeals provided their own interpretation of relevant FTAIA provisions. Despite these two cases being decided by the Court of Appeals, the first Court of Appeals in the *Empagran* litigation did not consider them as binding authorities, and therefore they were of no authority on the relevance (priority) of the issue of deterrence over the issue of anticompetitive effects within the U.S.

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<sup>249</sup> For the claim that it is unclear what is the correct interpretation of the Court of Appeals decision, see above.

<sup>250</sup> See n.247.

<sup>251</sup> N.78.

<sup>252</sup> N.19.

<sup>253</sup> N.18.

<sup>254</sup> See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,355,366 (D.C.Cir.2003).

<sup>255</sup> N.78.

<sup>256</sup> N.19.

<sup>257</sup> N.18.

<sup>258</sup> N.78.

<sup>259</sup> N.19.

<sup>260</sup> N.18.

In addition to the Court of Appeals' lack of persuasiveness in its reliance on this case law in constructing the argument of deterrence, there is another problem with relying so heavily on the policy of deterrence. The policy of deterrence itself does not exclude interpreting the FTAIA provision (i.e. formulating a test of subject matter jurisdiction) so as to include a relationship between anticompetitive effects within the U.S. and foreign antitrust injury. The nature of this relationship may be an issue to be determined, but what is crucial to bear in mind is that the policy of deterrence should not be used in presenting the argument that the relationship between anticompetitive effects (within the U.S.) and (foreign) antitrust injury is irrelevant and therefore may be ignored. Any different view will undermine the system of private antitrust law enforcement where the policy of deterrence does not exempt the private plaintiff from proving the elements of anticompetitive effects and antitrust injury. Relying on a policy of deterrence on its own is not enough for the private plaintiff to litigate private antitrust suits before the U.S. courts.<sup>261</sup>

The Court of Appeals' judgment made it quite clear that a policy of deterrence should allow private plaintiffs who suffer foreign antitrust injury to bring private antitrust suits before the U.S. courts. Otherwise, in the Court of Appeals' view *"global conspiracy would be under-deterred"*<sup>262</sup> and this is because the *"perpetrator might well retain the benefits that the conspiracy accrued abroad"*.<sup>263</sup> The Court of Appeals continued to explain that allowing private plaintiffs to bring a private antitrust case based on a policy of deterrence will take away from the perpetrators the profits that they obtained due to operating anticompetitive cartels outside the U.S. Consequently, this will be, in the Court of Appeals' view, a sufficient deterrent for global (international) cartels.<sup>264</sup> The Court of Appeals stated that without allowing private parties to litigate foreign injury before the U.S. courts:

*"There would be an incentive to engage in global conspiracies, because, even if the conspirator has to disgorge his U.S. profits in suits by*

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<sup>261</sup> See n.110.

<sup>262</sup> N.247.

<sup>263</sup> Ibid.

<sup>264</sup> See *ibid.*

*domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability.*<sup>265</sup>

Therefore, in the Court of Appeals' view, allowing private plaintiffs to litigate foreign antitrust injury before the U.S. courts will take away from the members of a global (international) cartel a certain amount of profits that the members of the cartel had accumulated by taking part in this type of antitrust conduct. Consequently, this may cause the members of the cartel to have insufficient funds to compensate the damage caused by their anticompetitive conduct within the U.S. In the first Court of Appeals' view, this possibility may cause the members of the cartel not to be interested in engaging in such anticompetitive conduct in the future.

On the surface, there is nothing wrong with this argument. The problem arises when a policy of deterrence argument is not presented as described above, i.e. from the point of view that deterrence has an impact on the perpetrators and on future anticompetitive conduct. It is submitted that a policy of deterrence cannot be given such an important role in permitting foreign antitrust injury to be litigated before the U.S. courts in a situation where a policy of deterrence is analysed from the perspective of how the U.S. market and the antitrust injuries within the U.S. would benefit from foreign antitrust injury being litigated before the U.S. courts. In other words, deterrence cannot explain how the U.S. would benefit from permitting foreign antitrust injury to be litigated before the U.S. courts. Irrespective of allowing private litigants to litigate their foreign antitrust injuries before the U.S. courts, private plaintiffs suffering domestic antitrust injury would be compensated anyway. This is because domestic antitrust injury can be litigated before the U.S. courts regardless of whether private plaintiffs are granted subject matter jurisdiction to litigate their foreign antitrust injury before the U.S. courts.

Does this mean that the first Court of Appeals had in mind the interest of foreign countries and the interest of private plaintiffs who suffer foreign antitrust injury in formulating the argument of deterrence and, consequently, allowing private

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<sup>265</sup> Ibid.

plaintiffs who suffer foreign antitrust injury to litigate their private antitrust claims before the U.S. courts?

The following sentence:

*“The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy”*<sup>266</sup>

shows that the focus of the Court of Appeals’ reasoning is the protection of U.S. consumers and therefore not a non-U.S. interest. A similar conclusion, i.e. that the Court of Appeals did not have in mind the protection of non-U.S. interests, can also be derived from the following sentence:

*“...the profitability of the global conspiracy would depend on the uncertainties of foreign antitrust enforcement.”*<sup>267</sup>

This sentence does not merely provide an argument in support of a policy of deterrence. There is another message that can be cited. The message is that it is not possible to rely on antitrust law enforcement by non-U.S. countries in order to make global (international) antitrust cartels unprofitable for perpetrators and therefore deter them from engaging in this type of antitrust conduct.

The only problem with this message is that the first Court of Appeals did not say anything about the existence, the nature, and the efficiency of antitrust law enforcement in non-U.S. countries. Therefore, for the first Court of Appeals it was irrelevant to consider the relationship and co-existence of antitrust law enforcement in the U.S. and in non-U.S. countries before the first Court of Appeals interpreted the relevant FTAIA provision and thus worded the test of subject matter jurisdiction.

This analysis of the Court of Appeals’ reasoning used in support of the decision that private plaintiffs are granted subject matter jurisdiction to litigate their

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<sup>266</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,356-357 (D.C.Cir.2003).

<sup>267</sup> N.247.

foreign antitrust injury before the U.S. courts under that condition that someone else suffers antitrust injury within the U.S. demonstrates that there is no particular reason why the first Court of Appeals worded the interpretation of the FTAIA provision in this particular way.

Therefore, the conclusion “...that the less restrictive view of FTAIA’s jurisdictional reach, allowing subject matter jurisdiction in this case, is what Congress meant to achieve”<sup>268</sup> is of no practical value. This sentence only states that the FTAIA provision supports a ‘less restrictive view’, i.e. allows foreign injury to be litigated before the U.S. courts without it being caused directly by anticompetitive effects within the U.S. This sentence does not explain why the FTAIA provision was interpreted as for the existence of domestic injury to be sufficient for foreign injury to be litigated before the U.S. courts. In addition to this, it is worth mentioning that the relevant FTAIA provision had been interpreted in a less restrictive way already in the Court of Appeals’ *Kruman*<sup>269</sup> case. Therefore, if the only aim of the first Court of Appeals was to interpret the relevant FTAIA provision less restrictively, then the first Court of Appeals really failed to understand the reason why the *Empagran* litigation had been initiated.

In conclusion, the first Court of Appeals<sup>270</sup> interpreted the relevant FTAIA provision and established the test of subject matter jurisdiction without considering it relevant to require a certain type of relationship between foreign antitrust injury and anticompetitive effects within the U.S. In addition, the Court of Appeals<sup>271</sup> did not provide any clear explanation of why the subject matter jurisdiction test was formulated in such a manner.

### 3.1.7.3 The Reasoning of the Supreme Court

The Supreme Court interpreted the relevant FTAIA provision and ruled on the subject matter jurisdiction test as follows:

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<sup>268</sup> N.129.

<sup>269</sup> N.19.

<sup>270</sup> N.15.

<sup>271</sup> Ibid.

*“...exception<sup>272</sup> does not apply where the plaintiff’s claim rests solely on the independent foreign harm.”<sup>273</sup>*

This statement by the Supreme Court determines the extent to which the Supreme Court’s decision regulates the subject matter jurisdiction. This statement addresses only the factual situation where foreign antitrust injury is independent from the anticompetitive effects within the U.S.

There are three problems with the Supreme Court’s interpretation of the relevant FTAIA provision:

- Firstly, this decision did not necessarily address the factual situation in the *Empagran* litigation.<sup>274</sup>
- Secondly, the Supreme Court did not set out the conditions under which foreign antitrust injury was considered as independent.
- Thirdly, the Court did not provide guidance on subject matter jurisdiction in situations where foreign antitrust injury is not independent from the anticompetitive effects within the U.S.

The Supreme Court’s formulation of the subject matter jurisdiction test is of limited significance. Therefore, not much value can be attributed to the practical examples with which the Supreme Court tried to justify its decision.

One of these practical examples was:

*“...a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.”<sup>275</sup>*

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<sup>272</sup> I.e. that the Sherman Act applies in a situation where a direct, substantial and reasonably foreseeable effect on domestic commerce gives rise to a claim.

<sup>273</sup> N.184.

<sup>274</sup> See subsection 3.1.6.3 of this chapter above.

<sup>275</sup> N.184.

There are five problems that this practical example raises with regard to understanding the substance of the Supreme Court's subject matter jurisdiction test.

- Firstly, this example does not recognise that the facts surrounding the conduct of a global (international) cartel are different from other types of cartel conduct.
- Secondly, it could be incorrectly inferred from the example given by the Supreme Court that the relationship between anticompetitive effects and antitrust injury is irrelevant.
- Thirdly, the example does not provide guidance on understanding the distinction between 'domestic injury', (domestic) 'anticompetitive effect' and 'foreign harm'.
- Fourthly, the example may be understood as covering only a situation where private plaintiffs buying products within the U.S. can be granted subject matter jurisdiction to bring their private antitrust suit before the U.S. courts. The possibility of such an interpretation brings confusion to the consistency of the Supreme Court's ruling on subject matter jurisdiction. The Supreme Court ruled only on a situation where foreign antitrust injury was independent from the anticompetitive effects within the U.S. In formulating this ruling, the Supreme Court did not state that subject matter jurisdiction for the foreign anticompetitive harm is present only in the situation where the purchase is made within the U.S. If the requirement of purchasing within the U.S. was necessary to obtain subject matter jurisdiction, then there would be no need for the U.S. Congress to pass the FTAIA and there would have been no need for the *Empagran* litigation to take so long. Situations where the purchasing takes place within the U.S., and the issue of the right to obtain compensation where the purchaser suffers antitrust injury due to this purchase, are covered already by the *Pfizer*<sup>276</sup> case. In addition, the requirement that the purchase should take place within the U.S. in order for the subject

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<sup>276</sup> N.78.

matter jurisdiction for foreign antitrust injury to be established is practically impossible to fulfil. In a situation where a product is bought within the U.S. and a private plaintiff suffers antitrust injury due to this purchase, the antitrust injury can be classified only as a domestic one.<sup>277</sup> Therefore, it is not possible to conclude the transaction and to obtain the product within the U.S. and to classify the suffered antitrust injury that derives out of this transaction as foreign antitrust injury.

- Finally, the Supreme Court has at no point provided any explanation alleging that foreign antitrust injury cannot be litigated before the U.S. courts. This is why the statement by the Supreme Court that “*a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm*” is unclear.

The only practical situation that the Supreme Court addressed in its decision is the following:

*“The 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. In these circumstances, we find that the FTAIA exception does not apply (and thus the Sherman Act does not apply)...”*<sup>278</sup>

This quotation is difficult to reconcile with the following passage:

*“We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury.”*<sup>279</sup>

and with the passage:

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<sup>277</sup> See subsection 3.1.1 of this chapter above.

<sup>278</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,163-164 (2004).

<sup>279</sup> N.180.



*“...The 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.”<sup>280</sup>*

It was already questioned above<sup>281</sup> whether the situation presented by the Supreme Court is in conformity with the facts of *Empagran*. In addition, the Supreme Court was not consistent when explaining what factual situation it assumed to exist.<sup>282</sup>

- With regard the nature of anticompetitive conduct, the last two passages state that anticompetitive conduct was “in significant part foreign”, whereas the first passage uses the characteristic of “significantly” with regard to the nature of anticompetitive effects caused by antitrust violation.
- Another inconsistency is present with regard to the range of people who were affected by the anticompetitive conduct. The second passage states that anticompetitive conduct caused “some domestic antitrust injury”, whereas the first and the third passages do not specify the extent of the domestic and of the foreign antitrust injury.

The question is whether this difference in explaining the assumed factual situation on the basis of which the Supreme Court shapes the final ruling is of enough relevance so that it cannot be ignored.

It is submitted that the nature of anticompetitive conduct, the extent of the antitrust harm caused, and the place of gravity as regards where anticompetitive conduct and anticompetitive effects and antitrust injury are located may have an important role in determining the subject matter jurisdiction. This is particularly true for situations where an adjudicating court may be required to

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<sup>280</sup> N.181.

<sup>281</sup> See subsection 3.1.6.3. of this chapter above.

<sup>282</sup> For the claim that the Supreme Court made a decision on an assumed, i.e. potential (hypothetical?) situation, see subsection 3.1.6.3. of this chapter above above.

take into consideration the issue of comity<sup>283</sup> to deliver its decision on whether subject matter jurisdiction is granted.

Irrespective of whether the elements just stated may have some bearing on the decision with regard to subject matter jurisdiction, it is important to be reminded that all three passages from the Supreme Court's judgment quoted above are consistent in classifying the foreign antitrust injury as independent from the anticompetitive effects within the U.S. The Supreme Court delivered its interpretation of the relevant FTAIA provision and formulated the test for subject matter jurisdiction for an assumed, potential (hypothetical?) factual situation where litigated foreign antitrust injury was independent from anticompetitive effects within the U.S. Therefore, the Supreme Court's inconsistency in explaining the nature of anticompetitive effects and the extent of antitrust harm is not relevant to the final outcome of the Supreme Court decision.

Nevertheless, it would be a challenge to establish whether the elements set out by the Supreme Court in an inconsistent manner<sup>284</sup> may have any significance and, therefore, any impact on the decision on whether to grant subject matter jurisdiction in a situation where the litigated foreign antitrust injury is not independent from anticompetitive effects felt in the U.S.

Irrespective of this limited extent of the Supreme Court's judgment, i.e. its focusing on a situation where the litigated foreign antitrust injury is independent from anticompetitive effects within the U.S., it is still necessary to examine whether and to what extent the reasoning of the Supreme Court has relevance to understand the nature of the relationship between anticompetitive effect and antitrust injury when a plaintiff seeks to recover compensation for foreign antitrust injury before the U.S. courts.

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<sup>283</sup> See Chapter 6, subsection 3.3.

<sup>284</sup> The first inconsistency concerns what is significant (anticompetitive conduct is significantly foreign vs. customers in the U.S and outside the U.S. being significantly affected). The second inconsistency concerns the extent of the injury within the U.S. (customers in the U.S. significantly affected vs. there is adverse domestic effect vs. there is causes some domestic injury).

The Supreme Court referred to case law precedents. The Supreme Court may well be correct that there are no case law precedents on the subject matter jurisdiction in a situation where foreign antitrust injury is independent. Nevertheless, it is surprising that the Supreme Court did not consider sufficiently the factual similarities and differences between the cited case law precedents and the facts of the *Empagran* litigation.

It is submitted that if a closer factual comparison had been made between the existing case law precedents and the *Empagran litigation*, the Supreme Court would have been in a position to provide guidance on what makes antitrust injury in cases such as *Industria Siciliana Asfalti*,<sup>285</sup> *Dominicus Americana Bohio*,<sup>286</sup> and *Hunt*<sup>287</sup> not independent. Unfortunately, the Supreme Court did not do this.<sup>288</sup>

The same criticism of the Supreme Court can be made in respect of its contribution to the understanding of the difference between independent and dependent antitrust injury, which may explain why the Supreme Court refused to consider the cases of *Timken Roller*,<sup>289</sup> *National Lead*,<sup>290</sup> and *American Tobacco*.<sup>291</sup> These three precedents were rejected as irrelevant to the analysis as the plaintiff in these cases was a public entity (i.e. the government) and not a private party.<sup>292</sup>

There are three criticisms of the Supreme Court declining to consider case law precedents based on the nature of the plaintiff.

- Firstly, the Supreme Court was not asked to rule on the similarities or differences between public and private antitrust law enforcement, but

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<sup>285</sup> *Industria Siciliana Asfalti v. Exxon Research and Engineering, Co.*, 1977 WL 1353 (S.D.N.Y.1977).

<sup>286</sup> *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680 (S.D.N.Y.1979).

<sup>287</sup> *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.1977).

<sup>288</sup> See Chapter 7.

<sup>289</sup> *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951).

<sup>290</sup> *U.S. v. National Lead Co.*, 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947).

<sup>291</sup> *U.S. v. American Tobacco Co.*, 221 U.S. 106, 31 Sup.Ct. 632, 55 L.Ed. 663 (1911).

<sup>292</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,170-171 (2004).

was asked to rule on the relationship between anticompetitive effects and antitrust injury with the purpose of formulating the test for establishing subject matter jurisdiction.

- Secondly, the relevant FTAIA provision upon which the entire *Empagran* litigation is based does not distinguish between public or private parties as plaintiffs.
- Thirdly, the tests for establishing subject matter jurisdiction have throughout the history of the U.S. antitrust law never been determined on the basis of the nature of the plaintiffs.<sup>293</sup>

As was explained above, one of the arguments submitted by the plaintiffs in the *Empagran* litigation in support of their position before the first Court of Appeals was for the adoption of a literal interpretation of the relevant FTAIA provision.<sup>294</sup> The first Court of Appeals did not adopt the plaintiffs' literal interpretation of the FTAIA, but provided its own interpretation of the FTAIA provision. Irrespective of the fact that the literal interpretation provided by plaintiffs was different from the interpretation of the FTAIA provision provided by the first Court of Appeals,<sup>295</sup> the outcome of the first Court of Appeals' decision was beneficial to the plaintiffs.

The first Court of Appeals' interpretation of the FTAIA provision was under review before the Supreme Court. Consequently, the plaintiffs argued for a literal interpretation of the FTAIA<sup>296</sup> before the Supreme Court.

The Supreme Court rejected the literal interpretation with the following words:

*“Despite their linguistic logic, these arguments are not convincing. Linguistically speaking, a statute can apply and not apply to the same*

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<sup>293</sup> E.g. *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir.1997) is a case law where the plaintiff was the government. In examining the existence of subject matter jurisdiction, the Court of Appeals used the test formulated in a case law precedent where the plaintiff was a private party. See also Chapter 6, subsection 3.2.

<sup>294</sup> For the arguments see n.226.

<sup>295</sup> N.235.

<sup>296</sup> See *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,173,174 (2004).

*conduct, depending upon other circumstances; and those other circumstances may include the nature of the lawsuit (or of the related underlying harm). It also makes linguistic sense to read the words “a claim” as if they refer to the “plaintiff’s claim” or “the claim at issue. At most, respondents’ linguistic arguments might show that respondents’ reading is the more natural reading of the statutory language. But those arguments do not show that we must accept that reading. And that is the critical point.”*<sup>297</sup>

Several points in this passage show that the Supreme Court rejected the plaintiffs’ argument for a literal interpretation of the FTAIA provision without conducting a thorough examination of the plaintiffs’ argument.

- Firstly, the Supreme Court conditioned the application of the FTAIA with some “*circumstances*”, but the problem is that the Supreme Court did not say anything about the application of the FTAIA being conditioned by the purpose of the statute and by the proper way of interpreting the statute.
- Secondly, the Supreme Court simply stated that “*the nature of the lawsuit (or of the related underlying harm)*” is one of those “*circumstances*” that determine the application of the statute. The problem is that the Supreme Court did not offer any further details. Therefore, it is not clear in what way the Supreme Court established that the “*nature of the lawsuit*” and “*related underlying harm*” were the decisive factors in interpreting the provision of the statute. In addition to this, it is not clear in what way the “*nature of the lawsuit*” and “*related underlying harm*” influenced the final interpretation.
- Thirdly, the Supreme Court admitted that the plaintiffs’ reading of the statute was “more natural”, but at the same time rejected it without providing any solid ground for this rejection.

The only part of the judgment that may explain why the Supreme Court rejected the literal interpretation of the FTAIA provided by the plaintiffs is:

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<sup>297</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,174 (2004).

*“The considerations previously mentioned—those of comity and history—make clear that the respondents’ [i.e. the plaintiffs’] reading is not consistent with the FTAIA’s basic intent.”*<sup>298</sup>

If the above analysis is correct and this statement is the real reason why the Supreme Court rejected the plaintiffs’ interpretation of FTAIA, i.e. because of comity and history, then this may raise two problems.

- Firstly, the Supreme Court based the entire argument of comity on the fact that the litigated foreign antitrust injury was independent.<sup>299</sup> The Supreme Court did not evaluate what type of statutory interpretation was expected due to comity, or how different statutory interpretations may affect the application of comity in the first place.
- Secondly, if the Supreme Court used the word “history” to refer to the case law precedents that it mentioned,<sup>300</sup> then there is inconsistency in the judgment. The Supreme Court examined the case law precedents only to establish whether there existed any case law precedent in which an adjudicating court had ruled on a private plaintiff being granted subject matter jurisdiction for an independent foreign antitrust injury. Since the Supreme Court concluded that no such precedent existed, it cannot be concluded that a “*more natural reading*” of the FTAIA has to be rejected.

Does this mean that the Supreme Court unjustifiably rejected the plaintiffs’ argument based on the literal interpretation of the FTAIA provision and that, therefore, a foreign antitrust injury should be granted subject matter jurisdiction before the U.S. courts irrespective of being independent?

Unfortunately, the plaintiffs conceded before the Supreme Court that the interpretation of the FTAIA provided by the first Court of Appeals was correct.<sup>301</sup> It was argued above that the first Court of Appeals’ interpretation of the FTAIA provision does not provide an explanation as to the required type of relationship

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<sup>298</sup> Ibid.

<sup>299</sup> See subsection 3.1.8. of this chapter below.

<sup>300</sup> See cases mentioned earlier in this subsection.

<sup>301</sup> See *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 173 (2004).

between anticompetitive effects in the U.S. and foreign antitrust injury. This weakness in the first Court of Appeals' judgment was identified above as problematic.

In conclusion, it is submitted that the type of relationship between anticompetitive effects and antitrust injury that may be necessary was not unambiguously established in the Supreme Court's<sup>302</sup> judgment. It was observed above that the Supreme Court decided on the interpretation of the FTAIA provision and therefore delivered the test of subject matter jurisdiction only for a situation<sup>303</sup> where the litigated foreign antitrust injury is independent from anticompetitive effects within the U.S. Therefore, the Supreme Court did not rule on how the FTAIA provision should be interpreted in a situation where foreign antitrust injury is dependent (transborder<sup>304</sup>). Furthermore, due to the fact that the Supreme Court did not elaborate in a convincing manner on why the case law precedents were not suitable and why the literal interpretation of the FTAIA provision could not be used in formulating the test of subject matter jurisdiction that could be generally applied, there is lack of authority on how to distinguish between independent and dependent foreign antitrust injury.

#### 3.1.7.4 The Judgment of the Second Court of Appeals

On referral from the Supreme Court, the second Court of Appeals<sup>305</sup> was asked to reconsider the interpretation of the relevant FTAIA provision and explain under what conditions foreign antitrust injury could be litigated before the U.S. courts:

*“At issue is the “domestic-injury exception” of section 6a(2), which we conclude, as counsel for the United States argued, applies in only limited circumstances.”*<sup>306</sup>

The defendants relied before this second Court of Appeals on exactly the same arguments as they had previously argued before the District Court<sup>307</sup> and the first

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<sup>302</sup> N.5.

<sup>303</sup> See n.181.

<sup>304</sup> See Chapter 5, subsections 2.2. and 2.3.

<sup>305</sup> N.40.

Court of Appeals,<sup>308</sup> i.e. “...exception applies only to injuries that arise in U.S. commerce, thus describing its reach by the situs of the transaction and resulting injuries rather than by the situs of the effects of the allegedly anti-competitive conduct giving rise to the appellants’ claims.”<sup>309</sup>

It is not just defendants who argued consistently. The second Court of Appeal’s reasoning is consistent with the reasoning during the first Court of Appeals’ adjudication process. The second Court of Appeals relied on the legislative history<sup>310</sup> to the following extent:

*“...the legislative history makes clear that the FTAIA’s “domestic effects” requirement “does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. [Reference omitted].”<sup>311</sup>*

The full significance of this passage can be understood only if read together with the passage from the judgment where the Court of Appeals relied on the text of the FTAIA with which the Court of Appeal rejected the defendant’s argument that in establishing subject matter jurisdiction, the focus should be on situs of transactions. The second Court of Appeals stated in this regard that

*“This interpretation [i.e. argued by the defendants] has no support from the text of the statute, which expressly covers conduct involving “trade or commerce with foreign nations. [Reference omitted]”<sup>312</sup>*

Therefore, by combining these two passages from the second Court of Appeal’s judgment, it could be concluded that

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<sup>306</sup> N.84.

<sup>307</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,2 (D.D.C. June 7, 2001) in connection with the arguments that the defendants presented on standing on pp. 5 and 6.

<sup>308</sup> N.166.

<sup>309</sup> N.84.

<sup>310</sup> Compare *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,352,353-355 (D.C.Cir.2003).

<sup>311</sup> N.84.

<sup>312</sup> *Ibid.*



1. The U.S. courts do have subject matter jurisdiction where private parties have suffered antitrust injury arising from transactions that they concluded outside the U.S.;
2. Private parties can litigate their antitrust injuries before the U.S. courts even in situations where they suffered antitrust injury outside the U.S.

The second Court of Appeals' reasoning is clear up to this point, and there is nothing to criticise. After this point problems do arise. The second Court of Appeals interpreted the relevant FTAIA provision and, therefore, established a condition for a private party being granted subject matter jurisdiction:

*"... [plaintiffs] need only demonstrate therefore that the U.S. effects of the appellees' [i.e. defendants'] allegedly anti-competitive conduct "[g]ive rise to" their claims."*<sup>313</sup>

The problems with this condition are the following:

- Firstly, this requirement does not follow either from the text of the FTAIA provision or from the legislative history the Court of Appeals referred to right before the Court of Appeals stated this requirement. This is why the word "*therefore*" in the passage is misleading.
- Secondly, the second Court of Appeals cited in the support of this requirement the *Pfizer*,<sup>314</sup> the *Industria Siciliana Asfalti*,<sup>315</sup> and the *Caribbean Broadcasting*<sup>316</sup> cases, but at the same time agreed "*that each of these cases is distinguishable*"<sup>317</sup> from the factual situation of *Empagran*. Therefore, it is submitted that the second Court of Appeals did not in fact know how and why it interpreted the FTAIA provision in the way it did. Thus, again, there are similarities between the earlier

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<sup>313</sup> Ibid.

<sup>314</sup> N.78.

<sup>315</sup> N.285.

<sup>316</sup> *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080 (D.C.Cir.1998).

<sup>317</sup> N.46.

judgment of the first Court of Appeals<sup>318</sup> and the judgment of the second Court of Appeals<sup>319</sup>. Neither judgment provided a clear and reasonable explanation as to why the test for subject matter jurisdiction was formulated in such a specific way.

- Thirdly, it seems that this time the second Court of Appeals<sup>320</sup> interpreted the relevant FTAIA provision and therefore formulated the test for subject matter jurisdiction in the same way as the defendants before the first Court of Appeals.<sup>321</sup> The defendants before the first Court of Appeals, in support of their arguments, referred to the interpretation of the FTAIA provision provided by the Court of Appeals in the *Den Norske*<sup>322</sup> case.

Therefore, it is surprising that the first Court of Appeals in the *Empagran* litigation did not adopt the ‘Den Norske’ interpretation of the FTAIA provision,<sup>323</sup> whereas the second Court of Appeals adopted the exact interpretation from the *Den Norske* case without explaining the reasons for such a switch. The second Court of Appeal in the *Empagran* litigation followed this interpretation without even referring to the *Den Norske* case. Therefore, it is not clear whether the second Court of Appeals adopted the same interpretation of the relevant FTAIA provision as in *Den Norske*:

*“Based on the language of Section 2 of the FTAIA, the effect on United States commerce-in this case, the higher prices paid by United States companies for heavy-lift services in the Gulf of Mexico-must give rise to the claim that Statoil asserts against the defendants.”*<sup>324</sup>

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<sup>318</sup> N.15.

<sup>319</sup> N.40.

<sup>320</sup> Ibid.

<sup>321</sup> See n.229.

<sup>322</sup> N.18.

<sup>323</sup> See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,350 (D.C.Cir.2003).

<sup>324</sup> *Den Norske Stats Oljeselskap As, v. HeereMac Vof*, 241 F.3d 420,427 (5th Cir.2001).

*“...FTAIA requires more than a “close relationship” between the domestic injury and the plaintiff’s claim; it demands that the domestic effect “gives rise” to the claim.”*<sup>325</sup>

*“...we find that the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.”*<sup>326</sup>

and whether the second Court of Appeals’ interpretation of FTAIA in the *Empagran* litigation that

*“... [plaintiffs] need only demonstrate therefore that the U.S. effects of the appellees’ [i.e. defendants’] allegedly anti-competitive conduct “g [a]ve rise to” their claims.”*<sup>327</sup>

means exactly the same as the requirement from the *Den Norske* case.

- Fourthly, the second Court of Appeals’ interpretation that anticompetitive effects in the U.S. must give rise to the plaintiffs’ claim is confusing also because the Supreme Court<sup>328</sup> did not rule that this is the only possible or plausible interpretation of the relevant FTAIA provision.

In conclusion, the second Court of Appeals’ interpretation of the relevant FTAIA provision and therefore of the test for subject matter jurisdiction is difficult to understand and support. There are two reasons for this confusion. Firstly, the second Court of Appeals based its ruling on arguments that are not clear, that are inherently inconsistent, and that are absolutely arbitrary. Secondly, the second Court of Appeals did not explain or provide guidance as to how the decision that private plaintiffs are permitted to litigate their antitrust injury that they suffer outside the U.S., out of the transactions that they concluded

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<sup>325</sup> Ibid.

<sup>326</sup> *Den Norske Stats Oljeselskap As, v. HeereMac Vof*, 241 F.3d 420,428 (5th Cir.2001).

<sup>327</sup> N.84.

<sup>328</sup> N.5.

outside the U.S., is compatible with the requirement that antitrust injury has to arise out of effects within the U.S.

### 3.1.7.5 Conclusion

This subsection analysed the judgments in the *Empagran* litigation and concluded that they did not provide a clear, consistent and undisputable clarification of the conditions under which private plaintiffs can litigate their foreign antitrust injuries before the U.S. courts.

It is submitted that the analysis of the rulings of all four adjudicating courts leads to a conclusion that the tests for establishing subject matter jurisdiction can be divided into two groups. The first group covers the tests that are worded in a way that they provide a general type of interpretation of the relevant FTAIA provision, i.e. one that can be applied to all factual situations. This type of interpretation of the relevant FTAIA provision was delivered by the District Court and by both Courts of Appeals. In the second group is the test worded by the Supreme Court. This test applies only to a factual situation where foreign antitrust injury is independent from the anticompetitive effects within the U.S.

The division between these two groups of tests for subject matter jurisdiction is problematic because there is no explanation of the relationship between them. The Supreme Court did not provide a general interpretation of the relevant FTAIA provision and the test for establishing subject matter jurisdiction that follows is of very limited scope. At the same time, the Supreme Court did not provide guidance for future litigation (the second Court of Appeals included) on what are the possible or permissible interpretations of the relevant FTAIA provision. Therefore, it can be doubted that the test for establishing subject matter jurisdiction set out by the second Court of Appeals is a valid one.

Irrespective of the group in which the test for subject matter jurisdiction is placed, there are matters that are common to them.

- Firstly, all the tests lack clarity and sustainable arguments as to why they have been worded in this particular way.

- Secondly, none of the judgments provide guidance to private litigants or adjudicating courts for future litigations as to what facts need to be proven in order to satisfy the test of subject matter jurisdiction.

In addition to this uncertainty that the *Empagran* judgments introduced in respect of obtaining compensation for a foreign antitrust injury before the U.S. courts, there are many questions that the *Empagran* litigation did not resolve.

- Firstly, how to make a distinction between independent and dependent foreign antitrust injury;
- Secondly, what makes a global antitrust cartel predominantly foreign (i.e. of non-U.S. nature);
- Thirdly, under what conditions can the anticompetitive effects of a global cartel be determined to be exclusively pertinent to one particular foreign (i.e. non-U.S.) country;
- Fourthly, why the U.S. courts should compensate foreign antitrust injury.

### **3.1.8 Reliance on the Policy of Comity**

The factual situation in *Empagran* extended beyond U.S. territorial borders. Therefore, the question this subsection will address is whether and to what extent the interests of non-U.S. countries have to be taken into consideration in private antitrust law enforcement cases. This raises the question of why the U.S. courts should grant remedies to non-U.S. nationals who suffer antitrust injury outside the U.S.

The *Empagran* cases addressed factual situations, irrespective of whether these were proven or merely assumed by the adjudicating courts.<sup>329</sup> The common feature pertinent to all the facts is that they were not limited to U.S. territory. The anticompetitive conduct was understood by the litigants and the adjudicating courts as being that of a global (international) cartel operating in

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<sup>329</sup> See subsection 3.1.6. of this chapter above.

part outside the U.S. This anticompetitive conduct caused anticompetitive effects that were felt not only within the U.S., but also in non-U.S. countries. Not all litigants were U.S. nationals. The reason why private plaintiffs initiated the litigation was to obtain compensation for the suffered antitrust injury, and the reason why the *Empagran* litigation was so complicated was the foreign nature of the antitrust injury, i.e. the antitrust injury having taken place outside the U.S.

Therefore, the adjudicating courts in *Empagran* were required to interpret the relevant FTAIA provision and to formulate the test for establishing subject matter jurisdiction. This was done by considering the potential interest of those non-U.S. countries where the facts of non-U.S. character, described above, were present.

The plaintiffs before the District Court included the interest of non-U.S. countries in their submissions. The plaintiffs tried to obtain supplemental jurisdiction by arguing on the basis of the interest of the non-U.S. countries. The plaintiffs argued that granting subject matter jurisdiction to the U.S. courts would benefit (i.e. “*reduce inefficiency and redundancy*”<sup>330</sup>) foreign plaintiffs and non-U.S. courts by reducing the number of cases: “*to litigate identical claims and issues in numerous courts around the world.*”<sup>331</sup>

The District Court did not accept this argument for three reasons. Firstly, the District Court stated that lawsuits before courts outside the U.S. were already pending, i.e. had been started before the *Empagran* litigation commenced in the U.S. Therefore, the District Court was not convinced that by granting subject matter jurisdiction, litigation elsewhere would be avoided (i.e. “*reduce the number of suits or increase efficiency*”<sup>332</sup>) before non-U.S. courts.<sup>333</sup> Secondly, the District Court explained that the U.S. courts lacked competence to order that the actions before non-U.S. courts be dismissed or consolidated. Therefore, it has to be considered in this regard that the U.S. courts may take into account the first-to-file rule. Consequently, by applying this rule, it might be the

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<sup>330</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360,8 (D.D.C. June 7, 2001).

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> See *ibid.*

*Empagran* litigation in the U.S. that should be dismissed as duplicative.<sup>334</sup> Thirdly, the District Court also stated that it would be “*more efficient and in the best interests of comity to allow the foreign courts to adjudicate the claims arising out of alleged violations of their own laws*”.<sup>335</sup>

It seems that the District Court did not accept the argument that the U.S. courts should have subject matter jurisdiction with the purpose of reducing the burden on non-U.S. courts. In other words, taking over the task of non-U.S. courts is not a valid reason upon which to facilitate the test for subject matter jurisdiction.

This argument was not challenged or considered by the other courts during the *Empagran* litigation. The *Empagran* litigation was decided without providing any guidance on whether the U.S. courts are expected to provide any type of help to non-U.S. courts. Ultimately, in a factual situation as present in the *Empagran* litigation, both the U.S. courts and the non-U.S. courts have to find a way to work together with the purpose of efficiently dealing with the same antitrust cartels that are global (international) and therefore cause anticompetitive effects and antitrust injury within the U.S. and within non-U.S. countries. With regard to the argument for helping non-U.S. courts, the Supreme Court<sup>336</sup> promoted a certain type of help that the U.S. courts will provide to non-U.S. countries. The Supreme Court delivered the decision that the U.S. courts must refrain from exercising subject matter jurisdiction in a specific type of situation, i.e. where the litigated foreign antitrust injury is independent from anticompetitive effects within the U.S.<sup>337</sup> This type of help from the U.S. courts to non-U.S. countries does not say anything about other situations where litigated foreign antitrust injury is not independent.

Unlike the District Court, the first Court of Appeals<sup>338</sup> did not consider the interests of non-U.S. countries (courts) from the perspective of “whether to help them”, but from the perspective of “whether to trust them”. In fact, the first Court of Appeals considered the interests of non-U.S. countries within the

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<sup>334</sup> See *ibid.*

<sup>335</sup> *Ibid.*

<sup>336</sup> N.5.

<sup>337</sup> See subsection 3.1.9. of this chapter below.

<sup>338</sup> N.15.

context of the policy of deterrence of antitrust cartels<sup>339</sup> in formulating test for subject matter jurisdiction.

As explained in the subsection above,<sup>340</sup> the first Court of Appeals elaborated the policy of deterrence from the perspective that a wider test for subject matter jurisdiction will benefit and protect the interests of the U.S. as well as U.S. consumers. Despite the fact that the first Court of Appeals showed awareness of the possibility of antitrust law enforcement in non-U.S. countries,<sup>341</sup> the first Court of Appeals did not say anything on the existence, nature, and efficiency of antitrust law enforcement in these non-U.S. countries. The first Court of Appeals did not consider what impact a wider test of subject matter jurisdiction (i.e. one based on the policy of deterrence) would have on the functioning of antitrust law enforcement in non-U.S. countries and on the relationship and co-existence of antitrust law enforcement in the U.S. and in non-U.S. countries.

The Supreme Court<sup>342</sup> addressed some of these questions, but unfortunately it did so to a very limited extent. Without, at this point, challenging the soundness of the Supreme Court ruling on respecting the interests of non-U.S. countries in enforcing non-U.S. antitrust law, it is submitted that the Supreme Court considered the interests of non-U.S. countries in a wider context than the first Court of Appeals.<sup>343</sup> The Supreme Court did so with regard to statutory construction,<sup>344</sup> but in this context the Supreme Court merely mentioned foreign nations' sovereign interests at a general level and stated that potential conflicting laws of different countries (i.e. the U.S. and non-U.S. countries) should work together in harmony.<sup>345</sup>

The problem is that the Supreme Court, in putting forward its position on comity, did not say anything about: the purpose of private antitrust law enforcement; the protection of those who suffer antitrust injury; the co-

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<sup>339</sup> See subsection 3.1.7.2. of this chapter above.

<sup>340</sup> Ibid.

<sup>341</sup> N.247.

<sup>342</sup> N.5.

<sup>343</sup> N.15.

<sup>344</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,164 (2004).

<sup>345</sup> See *ibid.*



existence and simultaneous applicability of antitrust law enforcement systems, as the Supreme Court stated in “*today’s highly interdependent commercial world*”.<sup>346</sup>

In evaluating the Supreme Court’s reference to comity, it is appropriate to mention that the Supreme Court’s view is limited to the following situation:

“...why is it reasonable to apply those laws<sup>347</sup> to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim?”<sup>348</sup>, or:

“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 the question”.<sup>349</sup>

The two quotations above show that the issue to which the Supreme Court applied its reasoning on comity is the foreign antitrust injury that is independent from anticompetitive effects within the U.S. In this type of situation, the anticompetitive effects in the U.S.<sup>350</sup> have nothing to do with the foreign antitrust injury for which private plaintiffs seek compensation. Therefore, there is no need for U.S. antitrust laws to be applied to this type of situation as there is no U.S. market or injury that is affected and therefore they do not require the protection of U.S. laws. It seems that the Supreme Court’s decision that justification for “*interference with a foreign nation’s ability independently to regulate its own commercial affairs*”<sup>351</sup> in this type of situation is really “*insubstantial*”<sup>352</sup>.

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<sup>346</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,165 (2004).

<sup>347</sup> I.e. U.S. antitrust laws that “redress domestic antitrust injury that foreign anticompetitive conduct has caused” [n.346].

<sup>348</sup> N.346.

<sup>349</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,166 (2004).

<sup>350</sup> The existence of anticompetitive effects in the U.S. generally allows the U.S. courts to exercise subject matter jurisdiction and redress these domestic injuries, irrespective of potential non-U.S. interests. See n.346.

<sup>351</sup> N.346.

<sup>352</sup> *Ibid.*

The support for this Supreme Court decision should not be undermined by the following example with which the Supreme Court tried to explain its decision:

*“Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies.”*<sup>353</sup>

This passage raises four problems with regard to providing a clear explanation of the Supreme Court’s decision on non-interference with non-U.S. countries regulating their own commercial affairs.

- Firstly, the passage does not fully cover the factual situation of the *Empagran* litigation.
- Secondly, in a global (international) cartel situation the perpetrators may be of U.S. nationality or operating within the U.S.
- Thirdly, the quotation does not say anything about the particularities of litigating foreign antitrust injury that is not independent from but dependent on anticompetitive effects within the U.S.
- Fourthly, it is important to mention that the mere fact of compensating foreign antitrust injury does not jeopardize the benefits that non-U.S. countries may give to their nationals (or other private parties) who suffer antitrust injury within these non-U.S. countries.

Irrespective of the fact that the Supreme Court limited its analysis of comity to a situation where the litigated foreign antitrust injury was independent from anticompetitive effects within the U.S.,<sup>354</sup> prudence requires mentioning two points in the Supreme Court’s analysis that may be problematic, or at least cause some confusion about reliance on comity in future cases.

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<sup>353</sup> Ibid.

<sup>354</sup> See explanation in this subsection above.

Firstly, the Supreme Court rejected the analysis of comity on a case-by-case basis. A case-by-case analysis of comity was proposed by the plaintiff when arguing for subject matter jurisdiction of the U.S. courts to be granted in a situation where foreign antitrust injury is independent from the anticompetitive effects in the U.S.<sup>355</sup> The Supreme Court rejected the submission that the independent foreign antitrust injury should be granted subject matter jurisdiction of the U.S. courts on individual (i.e. case-by-case) basis.

The Supreme Court rejected this submission for three reasons:

- a) The approach would be *“too complex to prove workable”*,<sup>356</sup> as adjudicating courts would have to examine how foreign law and how U.S. law treat different kinds of anticompetitive agreements.<sup>357</sup>
- b) The comparison between foreign and U.S. law may lead to *“lengthier proceedings, appeals, and more proceedings-to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system”*.<sup>358</sup>
- c) Adjudicating courts would be required to decide whether to give priority to the award of treble damages in situations such as this, which would increase deterrence and help to enforce antitrust law, or to give priority to amnesty programmes, used to enhance antitrust law enforcement. This question of whether to give priority to deterrence or amnesty is of an empirical nature that adjudication courts cannot resolve.<sup>359</sup>

The above grounds on which the Supreme Court rejected the case-by-case analysis for comity may sound convincing, but unfortunately, they are contrary to the substance and purpose of comity. Comity can be adjudicated only on an individual basis. The balancing of U.S. and non-U.S. interests is something that is

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<sup>355</sup> See *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,168 (2004).

<sup>356</sup> N.355.

<sup>357</sup> See n.355.

<sup>358</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,168-169 (2004).

pertinent to the comity argument.<sup>360</sup> In addition, the question of priority between deterrence and amnesty is commonly known and is present also within the domestic context.<sup>361</sup> In the domestic context there is no empirical evidence that would point in a particular direction. Nevertheless, there is no doubt that deterrence and amnesty can co-exist within the same system of antitrust law enforcement and that private antitrust law enforcement does not need to be sacrificed because of amnesty programmes. Amnesty programmes are grounded on the need to enhance deterrence, and deterrence is considered to be one of the aims of private antitrust enforcement as well.<sup>362</sup> Therefore, placing such emphasis on “...foreign nations’ own antitrust enforcement policies...” based on “...foreign firms’ incentive to cooperate with antitrust authorities in return for prosecutorial amnesty”<sup>363</sup> is not appropriate.<sup>364</sup>

Secondly, the opinions on which the Supreme Court relied were filled in by non-U.S. governments whose interests were in no way affected by the *Empagran* litigation. Neither the litigants, nor any factual element of antitrust violation, nor anticompetitive effects, nor antitrust injury that formed part of the *Empagran* case had anything to do with these non-U.S. countries whose governments filled-in the briefs.

At the same time, the Supreme Court did not evaluate the interests of those non-U.S. countries whose litigants were parties to the litigation; where the conduct of the global (international) cartel took place; who suffered anticompetitive effects due to this cartel; where the private plaintiffs suffered

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<sup>359</sup> See *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155,169 (2004) and the analysis on a similar issue in the same judgment on pp.174 and 175.

<sup>360</sup> See Chapter 6, subsection 3.3.

<sup>361</sup> Take into consideration the framework provided in n.151. In addition, leniency does not affect the right of plaintiffs to start antitrust litigation against perpetrators who applied for protection within the leniency program. For the fact that leniency program does not affect private antitrust litigation in an international context see Renato Nazzini, *Concurrent Proceedings in Competition Law; Procedure, Evidence, and Remedies* (New York, US: Oxford University Press, 2004), 221.

<sup>362</sup> See n.367.

<sup>363</sup> N.355.

<sup>364</sup> At this point it is important to mention that amnesty programmes do not apply internationally and do not affect private antitrust law enforcement. This means that in a situation where a perpetrator cooperates with public antitrust enforcing authorities in one country and consequently obtains amnesty, this does not exempt the same perpetrator from prosecution by public antitrust law enforcement authorities in other countries. The fact that perpetrators are granted amnesty does not mean that they cannot become parties (plaintiff or defendant) in private antitrust law enforcement litigation. See n.361.

their antitrust injury for the compensation of which they started the *Empagran* litigation in the first place. It is submitted that the interests of the litigants and of the non-U.S. countries whose interests were directly affected by the *Empagran* situation were not taken into consideration in deciding on the issue of comity.

Placing emphasis on the interests of those non-U.S. countries who are not directly involved in or affected by the litigation, and ignoring the interests of those non-U.S. countries that were directly involved in or affected by the litigation, goes against the established custom of considering the comity argument in litigation.<sup>365</sup>

In addition to this, the Supreme Court relied on the briefs submitted by non-U.S. countries without evaluating them in the following manner:

- What are the effects of these opinions on private antitrust law enforcement in the U.S.?
- What are the effects on private parties who suffered antitrust injury?
- What are the effects on the functioning of global (international) cartels?
- What do the arguments in the briefs mean for potential perpetrators?

In conclusion, the above analysis provides sufficient grounds to submit that the issue of comity within the area of private antitrust law enforcement was decided in the *Empagran* litigation only with regard to a situation where the litigated foreign antitrust injury is independent from anticompetitive conducts within the U.S.

Irrespective of the extent to which the issue of comity was determined in the *Empagran* litigation, it is not possible to ignore the confusion that arises from the Supreme Court's judgment. The Supreme Court was not expected to rule on comity by rejecting suitability of case-by-case analysis, considering interests that were not directly affected by the *Empagran* litigation, or refusing to

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<sup>365</sup> See Chapter 6, subsection 3.3.

consider the interests of litigants and those non-U.S. countries whose interests were directly affected by the *Empagran* litigation. Whether this type of attitude redefined the issue of comity remains an open question, particularly because the Supreme Court rejected the analysis of comity on a case-by-case basis, and at the same time did not provide any guidance on how comity should be analysed in future litigation.

Since the *Empagran* litigation decided the question of comity in a limited way, there are some factual situations that require guidance in terms of applying comity in future litigation. These factual situations are:

- How to apply comity in situations where the litigated foreign antitrust injury is dependent (transborder<sup>366</sup>)?
- How to apply comity in enforcing the antitrust law of different countries (i.e. the U.S. and non-U.S. countries) on a global antitrust cartel?
- How to apply comity in establishing the cooperation between private antitrust enforcement systems from different countries?
- What is the relationship between comity, the requirement that antitrust law should be enforced, and the right of private parties to obtain compensation?

### **3.1.9 Reliance on a Policy of Deterrence**

The U.S. courts consider deterrence as one of the two reasons for having private antitrust law enforcement.<sup>367</sup> The other reason is to enable private parties who have suffered antitrust injury to receive compensation in the form of treble damages.<sup>368</sup> As far as the domestic context is concerned, there has been a

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<sup>366</sup> For the explanation see Chapter 5, subsection 2.4.

<sup>367</sup> See n.151, Assimakis P. Komninos, *Ec Private Antitrust Enforcement; Decentralised Application of Ec Competition Law By National Courts* (Oxford and Portland, Oregon, US: Hart Publishing, 2008), 160; Richard A. Posner, *Antitrust Law* (The University of Chicago Press, 2001), 266. Compare with Nazzini, *Concurrent Proceedings in Competition Law; Procedure, Evidence, and Remedies*, 16, where are listed other reason for private antitrust law enforcement to exist.

<sup>368</sup> See n.367.

constant tension between deterrence and compensation. This tension has contributed to how the U.S. system of private antitrust law enforcement has been formed and how it operates in practice.<sup>369</sup>

The *Empagran* case extends beyond the domestic (i.e. the U.S.) scene but, nevertheless, the policy of deterrence had a role to play in the *Empagran* litigation. The question to be explored is whether deterrence was used in this litigation for the same purpose or in the same manner as it is used in the domestic context.

The use of deterrence in the *Empagran* litigation has been explained above in the relevant subsections. Nevertheless, in order to provide a complete and clear presentation of the *Empagran* litigation, it is worth listing, without repeating the analysis already conducted above, the manner in which the policy of deterrence was applied in this litigation.

The policy of deterrence was relied on on four occasions:

- 1) The first Court of Appeals<sup>370</sup> used the policy of deterrence argument in favour of granting standing to the plaintiffs. It is worth emphasizing that the plaintiffs were non-U.S. nationals and that they had suffered antitrust injury outside the U.S.<sup>371</sup>
- 2) The first Court of Appeals<sup>372</sup> relied on the policy of deterrence in expanding the subject matter jurisdiction of the U.S. courts with the result that foreign private parties who suffer foreign antitrust injury may obtain compensation before the U.S. courts for that injury. The first Court of Appeals explained that the policy of deterrence, by permitting foreign

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<sup>369</sup> Deterrence is contrary to legislative text of Clayton Act (Hovenkamp, "88 Mich. L. Rev. 1"). Deterrence was promoted by economists (Page, "37 Stan. L. Rev. 1445," 1450; William M. Landes and Richard Posner, "Adjudication as a Private Good," The Journal of Legal Studies 8 (1979); William M. Landes and Richard A. Posner, "The Private Enforcement of Law," The Journal of Legal Studies 4 (1975)). Literature that economists wrote influenced development of private antitrust law enforcement in a way that deterrence become its goal (Coffee, "42 Md. L. Rev. 215," 216; Kent Roach and Michael J. Trebilcock, "Private Enforcement of Competition Law," *Osgoode Hall Law Journal* 34, no. 3 (1996), 475).

<sup>370</sup> N.15.

<sup>371</sup> For the analysis of and problems with the first Court of Appeals' reasoning, see subsection 3.1.4. of this chapter above.

litigants to litigate their antitrust injury before the U.S. courts, would deprive the U.S. perpetrators of the profits and consequently reduce the incentive for these perpetrators to participate in organizing and running global cartels. However, the first Court of Appeals did not explain in what way such an expansion based on the policy of deterrence would benefit U.S. markets and U.S. consumers. Regardless of this expansion, the right of those who suffered antitrust injury in the U.S. to bring private antitrust suit is in no way affected.<sup>373</sup>

3) The Supreme Court<sup>374</sup> was asked to rule on the policy of deterrence on two occasions.

a) Firstly, when the plaintiffs put forward the policy of deterrence as an argument in support of establishing subject matter jurisdiction of the U.S. courts, because this would help to “*protect Americans against foreign-caused anticompetitive injury.*”<sup>375</sup> The plaintiffs did not elaborate this argument and the Supreme Court did not comment on its plausibility. The problem with this argument is that it is internally inconsistent. How can injury that is suffered outside the U.S. harm U.S. nationals?

b) The second occasion when the argument was raised was in respect of the issue of comity. The Supreme Court was asked to rule on the relationship and priority between deterrence and amnesty, but did not rule on this.<sup>376</sup>

In conclusion, this subsection summarized only those situations in the *Empagran* litigation where the policy of deterrence was pleaded. At the same time, in this subsection reference has been made to those subsections where in-depth analysis of the use of the policy of deterrence was offered. On the basis of the

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<sup>372</sup> N.15.

<sup>373</sup> For the analysis and problems in this regard, see subsection 3.1.7.2. of this chapter above.

<sup>374</sup> N.5.

<sup>375</sup> N.297.

<sup>376</sup> For the analysis and problems with the Supreme Court’s reasoning on this question, see subsection on the policy of comity.



analyses it can be concluded that the policy of deterrence played a different role in the *Empagran* litigation than it does in the domestic context.

### **3.1.10      *The Alternative Theory Claim***

This subsection discusses whether a new approach was introduced in *Empagran* to how an antitrust claim in an international context may be litigated. In the pre-*Empagran* era,<sup>377</sup> the focus of antitrust litigation was on delivering a decision that would redress anticompetitive effects within the U.S. and at the same time on protecting the interests, whatever they might be, of the U.S. This subsection will identify whether the *Empagran* case has changed the approach of the U.S. courts and, if so, whether this change introduces a possibility for private plaintiffs to obtain compensation for their suffered (foreign) antitrust injury in U.S. courts.

The term “alternative theory of subject matter jurisdiction” was introduced by the first Court of Appeals.<sup>378</sup> In essence, the phrase is used to describe the alternative basis for jurisdiction which the plaintiffs argued for before the District Court.

The plaintiffs’ primary claim before the District Court, with the purpose of convincing the District Court that it had subject matter jurisdiction to hear the case, was one based on the global nature of the antitrust cartel<sup>379</sup> whose conduct had caused the injury irrespective of where that injury had arisen. The plaintiffs also argued for a literal interpretation of the relevant FTAIA provision<sup>380</sup> to grant the U.S. court jurisdiction.

The substance of the plaintiffs’ ‘alternative claim’ was not considered by the District Court, and no reason was given for ignoring the claim. This lack of consideration of the plaintiffs’ alternative claim before the District Court meant

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<sup>377</sup> See Chapter 6, subsections 3.2. and 3.3.

<sup>378</sup> See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,341 (D.C.Cir.2003).

<sup>379</sup> See subsection 3.1.2. of this chapter above.

<sup>380</sup> See subsections 3.1.2. and 3.1.7.1. of this chapter above.

that neither the first Court of Appeals<sup>381</sup> nor the Supreme Court<sup>382</sup> were required to consider it.

The first Court of Appeals stated:

*“The District Court did not address this alternative theory of jurisdiction. Neither the Second Circuit nor the Fifth Circuit embrace this view of FTAIA’s jurisdictional reach, nor do we. In light of our disposition in favor of appellant on other grounds, we find it unnecessary to address this “alternative” theory of subject matter jurisdiction”.*<sup>383</sup>

The Supreme Court stated:

*“The Court of Appeals, however, did not address this argument,... and, for that reason, neither shall we.”*<sup>384</sup>

The question is whether considerations of an alternative claim would have made any difference to the plaintiffs. An answer to this question may explain why the Court of Appeals and the Supreme Court did not consider it.

The first Court of Appeals granted the plaintiffs subject matter jurisdiction on the beneficial (i.e. non-restrictive) interpretation of the FTAIA provision. Therefore, as the plaintiffs succeeded with their claim due to the beneficial interpretation of the FTAIA, it is understandable why the first Court of Appeals so easily reached the conclusion on the alternative claim in the way it was quoted above. Irrespective of whether the first Court of Appeals considered it relevant to address this plaintiffs’ alternative claim, the first Court of Appeals’ decision is not in conformity with other Court of Appeals rulings, where the first Court of Appeals stated:

*“...this court assumes the truth of the allegations made and construes them favorably to the pleader...”*<sup>385</sup>

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<sup>381</sup> N.15.

<sup>382</sup> N.5.

<sup>383</sup> N.378.

<sup>384</sup> N.8.

In a situation that these facts, as assumed by the Court of Appeals, support alternative claim, and in a situation that plaintiffs' allegations contribute to the positive solution of the alternative claim, then there was not reason not to consider the alternative claim as well. It is acceptable that positive outcome for the plaintiffs is based on two separate considerations. In fact, in a situation where one of these considerations is not supported at the appeal level, the other ground may still be approved and consequently remain valid.

The Supreme Court's decision to not rule on the alternative theory for establishing subject matter jurisdiction is less clear, as the Supreme Court admitted that:

“... [plaintiffs argued in] alternative, that the foreign injury was not independent... [it means that] the anticompetitive conduct's domestic effects were linked to that foreign harm.”<sup>386</sup>

As explained above,<sup>387</sup> the Supreme Court narrowed its analysis to an assumed, potential (hypothetical?) situation where the litigated foreign antitrust injury is independent from anticompetitive effects within the U.S. Based on those facts there was no need for the alternative theory of subject matter jurisdiction.

Therefore, the Supreme Court's decision not to address the alternative theory of subject matter jurisdiction is surprising for the following reasons:

- In the past, the U.S. courts, including the Supreme Court, had taken a more active role in formulating the tests for establishing subject matter jurisdiction.<sup>388</sup> Therefore, it is not clear why the Supreme Court took a passive role in the *Empagran* litigation, particularly as the *Empagran* litigation had opened a completely new chapter in the development of subject matter jurisdiction, i.e. rules have to be established under which private plaintiffs who suffer foreign antitrust claim can obtain compensation before the U.S. courts.

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<sup>385</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338,343 (D.C.Cir.2003).

<sup>386</sup> N.8.

<sup>387</sup> See subsection 3.1.7.3. of this chapter above.

<sup>388</sup> See Chapter 6, subsection 3.2.

- This passive position of the Supreme Court is also surprising because it affected the plaintiffs' position negatively. The first Court of Appeals<sup>389</sup> decided in favour of the plaintiffs. In such a situation the first Court of Appeals had adopted the alternative theory, the outcome of the litigation might remain the same, i.e. to the plaintiffs' benefit. The same result cannot be attributed automatically to the Supreme Court's<sup>390</sup> decision on alternative theory.

Irrespective of how favourable the Supreme Courts' decision was for the plaintiffs, what is important for the development of the alternative theory for establishing subject matter jurisdiction is that the Supreme Court did not reject it.

Therefore, it is important to consider the plaintiffs' alternative claim more closely, and examine whether the second Court of Appeals<sup>391</sup> provided any substantial and useful explanation as to how this alternative theory impacts on:

- private parties who will be able to obtain compensation for their antitrust injuries by bringing a private antitrust suit before the U.S. courts, and
- the enforcement of antitrust law in general.

At this point it is important to examine the substance of the plaintiffs' alternative claim.

The District Court<sup>392</sup> did not comment on the arguments the plaintiffs had put forward in formulating their alternative claim.

The Court of Appeals classified the plaintiffs' alternative claim as an alternative theory of subject matter jurisdiction, and presented it in the following way:

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<sup>389</sup> N.15.

<sup>390</sup> N.5.

<sup>391</sup> N.40.

<sup>392</sup> N.3.

*“...[the defendants] caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by the worldwide conspiracy..., but the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage. Thus,... the “fixed” United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts,... foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad.”<sup>393</sup>*

The Supreme Court commented on the plaintiffs’ alternative claim in the following manner:

*“...foreign injury was not independent... anticompetitive conduct's domestic effects were linked to that foreign harm,... because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers [defendants] could not have maintained their international price-fixing arrangement and respondents [plaintiffs] would not have suffered their foreign injury. They add that this “but for” condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA's exception.”<sup>394</sup>*

According to the joint views of the Court of Appeals’ and the Supreme Court’s views of an alternative theory for establishing subject matter jurisdiction, the alternative theory requires the following factual conditions:

- (1) there is a worldwide cartel that directly affects U.S. commerce;
- (2) the U.S. commerce was affected by the worldwide cartel causing anticompetitive effects in the U.S.;
- (3) the anticompetitive effects in the U.S. consisted of price changes and supply shifts;

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<sup>393</sup> N.378.

- (4) the anticompetitive effects in the U.S. also injured purchasers outside the U.S.;
- (5) the purchasers outside the U.S. suffered injury as a consequence of anticompetitive effects within the U.S. which caused prices around the world (i.e. including prices outside the U.S.) to rise;
- (6) the prices outside the U.S. were raised in order to keep them in equilibrium with the prices within the U.S.;
- (7) the equilibrium of prices outside and within the U.S. had to be in equilibrium in order to avoid a system of arbitrage;
- (8) the system of arbitrage was possible because products (i.e. vitamins) were fungible and readily transportable;
- (9) the manner in which the worldwide cartel kept the prices outside the U.S. equal to the prices within the U.S. (and consequently avoided the system of arbitrage) was by treating the prices within the U.S. as the benchmark prices. This means that the prices within the U.S. determined the prices outside the U.S.;
- (10) in practice, this means that when prices within the U.S. increased, so did prices outside the U.S.. As a consequence, when prices within the U.S. increased, this caused private parties (i.e. plaintiffs) who bought products outside the U.S. to pay higher prices. This means that the increase of the prices within the U.S. directly injured the private plaintiffs who bought the same products outside the U.S.;
- (11) the relationship between how prices within the U.S. affected prices outside the U.S. was classified by plaintiffs as “but for” causation;
- (12) the payment of inflated prices for products that private parties (plaintiffs) bought outside the U.S. was foreign antitrust injury;

(13) therefore, on the basis of the above, the foreign antitrust injury suffered by the private parties who bought products outside the U.S. at inflated prices was not independent of anticompetitive effects within the U.S.

As presented above, the plaintiffs' alternative claim (i.e. the alternative theory of subject matter jurisdiction) was considered to be a new approach to subject matter jurisdiction in the field of antitrust law. Since the Supreme Court did not reject the alternative theory,<sup>395</sup> it is important to analyse how the second Court of Appeals,<sup>396</sup> to which the Supreme Court referred the *Empagran* litigation for further adjudication, considered the alternative theory.

Points (8) and (9) of the alternative theory described above were first rephrased by the second Court of Appeals first rephrased in the following way:

*"Because the appellees' [defendants'] product (vitamins) was fungible and globally marketed, they were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well."*<sup>397</sup>

Then the Court of Appeals explained how the defendants had accomplished this relationship between prices within and outside the U.S.:

*"...by fixing a single global price for the vitamins and by creating barriers to international vitamin commerce in the form of market division agreements that prevented bulk vitamins from being traded between North America and other regions."*<sup>398</sup>

At this point it is important to mention that the defendants themselves admitted<sup>399</sup> that they used this system (i.e. fixing a single global market and dividing the international market to set up barriers to commerce between the

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<sup>395</sup> See *ibid.*

<sup>396</sup> N.40.

<sup>397</sup> N.46.

<sup>398</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267,1270,n.5 (D.C.Cir.2005).

<sup>399</sup> See *ibid.*

U.S. and non-U.S. countries) to accomplish such a relationship between prices within and outside the U.S.

The second Court of Appeals rephrased point (7) above, i.e. how the system of arbitrage might work in a situation where the defendants had not put their arrangement in place:

*“Otherwise, overseas purchasers would have purchased bulk vitamins at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States, thereby preventing the appellees [defendants] from selling abroad at the inflated prices. Thus, the super-competitive pricing in the United States “gives rise to” the foreign super-competitive prices from which the appellants claim injury”.*<sup>400</sup>

According to the plaintiffs, the constitutive elements of the alternative theory that should grant subject matter jurisdiction are the following:

- 1) nature of product;
- 2) territory where product is marketed or can be bought;
- 3) possibility of product moving from one market to another;
- 4) potential for the existence of the system of arbitrage;
- 5) goal of having a single price for the product irrespective of where the product is sold;
- 6) need to put in place the arrangement of market divisions and thereby create trading barriers between different markets;
- 7) the existence of a goal of having ‘single price’ (point 5) combined with the ‘possibility of arbitrage’ (point 4) and therefore with the ‘need to

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<sup>400</sup> N.46.



have market division agreements' (point 6), meaning that prices within the U.S. are 'benchmark prices' which cause the following:

- a. prices within the U.S. 'give rise to' prices outside the U.S. and
- b. buying products outside the U.S. priced at such level caused purchasers antitrust injury.

After the second Court of Appeals acknowledged the alternative theory, the second Court of Appeals made the following statement:

*"The appellants [plaintiffs] paint a plausible scenario under which maintaining super-competitive prices in the United States might well have been a "but-for" cause of the appellants' foreign injury".*<sup>401</sup>

The second Court of Appeals' statement is confusing as it enables an interpretation (understanding) that the second Court of Appeals narrowed the alternative theory down to a 'but for' causation. In other words, the second Court of Appeals' statement can be interpreted as the alternative theory meaning nothing more than 'but for' causation.

The rest of the statement causes further confusion:

*"As the appellants [plaintiffs] acknowledged at oral argument, however, "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."*<sup>402</sup>

The problems with the statement quoted above are the following:

- Firstly, the second Court of Appeals did not explain the reasons why the plaintiffs had changed their opinion in the oral argument.

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<sup>401</sup> Ibid.

<sup>402</sup> *Empagran S.A. v. F. Hoffman–LaRoche, Ltd.*, 417 F.3d 1267,1270-1271 (D.C.Cir.2005).

- Secondly, the second Court of Appeals did not explain why ‘but for’ causation was suddenly not sufficient, despite the fact that the Supreme Court<sup>403</sup> had not rejected it.

After the second Court of Appeals changed its focus from the alternative theory to causation, and after plaintiffs changed their perception of the required type of causation between anticompetitive effects within the U.S. and foreign antitrust injury, the second Court of Appeals stated:

*“The statutory language—“gives rise to”—indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for “nexus” the appellants advanced in their brief.”*<sup>404</sup>

The problems with requiring such type of causation between the anticompetitive effects within the U.S. and the foreign antitrust injury are the following:

- Firstly, the second Court of Appeals did not explain why direct causal relationship (i.e. proximate causation) between anticompetitive effects within the U.S. and foreign antitrust injury is required.
- Secondly, the second Court of Appeal did not explain the difference between ‘but for’ causation and proximate causation.
- Thirdly, the second Court of Appeals did not explain in what way the plaintiffs’ submissions should be changed to satisfy the requirements of proximate causation.
- Fourthly, the focus on the type of causation required for subject matter jurisdiction raises the question whether the element of causation is really the element that has to be scrutinised within the context of subject matter jurisdiction. The only regulated (required) type of relationship between reason and consequences for the purposes of subject matter jurisdiction is the one in respect of the nature of anticompetitive effects that have to occur within the U.S. Neither the FTAIA nor the history of

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<sup>403</sup> See n.8.

<sup>404</sup> N.48.

subject matter jurisdiction within the field of antitrust law<sup>405</sup> require assessment of any other type of causation within the process of granting subject matter jurisdiction.

The only potential explanation why the Court of Appeals determined proximate causation between anticompetitive effects within the U.S. and foreign antitrust injury to grant jurisdiction under this alternative theory are the ‘principles of perspective comity’<sup>406</sup>.

With regard to the ‘principles of prescriptive comity’ the second Court of Appeals cited:

- one statement from the dissenting opinion in the *Hartford Fire*<sup>407</sup> case (*“the respect sovereign nations afford each other by limiting the reach of their laws”*), and
- three statements from the Supreme Court’s decision in the *Empagran* litigation<sup>408</sup>:
  - *“...ordinarily construe[ ] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations”*;
  - *“To 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”*;
  - *“Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from*

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<sup>405</sup> See Chapter 6, subsections 3.2. and 4.2.5.

<sup>406</sup> See n.48.

<sup>407</sup> *Hartford Fire Insurance Co., et al., v. California et al.*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

<sup>408</sup> N.5.

*anticompetitive conduct engaged in [in] significant part by Canadian or British or Japanese or other foreign companies”.*

There are three problems that can be identified with requiring proximate causation based on the principles of prescriptive comity.

- Firstly, the Supreme Court extensively elaborated on the issue of comity. Its elaboration considered only situations where the litigated foreign injury was independent from anticompetitive effects within the U.S.<sup>409</sup> There was no reference to the type of causation.
- Secondly, granting subject matter jurisdiction in a situation of foreign antitrust injury does not affect foreign (non-U.S.) nations protecting their own citizens. Non-U.S. nations can still provide protection to their citizens. Additional protection that the U.S. courts can offer to non-U.S. citizens is never bad. These non-U.S. affected private parties may get compensation for their suffered antitrust injuries.
- Thirdly, in a situation where non-U.S. citizens are harmed by a global cartel and not all perpetrators of this cartel are present or operate only within the non-U.S. countries where these non-U.S. citizens who suffer foreign antitrust injury come from, the non-U.S. countries cannot sufficiently help their (i.e. non-U.S.) citizens. The reason for this limited help that non-U.S. countries can grant to their citizens is the fact that the global cartel may still continue to exist unless antitrust litigation takes place in the country (i.e. in the U.S.) where the source (and perpetrators) of the global cartel are located. In other words, if some of perpetrators who take part in a global cartel are located or operate within the U.S., the efficient way to stop their operation would be to litigate a private antitrust claim against them before the U.S. courts.

The second Court of Appeals then listed a set of statements from which it is impossible to understand how the second Court of Appeals dealt with the alternative theory. In addition, these statements do not provide guidance as to

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<sup>409</sup> See subsection 3.1.8. of this chapter above.

how foreign antitrust injury should be litigated with the purpose of granting subject matter jurisdiction of the U.S. courts. These statements are of no help, either, to understand how an alternative theory can be used to satisfy the required relationship between anticompetitive effects within the U.S. and foreign antitrust injury.

The second Court of Appeals' statements are the following:

*“Applying the proximate cause standard, we conclude the domestic effects the appellants cite did not give rise to their claimed injuries so as to bring their Sherman Act claim within the FTAIA exception.”*<sup>410</sup>

*“While maintaining super-competitive prices in the United States may have facilitated the appellees' [defendants'] scheme to charge comparable prices abroad, this fact demonstrates at most but-for causation. It does not establish..., that the U.S. effects of the appellees' [defendants'] conduct—i.e., increased prices in the United States—proximately caused the foreign appellants' injuries”.*<sup>411</sup>

*“Nor do the appellants otherwise identify the kind of direct tie to U.S. commerce...”*<sup>412</sup>

There is another statement by the second Court of Appeals that requires further consideration. This statement is:

*“...appellants [plaintiffs] argue that the vitamin market is a single, global market facilitated by market division agreements so that their injuries arose from the higher prices charged by the global conspiracy (rather than from super-competitive prices in one particular market)” and continued “they [i.e. plaintiffs] still must satisfy the FTAIA's requirement that the U.S. effects of the conduct give rise to their claims.”*<sup>413</sup>

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<sup>410</sup> N.48.

<sup>411</sup> Ibid.

<sup>412</sup> Ibid.

<sup>413</sup> Ibid.

This statement is not merely confusing, as it fails provide an explanation and guidance for future antitrust litigation, but also unclear about whether the second Court of Appeals was aware of the particularities of the factual situation that it was expected to adjudicate.

In addition to this general critique, there are other problems with the statement.

- Firstly, the statement does not show whether the second Court of Appeals was aware of what a global cartel means and what the necessary conditions are for a global cartel to furnish the expected benefits to the perpetrators.
- Secondly, the second Court of Appeals did not consider it relevant to evaluate the connection between a single market (embracing the U.S. and non-U.S. countries) and a situation where anticompetitive effects and antitrust injury are present outside the U.S.
- Thirdly, the second Court of Appeals did not consider it relevant to evaluate the purpose and effect of market division agreements on the relationship between anticompetitive effects within the U.S. and foreign antitrust injury.

The substance of the alternative theory was presented above. Due to the fact that the theory was written and rephrased not only by the Supreme Court, but also by the second Court of Appeals,<sup>414</sup> it was expected that the second Court of Appeals would be aware of its own explanation and would therefore be consistent in its analysis. Unfortunately, this was not the case. Otherwise the second Court of Appeals would not have stated the following:

*“Under the appellants’ theory, it was the foreign effects of price-fixing outside of the United States that directly caused, or “g[a]ve rise to,” their*

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<sup>414</sup> N.40.

*losses when they purchased vitamins abroad at super-competitive prices.*<sup>415</sup>

The problems within this presentation of the alternative theory are the following:

- Firstly, this statement is inconsistent with how second Court of Appeals<sup>416</sup> and the Supreme Court<sup>417</sup> initially described alternative theory<sup>418</sup>.
- Secondly, this statement is not supported by the factual situation, as pleaded by the plaintiffs in the *Empagran* litigation.
- Thirdly, it should be recalled that the Supreme Court decided on foreign antitrust injury under the assumption that this injury was independent from anticompetitive effects within the U.S. Therefore, any statement delivered by the Supreme Court has to be applied with caution.

Therefore, due to all this inconsistency, confusion, lack of understanding of the factual situation, and unsounded active role in formulating the nature of the expected causation between anticompetitive effects and antitrust injury, the only plausible way to read the following second Court of Appeals' statement is to understand it as being hypothetical:

*“That the appellees [plaintiffs] knew or could foresee the effect of their allegedly anti-competitive activities in the United States on the appellants' injuries abroad or had as a purpose to manipulate United States trade does not establish that “U.S. effects” proximately caused the appellants' harm.”*<sup>419</sup>

Nevertheless, there are few elements in the statement quoted above that can be used as guidance for future litigation:

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<sup>415</sup> N.48.

<sup>416</sup> N.40.

<sup>417</sup> N.5.

<sup>418</sup> See the presentation of the alternative theory in this subsection above.

<sup>419</sup> N.48.

- knowledge, or
- foreseeability of conduct within the U.S. on plaintiffs' injuries abroad, or
- purpose of manipulating U.S. trade

are not sufficient to establish the subject matter jurisdiction of the U.S. courts.

Nevertheless, a few observations can be made. There is nothing wrong with refusing subject matter jurisdiction in a situation where anticompetitive conduct within the U.S. caused anticompetitive effects only outside the U.S., or in a situation where these anticompetitive effects outside the U.S. are separate from - not connected with - anticompetitive effects within the U.S. The situation is completely different when anticompetitive conduct within the U.S. caused anticompetitive effects within the U.S. as well as outside the U.S., and there is no possibility of separating the anticompetitive effects into 'only U.S.' and 'only non-U.S.'

A similar argument to the one just described can be applied to a situation where the perpetrators have the purpose of affecting only trade within the U.S. (i.e. causing anticompetitive effects only within the U.S.). This means that in a situation where all that is needed to cause anticompetitive effects within the U.S. is to conduct certain activities within the U.S., anticompetitive effects and antitrust injury outside the U.S. may be classified simply as collateral damage. The argument may change in a situation where anticompetitive effects outside the U.S. and antitrust injury outside the U.S. are necessary to achieve anticompetitive effects within the U.S.

Irrespective of this explanation of the alternative theory, the question that cannot be left unanswered is the following: what is the factual situation to which the second Court of Appeals applied its ruling?

The answer can be found in the following statement:



*“It was the foreign effects of price-fixing outside of the United States that directly caused or “g[a]ve rise to” the appellants’ [plaintiffs’] losses when they purchased vitamins abroad at super-competitive prices.”*<sup>420</sup>

This statement enables to phrase the following ruling. In a situation where foreign antitrust injury is caused only by anticompetitive effects outside the U.S., foreign antitrust injury cannot be granted subject matter jurisdiction and, consequently, cannot be litigated before the U.S. courts.

It seems that the second Court of Appeals merely confirmed the ruling of the Supreme Court on foreign antitrust injury that is independent from anticompetitive effects within the U.S. The Supreme Court referred the *Empagran* litigation back to the second Court of Appeals in order to consider a factual situation where the litigated foreign antitrust injury was not independent of anticompetitive effects within the U.S. Consequently, the second Court of Appeals did not decide on the alternative theory in a factual situation where foreign injury was dependent, but only in a factual situation where foreign antitrust injury was independent from anticompetitive effects in the U.S. To the extent that the second Courts of Appeals did not decide the applicability of the alternative theory claim to dependent foreign injury, this question remains an open one.

Therefore, the second Court of Appeals’<sup>421</sup> final decision on the factual situation quoted above did not provide guidance on whether and how foreign antitrust injury that is not independent of anticompetitive effects within the U.S. can be litigated before the U.S. courts. In addition, the second Court of Appeals’ judgment does not provide any response to and guidance on the use of the alternative theory in litigating foreign antitrust injuries before the U.S. courts in situations where global cartels cause anticompetitive effects and antitrust injuries outside the U.S. that are not independent from anticompetitive effects and antitrust injuries within the U.S.

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<sup>420</sup> Ibid.

<sup>421</sup> N.40.

In conclusion, the alternative claim did not help the plaintiffs in the *Empagran* litigation to secure the subject matter jurisdiction of the U.S. courts. This outcome is a result of two factors: the plaintiffs' switch in argumentation and the second Court of Appeals' active role in interpreting the facts and the arbitrary adjudication on the requirements of an alternative theory.

The best that can be concluded from the *Empagran* litigation on an alternative claim is that this type of claim cannot be relied on by private plaintiffs who suffer independent foreign antitrust injury.

It is submitted that anything beyond this point should be considered as non-conclusive. The Supreme Court did not reject an alternative claim and at the same time did not place any limits on, or requirements for, how an alternative theory has to be analysed and applied. The second Court of Appeals provided its own interpretation of an alternative claim. In formulating its views on the alternative claim, the second Court of Appeals did not provide an explanation as to why it focused the alternative claim on the issue of causation, and why it required a particular type of causation (i.e. direct or proximate causation) between anticompetitive effects within the U.S. and foreign antitrust injury.

Whether the second Court of Appeals' decision on the alternative claim is the correct one may be re-examined in future litigation.<sup>422</sup> The re-examination of an alternative claim is also necessary for the following practical reasons:

- It enables courts to evaluate a global (international) cartel in its full extent;
- It provides a framework to adjudicating courts for the factual elements to take into consideration and for their analysis;
- Litigants and adjudicating courts need guidance;
- It represents a legal argument that can result in a benefit for private parties who suffer foreign antitrust injury that is not independent.

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<sup>422</sup> On the position of post-*Empagran* U.S. courts on the alternative claim see Chapter 3, subsection 5.2.

## 3.2 Concluding Remarks

The subsections above presented the *Empagran* litigation from the perspective of the issues that were considered as relevant either by the parties or by the adjudicating courts to reaching a decision as to whether the plaintiffs were entitled to compensation before the U.S. courts for antitrust injury suffered outside the U.S.

Each of the issues was presented in terms of its relevance to the *Empagran* litigation and to future litigation. Each of the issues was analysed in the following way: firstly, the arguments of the litigants in support or against a particular issue were considered. Secondly, the type of decision that the adjudicating courts reached on that particular issue was considered. Thirdly, the *Empagran* courts' decisions were assessed in terms of the reasons that the adjudicating courts set out in support of their decisions. Fourthly, it was examined whether the reasons given by the *Empagran* courts were clear, consistent, convincing and persuasive. Fifthly, this analysis of the *Empagran* courts' reasoning enabled the listing of questions that remained unresolved. Finally, the in-depth analysis of the *Empagran* litigation enabled the determination of the extent to which the decisions reached by the *Empagran* courts can be used as precedents in future litigation.

All these issues were raised in the *Empagran* litigation. Despite the fact that all of these issues are connected to the *Empagran* litigation, it is not possible to determine the inter-connection between all of them. Any attempt would result in a distortion of their significance and contribution to the outcome of the litigation.

The simplest way to summarize the analysis in section 3 of this chapter is to list the following statements:

- (1) The *Empagran* litigation may be perceived as nothing more than merely another case on the jurisdiction of U.S. courts. Nevertheless, the factual situation and issues argued and adjudicated in this case give the

*Empagran* litigation an important place in the development of antitrust law enforcement.<sup>423</sup>

- (2) Private plaintiffs in the *Empagran* litigation, or whoever may read the *Empagran* judgments, may agree with the outcome of the litigation, i.e. that foreign private plaintiffs were not granted subject matter jurisdiction to litigate their foreign private antitrust injury before the U.S. courts. Nevertheless, this outcome in itself does not reveal anything about the plausibility of the *Empagran* courts' reasoning that lead to the outcome. In addition, this outcome cannot be interpreted to mean that foreign nationals can never litigate their foreign antitrust injury before the U.S. courts.
- (3) The contribution and quality of the adjudicating process in *Empagran* may be evaluated in a convincing way. Nevertheless, an in-depth analysis of the courts' reasoning shows that the courts' decisions lacked clear and sufficient reasoning. This means that it is not convincing.
- (4) The private plaintiffs in the *Empagran* litigation may be convinced that they knew what they were expected to do and that they litigated their case on very solid grounds and with persuasive arguments. Nevertheless, the arguments the litigants used were not genuinely convincing and did not support their submissions.
- (5) There may be a perception that litigants and adjudicating courts have sufficient knowledge and expertise to address this new type of factual situations and the related new type of legal issues. Nevertheless, the *Empagran* litigation showed that this may not always be the case.
- (6) The *Empagran* litigation may be perceived as being relevant only to the U.S. as it deals with the subject matter jurisdiction of U.S. courts. Nevertheless, the facts and issues argued and, to a certain extent,

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<sup>423</sup> This is certainly true for private antitrust law enforcement. Nevertheless, the possibility of private parties litigating their private antitrust injuries before the national courts of countries different from the ones where private plaintiffs suffer their private antitrust injury may also have consequences for public antitrust law enforcement and cooperation between national antitrust law enforcement authorities.

settled in this litigation show that the *Empagran* case may have implications on antitrust law enforcement in non-U.S countries. Despite the fact that the adjudicating courts in the *Empagran* litigation were aware of the possibility of their decisions having an impact on non-U.S. countries, the adjudicating courts did not offer guidance for future litigation on what issues to take into consideration and how to evaluate these issues in relation to antitrust law enforcement before the non-U.S. courts.

Ending a conclusion by listing general comments does not provide guidance to litigants and adjudicating courts for future litigation. Without compromising the detailed analysis on each of the issues presented in subsections 3.1. of this chapter above, it is important to offer a clear and precise analysis of the contribution that the *Empagran* litigation delivered to the litigation of foreign antitrust injury before the U.S. courts. The simplest way to deliver this analysis is to list the issues on which the *Empagran* case provides a clear ruling (the clear issues) and the issues on which it does not (the unresolved issues).

The issues which after the *Empagran* litigation can be classified as clear issues and can consequently be used as precedents in future litigation are the following:

- (1) A private party cannot claim compensation for a suffered antitrust injury merely by relying on transactions the private party had concluded with the defendants. A private party has to prove the existence and functioning of the cartel of which defendants were members to satisfy the requirement of the existence of anticompetitive conduct.
- (2) The existence of the global nature of the cartel that includes perpetrators or activities in pursuance of the cartel being present in the U.S. is not sufficient to establish the subject matter jurisdiction of the U.S. courts. The subject matter jurisdiction of the U.S. courts cannot be established without the presence of anticompetitive effects within the U.S.

- (3) The place (i.e. country) where private plaintiffs conclude transactions with defendants resulting in the private plaintiffs suffering antitrust injury is not relevant to establishing the subject matter jurisdiction of the U.S. courts. This means that the fact that the plaintiffs concluded transactions with the defendants outside the U.S. is not an obstacle to the plaintiffs litigating their antitrust injury before the U.S. courts.
- (4) The nationality of private plaintiffs is not relevant to the process of establishing the subject matter jurisdiction of the U.S. courts. This means that non-U.S. nationals can litigate their suffered antitrust injuries before the U.S. courts and obtain compensation.
- (5) Fairness cannot be used as an argument on its own to establish the subject matter jurisdiction of the U.S. courts. There are requirements regulated by statutes or introduced by case law that have to be fulfilled for the U.S. courts hearing private antitrust injury claims.
- (6) Foreign antitrust injury (i.e. injury suffered outside the U.S.) cannot be litigated before the U.S. courts in a situation where it is independent from the anticompetitive effects within the U.S.
- (7) The policy of deterrence does not have any relevance in a situation where the litigated foreign antitrust injury is independent from anticompetitive effects within the U.S.
- (8) It is in conformity with the principle of comity that foreign antitrust injury which is independent from the anticompetitive effects within the U.S. cannot be litigated before the U.S. courts.
- (9) An alternative theory for establishing subject matter jurisdiction is an acceptable way to argue that the subject matter jurisdiction of the U.S. courts should be established in a situation of foreign antitrust injury.

The issues that remain unresolved after the *Empagran* litigation, and therefore are subject to further (theoretical) analysis and judicial evaluation, are the following:

- (1) A general interpretation of the §6a(2) of the FTAIA that may serve as guidance for adjudication courts in the future where they are in a position to analyse the existence of the subject matter jurisdiction of the U.S. courts.
- (2) The requirements that have to be fulfilled in order to determine whether foreign antitrust injury is independent from or dependent on anticompetitive effects within the U.S.
- (3) The nature of the required relationship between anticompetitive effects in the U.S. and foreign antitrust injury that is not independent from the anticompetitive effects in the U.S. in order to have the foreign antitrust injury litigated before the U.S. courts.
- (4) The relevance of the policy of deterrence and the method of its use in a situation where foreign antitrust injury is not independent from anticompetitive effects within the U.S.
- (5) The elements and assessment of comity in a situation where foreign antitrust injury is not independent from anticompetitive effects within the U.S.
- (6) The conditions under which the alternative theory of subject matter jurisdiction can become acceptable grounds on which private plaintiffs can successfully argue for the existence of subject matter jurisdiction of the U.S. courts.
- (7) The relationship between antitrust standing, antitrust injury, and antitrust causation on one side, and the subject matter jurisdiction of the U.S. courts on the other.

The analysis of the adjudicating courts' decisions and of the reasons that each of the adjudicating courts gave in delivering their decision showed that there is one issue that has a rather unique nature. The unique nature of this issue lies in the fact that it cannot be understood in a consistent and undisputable manner. Consequently, this issue enables different interpretations of the rule the

*Empagran* litigation delivered. It follows that these different interpretations lead to inconsistency in future litigation. This issue is:

- (1) Whether a foreign antitrust injury can be litigated before the U.S. courts?

None of the adjudicating courts in the *Empagran* litigation, including the Supreme Court, stated that a foreign antitrust injury could not be litigated and compensated before the U.S. courts.

The second Court of Appeals' decision that litigated antitrust injury has to arise from the U.S. effects brought some uncertainty to answering this question. It was explained above that none of the adjudicating courts, including this second Court of Appeals, provided guidance on how antitrust injury can be felt outside the U.S. and at the same time derive from the anticompetitive effects within the U.S.

It is submitted that there are two ways in which it is possible to resolve this uncertainty.

- The first is related to the comparison of judgments delivered by the adjudication courts in the *Empagran* litigation. It is important to remember that the second Court of Appeals based its decision on false grounds. Despite the fact that the Supreme Court did not require that the §6a(2) provision of the FTAIA be interpreted in a particular way, the second Court of Appeals delivered its interpretation, i.e. that antitrust injury has to arise from the anticompetitive effects in the U.S., without providing an explanation of why only this type of interpretation of the §6a(2) was permissible. This type of decision may not be problematic for the outcome of the *Empagran* case because of the way in which the second Court of Appeals construed the factual situation on which it then delivered its ruling, but a problem may arise in a situation where the second Court of Appeals' interpretation is perceived as a general rule of law (i.e. case law binding precedent) for future litigations.



- The second way is related to what this thesis proposes. It is submitted that because of “*today’s highly interdependent commercial world*”<sup>424</sup>, a new category of anticompetitive conduct, anticompetitive effect, and antitrust injury has to be introduced. The thesis determines this category as “transborder”. In a situation where the requirements of the transborder category are fulfilled,<sup>425</sup> antitrust injury may be suffered outside the U.S., and at the same time arise from the anticompetitive effects within the U.S., as it would not be possible to divide anticompetitive effects into ‘only U.S. effects’ and ‘only non-U.S. effects’. The transborder category of antitrust injury will enable the resolution of the problems that arise from the division between independent and dependent antitrust injury, which the adjudicating courts in the *Empagran* litigation left unresolved. Last but not least, the introduction of the transborder category will enable the evaluation of the nature of global cartels<sup>426</sup> and the consideration of a variety of possible relationships that may exist between antitrust law enforcements in different countries (the U.S. and non-U.S. countries).

## 4 Significance of the *Empagran* Litigation and New Challenges

There are two ways in which it is possible to look at the *Empagran* litigation: from a narrow and from a wider perspective.

In a situation where the *Empagran* litigation is evaluated from a narrow perspective, all that is possible to state is that the case is nothing more than a private antitrust litigation in which the adjudicating courts resolved a dispute between the parties so that the plaintiffs were refused subject matter jurisdiction of the U.S. courts and therefore deprived of the possibility of obtaining compensation for their suffered foreign antitrust injury on the basis of U.S. antitrust law.

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<sup>424</sup> N.346.

<sup>425</sup> See Chapter 5, subsection 2.

<sup>426</sup> Not all global cartels have same characteristics and modus operandi.

In a situation where the *Empagran* litigation is evaluated from a wider perspective, it is possible to state that it has shown the way for private antitrust law enforcement in the international context to be developed further. This means that the *Empagran* litigation may be perceived as a cornerstone that in fact made it possible for antitrust law to develop in this direction.

The *Empagran* litigation acknowledged that global cartels are a reality, that global cartels can affect markets and private parties in the U.S. and in non-U.S. countries, and that non-U.S. nationals who suffer antitrust injury in relation to the conduct of global cartels may litigate, under certain conditions, their foreign antitrust injury before the U.S. courts.

The subsections above presented the issues that the *Empagran* litigation resolved and the issues that require further analysis and adjudication. This means that the *Empagran* litigation raised a number of new questions that had not been considered before.

In addition to the issues and questions that were raised by the particularities of the adjudicating courts' decisions, the litigants' arguments, and the adjudicating courts' reasoning in the *Empagran* litigation, the case made it necessary to consider issues whose importance extends beyond a single antitrust litigation.

(1) The fact that foreign antitrust injury may be compensated before the U.S. courts on the basis of U.S. antitrust law requires the reconsideration of:

- The aims of U.S. antitrust law;
- The purpose of private antitrust law enforcement;
- The object of protection;
- The need to be concerned with factual situations outside the U.S. and potentially interfere with it.

(2) The fact that the operation of global cartels involves anticompetitive conduct taking place in more than one country, including the U.S. and non-U.S. countries, requires the consideration of:

- The factual difference in the nature of global cartels;
- The factual difference in the way that anticompetitive conduct, anticompetitive effects, and antitrust injury in different countries (the U.S. and non-U.S. countries) may be related;
- The need to establish a process to evaluate the relationship between what is happening outside the U.S. and within the U.S. in light of the world market becoming more connected;
- The fact that antitrust litigation in one country may not be sufficient to deal effectively with global cartels;
- The fact that public antitrust enforcement and cooperation between public antitrust enforcement institutions from different countries may not be sufficient to control global cartels.

(3) The fact that non-U.S. countries are developing their own system of private antitrust law enforcement requires the consideration of:

- The possibility that the same global cartel is subject to private antitrust litigation before the courts of different countries;
- The possibility that the same antitrust injury is litigated before the courts of different countries;
- The relevance (impact) of private antitrust law enforcement proceeding in one country on private antitrust law enforcement litigation in other countries;

- The possibility that the purpose of private antitrust law enforcement is different in different countries.

## Chapter 3: Post-*Empagran* Litigation

### 1 Introduction

The U.S. Supreme Court in the *Empagran* case opened a door to private plaintiffs being able to litigate their foreign antitrust injuries before the U.S. courts. Unfortunately, the Supreme Court did not show the path through this door, but referred the case back to the second Court of Appeals for a decision. The second Court of Appeals did not accept the Supreme Court's invitation to walk through the door, but placed an unexpected obstacle before the door. This thesis submits that private litigants have been left without instructions<sup>1</sup> as to how to overcome this obstacle and successfully enter through the door opened by the Supreme Court.

The *Empagran* case is considered to be the first antitrust litigation where the Supreme Court of the U.S. was asked to decide on the permissibility of foreign antitrust injury to be litigated before the U.S. courts.<sup>2</sup> It is submitted that the Supreme Court's *Empagran* decision opened wide the doors of the U.S. courts and thus permitted private plaintiffs who suffer antitrust harm outside the U.S. to bring private antitrust claims before the U.S. courts and seek compensation for their suffered antitrust injury.<sup>3</sup> At this point, a reminder is necessary that particular caution is required to understand correctly the extent of the issues decided through *Empagran*, and the significance of the Supreme Court's decision in particular for future antitrust litigation.<sup>4</sup> This means that the outcome of *Empagran* cannot be considered as guidance on its own for private litigants and adjudicating courts on how to conduct adjudication in future litigation. The arguments brought before the courts through *Empagran* and the reasoning that the courts used in formulating their decisions enable us to understand that *Empagran* does not provide guidance for private antitrust litigation, in particular and most importantly, with regard to how to establish the existence of a

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<sup>1</sup> See section 7 of this chapter.

<sup>2</sup> See Chapter 6, subsections 3.2. and 4.2.3.

<sup>3</sup> The relationship between the *Empagran* litigation and pre-*Empagran* cases is explained in Chapter 6.

relevant type of connection between litigated (foreign) private antitrust injury and anticompetitive effect (and antitrust injury) in the U.S. in order to have this antitrust injury litigated before the U.S. courts and obtain compensation.<sup>5</sup>

The *Empagran* litigation is not the last private antitrust litigation where private plaintiffs litigated their (foreign) private antitrust injury before the U.S. courts. Irrespective of confusions present in the reasoning of the adjudicating courts throughout *Empagran* and the questions these courts did not answer, private plaintiffs were not reluctant to continue to litigate their foreign antitrust injury before the U.S. courts. This antitrust litigation that private plaintiffs initiated after the *Empagran* litigation resulted in cases (i.e. post-*Empagran* cases) that will be analysed in this chapter.<sup>6</sup>

The metaphor offered at the beginning of this chapter included some colloquial words, i.e. doors, path, obstacle. Such words were used merely to illustrate in a simple way the legal issues, arguments, rulings, analysis and conclusions presented in detail and in a comprehensive manner in the previous chapter (i.e. chapter 2). As mentioned above, the analysis in this chapter (i.e. chapter 3) would not be possible without the existence of post-*Empagran* cases. Nevertheless, it is important to explain that the legal (i.e. primary) reason for conducting analysis in this chapter is not the existence of post-*Empagran* litigation itself, but the need to explore the relationship between the *Empagran* litigation and post-*Empagran* cases.

This chapter will analyse the nature of the relationship between *Empagran* and post-*Empagran* cases by providing answers to the following questions:

- Whether *Empagran* (i.e. decisions reached by the adjudicating courts) has influenced the adjudication process in post-*Empagran* litigation and to what extent;

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<sup>4</sup> See Chapter 2, subsections 3.1.6., 3.1.10, and 3.2., and section 4.

<sup>5</sup> See Chapter 2, subsection 3.1.7.5.

<sup>6</sup> This chapter analyses post-*Empagran* cases that were available through the Westlaw International database on 10 April 2015.

- Whether post-*Empagran* courts perceive the decisions in the *Empagran* case as binding, undisputed legal precedents, or merely as advisory statements subject to further development and review;
- Whether post-*Empagran* litigation has provided encouragement and support to private litigants to walk through the door opened by the Supreme Court.

The question of the relationship between the *Empagran* litigation and subsequent cases is also of great practical value. It is important that adjudicating courts in post-*Empagran* litigation do not misinterpret the extent, reasoning, and nature of the decisions reached by the adjudicating courts in the *Empagran* saga. If there is misinterpretation then private antitrust law enforcement may take a questionable direction and, consequently, affect the rights of private plaintiffs who suffer foreign antitrust injury.

Therefore, it is important to be reminded of the analysis undertaken in chapter 2, which can be summarized as follows: the decisions in the *Empagran* litigation were based on several assumptions; the *Empagran* litigation raised more questions than it answered; the *Empagran* litigation did not provide guidance for future private antitrust litigation, and there exists an unresolved relationship between the Supreme Court's acceptance of the possibility that the private plaintiffs litigate their foreign antitrust injury claim on the basis of the alternative theory (as long as the facts support the existence of the alternative theory<sup>7</sup>) and the position of the Second Court of Appeals with regard to proximate causation between anticompetitive effect (antitrust injury) in the U.S. and litigated (foreign) private antitrust injury being the legal standard under which private plaintiffs who suffer antitrust harm outside the U.S. can bring their private antitrust claims before the U.S. courts.

The analysis of how the *Empagran* decision was applied in subsequent litigation provides a practical opportunity to review how adjudicating courts are asked to consider problematic situations when they have only one, binding but unclear decision that can be classified as the only relevant precedent on the legal issue

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<sup>7</sup> The existence of the fact that can support the alternative theory claim was confirmed in a separate proceeding, following the Supreme Court's decision (see Chapter 2, section 2).

under adjudication.<sup>8</sup> The law in this area is not definitively established<sup>9</sup> and is not even sufficiently developed.<sup>10</sup> Therefore, this chapter provides a critical evaluation of the existing approach that adjudicating courts have adopted in deciding whether foreign private antitrust injury can be compensated. The chapter also identifies the issues through post-*Empagran* cases which, according to this thesis, were correctly decided, and those which were not and, therefore, need to be changed in any future litigation.

## 2 The Significance of this Chapter

A crucial proposition of this thesis is the submission that the *Empagran* litigation is a starting point for a new type of private antitrust law litigation. The *Empagran* litigation provided some analysis and decisions, but it has not definitively framed the area of private antitrust law enforcement within the international context. The *Empagran* litigation has raised a number of issues, some of which were decided (correctly/appropriately or not), but some were left open.<sup>11</sup>

This chapter confirms that the law on litigating (foreign) private antitrust injury is under development and that it is important to understand how and why it develops in the manner that it does. It is relevant to analyse whether adjudicating courts perform their role in a purely technical manner (i.e. finding a reason for their decisions in existing precedents), or whether they look for legal arguments in support of their decision by analogy (i.e. theoretical and legal arguments from other areas of antitrust law). Understanding the way post-*Empagran* adjudicating courts reach their decisions will demonstrate the extent of the influence and impact of the *Empagran* case on subsequent litigation.

This thesis maintains that law cannot be understood by focusing merely on understanding the words in a court's judgment. It is crucial to understand the

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<sup>8</sup> The analysis of post-*Empagran* cases shows that courts do attribute significance to whether the particular case was decided prior to the enactment of the FTAIA and to the Supreme Court's and second Court of Appeals' in the *Empagran* litigation.

<sup>9</sup> See further analysis and commentary below.

<sup>10</sup> See Chapter 4, section 2.

<sup>11</sup> For in-depth explanation see Chapter 2, subsection 3.2.



reasoning that leads to the final holding (i.e. the decision). This is the approach that was taken in the previous chapter (i.e. chapter 2) and the same approach is followed in this chapter.

Analyzing the reasoning behind post-*Empagran* judgments may help to understand whether the outcome in post-*Empagran* cases is due to: a) the existing status of the law<sup>12</sup> (i.e. by making reference to the *Empagran* litigation); b) the individual factual situation of each case; c) poor advocacy (i.e. the way in which litigants argued their case); d) reasons outside the area of antitrust law.

Understanding post-*Empagran* case law correctly enables constructive critical analysis. This type of analysis will be provided at the end of this chapter. The purpose of such analysis is to help litigants and adjudicating courts in future litigation. The analysis will take the following form: first, it will identify the issues in post-*Empagran* case law that are argued in this thesis to be correct and that should be relied on in future litigation. Secondly, the analysis will consider the problematic aspects of post-*Empagran* case law, e.g. the lack of consistency that needs to be addressed in future cases. Finally, the analysis will identify the issues that have neither been raised nor litigated to-date, and submit that these issues need to be considered in future litigation.

### 3 Structure of the Chapter

Section 1 above presented the purpose of the chapter arguing that post-*Empagran* litigation is a natural development of the decisions taken by the adjudicating courts in the *Empagran* litigation saga. Therefore, it is important to understand the relationship between the *Empagran* case and subsequent relevant case law.

Section 2 above explained that to understand the relationship between the *Empagran* case and subsequent case law correctly, it is important to understand

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<sup>12</sup> A reminder is due here of what was previously mentioned, i.e. that the decisions reached by the Supreme Court and Second Court of Appeals in the *Empagran* litigation are the only cases that can be considered as legally binding precedents on the issue of the permissibility of litigating foreign private antitrust injury before the U.S. courts. It is demonstrated further in this chapter that post-*Empagran* courts themselves recognise the binding legal authority of the decisions reached by these two courts.

the reasoning behind the adjudicating courts' decisions, and how they were formulated. Only this type of analysis can enable the formulation of opinions on the validity of the existing law and provide recommendations for arguments in future litigation.

In-depth analysis of post-*Empagran* litigation is not possible without first presenting a general overview of (foreign) private antitrust law litigation. This overview is the subject of section 4. Concentrating on one specific issue present in the post-*Empagran* litigation is not possible without understanding how that specific issue fits into the wider picture of post-*Empagran* case law. This section 4 will argue that post-*Empagran* case law is formulated predominantly by District Court decisions. Some post-*Empagran* adjudicating courts do recognize the importance of the *Empagran* litigation on the development of the law. The problem arises when post-*Empagran* adjudicating courts apply the *Empagran* judgment to factual situations that are different from that of *Empagran* and that have no connection with foreign antitrust injury, e.g. factual situations concerning imports to the U.S., commercial transactions concluded between private parties within the U.S., domestic antitrust injury, etc. The reason why these decisions are included in the analysis is that some of the reasoning developed in litigation that address foreign private antitrust injury is used in litigation that address issues that have no connection with foreign antitrust injury, and vice versa. The last issue that section 4 will address is the question of whether the Foreign Trade Antitrust Improvement Act (hereafter referred to as FTAIA) is a statute that regulates the subject matter jurisdiction of U.S. courts, or it is a statute that regulates substantive antitrust claim. The status of the FTAIA was not relevant to the *Empagran* litigation. This question has arisen in post-*Empagran* case law and courts have been divided on the issue. The FTAIA is a statute on which private plaintiffs rely in litigating their foreign private antitrust injury before U.S. courts. This is the reason why the present thesis cannot ignore this matter.

The core analysis of the relationship between the *Empagran* case and post-*Empagran* litigation will be found in section 5. This section has two objectives. Firstly, it will present reasons as to why the post-*Empagran* cases were decided in the way they were, and consider whether reference to the *Empagran* litigation is made in a correct manner. Secondly, the analysis will seek to

establish the extent to which post-*Empagran* cases provide answers to questions left open by the adjudicating courts in the *Empagran* litigation. This section will also examine whether the post-*Empagran* cases provide guidance on the criteria for deciding whether foreign anticompetitive effect (and antitrust injury) are independent from anticompetitive effect (and antitrust injury) within the U.S. This section will also address the question whether post-*Empagran* courts understand and apply the ‘alternative theory’ that was considered by the Supreme Court in the *Empagran* litigation as a possible basis on which to litigate foreign private antitrust injury before the U.S. courts.<sup>13</sup> This is a particularly challenging question, as the post-*Empagran* adjudicating courts relied for support for their decisions on theories that were named differently from the ‘alternative theory’. The Second Court of Appeals in the *Empagran* litigation did not consider the Supreme Court’s alternative theory request, but narrowed its adjudication to the problematic ‘but-for’ causation.<sup>14</sup> Thus an enquiry is appropriate into whether post-*Empagran* adjudication courts have attributed sufficient attention to this relationship between the Supreme Court’s and the Second Court of Appeals’ use of alternative theory, and what their position was with regard to the required type of relationship between anticompetitive effects in the U.S. and (foreign) private antitrust injury that private plaintiffs litigated before the U.S. courts. The remaining three issues that this section will address are those of comity, antitrust standing and antitrust injury.

The element of comity was taken into consideration by all adjudicating courts in the *Empagran* litigation, but only the Supreme Court and the Second Court of Appeals explicitly used comity as an argument in support of their decision.<sup>15</sup> Therefore, a question arises whether post-*Empagran* adjudicating courts provided clarity on how comity affects the adjudicating process. Antitrust standing (but not antitrust injury) was raised as an issue in the *Empagran* litigation and was considered and applied as if the case had been about a purely

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<sup>13</sup> See Chapter 2, subsection 3.1.10.

<sup>14</sup> Ibid.

<sup>15</sup> See Chapter 2, subsection 3.1.8.

domestic situation.<sup>16</sup> Therefore, it is necessary to consider whether the post-*Empagran* judgments differ in this regard.

One of the major failures of the *Empagran* litigation (particularly of the Supreme Court's decision) is that the courts failed to provide clear, concise, and applicable guidance to private parties and adjudicating courts on how (foreign) private antitrust injury had to be presented and analysed before the U.S. courts for private plaintiffs to obtain a satisfactory antitrust remedy. Section 6 below will address the question whether post-*Empagran* case law provides such guidance. This section will analyse the reasoning of post-*Empagran* judges in formulating the grounds on which they reached their decisions. The analysis of this reasoning will provide an answer to the question of the consistency of post-*Empagran* case law. The purpose of section 6 is not to criticise the plausibility of the decisions delivered by post-*Empagran* courts. Therefore, the analysis will not challenge post-*Empagran* cases in terms of whether the final decision is in conformity with the arguments provided by the litigants to the adjudicating courts.

This chapter will end with section 7, which will provide an overview of the conclusions reached in each of the earlier sections. The most important conclusion will be the answer to the question whether post-*Empagran* case law recognizes the right of private plaintiffs to litigate foreign antitrust injury before the U.S. courts, and if so, under what conditions. This section will also formulate the grounds on which this thesis will propose a standard<sup>17</sup> for the litigation of foreign private antitrust injury can be litigated before the U.S. courts.

## 4 Overview of Post-*Empagran* Case Law

The *Empagran* litigation is considered as a starting point, i.e. a new beginning; namely, the beginning of the development of private antitrust law enforcement within the international context. As stated above, the *Empagran* litigation is considered to be the first antitrust litigation where the Supreme Court of the

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<sup>16</sup> There is no doubt that the issues of antitrust standing and antitrust injury do play important roles in private antitrust law enforcement within the domestic context.

<sup>17</sup> See Chapter 5.

U.S. was asked to decide on the permissibility of foreign antitrust injury to be litigated before the U.S. courts. Comparisons of the factual situation litigated in *Empagran* with factual situations in pre-*Empagran* cases where private antitrust litigation addressed factual situations that had international elements (i.e. litigants having non-U.S. nationality, and/or elements of anticompetitive conduct being of a non-U.S. nature, and/or anticompetitive effects being of a non-U.S. nature, and/or antitrust injury extended beyond U.S. territorial borders)<sup>18</sup> reveals that the Supreme Court accepted as being in general permissible that foreign private antitrust injury should be litigated before the U.S. courts irrespective of the nationality of the litigants, the place where the private parties concluded the transactions, whether the private plaintiffs obtained goods/services, and whether the goods/services ever entered the national territory of the U.S.

Therefore, it is appropriate to examine whether, and to what extent, the *Empagran* litigation influenced the private antitrust law litigation that followed. This is not to say that this chapter will cover every single aspect of private antitrust law enforcement. The thesis itself imposes certain restrictions on the conducted research.

The selection of post-*Empagran* cases for the purposes of analysis in this chapter was made by focusing on:

- 1.) Case law that used the *Empagran* decisions as precedents, and
- 2.) Case law covering issues that were either raised during the *Empagran* litigation (e.g. proximate causation between anticompetitive effects and antitrust injury) or require answers to the questions remaining unresolved after the *Empagran* litigation (e.g. alternative theory claim, comity).

The result of this selection of post-*Empagran* case law provides sufficient material to understand the U.S. courts' approach to adjudicating private antitrust injury in situations where facts (i.e. nationality of litigants, elements of antitrust cartel, consequences of anticompetitive activities) extend beyond

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<sup>18</sup> See Chapter 6, subsections 2.1.2. and 2.1.3.

U.S. territorial borders. In addition, the analysis in this chapter will demonstrate the way in which the U.S. courts developed this newly formulated area of private antitrust law litigation.

The purpose of this section is not to provide in-depth analysis of the courts' reasoning. This will be done in subsequent sections. This section seeks only to provide a general evaluation of the material that will be the object of analysis in this chapter. This general evaluation is centred on three aspects the post-*Empagran* case law:

- a.) Authority of judgments;
- b.) Factual situations adjudicated by judgments;
- c.) Nature of the question that requires adjudication.

## 4.1 Authority of Judgments

Post-*Empagran* antitrust litigation where adjudicating courts made reference to the *Empagran* litigation predominantly ends at the district court level.<sup>19</sup> This simply means that among all post-*Empagran* cases analysed in this chapter, there are relatively few cases where private plaintiffs appealed and were consequently decided by Courts of Appeals. This thesis does not need to analyse the reasons why post-*Empagran* case law is predominantly made by district courts. Nevertheless, it seems appropriate to state that these District Courts may use decisions by Courts of Appeals as precedents. Therefore, private litigants may not consider it necessary to appeal decisions reached by District Courts.

It follows that the focus of the present research has to be on the nature of precedents that District Courts and Courts of Appeals use in delivering their judgments. Bearing in mind the purpose of this thesis, the focus of the present research has to be on the impact that the *Empagran* litigation had on post-

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<sup>19</sup> There is no need to list separately District Courts' judgments and Court of Appeals' judgments. The authority of each post-*Empagran* case cited in this chapter can be seen by looking at the footnote where the judgment is mentioned.

*Empagran* litigation. The analysis of precedents that post-*Empagran* courts used in delivering their decisions will provide information on whether and to what extent the *Empagran* litigation shaped post-*Empagran* antitrust litigation.

The analysis of precedents used in post-*Empagran* cases reveals that post-*Empagran* case law can be divided into seven categories.

The first category includes the Court of Appeals' decision<sup>20</sup> that was influenced by the Supreme Court's<sup>21</sup> decision and the Second Court of Appeals'<sup>22</sup> decision in *Empagran*. It is also possible to add to this category one Court of Appeals<sup>23</sup> decision that was influenced, in addition to the *Empagran* decisions just mentioned, by another post-*Empagran* Court of Appeals decision, and one Court of Appeals<sup>24</sup> decision that was influenced, in addition to the type of decisions just mentioned, by post-*Empagran* District Court decisions.

Secondly, there are Courts of Appeals decisions that were influenced by the *Empagran* Supreme Court's<sup>25</sup> decision in connection with post-*Empagran* District Court decisions,<sup>26</sup> or post-*Empagran* Court of Appeals decisions<sup>27</sup>.

The third category is one constituted by District Courts decisions<sup>28</sup> where the adjudicating courts use as precedents the Supreme Court's<sup>29</sup> decision and second Court of Appeals'<sup>30</sup> decision in the *Empagran* litigation.

<sup>20</sup> *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir.2012).

<sup>21</sup> *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

<sup>22</sup> *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005).

<sup>23</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981 (9th Cir.2008).

<sup>24</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395 (2d Cir.2014).

<sup>25</sup> N.21.

<sup>26</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir.2011); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650 (7th Cir.2011).

<sup>27</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir.2012); *U.S. v. Hui Hsiung*, 758 F.3d 1074 (9th Cir.2014); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir.2015); *U.S. v. Hui Hsiung*, 778 F.3d 738 (9th Cir.2014); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir.2014).

<sup>28</sup> *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815 (N.D.Ill.); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017 (S.D.N.Y.); *In re Monosodium Glutamate*, 2005 WL 2810682 (D.Minn.); *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777 (N.D.Cal.2007); *American Pan Co. v. Lockwood Mfg., Inc.*, 2008 WL 471685 (S.D.Ohio).

The fourth category of post-*Empagran* judgments relates to cases where District Courts, in addition to the Supreme Court's<sup>31</sup> decision and the second Court of Appeals'<sup>32</sup> decision in the *Empagran* litigation, use as precedents either post-*Empagran* District Court decisions,<sup>33</sup> or post-*Empagran* Court of Appeals decisions,<sup>34</sup> or both types of post-*Empagran* decisions<sup>35</sup>.

The fifth category of post-*Empagran* judgments to be considered is one where District Courts<sup>36</sup> use as a precedent only the Supreme Court's<sup>37</sup> decision in the *Empagran* litigation, or combine the Supreme Court's decision with post-*Empagran* District Court judgments,<sup>38</sup> or post-*Empagran* Court of Appeals judgments<sup>39</sup>.

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<sup>29</sup> N.21.

<sup>30</sup> N.22.

<sup>31</sup> N.21.

<sup>32</sup> N.22.

<sup>33</sup> *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684 (E.D.Pa.); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629 (N.D.Cal.).

<sup>34</sup> See *Chavez v. Carranza*, 559 F.3d 486 (6th Cir.2009).

<sup>35</sup> See *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310 (E.D.N.Y.2012); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101 (N.D.Cal.2007); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548 (E.D.Pa.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835 (N.D.Cal.2011); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738 (N.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154 (N.D.Ill.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195 (E.D.N.Y.2013); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465 (D.N.J.2014).

<sup>36</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084 (N.D.Cal.); *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526 (D.N.J.2005); *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050 (N.D.Cal.2006); *In re eBay Seller Antitrust Litigation*, 2008 WL 3925350 (N.D.Cal.); *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881 (E.D.Pa.); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2010 WL 9543295 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 (N.D.Cal.2010); *Fond du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co., Ltd.*, 753 F.Supp.2d 792 (E.D.Wis.2010); *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907 (N.D.Ill.2009).

<sup>37</sup> N.21.

<sup>38</sup> *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236 (S.D.N.Y. 2008); *In re Urethane Antitrust Litigation*, 261 F.R.D. 570 (D.Kan.2009); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320 (D.N.J.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2629728 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807 (E.D.N.Y.); *In re Intel Corp. Microprocessor Antitrust Litigation*, 476 F.Supp.2d 452 (D.Del.2007); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589 (N.D.Cal.).

<sup>39</sup> *Lavoho, LLC v. Apple Inc.*, 2014 WL 6791612 (S.D.N.Y.).



The sixth category of post-*Empagran* judgments is where District Courts<sup>40</sup> rely on the Supreme Court decision in the *Empagran* litigation and on post-*Empagran* Court of Appeals and District Courts judgments.

The seventh category of post-*Empagran* judgments consists of cases where District Courts rely exclusively<sup>41</sup> on post-*Empagran* Court of Appeals judgments,<sup>42</sup> or exclusively on post-*Empagran* District Court judgments,<sup>43</sup> or on these two types of post-*Empagran* judgments together,<sup>44</sup> or on neither of them<sup>45</sup>. The existence of this category of post-*Empagran* judgments provides a basis on which it could be submitted that there exists a possibility that post-*Empagran* case law may go its own way. This means that post-*Empagran* case law may develop in the future without the need to make reference to the *Empagran* litigation or without acknowledging the impact that the *Empagran* litigation had on antitrust litigation. It is difficult to say whether this submission will become the factual reality, as at the present stage of post-*Empagran* case law no post-*Empagran*

<sup>40</sup> *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061 (E.D.N.Y.); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166 (N.D.Cal.2009); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 (N.D.Cal.2010); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365 (N.D.Cal.); *In re Chocolate Confectionary Antitrust Litigation*, 602 F.Supp.2d 538 (M.D.Pa.2009); *In re Optical Disk Drive Antitrust Litigation*, 2014 WL 3378336 (N.D.Cal.); *In re Automotive Parts Antitrust Litigation*, 2014 WL 4209588 (E.D.Mich.); *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358 (W.D.Wash.); *Fenerjian v. Nongshim Company, Ltd.*, 2014 WL 5685562 (N.D.Cal.); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894 (S.D.N.Y.).

<sup>41</sup> For the sake of a complete analysis, mention must be made of the post-*Empagran* District Court judgment where the adjudicating court relied not only on post-*Empagran* Court of Appeals and post-*Empagran* District Court judgments, but made reference to the second Court of Appeals' judgment [*Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005)] in the *Empagran* litigation as well. See *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313 (N.D.Cal.).

<sup>42</sup> *In re Korean Air Lines Co., Ltd. Antitrust Litigation*, 2010 WL 3184372 (C.D.Cal.); *In re Optical Disk Drive Antitrust Litigation*, 2011 WL 3894376 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 4652126 (N.D.Cal.); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451 (D.C.N.J.1918).

<sup>43</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842 (D.N.J.2008); *In re Urethane Antitrust Litigation*, 683 F.Supp.2d 1214 (D.Kan.2010); *In re Optical Disk Drive Antitrust Litigation*, 303 F.R.D. 311 (N.D.Cal.2014).

<sup>44</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 6174683 (N.D.Cal.); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F.Supp.2d 1011 (N.D.Cal.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1164897 (N.D.Cal.); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227 (S.D.N.Y.); *In re Refrigerant Compressors Antitrust Litigation*, 2015 WL 1181168 (E.D.Mich.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 1568870 (N.D.Cal.).

<sup>45</sup> *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834 (N.D.Cal.); *In re Rubber Chemicals Antitrust Litigation*, 486 F.Supp.2d 1078 (N.D.Cal.2007); *In re Aspartame Antitrust Litigation*, 2008 WL 2275531 (E.D.Pa.); *In re Vitamin C Antitrust Litigation*, 810 F.Supp.2d 522

Court of Appeals judgment has been found where the decision was based merely on post-*Empagran* District Court or Courts of Appeals judgments. For the sake of completeness, it must also be mentioned that no Court of Appeals judgment has been found where the adjudicating court relied merely on the second Court of Appeals'<sup>46</sup> judgment in the *Empagran* litigation in connection with post-*Empagran* District Court and Courts of Appeals judgments.

This overview of post-*Empagran* judgments reveals that, in general, District Courts and Courts of Appeals do refer to the Supreme Court's<sup>47</sup> and second Court of Appeals'<sup>48</sup> judgment in the *Empagran* litigation in explaining their reasoning. Post-*Empagran* case law can be divided into seven categories of judgments depending on the extent to which they refer to the *Empagran* litigation. Among these categories, the most challenging post-*Empagran* judgments are those where adjudicating courts refer separately, sometimes even exclusively, to post-*Empagran* District Courts' and post-*Empagran* Courts of Appeals' judgments. It is submitted that these post-*Empagran* cases that use as precedents only post-*Empagran* judgments raise concerns as to whether the post-*Empagran* development of antitrust law in this field is moving in a justifiable direction. If post-*Empagran* case law develops without resolving the questions that were left open and/or issues that were problematic throughout the *Empagran* litigation,<sup>49</sup> and if such 'poisoned' post-*Empagran* case law is used on its own<sup>50</sup> as precedents in further antitrust litigation, the results may be twofold. Firstly, private litigants may unjustifiably be deprived of their right to get compensation for their foreign private antitrust injury. Secondly, antitrust cartels that operate on an international level may continue to exist and cause anticompetitive effects in the U.S. and non-US countries. Therefore, this thesis submits that it is important to understand the *Empagran* litigation correctly<sup>51</sup> and if post-*Empagran* case law

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(E.D.N.Y.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2011 WL 5444261 (N.D.Cal.); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464 (S.D.N.Y.).

<sup>46</sup> N.22.

<sup>47</sup> N.21.

<sup>48</sup> N.22.

<sup>49</sup> See Chapter 2, section 4.

<sup>50</sup> I.e. without any reference to the *Empagran* litigation.

<sup>51</sup> See Chapter 2, subsection 3.2.

develops in a questionable direction, it is important to notice these problems promptly and act accordingly.

## 4.2 Adjudicated Factual Situations

Adjudicating courts throughout the *Empagran* litigation were dealing with cases<sup>52</sup> where non-U.S. plaintiffs were litigating their antitrust injury that they had suffered due to commercial transactions concluded outside the U.S., with non-U.S. defendants, and of goods that were consumed outside the U.S.

The factual gravity (essence) of the *Empagran* litigation was to provide a decision on the required nature of the relationship between anticompetitive effects within the U.S. and litigated private antitrust injury in order to allow foreign private plaintiffs to litigate their foreign antitrust injury (i.e. antitrust injury they suffered outside the U.S) before the U.S. courts. In other words, courts in the *Empagran* litigation were required to decide on the required nature of the relationship between anticompetitive effects in the U.S. and litigated foreign antitrust injury. However, this was not achieved. As explained in depth in chapter 2, the Supreme Court decided that foreign private antitrust injury that is independent from anticompetitive effects (and antitrust injury) within the U.S. cannot be litigated before the U.S. courts. In addition, the Supreme Court left open the possibility that foreign private antitrust injury that is not independent from anticompetitive effects in the U.S. can be litigated before the U.S. courts on the basis of the alternative theory. The Supreme Court referred the *Empagran* litigation to the second Court of Appeals. The second Court of Appeals decided that the factual situations in the *Empagran* litigation had to be adjudicated on the basis of proximate causation between anticompetitive effects in the U.S. and litigated foreign private antitrust injury.<sup>53</sup> This thesis submits that it is not possible to reconcile the decision taken by the Supreme Court and the decision taken by the second Court of Appeals.

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<sup>52</sup> See Chapter 2, subsection 3.1.7.

<sup>53</sup> See Chapter 2, subsections 3.1.6.4 and 3.1.10.

However, a review of post-*Empagran* cases in this chapter<sup>54</sup> reveals that the *Empagran* litigation had an impact on the adjudicating process even in factual situations that were radically different from those of the *Empagran* case. Therefore, this post-*Empagran* case law has to be included in the analysis given that the present thesis focuses on the requirements under which foreign antitrust injury may be litigated before the U.S. courts. An analysis of post-*Empagran* case law may provide the means to understand the U.S. courts' position on this relationship between anticompetitive effects and litigated private antitrust injury, irrespective of whether the adjudicating courts explained this relationship within a factual framework similar to the one present in the *Empagran* case.

The *Empagran* litigation saga ended with foreign private plaintiffs being unable to obtain compensation before the U.S. courts for antitrust injury they had suffered outside the U.S.<sup>55</sup>

Post-*Empagran* case law is inconsistent with regard to the possibility of foreign nationals who suffer antitrust injury (by obtaining goods) outside the U.S. litigating their private antitrust claim before the U.S. courts. The majority of post-*Empagran* case law denies jurisdiction to foreign private plaintiffs in such a situation.<sup>56</sup> There is one judgment<sup>57</sup> that denied jurisdiction in such situation, but left open the possibility of re-adjudicating the issue. Equally important is the acknowledgement that post-*Empagran* case law in some instances allowed

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<sup>54</sup> See below.

<sup>55</sup> See Chapter 2.

<sup>56</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084 (N.D.Cal.); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017 (S.D.N.Y.); *In re Monosodium Glutamate*, 2005 WL 2810682 (D.Minn.); *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526 (D.N.J.2005); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629 (N.D.Cal.); *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684 (E.D.Pa.); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535 (8th Cir.2007); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166 (N.D.Cal.2009); *In re Korean Air Lines Co., Ltd. Antitrust Litigation*, 2010 WL 3184372 (C.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154 (N.D.Ill.); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894 (S.D.N.Y.); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395 (2d Cir.2014).

<sup>57</sup> *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313 (N.D.Cal.).

foreign private plaintiffs to litigate a foreign antitrust injury before the U.S. courts,<sup>58</sup> or at least made such possibility theoretically possible.<sup>59</sup>

A completely different factual situation to that of *Empagran* is addressed in post-*Empagran* judgments where the private plaintiffs of U.S. nationality litigated their foreign antitrust injury before the U.S. courts. Again, post-*Empagran* case law is inconsistent. This means that there exists case law where the U.S. national was not successful in litigating his foreign antitrust injury before the US courts,<sup>60</sup> or at least he was temporarily precluded from litigating, the final decision pending on further litigation.<sup>61</sup> In other situations, the U.S. national was successful in litigating the foreign antitrust injury before the U.S. courts,<sup>62</sup> or at least allowed to do so in general, the final decision being pendent on the fulfilment of certain criteria.<sup>63</sup>

Post-*Empagran* case law certainly does not address only factual situations similar to the one in *Empagran* (where the litigated antitrust injury is of a foreign nature, i.e. that occurred outside the U.S.). The *Empagran* litigation also had an impact where private plaintiff obtained goods (suffered antitrust injury) within the U.S. In such a situation, private plaintiffs of U.S. nationality sometimes succeeded with their claim,<sup>64</sup> and were sometimes given the opportunity to

<sup>58</sup> *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777 (N.D.Cal.2007); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835 (N.D.Cal.2011); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310 (E.D.N.Y.2012).

<sup>59</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101 (N.D.Cal.2007).

<sup>60</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555 (D.Del.2006); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166 (N.D.Cal.2009); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548 (E.D.Pa.2010); *In re Korean Air Lines Co., Ltd. Antitrust Litigation*, 2010 WL 3184372 (C.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154 (N.D.Ill.); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir.2014).

<sup>61</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2629728 (N.D.Cal.).

<sup>62</sup> *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777 (N.D.Cal.2007); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835 (N.D.Cal.2011); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589 (N.D.Cal.).

<sup>63</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101 (N.D.Cal.2007); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 (N.D.Cal.2010).

<sup>64</sup> *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526 (D.N.J.2005); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2010 WL 9543295 (N.D.Cal.); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548 (E.D.Pa.2010); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835 (N.D.Cal.2011); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195 (E.D.N.Y.2013); *Motorola Mobility, Inc. v. AU Optronics*

succeed if they satisfied certain criteria,<sup>65</sup> but it is appropriate to mention that sometimes they did not succeed with their claim,<sup>66</sup> or at least not until final decision.<sup>67</sup> This is a remarkable finding because, in comparison, there exists case law influenced by the *Empagran* litigation<sup>68</sup> where a private litigant of non-U.S. nationality succeeded with his private antitrust claim for antitrust injury suffered in consequence of obtaining goods in the U.S, and even if these goods then left U.S. soil.<sup>69</sup>

The final destination of goods obtained by the private plaintiff is another way to examine post-*Empagran* case law. In *Empagran*, goods were obtained outside the U.S. and remained outside the U.S. Post-*Empagran* case law, apart from one decision,<sup>70</sup> is consistent with regard to refusing protection by the U.S. courts in situations where the goods were obtained outside the U.S. and their final destination was also outside the U.S.<sup>71</sup> Where the goods are obtained outside the U.S., but later move into the U.S. and then leave the U.S., post-*Empagran* case law is not so consistent anymore as there exists a judgment<sup>72</sup> where the private plaintiff was allowed protection, but there also exist judgments<sup>73</sup> where the decisions were the opposite.

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*Corporation*, 2014 WL 258154 (N.D.Ill.); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589 (N.D.Cal.).

<sup>65</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 (N.D.Cal.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2629728 (N.D.Cal.).

<sup>66</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 (N.D.Cal.); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738 (N.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154 (N.D.Ill.); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir.2014).

<sup>67</sup> N.57.

<sup>68</sup> Even if decided before the *Empagran* litigation was concluded.

<sup>69</sup> *MM Global Services, Inc. v. Dow Chemical Co.*, 329 F.Supp.2d 337 (D.Conn.2004).

<sup>70</sup> *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195 (E.D.N.Y.2013).

<sup>71</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017 (S.D.N.Y.); *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555 (D.Del.2006); *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684 (E.D.Pa.); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535 (8th Cir.2007); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 (N.D.Cal.).

<sup>72</sup> N.57.

<sup>73</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084 (N.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154 (N.D.Ill.).

There exists category of post-*Empagran* case law that is broader than the previous two and where the factual situation is slightly different from the factual situation in the *Empagran* litigation. In this group of post-*Empagran* cases, the goods were obtained outside the U.S., but their final destination was within the U.S. This group of post-*Empagran* cases is also more inconsistent in terms of the outcomes of the adjudication courts. This means that there are judgments where the adjudicating courts refused protection to private plaintiffs,<sup>74</sup> refused protection only temporarily,<sup>75</sup> allowed protection,<sup>76</sup> or allowed protection conditionally.<sup>77</sup>

The summary of post-*Empagran* case law in this subsection has revealed thus far that it is not possible to reach any conclusion with regard to the protection of private plaintiffs before the U.S. courts based merely on nationality, place where the private plaintiffs suffered antitrust injury, or the movement (final destination) of the goods obtained.

This subsection reviewed post-*Empagran* case law where the adjudicating courts conducted analysis with regard to the nature of the relationship between anticompetitive effects within the U.S. and the plaintiffs' litigated antitrust injury. Post-*Empagran* case law as a whole encompasses a much greater number of judgments. These judgments address similar factual situations to the ones just described. The only difference is the reasoning, i.e. the grounds on which the adjudicating courts based their decision. These judgments were based not on the question whether the required nature of the relationship between

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<sup>74</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166 (N.D.Cal.2009); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548 (E.D.Pa.2010) [for purchases outside the US]; *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 (N.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154 (N.D.Ill.); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464 (S.D.N.Y.); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451 (D.C.N.J.1918).

<sup>75</sup> N.57.

<sup>76</sup> *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777 (N.D.Cal.2007); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2010 WL 9543295 (N.D.Cal.); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548 (E.D.Pa.2010) [for purchases in the US]; *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835 (N.D.Cal.2011); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310 (E.D.N.Y.2012); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894 (S.D.N.Y.).

<sup>77</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101 (N.D.Cal.2007); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 (N.D.Cal.2010).

anticompetitive effects in the U.S. and the plaintiffs' litigated antitrust injury was satisfied but on other grounds.

This means that private plaintiffs of U.S. nationality did not succeed with their claim despite the fact that they obtained the goods in the U.S. because they failed to prove the existence of anticompetitive effects within the U.S.,<sup>78</sup> or because there was no import of goods into the U.S. or export of goods out of the U.S.,<sup>79</sup> or because they lacked standing,<sup>80</sup> or because there was something wrong with the allegations (i.e. arguments provided by the litigants),<sup>81</sup> or because there was something wrong with the nature of the plaintiff (e.g. plaintiffs failed to satisfy the requirement to be classified as members of class action).<sup>82</sup>

The opposite is also true. This means that private plaintiffs of U.S. nationality succeeded with their claim merely on the basis that there existed anticompetitive effects within the U.S.,<sup>83</sup> that private plaintiffs properly

<sup>78</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 476 F.Supp.2d 452 (D.Del.2007); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437 (D.N.J.2007); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236 (S.D.N.Y. 2008); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842 (D.N.J.2008); *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815 (N.D.Ill.); *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881 (E.D.Pa.); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320 (D.N.J.2010); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313 (N.D.Cal.); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738 (N.D.Cal.); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650 (7th Cir.2011); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365 (N.D.Cal.).

<sup>79</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084 (N.D.Cal.); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320 (D.N.J.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 (N.D.Cal.).

<sup>80</sup> *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907 (N.D.Ill.2009); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807 (E.D.N.Y.); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465 (D.N.J.2014); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464 (S.D.N.Y.).

<sup>81</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084 (N.D.Cal.); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 2007 WL 1056783 (N.D.Cal.); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437 (D.N.J.2007); *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir.2007); *American Pan Co. v. Lockwood Mfg., Inc.*, 2008 WL 471685 (S.D. Ohio); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061 (E.D.N.Y.); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842 (D.N.J.2008); *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815 (N.D.Ill.); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320 (D.N.J.2010); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650 (7th Cir.2011); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464 (S.D.N.Y.).

<sup>82</sup> *In re Chocolate Confectionary Antitrust Litigation*, 602 F.Supp.2d 538 (M.D.Pa.2009); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313 (N.D.Cal.).

<sup>83</sup> *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907 (N.D.Ill.2009); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F.Supp.2d 1011 (N.D.Cal.2010); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807 (E.D.N.Y.); *In re TFT-LCD (Flat*



litigated their case,<sup>84</sup> that the importation of goods into the U.S. was established,<sup>85</sup> or that private plaintiffs satisfied the requirement of standing<sup>86</sup>.

In situations where U.S. nationals<sup>87</sup> or non-U.S. nationals<sup>88</sup> obtained goods from outside the U.S. and the adjudicating courts decided the case based on the existence of anticompetitive effects in the U.S., anticompetitive effects in the U.S. were not found. Some post-Empagran case law refused protection to U.S. private plaintiffs<sup>89</sup> and non-U.S. private plaintiffs<sup>90</sup> because they did not present

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*Panel) Antitrust Litigation*, 822 F.Supp.2d 953 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2011 WL 5444261 (N.D.Cal.); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir.2012); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir.2012); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589 (N.D.Cal.).

<sup>84</sup> *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050 (N.D.Cal.2006); *Fond du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co., Ltd.*, 753 F.Supp.2d 792 (E.D.Wis.2010); *In re Vitamin C Antitrust Litigation*, 810 F.Supp.2d 522 (E.D.N.Y.2011); *In re Automotive Parts Antitrust Litigation*, 2014 WL 4209588 (E.D.Mich.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 4652126 (N.D.Cal.); *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358 (W.D.Wash.); *In re Optical Disk Drive Antitrust Litigation*, 303 F.R.D. 311 (N.D.Cal.2014); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894 (S.D.N.Y.).

<sup>85</sup> *Fond du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co., Ltd.*, 753 F.Supp.2d 792 (E.D.Wis.2010); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807 (E.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835 (N.D.Cal.2011); *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir.2011); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir.2012); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir.2012); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 6174683 (N.D.Cal.); *In re Optical Disk Drive Antitrust Litigation*, 2014 WL 3378336 (N.D.Cal.); *U.S. v. Hui Hsiung*, 758 F.3d 1074 (9th Cir.2014); *In re Automotive Parts Antitrust Litigation*, 2014 WL 4209588 (E.D.Mich.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 4652126 (N.D.Cal.); *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358 (W.D.Wash.); *In re Optical Disk Drive Antitrust Litigation*, 303 F.R.D. 311 (N.D.Cal.2014); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589 (N.D.Cal.).

<sup>86</sup> *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050 (N.D.Cal.2006); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F.Supp.2d 1011 (N.D.Cal.2010); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894 (S.D.N.Y.); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589 (N.D.Cal.).

<sup>87</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555 (D.Del.2006); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365 (N.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154 (N.D.Ill.).

<sup>88</sup> *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050 (N.D.Cal.2006); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437 (D.N.J.2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981 (9th Cir.2008); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227 (S.D.N.Y.).

<sup>89</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 2007 WL 1056783 (N.D.Cal.); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061 (E.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1164897; *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir.2015); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464 (S.D.N.Y.).

<sup>90</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017 (S.D.N.Y.); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 2007 WL 1056783 (N.D.Cal.); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437 (D.N.J.2007); *In re Air Cargo Shipping*

their claim properly, or because they failed to satisfy the requirement of standing.<sup>91</sup> When private plaintiffs obtained goods outside the U.S., the question that may not necessarily be avoided is whether the goods were imported into the U.S. A few post-Empagran cases were decided on this issue.<sup>92</sup>

Post-Empagran case law also demonstrates that where goods are obtained outside the U.S. and remain outside the U.S., anticompetitive effects may not be present,<sup>93</sup> even if the goods enter the U.S. on a temporary basis before they finally leave the U.S.<sup>94</sup> In a situation where the U.S. is the final destination of the goods, post-Empagran case law explains that there may exist anticompetitive effects within the U.S.,<sup>95</sup> or these anticompetitive effects may be lacking.<sup>96</sup> Certainly, it is not possible to talk about the importation of goods

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*Services Antitrust Litigation*, 2008 WL 5958061 (E.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1164897 (N.D.Cal.); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir.2015); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451 (D.C.N.J.1918).

<sup>91</sup> US national:

*Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166 (N.D.Cal.2009); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464 (S.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 1568870 (N.D.Cal.).

Non-US nationals:

*Korea Kumho Petrochemical v. Flexsys America LP*, 2007 WL 2318906 (N.D.Cal.); *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834 (N.D.Cal.); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166 (N.D.Cal.2009); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451 (D.C.N.J.1918).

<sup>92</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 (N.D.Cal.); *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834 (N.D.Cal.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310 (E.D.N.Y.2012); *In re Optical Disk Drive Antitrust Litigation*, 2014 WL 3378336 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 4652126 (N.D.Cal.); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir.2015); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451 (D.C.N.J.1918).

<sup>93</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555 (D.Del.2006); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981 (9th Cir.2008); *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881 (E.D.Pa.); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365 (N.D.Cal.); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227 (S.D.N.Y.).

<sup>94</sup> N.57.

<sup>95</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953 (N.D.Cal.2011); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir.2012); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir.2012); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589 (N.D.Cal.).

<sup>96</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 476 F.Supp.2d 452 (D.Del.2007); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437 (D.N.J.2007); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842 (D.N.J.2008); *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815 (N.D.Ill.); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320 (D.N.J.2010); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650 (7th Cir.2011); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154 (N.D.Ill.).

into the U.S. in situations where goods in fact never enter the U.S.,<sup>97</sup> but the conclusion may<sup>98</sup> be different where goods enter the U.S. and stay there,<sup>99</sup> even if only on a temporary basis.<sup>100</sup> Even if goods enter the U.S. on a permanent basis, private plaintiffs must still satisfy requirements of standing, otherwise they will be deprived of the protection of the U.S. courts.<sup>101</sup>

Last but not least, even within this additional group of post-Empagran cases where the adjudicating courts based their decisions on the existence of anticompetitive effects, import of goods into the US, or antitrust standing, there exist situations where private plaintiffs were refused protection by the U.S. courts merely because they failed to present (allege) facts as required by legal standards.<sup>102</sup> This means that in the real world, the factual situation may be such that private plaintiffs would be entitled to obtain compensation for suffered

<sup>97</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 (N.D.Cal.); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451 (D.C.N.J.1918).

<sup>98</sup> The existence of import of goods into the US was not found in the following litigations: *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834 (N.D.Cal.); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320 (D.N.J.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 (N.D.Cal.).

<sup>99</sup> *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir.2012); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir.2012); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616 (N.D.Cal.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310 (E.D.N.Y.2012); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 6174683 (N.D.Cal.); *In re Optical Disk Drive Antitrust Litigation*, 2014 WL 3378336 (N.D.Cal.); *U.S. v. Hui Hsiung*, 758 F.3d 1074 (9th Cir.2014); *In re Automotive Parts Antitrust Litigation*, 2014 WL 4209588 (E.D.Mich.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 4652126 (N.D.Cal.); *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358 (W.D.Wash.); *In re Optical Disk Drive Antitrust Litigation*, 303 F.R.D. 311 (N.D.Cal.2014); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589 (N.D.Cal.).

<sup>100</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616 (N.D.Cal.).

<sup>101</sup> *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834 (N.D.Cal.); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166 (N.D.Cal.2009); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465 (D.N.J.2014); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894 (S.D.N.Y.); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589 (N.D.Cal.); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464 (S.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 1568870 (N.D.Cal.); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451 (D.C.N.J.1918).

<sup>102</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 2007 WL 1056783 (N.D.Cal.); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437 (D.N.J.2007); *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir.2007); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842 (D.N.J.2008); *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815 (N.D.Ill.); *In re Chocolate Confectionary Antitrust Litigation*, 602 F.Supp.2d 538 (M.D.Pa.2009); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320 (D.N.J.2010); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650 (7th Cir.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1164897 (N.D.Cal.); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir.2015); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464 (S.D.N.Y.); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451 (D.C.N.J.1918).

antitrust injury before the U.S. courts, but because they failed to present the evidence in the form required, they remained without antitrust damages.

In conclusion, the *Empagran* litigation influenced the adjudicating process in post-*Empagran* litigation where the factual situation was different from that of *Empagran*. Factual situations adjudicated in post-*Empagran* cases are varied. An examination of post-*Empagran* case law suggests that similar factual situations may not necessarily lead to the same outcome. This has occurred despite the fact that adjudicating courts in post-*Empagran* cases have stated on several occasions<sup>103</sup> that adjudicating courts do pay particular attention to the differences between precedents and between the facts of the cases. It is not just a difference in the facts of the cases distinguishes judgements from each other. It is also to do with the reasoning, i.e. the legal grounds upon which the adjudicating courts based their decisions. Therefore, to understand post-*Empagran* case law, it is not sufficient to look at the status (nationality) of the

<sup>103</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,3,4,5 (N.D.Cal.); *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,1 (E.D.Pa.); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,537 (8th Cir.2007); *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,782 (N.D.Cal.2007); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1112,1114,1115 (N.D.Cal.2007); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,251 (S.D.N.Y. 2008); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,6,15 (E.D.N.Y.); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,988 (9th Cir.2008); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,876 (D.N.J.2008); *In re Chocolate Confectionary Antitrust Litigation*, 602 F.Supp.2d 538,997 (M.D.Pa.2009); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166,1186 (N.D.Cal.2009); *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,925 (N.D.Ill.2009); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583,599 (N.D.Cal.2010); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F.Supp.2d 1011,1018 (N.D.Cal.2010); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,366-368 (D.N.J.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,7 (N.D.Cal.); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,5-7 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,12,21,36,37 (E.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,842,843 (N.D.Cal.2011); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,25,27,28 (E.D.N.Y.2013); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,964 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1164897,3 (N.D.Cal.); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430,439,440 (6th Cir.2012); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,854,860 (7th Cir.2012); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616,2 (N.D.Cal.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,315,320 (E.D.N.Y.2012); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365,7,8 (N.D.Cal.); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227,10 (S.D.N.Y.); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,505-512 (D.N.J.2014); *U.S. v. Hui Hsiung*, 758 F.3d 1074,1086,1092 (9th Cir.2014); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 4652126,2 (N.D.Cal.); *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358,7 (W.D.Wash.); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,819 (7th Cir.2015); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,12 (S.D.N.Y.); *U.S. v. Hui Hsiung*, 778 F.3d 738,759-760 (9th Cir.2014); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,320 (E.D.N.Y.2012).

litigants, the place where transactions were concluded, the place where the private plaintiff obtained his goods (suffered antitrust injury), or the movement (final destination) of goods. Facts on their own do not reveal anything about how adjudicating courts reason, i.e. formulate their reasoning. It is important to understand first the legal grounds upon which the adjudicating courts interpret the facts presented to them by the litigants. The analysis in the following section of this chapter will be restricted to the interplay between legal grounds and the facts. It is submitted that the analysis will provide an understanding of the U.S. courts' reasoning.

### 4.3 Nature of Question under Adjudication

Is the adjudication of the question on the existence of the required relationship between anticompetitive effects within the U.S. and antitrust injury litigated by private plaintiffs a decision on the subject matter jurisdiction of the U.S. courts, or a decision on the substantive elements of antitrust claims? This is the question to which this subsection will seek to provide an answer.

This question became part of the adjudication process only in post-*Empagran* case law. In the *Empagran* litigation, the analysis of the relationship between anticompetitive effects in the U.S. and litigated private antitrust injury took place within the context of the subject matter jurisdiction of the U.S. courts. Neither the litigants nor the adjudicating courts in the *Empagran* litigation ever raised questions or concerns about the FTAIA and the required nature of the relationship between anticompetitive effects within the U.S. and litigated private antitrust injury being anything other than a matter of subject matter jurisdiction analysis of the U.S. courts.<sup>104</sup>

In contrast, post-*Empagran* case law can be divided into three groups based on whether the adjudicating courts understand the nature of the FTAIA and the question of the relationship between anticompetitive effects within the U.S. and litigated private antitrust injury as a matter of subject matter jurisdiction of the

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<sup>104</sup> This is explicitly evident in judgments delivered by all adjudicating courts throughout *Empagran* and in relation to all issues that were litigated throughout the *Empagran* litigation. See Chapter 2, section 2 and subsection 3.1.7.

U.S. courts (group 1), as a matter of substantive antitrust claim (group 2), or as an issue which did not need to be decided (group 3).

### 4.3.1 Subject Matter Jurisdiction

Post-*Empagran* case law<sup>105</sup> predominantly supports the position that the FTAIA and the issue of the relationship between anticompetitive effects within the U.S. and litigated private antitrust injury deals with the question of the subject matter jurisdiction of the U.S. courts. Nevertheless, it is important to mention that this position has been reversed and recent post-*Empagran* cases declare that the FTAIA is a statute that regulates substantive antitrust claim.<sup>106</sup>

The post-*Empagran* adjudicating courts formulated their position on the nature of the FTAIA in different ways. Some of them<sup>107</sup> merely stated that the FTAIA regulates subject matter jurisdiction without additionally elaborating their position. Some other post-*Empagran* adjudicating courts based their decision on existing case law, meaning case law that already existed before the *Empagran* litigation,<sup>108</sup> or case law that arose during the *Empagran* litigation,<sup>109</sup> or on post-

<sup>105</sup> Even those few judgments that become final during the *Empagran* litigation were of the opinion that the FTAIA is a statute that regulates subject matter jurisdiction: *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1008,1009,1021,1022 (N.D.Ill.2001); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942,949,950,951,952 (7th Cir.2003); *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,838 (7th Cir.2003); *Sniado v. Bank Austria AG*, 352 F.3d 73,77 (2d Cir.2003); *MM Global Services, Inc. v. Dow Chemical Co.*, 329 F.Supp.2d 337,341,342 (D.Conn.2004); *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,2 (D.Minn.).

<sup>106</sup> See subsection that follows on which these judgments are, including the ones enacted by Courts of Appeals that turned around this perception of nature of the FTAIA.

<sup>107</sup> *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,531,532 (D.N.J.2005); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,2 (N.D.Cal.); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,443 (D.N.J.2007); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1109 (N.D.Cal.2007); *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834,6 (N.D.Cal.); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,862 (D.N.J.2008); *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881,2 (E.D.Pa.); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F.Supp.2d 1011,1023 (N.D.Cal.2010); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,3 (N.D.Cal.); *In re Optical Disk Drive Antitrust Litigation*, 2011 WL 3894376,12 (N.D.Cal.).

<sup>108</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,5,6 (N.D.Cal.); *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,536-537 (D.N.J.2005); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,243 (S.D.N.Y.2008); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,860 (D.N.J.2008); *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881,2 (E.D.Pa.); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365,5 (N.D.Cal.).

*Empagran* judgments,<sup>110</sup> and even on the Supreme Court decision in the *Empagran* litigation<sup>111</sup>.

Post-*Empagran* adjudicating courts based their arguments in support of the FTAIA being viewed as a subject matter jurisdiction statute on the purpose of the FTAIA,<sup>112</sup> on a congressional debate at the time when the FTAIA was enacted,<sup>113</sup> and on the literature<sup>114</sup>.

There is a separate category of post-*Empagran* case law where the adjudicating courts formulated their position on the nature of the FTAIA by relying on the litigants' consensus that the FTAIA is a statute of subject matter jurisdiction,<sup>115</sup> or on litigants not challenging the characterisation of the FTAIA as jurisdictional<sup>116</sup>.

There are also post-*Empagran* judgments where the adjudicating courts determined the nature of the FTAIA as being the statute that regulates subject matter jurisdiction by assuming that such position is correct,<sup>117</sup> or by explicitly stating that such position was a valid law in the circuit at the moment of

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<sup>109</sup> *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815,3,n.2 (N.D.Ill.); *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,925 (N.D.Ill.2009).

<sup>110</sup> *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365,5 (N.D.Cal.).

<sup>111</sup> *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050,1058 (N.D.Cal.2006); *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,3 (E.D.Pa.); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,243 (S.D.N.Y. 2008).

<sup>112</sup> *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,536-537 (D.N.J.2005); *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,3 (E.D.Pa.); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,860 (D.N.J.2008); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,335-336 (D.N.J.2010); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,2 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 6174683,4 (N.D.Cal.).

<sup>113</sup> *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,925 (N.D.Ill.2009); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2010 WL 9543295,8 (N.D.Cal.).

<sup>114</sup> *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,243 (S.D.N.Y. 2008).

<sup>115</sup> *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,781 (N.D.Cal.2007).

<sup>116</sup> *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,243,n.6 (S.D.N.Y. 2008); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,11 (E.D.N.Y.); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,3 (N.D.Cal.); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430,440,n.4 (6th Cir.2012).

<sup>117</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,983 (9th Cir.2008).

adjudication and they were bound to follow it,<sup>118</sup> or by indirectly (through wider elaboration of reasoning) formulating their position<sup>119</sup>.

### 4.3.2 Substantive Antitrust Claim

The number of post-*Empagran* judgments that classify the FTAIA and the issue of the relationship between anticompetitive effects within the U.S. and litigated private antitrust injury as an element of antitrust claim is smaller than the number of post-*Empagran* judgments that support the opposite view, discussed in the subsection above, i.e. that the FTAIA is the statute that regulates subject matter jurisdiction. Nevertheless, it seems that all recent post-*Empagran* cases<sup>120</sup> are declaring that the FTAIA regulates substantive elements of antitrust claim.

In addition to this, post-*Empagran* adjudicating courts use much shorter lists of argument in support of their position that the FTAIA regulates substantive antitrust claim, or, as it will be presented, they all rely on the same, relatively limited list of arguments.

Post-*Empagran* case law that is of the position that the FTAIA regulates substantive antitrust claim bases its argument on the Supreme Court's critique articulated outside the area of antitrust. This critique was formulated because apparently adjudicating courts, by deciding not to have jurisdiction, decide a case without evaluating the merits.<sup>121</sup>

Based on this observation, the Supreme Court formulated the "readily administrable bright line," "clearly states" rule. This rule is applied to determine whether a statutory limitation sets forth a jurisdictional requirement

<sup>118</sup> *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,243,n.6 (S.D.N.Y. 2008); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,3 (N.D.Cal.); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227,7 (S.D.N.Y.).

<sup>119</sup> *Korea Kumho Petrochemical v. Flexsys America LP*, 2007 WL 2318906,4 (N.D.Cal.); *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834,1,2 (N.D.Cal.).

<sup>120</sup> These cases are analysed in depth in relation to grounds and arguments that adjudicating courts provided as explanation of their decisions on the issue of the nature of the FTAIA.

<sup>121</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,466,467 (3d Cir.2011).



or a substantive merits element.<sup>122</sup> In other words, legislature (i.e. Congress) must “clearly state” that a statute is jurisdictional in character;<sup>123</sup> if it does not, then any limitation (restriction) in the statute should be treated as non-jurisdictional.<sup>124</sup>

Post-*Empagran* judgments present in a clear manner that the Supreme Court formulated this rule in relation to employment statute.<sup>125</sup> The Supreme Court formulated a similar position also in relation to copyright statute,<sup>126</sup> to statutes from the area of bankruptcy,<sup>127</sup> criminal procedure,<sup>128</sup> labour law,<sup>129</sup> securities,<sup>130</sup> emergency planning and right to know,<sup>131</sup> and veteran benefits<sup>132</sup>.

The second argument that post-*Empagran* adjudicating courts used in support of their position that the FTAIA regulates substantive antitrust claim is the language of the FTAIA. This view of the adjudicating courts stipulates that the language of the FTAIA does not speak in jurisdictional terms nor does it refer in any way to jurisdiction.<sup>133</sup> Post-*Empagran* courts use this argument as a basis on which they can apply the “clearly states” test mentioned above and interpret the FTAIA as a statute that regulates substantive merits and not jurisdiction.<sup>134</sup>

The third and fourth arguments are dissenting opinions in case law that was decided before the final decision in the *Empagran* litigation. The first of these

<sup>122</sup> See *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,468 (3d Cir.2011) and case used as precedent.

<sup>123</sup> See *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,959 (N.D.Cal.2011) and cases used as precedents.

<sup>124</sup> N.122.

<sup>125</sup> *Ibid.*

<sup>126</sup> See *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,468 (3d Cir.2011) and case used as precedent; *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,852 (7th Cir.2012) and case cited.

<sup>127</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,466 (3d Cir.2011); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,852 (7th Cir.2012) and case cited.

<sup>128</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,466 (3d Cir.2011).

<sup>129</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,468 (3d Cir.2011).

<sup>130</sup> N.127.

<sup>131</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,852 (7th Cir.2012) and case cited.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,468 (3d Cir.2011); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,852 (7th Cir.2012).

<sup>134</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,468-469 (3d Cir.2011).

dissenting opinions on which post-*Empagran* adjudicating courts rely is the dissenting opinion in *Hartford Fire Ins. v. California*, 509 U.S. 764 where it was stated that “*extraterritorial reach of the Sherman Act... has nothing to do with the jurisdiction of the court..., but is the question of substantive law...*”.<sup>135</sup> The second of these dissenting opinions is the dissenting opinion in *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942.<sup>136</sup> This dissenting opinion was formulated based on the following arguments: lack of clear Congressional statement in the FTAIA language that the statute restricts subject matter competition;<sup>137</sup> the Supreme Court’s decision in a non-antitrust case that the statute needs to make clear whether it rips off jurisdiction;<sup>138</sup> consequences that classifying the FTAIA statute as jurisdictional may have on antitrust litigation procedure;<sup>139</sup> history of application of antitrust law to persons and conduct beyond the borders of the U.S.,<sup>140</sup> and the fact that Congress was dealing with prescriptive jurisdiction while enacting the FTAIA<sup>141</sup>.

As mentioned above, recent post-*Empagran* courts share a common understanding on the FTAIA as a statute that regulates substantive antitrust claim, i.e. deals with the merits of a case and does not address the jurisdiction of U.S. courts. Therefore, it is important to understand the reasons for these changes taking place.

It is possible to come across statements in post-*Empagran* cases where all that the adjudicating courts state in this regard is that the FTAIA is not a subject matter jurisdiction limitation on the power of the federal courts but a component of the merits of a Sherman Act claim involving nonimport trade or commerce with foreign nations,<sup>142</sup> or they provide such statement by relying on

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<sup>135</sup> See *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,469,n.7 (3d Cir.2011).

<sup>136</sup> See *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,469 (3d Cir.2011).

<sup>137</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942,955 (7th Cir.2003).

<sup>138</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942,956 (7th Cir.2003).

<sup>139</sup> See *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942,956-959 (7th Cir.2003).

<sup>140</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942,959 (7th Cir.2003).

<sup>141</sup> See *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942,961 (7th Cir.2003).

<sup>142</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1087 (9th Cir.2014).

post-*Empagran* cases that stated the same,<sup>143</sup> or post-*Empagran* cases that overruled their prior different decision on the nature of the FTAIA,<sup>144</sup> or even by stating that the adjudicating panel is bound by the decisions of prior panels until such times as they are overruled either by an en banc panel of the Court or by the Supreme Court<sup>145</sup>. It is right to respect precedents that are enacted by higher courts, but the existence of such precedents should not prevent adjudicating courts from expressing some critique in relation to these precedents, in particular where precedents may not necessarily be persuasive in the argumentation on which the courts formulated the precedents.

Another, rather surprising way of reasoning on the part of post-*Empagran* courts is attributing the nature of regulating substantive claim to the FTAIA merely by stating that other circuits are of the same position.<sup>146</sup> This argumentation is classified as weak because it does not exclude the possibility that other circuits may be also wrong in determining the nature of the FTAIA. The argument invoked in support of such position, i.e. “*that number of courts have referred to the FTAIA as jurisdictional, but did so prior to the Supreme Court’s decisions in Reed Elsevier and Morrison and without analyzing whether the FTAIA concerns subject-matter jurisdiction or the scope of coverage of antitrust laws*”<sup>147</sup> is also weak one, because the Supreme Court of the U.S. did not analyse the FTAIA in the *Reed Elsevier*<sup>148</sup> case and not in the *Morrison*<sup>149</sup> case. In addition, at the time when the Supreme Courts of the U.S. delivered their decision in these two cases, there was a common understanding among the U.S. courts that the FTAIA is a jurisdictional statute and that is why these courts never considered it necessary to challenge the nature of the FTAIA.

<sup>143</sup> *In re Automotive Parts Antitrust Litigation*, 2014 WL 4209588,6 (E.D.Mich.); *Fenerjian v. Nongshim Company, Ltd.*, 2014 WL 5685562,14,n.29 (N.D.Cal.); *U.S. v. Hui Hsiung*, 778 F.3d 738,752 (9th Cir.2014); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451,467,n.14 (D.C.N.J.1918).

<sup>144</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,406 (2d Cir.2014).

<sup>145</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,405 (2d Cir.2014).

<sup>146</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1088 (9th Cir.2014); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,486 (D.N.J.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,752 (9th Cir.2014).

<sup>147</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1088,n.6 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,752,n.7 (9th Cir.2014).

<sup>148</sup> *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S.Ct. 1237, 1246, 176 L.Ed.2d 18 (2010).

<sup>149</sup> *Morrison v. National Australia Bank*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010).

A similar line of argument is found in post-*Empagran* cases where the adjudicating court provides a conclusory statement that the Supreme Court in the *Morrison*<sup>150</sup> case stated that the part where the FTAIA prohibits conduct is considered a question of merits, not a jurisdictional one.<sup>151</sup> As mentioned above, the *Morrison* case was not a case where the Supreme Court of the U.S. assessed the FTAIA. In addition, the FTAIA statutory text does not say anything about the FTAIA prohibiting conduct; all the FTAIA (in its §6(a) paragraph) states is that “the Sherman Act shall not apply to conduct”.

A similar critique applies to the argument where a post-*Empagran* courts<sup>152</sup> stated that the statutory text of the FTAIA refers to the conduct to which the Sherman Act applies, which has to be the language of elements of merits, not jurisdiction. Post-*Empagran* courts should be reminded that the entire history of the application of the Sherman Act in the international context was centred on the question whether the Sherman Act applies to conduct. This is why the commonly used term of extraterritorial application of U.S. antitrust law emerged,<sup>153</sup> and this is why this question on the application of the Sherman Act in relation to conduct (that takes place outside the national territorial borders of the U.S.) has always been analysed within the question of the jurisdiction of the U.S. courts.

Post-*Empagran* courts take a rather different approach in determining the nature of the FTAIA where they first assert their knowledge and awareness of case law on the matter (i.e. by providing statements and citations from case law that classified the FTAIA to create a jurisdictional test<sup>154</sup>), and that the U.S. Congress enacted the FTAIA in response to concerns regarding the scope of the broad

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<sup>150</sup> Ibid.

<sup>151</sup> N.142.

<sup>152</sup> N.145.

<sup>153</sup> See Robert Pitofsky, “Antitrust in the Next 100 Years,” *California Law Review* 75 (1987). Thomas E. Kauper. The Treatment of Cartes under Antitrust Laws of the Unites States in Chia-Jui Cheng, Lawrence S. Lui, and Chih-Kang Wang, eds. *International Harmonization of Competition Laws* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1995), 83,84. For the argument that the concept of extraterritoriality has been misused because sovereigns (through courts) always deal with effects in its own territoriality and defendants against whom imposes penalties are always within its own territory see Ky P. Jr. Ewing, *Competition Rules for the 21st Century: Principles From Amerca’s Experience* (Alphen AAn Den Rijn, The Netherlands: Kluwer Law International, 2006), 239.

<sup>154</sup> *U.S. v. Hui Hsiung*, 778 F.3d 738,751 (9th Cir.2014).

jurisdictional language of the Sherman Act,<sup>155</sup> and that the FTAIA creates a jurisdictional test,<sup>156</sup> but then attribute determinative significance to two statements delivered by the Supreme Court of the U.S. in the *Reed Elsevier*<sup>157</sup> case:

- that courts have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis;<sup>158</sup>
- that courts may be driven by jurisdictional rulings, and by taking such an approach, courts can too easily miss the critical difference(s) between true jurisdictional conditions and nonjurisdictional limitations on causes of action.<sup>159</sup>

A situation assessment of the performance of adjudicating courts reveals that courts are not thorough enough in performing their judging role. This lack of expected quality of courts' performance cannot be remedied by attributing to the statute, i.e. the FTAIA, a particular type of nature. A solution to the problem of remedying poor courts' performance by attributing to a certain statute a particular type of nature does not make any logical sense.

Therefore, the argument that the FTAIA is not a jurisdictional limitation on the court's power because of the Supreme Court's expression of intention in the *Henderson*<sup>160</sup> case to bring some discipline to the use of the term 'jurisdictional'<sup>161</sup> cannot be accepted because the Supreme Court did not deliver this statement in relation to the FTAIA and, as explained above, determining the

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<sup>155</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1086 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,751 (9th Cir.2014).

<sup>156</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1087 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,751 (9th Cir.2014).

<sup>157</sup> N.148.

<sup>158</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1087 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,752 (9th Cir.2014).

<sup>159</sup> *Ibid.*

<sup>160</sup> *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011).

<sup>161</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1088 (9th Cir.2014).

nature of a statute is not how the problem of adjudicating courts not performing their job as expected should be addressed.

Completely different approach by Post-*Empagran* courts take a completely different approach to determining the nature of the FTAIA when they rely on the Supreme Court's *Morrison*<sup>162</sup> case, where the Supreme Court explained the difference between the merit question (i.e. what conduct statute prohibits) and subject matter jurisdiction (i.e. a tribunal's power to hear a case).<sup>163</sup> Post-*Empagran* courts in these cases merely state that FTAIA is like the statute analysed in the *Morrison* case (i.e. the Securities Exchange Act) and therefore removes conduct from the Sherman Act's reach. Surprisingly, they even cite the Supreme Court's *Empagran* decision in support of this position.<sup>164</sup> This argumentation by post-*Empagran* courts is difficult to understand because merely on the basis that there exist 'two questions' on the nature of a statute in general, it is not possible to conclude that the FTAIA regulates substantive claim. In addition, post-*Empagran* courts do not provide any analysis why the FTAIA, which is an independent statute, unlike the Securities Exchange Act analysed in the *Morrison* case, should be addressed (i.e. classified) in the same way as the Securities Exchange Act. This argument for attributing to the FTAIA the same nature that the Securities Exchange Act has is of questionable significance also because in determining the meaning of 'directness of anticompetitive effect' relevant to the application of the FTAIA, post-*Empagran* courts explicitly refused to accept the definition of 'directness of anticompetitive effect' that U.S. courts provided within the application of the Foreign Sovereign Immunity Act.<sup>165</sup> Last but not least, the Supreme Court of the U.S. in its *Empagran* decision did not say anything about the nature of the FTAIA regulating substantive antitrust claim. On the contrary, the entire *Empagran* litigation was considered in the light of the FTAIA regulating the jurisdiction of the U.S. courts.<sup>166</sup>

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<sup>162</sup> N.149.

<sup>163</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1087 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,752 (9th Cir.2014).

<sup>164</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1087 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,752,753 (9th Cir.2014).

<sup>165</sup> See subsection 6.1.1. in this chapter here below.

<sup>166</sup> See analysis throughout Chapter 2.

Post-*Empagran* courts apply a different line of reasoning in attributing to the FTAIA the nature of regulating substantive (merits) claim where reference is made to the Supreme Court's *Henderson*<sup>167</sup> case to argue that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject matter or personal jurisdiction.<sup>168</sup> This attribution of substantive antitrust nature to the FTAIA is nothing more than a conclusory statement on the nature of the FTAIA, and therefore difficult to agree with. In addition, the *Henderson* case did not rule on the FTAIA and there was no proper analysis undertaken to justify rejecting the at that time commonly agreed perception that the FTAIA is a jurisdictional statute.

Post-*Empagran* courts use a distinct set of arguments in classifying the FTAIA as a statute that regulates substantive claim (i.e. merits) where they make reference to the argument that the Supreme Court put forward in the *Arbaugh*<sup>169</sup> case and in the *Sebelius*<sup>170</sup> case, i.e. that "*because the U.S. Congress has not clearly stated that requirements in FTAIA are jurisdictional, they go to the merits of the claim rather than the adjudicative power of the court*".<sup>171</sup> In support of this position, the post-*Empagran* court also cited the Supreme Court's *Empagran* decision.<sup>172</sup> This line of argumentation is difficult to sustain for three reasons. Firstly, the Supreme Court's cases to which this argument makes reference did not include an assessment of the FTAIA. Secondly, if some clear words are not mentioned in the text of FTAIA, it does not mean per se that FTAIA did not take them in consideration while formulating the final form of legislative text. As indicated above, post-*Empagran* courts are aware that the U.S. Congress enacted the FTAIA to deal with concerns regarding the scope of the broad jurisdictional language in the Sherman Act.<sup>173</sup> Thirdly, as explained above, the Supreme Court of the U.S. did not rule on the nature of the FTAIA.

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<sup>167</sup> N.160.

<sup>168</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1088 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,752 (9th Cir.2014).

<sup>169</sup> *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 1245, 163 L.Ed.2d 1097 (2006).

<sup>170</sup> *Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013).

<sup>171</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,403,405 (2d Cir.2014).

<sup>172</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,404 (2d Cir.2014).

<sup>173</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1086 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,751 (9th Cir.2014).

Thus far, the analysis has shown that the arguments used by post-*Empagran* courts in support of their position on the nature of the FTAIA come as a surprise, as the post-*Empagran* courts made no reference to the reasons for and background to the U.S. Congress enacting the FTAIA. Are post-*Empagran* courts aware of the purpose of the FTAIA?

It seems that post-*Empagran* courts are aware that the U.S. Congress enacted the FTAIA with two principal purposes in mind:

- a.) To boost U.S. export by making it clear to U.S. exporters (and to firms conducting business abroad) that the Sherman Act does not prevent them from entering into business arrangements (for example, joint-selling arrangements), however anticompetitive, as long as those arrangements only affect foreign markets adversely;<sup>174</sup>
- b.) To clarify the legal standard determining when U.S. antitrust law governs foreign conduct, which different courts had articulated in slightly different ways. The U.S. Congress thus 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.<sup>175</sup>

For the sake of a complete analysis, it must be mentioned that post-*Empagran* courts tried to provide answers to some of the arguments that litigants brought forward to sustain their opinion on the FTAIA being a statute that regulates the jurisdiction of the U.S. courts.

The first argument brought up by litigants is that the statutory structure indicates that the FTAIA is a jurisdictional statute. According to this argument, the FTAIA addresses foreign conduct and claims based on this foreign conduct are barred by the FTAIA unless this foreign conduct has a cognisable effect on the U.S. Where this effect is present in the U.S., plaintiffs are allowed to pursue their claim under the provisions of the Sherman Act.<sup>176</sup> The adjudicating court answered this argument by stating that statutes generally do impose threshold

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<sup>174</sup> N.172.

<sup>175</sup> Ibid.

<sup>176</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,406 (2d Cir.2014).



requirements on adjudicating foreign conduct, either in the same or in separate statutes, so this is not unique to the FTAIA. What was relevant in the court's view is the fact that the FTAIA does not clearly state that these threshold requirement in the FTAIA are of a jurisdictional nature.<sup>177</sup> This adjudicating court made such a decision by reference to the *Reed Elseview*<sup>178</sup> case and the *Arbaugh*<sup>179</sup> case. This court's argument was challenged above where it was pointed out that the lack of an explicit term (word), i.e. 'jurisdiction' in the statutory text is not sufficient indication on its own that the FTAIA is a substantive statute. It was submitted that to determine the nature of the FTAIA correctly it is necessary to take into consideration the purpose why the U.S. Congress enacted the FTAIA, and history of the application of the Sherman Act to foreign conduct. If post-*Empagran* courts conducted such analysis, the result would reveal that the application of the Sherman Act and the FTAIA to foreign conduct can be correctly determined only by understanding the FTAIA as jurisdictional.

The second argument brought forward by the litigants to support their position of the FTAIA being a jurisdictional statute relies on the FTAIA's legislative history.<sup>180</sup> Post-*Empagran* courts dealt with this argument by rejecting the statutory interpretation to look beyond the test of the statute (reference was made here to the *Minn-Chem*<sup>181</sup> case and the *Arbaugh*<sup>182</sup> case) and consequently attributing to the FTAIA's statutory text a decisive role, i.e. pointing out that the FTAIA text does not include the clear word 'jurisdiction', which means that the FTAIA addressed elements of substance, not jurisdiction. The same critique can be applied as above. In addition, as explained above, post-*Empagran* courts are aware of why the FTAIA was enacted. Therefore, it is very surprising that post-*Empagran* courts should not use this knowledge as a relevant argument in delivering their opinion on the nature of the FTAIA.

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<sup>177</sup> Ibid.

<sup>178</sup> N.148.

<sup>179</sup> N.169.

<sup>180</sup> N.176.

<sup>181</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir.2012).

<sup>182</sup> N.169.

The third argument with which litigants tried to persuade post-*Empagran* courts to interpret the FTAIA as a jurisdictional statute is that portions of legislative history employ jurisdictional language.<sup>183</sup> The adjudicating court made reference to the *Arbaugh*<sup>184</sup> case and the *Steel*<sup>185</sup> case, where the Supreme Court of the U.S. explained that jurisdiction is a word of many - too many - meanings;<sup>186</sup> to the *Yousef*<sup>187</sup> case and the *Sabella*<sup>188</sup> case, where Courts of Appeals stated that legal lexicon knows no word more chameleon-like than ‘jurisdiction’;<sup>189</sup> to the *Arbaugh*<sup>190</sup> case, where the Supreme Court of the U.S. made a self-critical comment of being profligate in the use of the term ‘jurisdiction’;<sup>191</sup> and to the *Henderson*<sup>192</sup> case, where the Supreme Court of the U.S. expressed the need to bring more discipline into the use of the term ‘jurisdiction’.<sup>193</sup> The adjudicating court emphasized that none of the cases to which litigants referred to in support of their argument used the term ‘jurisdiction’ unambiguously to describe the adjudicative authority of U.S. courts rather than, somewhat less precisely, the prescriptive scope of U.S. law.<sup>194</sup> The critique of this type of reasoning of post-*Empagran* courts remains the same, i.e. that none of the cases to which post-*Empagran* courts made reference to are cases that assessed the nature of the FTAIA. In addition, the problem of the term ‘jurisdiction’ having an ambiguous meaning does not entitle post-*Empagran* courts to solve this problem simply by attributing to the FTAIA a nature that the FTAIA does not have. The logic of post-*Empagran* courts is rather challenging and difficult to understand. It is not possible to determine the nature of the FTAIA by saying ‘we give you a substantive nature because we say so’.

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<sup>183</sup> N.176.

<sup>184</sup> N.169.

<sup>185</sup> *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

<sup>186</sup> N.176.

<sup>187</sup> *U.S. v. Yousef*, 750 F.3d 254 (2d Cir.2014).

<sup>188</sup> *U.S. v. Sabella*, 272 F.2d 206 (2d Cir. 1959).

<sup>189</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,407 (2d Cir.2014).

<sup>190</sup> N.169.

<sup>191</sup> N.189.

<sup>192</sup> N.160.

<sup>193</sup> N.189.

<sup>194</sup> *Ibid.*

The fourth argument used by litigants in support of the FTAIA being jurisdictional is the invocation of the canon of statutory interpretation whereby courts “*ordinarily construe ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations*”<sup>195</sup>. Post-*Empagran* courts rejected this argument by saying that the FTAIA is not ambiguous, and added that even if the FTAIA was ambiguous, the Supreme Court in the *Arbaugh* case has specifically instructed post-*Empagran* courts to treat statutory limitations as nonjurisdictional unless the U.S. Congress “clearly states”<sup>196</sup> otherwise. This line of reasoning by post-*Empagran* court shows nothing more than that post-*Empagran* courts simply attributed a substantive nature to the FTAIA, and that they did so by analogy with cases that were not FTAIA cases.

The fifth argument that litigants used in support of their position that the FTAIA is a jurisdictional statute was by reference to the part of the Supreme Court’s *Empagran* decision where the Supreme Court of the U.S. stated that “*there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor*” and to the part where the Supreme Court made reference to a pre-*Empagran* case where the adjudication court stated that “*no case in which jurisdiction was found in a case like [Empagran]*”<sup>197</sup>.

The adjudicating court rejected these arguments in the following way:

- The Supreme Court in the *Empagran* decision also quoted a treatise arguing that Congress would not have intended the FTAIA to “*provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier for conduct that has independent effects on U.S. commerce*”, and that the Supreme Court in the *Arbaugh*<sup>198</sup> case and the *Steel*<sup>199</sup> case stated that jurisdiction is a world of many - too many - meanings<sup>200</sup>. This response of post-*Empagran* courts is nothing more than a

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<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> N.169.

<sup>199</sup> N.185.

<sup>200</sup> N.189.

repetition of the arguments that were criticised here above, i.e. that post-*Empagran* courts should take into consideration the purpose of the FTAIA and that the cases to which reference is made are not FTAIA cases;

- The Supreme Court delivered its decision in the *Empagran* litigation in 2004, i.e. before the *Arbaugh*<sup>201</sup> case was handed down in 2006, and the Supreme Court confessed in the *Arbaugh* case to being imprecise in its use of jurisdictional language prior to *Arbaugh*. Therefore, the post-*Empagran* court states, by relying on the *Minn-Chem*<sup>202</sup> case, that jurisdictional references in the *Empagran* decision appear in quotations from other sources, and that the Supreme Court's *Empagran* decision also contains language that describes the FTAIA in decidedly nonjurisdictional terms<sup>203</sup>. Simply stating that the post-*Empagran* court relied on a statement by another post-*Empagran* courts and this precedent can be wrong too can refute this argument. In addition, the Supreme Court in the *Empagran* litigation explicitly addressed the FTAIA and therefore had an opportunity to decide on the nature of the FTAIA, but it did not find it necessary to raise this question. It is also worth remembering the critique presented above, i.e. that questionable reliance of the U.S. courts on matter of jurisdiction to adjudicate a case does not on its own entitle post-*Empagran* courts to attribute to the FTAIA a nature that it does not have;
- The Supreme Court in the *Empagran* decision, e.g. spoke of the FTAIA removing certain types of conduct from the Sherman Act's reach, and also elaborate a valid question whether it was reasonable to apply this law to conduct that was significantly foreign.<sup>204</sup> This argument was already refuted above in that the FTAIA talking about conduct does not imply on its that the FTAIA is a substantive statute. The history of the application of the Sherman Act to foreign conduct points in the opposite direction;

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<sup>201</sup> N.169.

<sup>202</sup> N.181.

<sup>203</sup> N.189.

<sup>204</sup> Ibid.

- The requirements of the FTAIA are substantive and nonjurisdictional in nature.<sup>205</sup> This is merely another example of a conclusory post-*Empagran* courts and, as such, should be rejected;
- A post-*Empagran* courts first cited legislative history in the passage “Congress sought to clarify the legal standard determining when American antitrust law governs foreign conduct, which different courts had articulated in somewhat different ways”. In furtherance of this statement, the post-*Empagran* court then cited the passage from the Supreme Court’s *Empagran* decision where the Supreme Court stated that the U.S. Congress thus “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”<sup>206</sup>. There is no doubt that these citations are correct. The only problem is that the post-*Empagran* court ignored the fact that these statements were produced in a context where the U.S. Congress and the Supreme Court were talking about the jurisdiction of the U.S. courts.

### 4.3.3 Issue Left Undecided

The substance of this subsection does not contribute anything to the understanding whether the FTAIA and the question of the relationship between anticompetitive effects and litigated private antitrust injury is an issue of subject matter jurisdiction or an issue of substantive antitrust claim.

This subsection merely completes the overall presentation of post-*Empagran* decisions that adjudication courts took in relation to this issue.

There are a number of post-*Empagran* adjudication courts that were in a position where they could have undertaken analysis and provided their elaborated position on the nature of the FTAIA.

The reasons why these post-*Empagran* adjudication courts did not undertake adjudication analysis of the issue are the following: litigants did not challenge

<sup>205</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,398 (2d Cir.2014).

<sup>206</sup> N.172.

the characterization of the FTAIA,<sup>207</sup> they assumed that lower courts had taken the correct decision on the nature of the FTAIA,<sup>208</sup> or there was no need to do so, because a solution to the dispute between litigants was possible irrespective of the FTAIA being classified as a jurisdictional statute or a statute that regulates substantive antitrust claim.<sup>209</sup>

#### 4.3.4 Significance for Private Antitrust Litigation

As mentioned in the subsection above, some post-*Empagran* adjudicating courts<sup>210</sup> were able to resolve the dispute between litigants without finding it necessary to provide any determination of the nature of the FTAIA.

Nevertheless, it is important to analyse whether and to what extent the issue of the nature of the FTAIA and relationship between anticompetitive effects and litigated private antitrust injury may affect private antitrust law enforcement in practice and on the research presented in this thesis.

If the FTAIA was perceived as a statute that regulates the subject matter jurisdiction of U.S. courts, the consequences for private antitrust law enforcement in practice would be the following:

- The question of the existence of the required type of relationship between anticompetitive effects in the U.S. and litigated private antitrust injury would be addressed by the courts and would not reach the jury;<sup>211</sup>

<sup>207</sup> *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,243,n.6 (S.D.N.Y. 2008); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,11 (E.D.N.Y.); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,983,985 (9th Cir.2008); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,3 (N.D.Cal.); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430,440,n.4 (6th Cir.2012).

<sup>208</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,983 (9th Cir.2008).

<sup>209</sup> *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430,440,n.4 (6th Cir.2012); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,983,985 (9th Cir.2008); *Minn-Chem, Inc. v. Agrum Inc.*, 657 F.3d 650,659 (7th Cir.2011); *In re Optical Disk Drive Antitrust Litigation*, 2014 WL 3378336,1 (N.D.Cal.); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589,13,n.9 (N.D.Cal.).

<sup>210</sup> *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430,440,n.4 (6th Cir.2012); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,983,985 (9th Cir.2008); *Minn-Chem, Inc. v. Agrum Inc.*, 657 F.3d 650,659 (7th Cir.2011); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,315 (E.D.N.Y.2012).

- The adjudicating courts would be entitled to raise a motion on its own and evaluate whether there exists a required relationship between anticompetitive effects in the U.S. and litigated private antitrust injury;<sup>212</sup>
- The adjudicating courts may have the authority to dismiss litigants' action, depending on the existence of the relationship between anticompetitive effects in the U.S. and litigated private antitrust injury;<sup>213</sup>
- The question of the existence of the required type of relationship between anticompetitive effects in the U.S. and litigated private antitrust injury could be raised at any time;<sup>214</sup>
- The non-existence of the required type of relationship between anticompetitive effects in the U.S. and litigated private antitrust injury could cause the litigation to be removed from federal courts to state courts;<sup>215</sup>
- Private plaintiffs would carry the burden to establish the existence of the required type of relationship between anticompetitive effects in the U.S. and litigated private antitrust injury;<sup>216</sup>
- The adjudicating courts would not be permitted to make independent findings of fact, examine evidence, and resolve factual disputes.<sup>217</sup>

If the FTAIA was perceived as a statute that regulates substantive antitrust claim, the consequences for private antitrust law enforcement in practice would be the following:

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<sup>211</sup> See explanation in *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1021,1022 (N.D.Ill.2001).

<sup>212</sup> See explanation in *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,850 (D.N.J.2008).

<sup>213</sup> See explanation in *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,2 (N.D.Cal.).

<sup>214</sup> N.139.

<sup>215</sup> Ibid.

<sup>216</sup> See explanation in *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,469,n.9 (3d Cir.2011).

<sup>217</sup> Ibid.

- The question of the existence of the required type of relationship between anticompetitive effects in the U.S. and litigated private antitrust injury would be addressed by jury;<sup>218</sup>
- Jury would be allowed to evaluate whether there exists a required relationship between anticompetitive effects in the U.S. and litigated private antitrust injury only if any of the litigants raise this issue;<sup>219</sup>
- Courts would have authority to issue summary judgments, depending on the existence of the relationship between anticompetitive effects in the U.S. and litigated private antitrust injury;<sup>220</sup>
- The question of the existence of the required type of relationship between anticompetitive effects in the U.S. and litigated private antitrust injury could be resolved on pleading, within summary judgment, and raised on appeal within factual issues;<sup>221</sup>
- The defendant would carry the burden to show that the private plaintiff has failed to demonstrate the existence of the required type of relationship between anticompetitive effects in the U.S. and litigated private antitrust injury;<sup>222</sup>
- The adjudicating courts would generally be permitted to look only at the face of the plaintiff's complaint, and would have to accept all alleged facts to be true. The court would not be permitted to make independent findings of fact, or examine evidence, or resolve factual disputes.<sup>223</sup>

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<sup>218</sup> N.211.

<sup>219</sup> N.212.

<sup>220</sup> N.213.

<sup>221</sup> N.139.

<sup>222</sup> See explanation in *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,469,n.9 (3d Cir.2011); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,487 (D.N.J.2014).

<sup>223</sup> Ibid.



The significance of the nature of the FTAIA and the relationship between anticompetitive effects and litigated private antitrust injury may have for the research presented in this thesis is slight.

The focus of the thesis is to establish the conditions, i.e. standards under which foreign private antitrust injury may be litigated before the U.S. courts. These conditions cannot exist without the existence of a certain type of relationship between anticompetitive effects in the U.S. and the litigated private antitrust injury, irrespective of whether this relationship falls within the ambit of subject matter jurisdiction or within the area of substantive antitrust claim.

### **4.3.5 Conclusion**

The nature of FTAIA and of the relationship between anticompetitive effects in the U.S. and litigated private antitrust injury does not change the significance of the research in this thesis.

Nevertheless, this thesis is of the position that the FTAIA and the relationship between anticompetitive effects in the U.S. and litigated private antitrust injury is an issue that falls within the subject matter jurisdiction of the U.S. courts.

Arguments that post-*Empagran* adjudicating courts use in support of their position on the nature of the FTAIA as a statute that regulates substantive elements of antitrust claim are not persuasive. Post-*Empagran* courts base their opinion predominantly on the Supreme Court's "clearly state" rule. This rule was formulated outside the area of antitrust law. Therefore, it is merely a speculation whether the Supreme Court might make the same decision with regard to the FTAIA.

The Supreme Court in the *Empagran* litigation did not raise any concerns about lower courts in the *Empagran* litigation having treated the FTAIA as a jurisdictional statute. In addition to this, the Supreme Court had an opportunity to scrutinize the FTAIA not only in the *Empagran* litigation, but already in the *Hartford Fire*<sup>224</sup> case, and on both these occasions, it does not seem as if the

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<sup>224</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

Supreme Court at that time had had any problems understanding the litigation the court was expected to adjudicate as one of jurisdiction.

The biggest problem with post-*Empagran* courts' argumentation that the FTAIA is a statute that regulates substantive antitrust claim is that these courts import arguments that the U.S. courts, primarily the Supreme Court of the U.S., developed outside the area of antitrust law and on the basis of the analysis of statutes that were not the FTAIA. Therefore, they can only speculate about whether the Supreme Court of the U.S. would make the same decision regarding the FTAIA. The analysis of post-*Empagran* courts' opinion on the nature of the FTAIA showed that the courts simply attributed a substantive nature to the FTAIA with the purpose of contributing to the trend of approving bad practice by the U.S. courts that are not prudent or vigilant or eager to conduct the adjudicating process thoroughly, but tend to decide litigation by using jurisdictional analysis.

In addition, none of the post-*Empagran* courts took into consideration the fact that the entire history of resolving the application of the Sherman Act in the international context referred to a single question, i.e. whether the U.S. courts have the right and power to apply the Sherman Act to conduct that takes place outside the U.S. The fact that the U.S. Congress let the U.S. courts to determine the reach of Sherman Act<sup>225</sup> in the international context resulted in the following: the U.S. courts formulated different tests for subject matter jurisdiction;<sup>226</sup> the U.S. courts determined that the Sherman Act is an exception of presumption against the extraterritorial application of the U.S. laws;<sup>227</sup> negative reaction of non-U.S. states to the application of the Sherman Act extraterritorially;<sup>228</sup> introduction of comity;<sup>229</sup> enactment of the FTAIA as a

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<sup>225</sup> See Robert H. Bork, *The Antitrust Paradox: A Policy At War With Itself* (Basic Books, Inc., 1978), 72; William H. Page, "The Scope of Liability for Antitrust Violations," *Stanford Law Review* 37 (1985), 1707-08; Comment, "Fifty Years of Sherman Act Enforcement," *The Yale Law Journal* 49, no. 2 (1939), 286 and Chapter 6, section 3.

<sup>226</sup> See Chapter 6, subsection 3.2.

<sup>227</sup> See William S. Dodge, "Understanding the Presumption Against Extraterritoriality," *Berkeley Journal of International Law* 16 (1998); John H. Knox, "A Presumption Against Extrajurisdictionality," *American Journal of International Law* 104, no. 3 (2010).

<sup>228</sup> See Thomas E. Kauper. The Treatment of Cartels under the Antitrust Laws of the United States in Manfred Neumann and Jürgen Weigand, eds. *The International Handbook of Competition* (Cheltenham, UK/Northampton, Massachusetts, USA: Edward, Elgar, 2004); Maher M. Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge, UK: Cambridge University Press, 2003).

consequence of the need to bring order into the area of subject matter jurisdiction of the U.S. courts when applying U.S. antitrust laws to foreign trade and commerce.<sup>230</sup> All these should be sufficient arguments in support of considering the FTAIA as a jurisdictional statute.

There is another aspect of the FTAIA that has not been considered by post-*Empagran* courts in formulating their opinion that the FTAIA is not a jurisdictional statute. As mentioned above, the FTAIA was enacted to restore order in the application of the Sherman Act in the international context. Therefore, the FTAIA cannot be analysed separately from the Sherman Act without explicitly taking into consideration that the purpose of the FTAIA was jurisdictional.

This thesis places considerable emphasis on the *Empagran* litigation. The Supreme Court has not ruled on the nature of the FTAIA explicitly, but it is important to remember that the entire *Empagran* litigation started because of inconsistency in interpreting the FTAIA with regard to the possibility of foreign private antitrust injury being litigated before the U.S. courts. Lower courts in the *Empagran* litigation used the FTAIA to rule explicitly on the question of the jurisdiction of the U.S. courts. This means that the whole litigation was intended to set up the subject matter jurisdiction standard for litigating foreign private antitrust injury before the U.S. courts, and the Supreme Court was addressed to rule on this matter too. This means that the Supreme Court did have an opportunity to say something about the FTAIA not being jurisdictional and consequently classify the question under adjudication as incorrectly worded (i.e. the Supreme Court might have said that on the basis of the FTAIA the U.S. courts

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<sup>229</sup> See Note, "Comity and Extraterritoriality in Antitrust Enforcement," *Harvard Law Review* 124(2011); James M. Grippando, "Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine," *Virginia Journal of International Law* 23, no. 3 (1983) and Chapter 6, subsection 3.3.

<sup>230</sup> See Chapter 6, subsections 3.1.1. and 3.1.2. See also Thomas E. Kauper. The Treatment of Cartels under the Antitrust Laws of the United States in Cheng, Lui, and Wang, *International Harmonization of Competition Laws*, 83; Gary R. Sprawling, D. Jarrett Arp & Alexandra J. Shephard. Making the Decision: What to do when faced with International Cartel exposure in Ewing, *Competition Rules for the 21st Century: Principles From America's Experience*, 615; Warren S. Grimes. International Antitrust Enforcement Directed at Restrictive Practices and Concentration: The United States' Experience in Hanns Ullrich, ed. *Comparative Competition Law: Approaching an International System of Anti-Trust Law: Proceedings of the Workshop, Bruges, College of Europe, July 3-5, 1997* (Baden-Baden, Germany: Auflage, 1998), 222; Bruno Zanettin, *Cooperation Between Antitrust Agencies At the International Level* (Portland, Oregon, USA: Hart Publishing, 2002), 28.

do always have jurisdiction), but the Supreme Court did not do so. In addition, all cases<sup>231</sup> that were mentioned or taken explicitly into consideration throughout the *Empagran* litigation with the purpose of reaching a decision on how to interpret the FTAIA to grant an opportunity for foreign private antitrust injury to be litigated before the U.S. courts were dealing with subject matter jurisdiction.

Another reason why this thesis considers post-*Empagran* cases that attribute a non-jurisdictional nature to the FTAIA as inconclusive is that none of them are of the Supreme Court's authority. The *Empagran* litigation and pre-*Empagran* cases were concerned with the application of U.S. antitrust laws in the international context within the question of the jurisdiction of the U.S. courts. As mentioned above, the Supreme Court was involved in the formulation of this U.S. antitrust law too. The Supreme Court did not have anything to say in any of the post-*Empagran* cases that classified the FTAIA as non-jurisdictional. Therefore, post-*Empagran* cases that attributed a substantive nature to the FTAIA are of lower legal authority than pre-*Empagran* cases and the *Empagran* case where the Supreme Court ruled on the jurisdiction of the U.S. courts.

Last but not least, if the FTAIA was construed as a statute that regulates substantive antitrust claim, the question of the jurisdiction of the U.S. courts would remain unresolved. None of the post-*Empagran* courts decided on conditions for determining the jurisdiction of the U.S. courts in the international context. In this situation, there are only two options of how the jurisdiction of the U.S. courts could be determined. The first option is to decide that the U.S. courts do always have jurisdiction and foreign private antitrust injury can always be litigated before the U.S. courts. The second option is to say that the jurisdiction of the U.S. court should be determined under the Sherman Act and pre-*Empagran* case law. Neither of these options can be accepted otherwise, it would be make the FTAIA an unnecessary statute and negate the purpose behind the FTAIA.

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<sup>231</sup> See Chapter 2, in particular subsection 3.1.7.3.

## 5 Post-*Empagran* Courts' Perception of the *Empagran* Litigation

Chapter 2 explained very thoroughly that extreme caution<sup>232</sup> is required to correctly understand the importance, nature and contribution of the *Empagran* litigation to the development of private antitrust law enforcement within the international context.

The adjudicating courts in the *Empagran* litigation decided on a very narrow factual situation. The *Empagran* litigation provides a decision on the possibility of private plaintiffs obtaining compensation for private antitrust injury that

- they suffered outside the U.S., and
- is independent from any antitrust injury and anticompetitive effects within the U.S.<sup>233</sup>

The analysis in chapter 2 demonstrated that the Supreme Court's decision opened the door for foreign antitrust injury to be litigated before the U.S. courts. In this regard, it is very important to stress that the Supreme Court did not reject the possibility that private plaintiff may litigate their antitrust injury on the basis of the alternative theory.<sup>234</sup>

Nevertheless, chapter 2 also expressed strong criticism of how the Supreme Court was conducting adjudicating process, in particular because it based its decision on an assumptions<sup>235</sup> and because it failed to provide guidance for future private antitrust law litigation<sup>236</sup>.

Chapter 2 expressed strong scepticism regarding the correctness of the second Court of Appeals' decision to which the Supreme Court referred litigation for

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<sup>232</sup> See Chapter 2, subsection 3.2. and section 4.

<sup>233</sup> See Chapter 2, subsections 3.1.6.3, 3.1.6.4., 3.1.7.3., and 3.1.7.4.

<sup>234</sup> See Chapter 2, subsection 3.1.10.

<sup>235</sup> That was not in conformity with what litigants argued and therefore did not address the factual situation as presented before the adjudicating courts (see Chapter 2).

<sup>236</sup> See Chapter 2, subsection 3.2.

further scrutiny. In chapter 2 it was submitted that this second Court of Appeals did not fully comply with the Supreme Court's decision.<sup>237</sup> Consequently, this approach taken by the second Court of Appeals resulted in new obstacles being imposed on foreign antitrust injury being litigated before the U.S. courts.

The narrow factual situation resolved by the *Empagran* decision and the highly questionable legal reasoning<sup>238</sup> behind the adjudicating courts' decisions throughout the *Empagran* litigation resulted in the end in many questions being left open.

Therefore, the purpose of this section is to analyse post-*Empagran* case law and try to understand:

- 1.) Whether post-*Empagran* adjudicating courts provide answers to the questions left open in the *Empagran* litigation;
- 2.) What legal grounds post-*Empagran* adjudicating courts used in reaching their decision.

Before undertaking this analysis, it is important to see whether post-*Empagran* adjudicating courts understood correctly the *Empagran* litigation and its decisions.

## 5.1 Understanding the *Empagran* Litigation

### 5.1.1 Significance

This thesis submits that the *Empagran* litigation is a new, very important cornerstone case in the development of U.S. antitrust law. The Supreme Court's

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<sup>237</sup> See Chapter 2, subsection 3.1.7.4. and subsection 3.1.10.

<sup>238</sup> The analysis in Chapter 2 paid particular attention to whether the arguments the adjudicating courts used throughout the *Empagran* litigation are persuasive and in conformity with the precedents on which the courts relied to formulate their decision.

*Empagran* opened the door to private plaintiffs litigating their foreign antitrust injury before the U.S. courts.<sup>239</sup>

Chapter 2 explained that *Empagran* is a relatively complex case.<sup>240</sup> Chapter 2 also presented that particular prudence is required to understand correctly:

- The ruling delivered by the adjudicating courts;
- The reasoning that the adjudicating courts used in delivering their ruling; and
- The type of factual situation in the real world (i.e. extent) to which the ruling in the *Empagran* litigation can be applied.

Chapter 2 expressed a strong critique of the ruling and reasoning of the second Court of Appeals<sup>241</sup> decision in the *Empagran* litigation. This second Court of Appeal decision may not be problematic for the private plaintiffs in the *Empagran* litigation.<sup>242</sup> Irrespective of this, the second Court of Appeal's *Empagran* decision may be problematic for private antitrust law enforcement in the future.

This section is result of awareness that:

- 1) Post-*Empagran* adjudicating courts use the rulings developed in the *Empagran* litigation as legal precedents to deliver their own decisions. Therefore, interpreting rulings from the *Empagran* litigation in a way that does not comply with the reasoning used in the *Empagran* litigation may potentially lead to post-*Empagran* decisions of questionable legal validity;
- 2) Post-*Empagran* decisions of questionable legal validity may become precedents, i.e. without being accompanied by rulings from the

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<sup>239</sup> For a comparison of the *Empagran* case with pre-*Empagran* cases see Chapter 6.

<sup>240</sup> See Chapter 2, subsection 3.1.

<sup>241</sup> N.22.

<sup>242</sup> See Chapter 2, subsection 3.2.

*Empagran* litigation.<sup>243</sup> If post-*Empagran* decisions are used in further litigation, the development of antitrust law may go in a direction that was not intended by the Supreme Court in the *Empagran* litigation. In addition, it is submitted that such development will not benefit U.S. antitrust law<sup>244</sup> and the interests of private litigants.

Post-*Empagran* case law shows recognition that the Supreme Court decision in *Empagran* is a seminal case interpreting the FTAIA,<sup>245</sup> and therefore controlling precedent on the §6a(2).<sup>246</sup> This means that the Supreme Court decision should be used for interpreting what the required type of relationship is between anticompetitive effects within the U.S. and litigated private antitrust injury, i.e. what the require type of causation is between these two.<sup>247</sup>

A few post-*Empagran* adjudicating courts also expressed the importance of the Supreme Court decision by refusing to apply some case law merely because it pre-dated the Supreme Court decision.<sup>248</sup>

The previous section presented that there are numerous post-*Empagran* judgments influenced by the *Empagran* litigation. Nevertheless, one of the post-*Empagran* courts observed correctly that after the Supreme Court delivered its *Empagran* decision, a small number of post-*Empagran* courts addressed the issue

<sup>243</sup> See section above where it was presented that post-*Empagran* courts use post-*Empagran* cases as precedents without making any reference to decisions formulated by the *Empagran* courts.

<sup>244</sup> See Chapter 4, section 4.

<sup>245</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 476 F.Supp.2d 452,456 (D.Del.2007); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010).

<sup>246</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,3 (N.D.Cal.); *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,2 (E.D.Pa.); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,537 (8th Cir.2007); *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,782 (N.D.Cal.2007); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1113 (N.D.Cal.2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,986 (9th Cir.2008); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,960 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,840 (N.D.Cal.2011).

<sup>247</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,562 (D.Del.2006).

<sup>248</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 476 F.Supp.2d 452,456 (D.Del.2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,989 (9th Cir.2008); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,557,558 (E.D.Pa.2010); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,7 (N.D.Cal.); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,246,n.9 (S.D.N.Y. 2008); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,988 (9th Cir.2008).



whether foreign injury is dependent on anticompetitive effects in the U.S.<sup>249</sup> This observation raises serious concerns, bearing in mind that the distinction between independent and dependent foreign injury was crucial<sup>250</sup> to the Supreme Court delivering its decision.

An overview<sup>251</sup> of post-*Empagran* case law reveals that adjudicating courts might not necessarily understand the importance of the Supreme Court decision. One piece of evidence that indicates the existence of this problem is that some post-*Empagran* courts used only the Supreme Court decision as a precedent (as the second Court of Appeals decision in the *Empagran* litigation had not been articulated yet),<sup>252</sup> or only the Supreme Court decision despite the existence of the second Court of Appeals decision,<sup>253</sup> or only the second Court of Appeals decision,<sup>254</sup> and even only post-*Empagran* case law without any reference to the *Empagran* litigation<sup>255</sup>.

<sup>249</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,3 (D.Minn.) [direct reference to merely one judgment]. See also analysis in subsections that follow.

<sup>250</sup> See analysis in Chapter 2, subsection 3.1.7.3.

<sup>251</sup> See analysis that follows.

<sup>252</sup> *BHP New Zealand Ltd. v. UCAR Intern., Inc.*, 106 Fed.Appx. 138, 2004 WL 1771436 (3d Cir.); *MM Global Services, Inc. v. Dow Chemical Co.*, 329 F.Supp.2d 337 (D.Conn.2004); *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790 (D.Minn.).

<sup>253</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,8 (N.D.Cal.); *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526 (D.N.J.2005).

<sup>254</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,561 (D.Del.2006); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,537 (8th Cir.2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,987 (9th Cir.2008); *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815,4 (N.D.Ill.); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,553 (E.D.Pa.2010).

<sup>255</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,4,5 (N.D.Cal.); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,244 (S.D.N.Y.2008); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,987 (9th Cir.2008); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166,1190 (N.D.Cal.2009) [mentioning *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004)]; *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583,598 (N.D.Cal.2010) [mentioning *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) as well but no analysis of the relationship between them]; *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,6,7 (N.D.Cal.); *In re Korean Air Lines Co., Ltd. Antitrust Litigation*, 2010 WL 3184372 (C.D.Cal.); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,2,4,6 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,960,962 (N.D.Cal.2011) [mentioning *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) as well but no analysis of relationship between them]; *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,840 (N.D.Cal.2011) [mentioning *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) as well but no analysis of the relationship between them]; *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,4,6 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,26,30,31 (E.D.N.Y.2013) [*F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) is mentioned in the analysis, but not with regard to the required type of relationship

This subsection will analyse how post-*Empagran* adjudicating courts understand the Supreme Court decision, the second Courts of Appeals decision, and whether post-*Empagran* courts are aware and consequently address the tension that exists between these two judgments. Each part of this subsection will divide the reasoning (statements) from post-*Empagran* case law into categories of correct, questionable, and inconsistent.

## 5.1.2 The Supreme Court's Decision

### 5.1.2.1 Correct Understanding

The starting statement from post-*Empagran* case law should be the one where it is clearly explained that the Supreme Court decided on a factual situation where foreign anticompetitive effects (and antitrust injury) were independent of anticompetitive effects in the U.S.<sup>256</sup> The explanation that the Supreme Court

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between anticompetitive effects in the U.S. and litigated private injury]; *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365,6 (N.D.Cal.) [it can be demonstrated that despite giving authority to *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) and post-*Empagran* cases in interpreting the FTAIA, the final decision of the litigation was based on pre-*Empagran* case law; *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616,2 (N.D.Cal.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,316-319 (E.D.N.Y.2012); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154 (N.D.Ill.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 4652126 (N.D.Cal.); *In re Optical Disk Drive Antitrust Litigation*, 303 F.R.D. 311 (N.D.Cal.2014); *In re Refrigerant Compressors Antitrust Litigation*, 2015 WL 1181168 (E.D.Mich.); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464 (S.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 1568870 (N.D.Cal.); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451 (D.C.N.J.1918).

<sup>256</sup> *BHP New Zealand Ltd. v. UCAR Intern., Inc.*, 106 Fed.Appx. 138,142 2004 WL 1771436 (3d Cir.) [pre *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005)]; *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,2 (D.Minn.) [pre *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005)]; *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,3 (N.D.Cal.); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,2,7 (S.D.N.Y.); *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,358,552,n.17 (D.N.J.2005); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,4 (N.D.Cal.); *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,2,3 (E.D.Pa.); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,538 (8th Cir.2007); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 2007 WL 1056783,4 (N.D.Cal.); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,444-445 (D.N.J.2007); *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,782 (N.D.Cal.2007); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1113 (N.D.Cal.2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,986 (9th Cir.2008); *In re Urethane Antitrust Litigation*, 261 F.R.D. 570,575 (D.Kan.2009); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,960 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,841 (N.D.Cal.2011); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,5 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,29 (E.D.N.Y.2013); See *Power Integrations, Inc. v. Fairchild Semiconductor Intern., Inc.*, 711 F.3d 1348,1372 (Fed.Cir.2013); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL

stated no position with regard to factual situations where foreign injury was not independent of anticompetitive effects in the U.S. is in conformity with the statement above and other evidence of correct understanding.<sup>257</sup>

Few of the post-*Empagran* court showed awareness that the Supreme Court reached its conclusion on the assumption that the anticompetitive conduct independently caused foreign injury.<sup>258</sup> Therefore, the Supreme Court declined to address factual situations where foreign injury was not independent of but rather “linked to” the domestic effects.<sup>259</sup>

One of the reasons the Supreme Court used in support of its decision is the reliance on prescriptive comity that the Supreme Court interpret to mean that applying U.S. antitrust law is reasonable where foreign anticompetitive conduct causes domestic injury, as this injury needs to be redressed. It follows that in a situation where anticompetitive conduct causes independent foreign harm and that harm alone gives rise to a plaintiff’s claim, it is not reasonable to apply U.S. antitrust law.<sup>260</sup> The statement is also in conformity with this explanation that

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258154,6 (N.D.Ill.); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,319 (E.D.N.Y.2012).

<sup>257</sup> *BHP New Zealand Ltd. v. UCAR Intern., Inc.*, 106 Fed.Appx. 138,142 2004 WL 1771436 (3d Cir.2004) [pre *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005)]; *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010).

<sup>258</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,960 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,841 (N.D.Cal.2011); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,5 (N.D.Cal.).

<sup>259</sup> *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,552,n.17 (D.N.J.2005); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,3 (N.D.Cal.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,319 (E.D.N.Y.2012).

<sup>260</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,6 (D.Minn.) [pre *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005)]; *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,3 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583,307 (N.D.Cal.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,3 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,29 (E.D.N.Y.2013); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,964 (N.D.Cal.2011); See *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,858 (7th Cir.2012); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,6 (N.D.Ill.); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,414 (2d Cir.2014); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842,846 (7th Cir.2014).

U.S. antitrust law does not apply to anticompetitive conduct<sup>261</sup> where anticompetitive conduct affects only foreign markets.<sup>262</sup>

Post-*Empagran* case law did not forget to mention the part of the Supreme Court decision where the Supreme Court did not adjudicate the matter, but remanded the question to the Court of Appeals. Post-*Empagran* courts interpreted the reminded question in four different ways:

- Whether the plaintiffs should be permitted to proceed on an alternative theory;<sup>263</sup>
- Whether the foreign purchasers would have a Sherman Act claim if the foreign injury was dependent on domestic price-fixing and injury;<sup>264</sup>
- Whether the Sherman Act may apply to foreign claims linked to domestic effects (i.e. claims in which the foreign injury is not independent of the domestic effect);<sup>265</sup>
- Whether the plaintiff's alternative argument that its foreign injury was not in fact independent of any adverse domestic effect should be reconsidered.<sup>266</sup>

The statements presented above on what factual situation the Supreme Court decided on, and statements about what questions the Supreme Court referred to the Court of Appeals for further consideration, indicate that the Supreme Court did not rule that the required type of relationship between anticompetitive effects in the U.S. and litigated private antitrust injury is one of direct

<sup>261</sup> Irrespective of the nationality of the firms involved. This means that U.S. firms can be involved in anticompetitive conduct.

<sup>262</sup> *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815,3 (N.D.Ill.); *In re Chocolate Confectionary Antitrust Litigation*, 602 F.Supp.2d 538,576,n.44 (M.D.Pa.2009); *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881,4 (E.D.Pa.); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650,658 (7th Cir.2011); See *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,964 (N.D.Cal.2011); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,5 (N.D.Ill.).

<sup>263</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,2 (S.D.N.Y.).

<sup>264</sup> *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,445 (D.N.J.2007).

<sup>265</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1113 (N.D.Cal.2007).

<sup>266</sup> *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,6 (N.D.Ill.).

(proximate) causation. This is evident from post-*Empagran* case law where the adjudicating courts used the Supreme Court decision to interpret the FTIA provisions to mean that domestic anticompetitive effect must give rise to “a claim”,<sup>267</sup> and not to “the claim” that will point to the proximate causation requirement.

The existence of analysis of the required type of relationship between anticompetitive effects within the U.S. and litigated private antitrust injury in post-*Empagran* case law shows that the post-*Empagran* adjudicating courts understood correctly the ruling from the *Empagran* litigation that private plaintiffs cannot establish this required relationship merely by alleging the existence of a global conspiracy that caused both domestic and foreign adverse effects.<sup>268</sup>

### 5.1.2.2 Questionable Understanding

In the previous part of this subsection it was explained that some post-*Empagran* courts interpreted the Supreme Court decision to mean that the Supreme Court did not rule that the only correct type of relationship between anticompetitive

<sup>267</sup> *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,545 (D.N.J.2005); *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,558 (D.Del.2006); *In re Intel Corp. Microprocessor Antitrust Litigation*, 476 F.Supp.2d 452,456 (D.Del.2007); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1110 (N.D.Cal.2007); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,243 (S.D.N.Y. 2008); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,12 (E.D.N.Y.); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,985 (9th Cir.2008); *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815,3 (N.D.Ill.); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166,1183 (N.D.Cal.2009); *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,925 (N.D.Ill.2009); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2010 WL 9543295,8 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583,598 (N.D.Cal.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,3,6 (N.D.Cal.); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,2 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,33 (E.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,960 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,840 (N.D.Cal.2011); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,26 (E.D.N.Y.2013); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,854 (7th Cir.2012); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227,6 (S.D.N.Y.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,5 (N.D.Ill.); *In re Optical Disk Drive Antitrust Litigation*, 2014 WL 3378336,2 (N.D.Cal.); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,818 (7th Cir.2015); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,404 (2d Cir.2014); *U.S. v. Hui Hsiung*, 758 F.3d 1074,1089-1090 (9th Cir.2014); *Fenerjian v. Nongshim Company, Ltd.*, 2014 WL 5685562,14 (N.D.Cal.); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,13 (S.D.N.Y.); *U.S. v. Hui Hsiung*, 778 F.3d 738,754 (9th Cir.2014).

<sup>268</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,7 (S.D.N.Y.).

effect in U.S. and litigated private antitrust injury is direct (proximate) causation.

Unfortunately, this is not common understanding among post-*Empagran* courts. This is evident from those statements where post-*Empagran* courts relied on the Supreme Court decision in interpreting the FTAIA to mean that anticompetitive effects in the U.S. must give rise to “the” plaintiff’s claim.<sup>269</sup>

At this point it is useful to mention some of the post-*Empagran* courts’ statements that show how these courts relied on the Supreme Court judgment in justifying the direct (proximate) causation.

One example is where post-*Empagran* adjudicating courts stated that because the Supreme Court in *Empagran* ruled that independent foreign harm is not sufficient to establish jurisdiction, this means that to establish the jurisdiction of U.S. courts it is required that the anticompetitive effect in the U.S. should give rise to the plaintiff’s claim.<sup>270</sup> It is submitted that this type of reasoning is difficult to follow. The requirement that foreign private antitrust harm must not be independent does not say anything about the type of required relationship between anticompetitive effects within the U.S. and litigated private antitrust injury in a situation where this private antitrust injury is not independent.

The other example used by post-*Empagran* adjudicating courts where they rely on the Supreme Court judgment in support of the position that the relationship between anticompetitive effects in the U.S. and litigated antitrust injury has to be one of direct (proximate) causation is a statement that the FTAIA language of

<sup>269</sup> *Sniado v. Bank Austria AG*, 378 F.3d 210,212 (2d Cir.2004) [pre *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005)]; *MM Global Services, Inc. v. Dow Chemical Co.*, 329 F.Supp.2d 337,341 (D.Conn.2004) [pre *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005)]; *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,2 (D.Minn.) [pre *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005)]; *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,1,3 (N.D.Cal.); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,7 (S.D.N.Y.); *In re Monosodium Glutamate*, 2005 WL 2810682,1 (D.Minn.); *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,548-549 (D.N.J.2005); *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,3 (E.D.Pa.); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,444 (D.N.J.2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,986 (9th Cir.2008); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589,14 (N.D.Cal.); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,414 (2d Cir.2014); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842,845 (7th Cir.2014).

<sup>270</sup> See *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,444 (D.N.J.2007).

a claim means that not “*only foreign injury*”<sup>271</sup> should be litigated. This reasoning does not make any sense at all. In a situation where the litigated private antitrust injury is independent foreign injury, the U.S. courts do not have jurisdiction anyway. The situation where litigated antitrust injury is both (i.e. domestic and foreign combined together) was not decided in the *Empagran* litigation and therefore the Supreme Court did not provide any ruling on the required type of relationship between anticompetitive effects in the U.S. and litigated antitrust injury.

The fact that there is a discussion on the required relationship between anticompetitive effects and litigated private antitrust injury suggests that it is worth mentioning that few post-*Empagran* adjudicating courts were focusing their analysis on the relationship between the defendant's anticompetitive conduct and the plaintiff's injury.<sup>272</sup>

It is submitted that the most problematic post-*Empagran* statements on the Supreme Court ruling are the ones where post-*Empagran* adjudicating courts state that the FTAIA excludes from Sherman Act's reach, i.e. there is no jurisdiction of the U.S. courts under the FTAIA in those situations where anticompetitive conduct causes “*only foreign injury*”<sup>273</sup>, or in those factual situations where anticompetitive conduct results “*in foreign injury*”<sup>274</sup>, or in those situations where a private plaintiff brings before the U.S. court a claim

<sup>271</sup> See *American Pan Co. v. Lockwood Mfg., Inc.*, 2008 WL 471685,11 (S.D.Ohio).

<sup>272</sup> FTAIA §6a(2) was also explained to mean that anticompetitive conduct must give rise to a claim in *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881,4 (E.D.Pa.) and a pre-*Empagran* case was used as precedent; *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,521 (D.N.J.2014).

<sup>273</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,2 (N.D.Cal.); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,444 (D.N.J.2007); *American Pan Co. v. Lockwood Mfg., Inc.*, 2008 WL 471685,11 (S.D.Ohio); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,985 (9th Cir.2008); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583,597,598 (N.D.Cal.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,3 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2629728,2 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,23 (E.D.N.Y.2013) [in connection with “wholly foreign transactions & exports ... excluded from the Sherman – the problem is that this is not the same as ‘whole foreign injury’”]; *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,314 (E.D.N.Y.2012); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227,5 (S.D.N.Y.); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,521 (D.N.J.2014); *Lavoho, LLC v. Apple Inc.*, 2014 WL 6791612,2 (S.D.N.Y.).

<sup>274</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1109 (N.D.Cal.2007).

based on “*foreign harm*”<sup>275</sup>. The Supreme Court in the *Empagran* litigation denied the U.S. courts jurisdiction only in those factual situations where foreign antitrust injury was independent of the anticompetitive effects and antitrust injury in the U.S. Therefore, the Supreme Court did not deny the U.S. courts subject matter jurisdiction in all types of factual situations where the litigated antitrust injury is foreign.

Consequently, the post-*Empagran* adjudicating courts’ ruling is problematic in all those situations where post-*Empagran* adjudicating courts refused jurisdiction to private plaintiffs merely because they had purchased goods outside the U.S.<sup>276</sup>

Similarly problematic are those post-*Empagran* statements where post-*Empagran* adjudicating courts interpreted the Supreme Court judgment to mean that for the U.S. courts to have jurisdiction, both the purchase and the delivery of goods has to take place in the U.S.,<sup>277</sup> or the statement that the Supreme Court left unresolved the right of private litigants to bring before the U.S. courts a private antitrust law claim based on antitrust injury suffered in a situation where “*either the purchase or the delivery of goods takes place within the United States*”.<sup>278</sup>

The post-*Empagran* adjudicating courts’ statements are problematic not merely with regard to the requirement that for the U.S. courts to have jurisdiction, purchases, i.e. transactions, have to take place within the U.S. The post-*Empagran* adjudicating courts’ statements are also problematic in those situations where the post-*Empagran* adjudicating courts made the nationality of private plaintiff a requirement for establishing the jurisdiction of the U.S. courts. One such example is the statement that the “*concern of the antitrust laws is the protection of American consumers and exporters, not foreign consumers or producers*”.<sup>279</sup> Another example is the statement that U.S.

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<sup>275</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,366 (D.N.J.2010).

<sup>276</sup> *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,30 (E.D.N.Y.2013).

<sup>277</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,321 (E.D.N.Y.2012).

<sup>278</sup> *Ibid.*

<sup>279</sup> *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,925 (N.D.Ill.2009).



antitrust law “*should not be used [to redress] injury to foreign consumers*”.<sup>280</sup> The Supreme Court in *Empagran* did not rule that non-U.S. nationals cannot obtain compensation before the U.S. courts for (foreign) antitrust injury they had suffered.

The analysis of post-*Empagran* case law also suggests that not all post-*Empagran* adjudicating courts understand correctly what exactly the Supreme Court asked the second Court of Appeals to adjudicate on remand.

One example of this misunderstanding is the statement by post-*Empagran* adjudicating courts that the second Court of Appeals was asked whether “*domestic effects did not help to bring about the foreign injury*”.<sup>281</sup> This statement alleges the exact opposite of what the Supreme Courts asked. The Supreme Court asked<sup>282</sup> the Court of Appeals to reconsider whether there exists a relationship between anticompetitive effects in the U.S. and litigated foreign injury that would support the claim that this litigated foreign antitrust injury is not independent. If foreign injury needs to be dependent then domestic anticompetitive effects need to contribute, i.e. help anticompetitive conduct to cause foreign antitrust injury, and not be of “non help,” as the post-*Empagran* adjudicating court explained.

Similarly questionable is the post-*Empagran* adjudicating court’s statement that the Supreme Court asked Court of Appeals to reconsider whether “*the anticompetitive conduct’s domestic effects were linked to [the] foreign harm*”.<sup>283</sup> The Supreme Court did not require the Court of Appeals to reconsider whether any kind of link existed between anticipative effects within the U.S. and litigated foreign injury, but the Supreme Court explicitly required<sup>284</sup> the Court of Appeals to reconsider whether there exists such a relationship between anticompetitive effects in the U.S. and litigated private foreign antitrust injury that would make this litigated foreign antitrust injury not merely “linked” to

<sup>280</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,858 (7th Cir.2012).

<sup>281</sup> *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,3 (E.D.Pa.).

<sup>282</sup> See Chapter 2, subsection 3.1.7.3.

<sup>283</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,5 (N.D.Cal.).

<sup>284</sup> See Chapter 2, subsection 3.1.7.3.

anticompetitive effects within the U.S., but “dependent” on the anticompetitive effects within the U.S.

Additional misunderstanding is shown in post-*Empagran* case law with regard to the substance of what the Supreme Court asked the second Court of Appeal to reconsider in the statement that the second Court of Appeals was required to rule on “*arbitrage contention*”.<sup>285</sup> It was presented in chapter 2 that the Supreme Court asked the second Court of Appeals on remand to decide on the alternative theory claim where “arbitrage” is only one of the characteristics of the alternative theory claim.<sup>286</sup>

One of the most important questions that remained unresolved in the *Empagran* litigation is how to determine whether foreign anticompetitive effects and litigated foreign private antitrust injury are dependent on anticompetitive effects (and antitrust injury) within the U.S. This thesis looked at post-*Empagran* case law with the purpose of establishing whether post-*Empagran* adjudicating courts provide an answer, i.e. guidance (criteria) that would help private litigants and adjudicating courts in the future to establish correctly whether litigated foreign antitrust injury is dependent on or independent from anticompetitive effects (antitrust injury) within the U.S. The only statement<sup>287</sup> that could be found in post-*Empagran* case law is that “*private plaintiff’s injury is independent from domestic effect where defendant’s conduct affects both domestic and foreign commerce but the plaintiff’s injury arises only from conduct’s foreign effect*”.<sup>288</sup> Unfortunately, this ruling cannot be accepted as valid on determination of the “dependency” of the litigated private antitrust injury. The fact that injury arises from foreign anticompetitive effects does not say anything about the nature of the connection between anticompetitive effects within the U.S. and anticompetitive effects outside the U.S., or about the connection between antitrust injury outside the U.S. and antitrust injury in the U.S. A factual situation may exist where the litigated antitrust injury may arise from anticompetitive effects outside the U.S., but anticompetitive effects

<sup>285</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010).

<sup>286</sup> See Chapter 2, subsection 3.1.10.

<sup>287</sup> See analysis in subsection 6.2.1. in this chapter below.

<sup>288</sup> *MM Global Services, Inc. v. Dow Chemical Co.*, 329 F.Supp.2d 337,341-342 (D.Conn.2004) [pre *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C.Cir.2005)].

(and antitrust injury) outside the U.S. may be dependent on anticompetitive effects (and antitrust injury) within the U.S.

### 5.1.2.3 Confusing Statements

The analysis of post-*Empagran* adjudicating courts' understanding of the *Empagran* litigation reveals that post-*Empagran* judgments contain some statements that do not unambiguously reveal what the *post-Empagran* adjudicating courts had in mind when they delivered their decision. In other words, there are some statements present in post-*Empagran* case law that cast doubt on whether adjudicating courts really made any effort to understand the *Empagran* litigation.

A statement that can be taken to indicate that post-*Empagran* adjudicating court tried to deliver an assessment of existing case law is the one where a post-*Empagran* court, by referring to the Supreme Court's *Empagran* decision, stated that the FTAIA meant that "*federal courts do not have jurisdiction over most cases involving foreign commerce*".<sup>289</sup> The problem with this statement is that the Supreme Court did not provide any assessment of the matter. In addition to this, this statement is very vague, abstract, and does not explain the grounds on which such a conclusion was reached. Surprisingly, the post-*Empagran* court that produced this statement did not list any case law in support of this statement.

Another set of confusing statements was made by post-*Empagran* adjudicating courts when they tried to explain the requirement that has to be fulfilled for private antitrust injury to be successfully litigated before the U.S. courts.

The first statement is that "some effect" in addition to independent foreign effect has to serve as a basis on which the plaintiff's claim may arise.<sup>290</sup> The problem with this statement is that it is not clear what this post-*Empagran* adjudicating court meant by "some" effect. Does it mean that in this post-*Empagran* adjudicating court's view, the focus of the inquiry should be on the

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<sup>289</sup> *Fond du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co., Ltd.*, 753 F.Supp.2d 792,795 (E.D.Wis.2010).

<sup>290</sup> *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,545 (D.N.J.2005).

extent of the effects instead of the quality of the effects?<sup>291</sup> In addition to this, this statement is also confusing because it enables the understanding that foreign antitrust injury can be litigated before the U.S. courts even if it is independent from the anticompetitive effects (and antitrust injury) within the U.S. under the condition that there should exist some “other?” effect.

The second statement in this set by post-*Empagran* adjudication courts is that the plaintiff’s claim must arise from “*independent domestic effect*”.<sup>292</sup> Firstly, the Supreme Court in the *Empagran* litigation did not say anything like this. The Supreme Court used the classification of “independent” in relation to foreign antitrust injury vis-à-vis anticompetitive effects (and antitrust injury) within the U.S.<sup>293</sup> Secondly, this post-*Empagran* adjudication court’s statement may allow the understanding that there should not exist any connection between the litigated antitrust injury and anticompetitive effects outside the U.S. If such an understanding is possible, this means that this post-*Empagran* adjudicating court does not support the view that antitrust injury that is of a foreign nature could be litigated before the U.S. courts. This post-*Empagran* statement simply does not facilitate the understanding of how the litigated antitrust injury can derive from transactions concluded by a private plaintiff outside the U.S.<sup>294</sup> with this injury arising from anticompetitive effect (and antitrust injury) within the U.S. and this domestic anticompetitive effect (and antitrust injury) having no connection with the transactions that took place outside the U.S.

The third statement in this set by post-*Empagran* adjudicating courts is that the Supreme Court ruled that the plaintiff’s claim (i.e. antitrust injury) must not arise “out of a foreign harm” if the FTAIA allows the application of the Sherman Act to apply.<sup>295</sup> An assessment of this statement on its own would classify it as “questionable understanding” of the Supreme Court’s *Empagran* decision. The reason why this statement is put in this part of the subsection is because in

<sup>291</sup> FTAIA §6(a) requires the effect to be direct, substantial, and reasonably foreseeable. See section on reasoning here below.

<sup>292</sup> *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,551 (D.N.J.2005).

<sup>293</sup> See Chapter 2, subsection 3.1.7.3.

<sup>294</sup> The Supreme Court did not exclude foreign antitrust law claim from being litigated before the U.S. courts [see Chapter 2, subsection 3.2.].

<sup>295</sup> *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,29 (E.D.N.Y.2013).

support of this statement, the post-*Empagran* adjudicating court used a citation from the Supreme Court's *Empagran* judgment stating explicitly that the plaintiff's claim must not "rests solely on the independent foreign harm".<sup>296</sup> The reasoning behind this statement by the post-*Empagran* adjudicating court implies that "independent foreign harm" is the same as "foreign harm in general". This is why this statement is classified as "confusing".

Post-*Empagran* case law also includes confusing statements on what question the Supreme Court actually decided and what kind of question it remanded to the second Court of Appeals for further adjudication. There are three statements that fall within this group.

The first statement is that the Supreme Court "*expressly declined to address the issue in situation whether foreign injury is allegedly linked to the domestic effects*".<sup>297</sup> This statement is confusing because it uses the expression "allegedly linked". The Supreme Court never used such an expression.<sup>298</sup> In addition to this, such a classification does not say anything about the type (nature) of the connection that has to exist between anticompetitive effects in the U.S. and the litigated antitrust injury. Furthermore, the use of the term "allegedly" in the statement casts doubt on whether, in this post-*Empagran* adjudication court's view, foreign injury has to be *de facto* connected with anticompetitive effects in the U.S.

The second statement by the post-*Empagran* adjudicating court is that the Supreme Court in the *Empagran* litigation "*declined to address the situation in which the foreign injury was not independent of but rather "linked to" the domestic effects*".<sup>299</sup> This statement is confusing because it implies that as soon as a "link" exists between anticompetitive effects in the U.S. and foreign injury, this injury can be litigated before the U.S. courts. Is really the existence of such a "link", irrespective of the nature of the link, itself a sufficient condition for making the litigated foreign injury dependent and, consequently, eligible to be

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<sup>296</sup> Ibid.

<sup>297</sup> *In re Monosodium Glutamate*, 2005 WL 2810682,1 (D.Minn.); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,538 (8th Cir.2007).

<sup>298</sup> See Chapter 2, subsection 3.1.7.3.

<sup>299</sup> *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,552,n.17 (D.N.J.2005).

litigated before the U.S. courts? As explained in this subsection above, there may be a factual situation where there exists a link between foreign antitrust injury and anticompetitive effects within the U.S., but this foreign antitrust injury may still be classified as independent and consequently not eligible to be litigated before the U.S. courts. This critique is consistent with the statement produced by the post-*Empagran* adjudicating court “*that foreign claim [must be] linked to domestic effect*” and “*foreign injury [must not be] independent of the domestic effect*”.<sup>300</sup>

The third statement by post-*Empagran* adjudicating courts is that the Supreme Court requires private plaintiffs to allege a “*sufficient link between the U.S. effect and their foreign injury*”.<sup>301</sup> This statement is confusing because it does not provide any explanation of what “sufficient” means. The Supreme Court judgment requires talking merely in terms of “independent” or “dependent” injury.<sup>302</sup> Therefore, this statement, by using the category of “sufficient”, does not provide any explanation of the point where “sufficient” becomes “dependent”.

As stated several times already in this chapter, and discussed in-depth in chapter 2, the Supreme Court did not rule that the only acceptable relationship between anticompetitive effects in the U.S. and the litigated private antitrust injury is one of direct (proximate) causation determined as standard by the second Court of Appeals, to which the Supreme Court remanded the *Empagran* litigation for further adjudication. In relation to this critique of the second Court of Appeals’ ruling in the *Empagran* litigation under which there must exist direct (proximate) causation between anticompetitive effects in the U.S. and the litigated private antitrust injury, it is important not to forget to mention the post-*Empagran* adjudication court’s statement according to which the Supreme Court in the *Empagran* litigation recognized that the private plaintiff’s “*claim based on foreign injury that depends on the domestic effect of the defendant’s*

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<sup>300</sup> N.265.

<sup>301</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,986 (9th Cir.2008).

<sup>302</sup> This thesis introduces the term “transborder” which, it is submitted, satisfies the requirement of being dependent.

*anti-competitive conduct involves but-for causation*".<sup>303</sup> This statement can be understood in two ways. Firstly, that but-for causation is merely one of many possible and therefore permissible types of relationship between anticompetitive effects within the U.S. and the litigated private antitrust injury. Secondly, that but-for causation is the only permissible standard under which it is sufficient to analyse the existence of the relationship between anticompetitive effects within the U.S. and the litigated private antitrust injury.

### 5.1.3 The Second Court of Appeals' Decision

It was argued in this chapter above that the second Court of Appeals' decision influenced the development of post-*Empagran* case law. Therefore, it is important to analyse whether post-*Empagran* adjudicating courts understood the second Court of Appeals' *Empagran* decision correctly, or whether their understanding of the second Court of Appeals' *Empagran* decision is of a questionable nature.

#### 5.1.3.1 Correct Understanding

Post-*Empagran* adjudicating courts interpreted the second Court of Appeals' ruling to mean that the "*gives rise to*" language in the FTAIA requires a plaintiff to demonstrate a direct causal relationship between the domestic effects and the foreign injury. Thus, a mere but-for nexus is insufficient."<sup>304</sup>

Post-*Empagran* courts also provided an explanation that this second Court of Appeals' ruling means that "*plaintiffs needed to allege more than a mere link between domestic effect and foreign injury*". They explained that this means that "*proximate causation is the standard*", and by applying this standard to

<sup>303</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,3 (D.Minn.) [pre *Empagran* S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267 (D.C.Cir.2005)].

<sup>304</sup> *In re Monosodium Glutamate*, 2005 WL 2810682,2 (D.Minn.); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,538 (8th Cir.2007); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1113 (N.D.Cal.2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,987 (9th Cir.2008); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,6 (N.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,7 (N.D.Ill.); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,553 (E.D.Pa.2010).

factual situations where “if U.S. prices facilitate prices abroad [this] demonstrates merely but-for causation”, i.e.... “establishes only indirect connection”.<sup>305</sup>

Post-*Empagran* courts also correctly identified one of the reasons why the second Court of Appeals ruled on the type of required relationship in the way it did. This reason is that the private plaintiffs in the *Empagran* litigation acknowledged before the second Court of Appeals “at oral argument [that] “but-for” causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anti-competitive conduct within the FTIAA exception”,<sup>306</sup> i.e. under §6a(2).

### 5.1.3.2 Questionable Understanding

The final statement in the part above that was classified as correct understanding of the second Court of Appeals’ ruling in the *Empagran* litigation addressed one of the reasons why the second Court of Appeals reached its decision on the required type of relationship between anticompetitive effects in the U.S. and the litigated foreign antitrust injury.

This is not the only reason why the second Court of Appeals ruled in the way it did.<sup>307</sup> Another reason is comity,<sup>308</sup> and post-*Empagran* courts explained that the second Court of Appeals used comity as required by the Supreme Court in establishing the nature of the required relationship between anticompetitive effects in the U.S. and the litigated private antitrust injury, and that according to the second Court of Appeals, comity required direct causal (i.e. proximate) causation.<sup>309</sup> The problem with this reasoning is that comity was used as an argument by the Supreme Court decision in the *Empagran* litigation only in

<sup>305</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,4 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,30 (E.D.N.Y.2013); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,7 (N.D.Ill.).

<sup>306</sup> *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,5 (E.D.Pa.); See also statement in *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,7 (S.D.N.Y.).

<sup>307</sup> See Chapter 2, subsection 3.1.7.4. in this regard.

<sup>308</sup> See Chapter 2, subsection 3.1.8.

<sup>309</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,8 (S.D.N.Y.); *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,5 (E.D.Pa.).



connection with the question whether independent foreign antitrust injury should be litigated before the U.S. courts.<sup>310</sup> The Supreme Court did not develop comity to indicate a direct causal (i.e. proximate) type of relationship between anticompetitive effects in the U.S. and the litigated private antitrust injury. Post-*Empagran* case law did not recognize this part of the *Empagran* reasoning.

A Post-*Empagran* case mentions that one of the reasons why the private plaintiffs in the *Empagran* litigation did not succeed with their claim before the second Court of Appeals is “*because the global conspiracy theory did not show that the foreign injury was inextricably linked to domestic restraints of trade*” and therefore “*domestic effect cited by the plaintiffs did not give rise to their claimed injuries*”.<sup>311</sup> As explained in chapter 2,<sup>312</sup> the second Court of Appeals did not conduct any factual analysis of the nature of the relationship between anticompetitive effects within the U.S. and the litigated antitrust injury before delivering its decision. In addition to this, it was presented in chapter 2<sup>313</sup> that the Supreme Court and the District Court<sup>314</sup> who re-evaluated the plaintiffs’ allegations before the case went back to the second Court of Appeals saying that the private plaintiffs did present allegations in a way that might support a type of relationship between anticompetitive effects in the US and the litigated foreign antitrust injury that is not independent.

Another failure present in post-*Empagran* case law is the reference to the second Court of Appeals’ statement reading the FTAIA broadly “*more flexible, less direct standard than proximate cause would open the door to [unreasonable interference with the sovereign authority of other nations] to safeguard their own citizens from anti-competitive activity within their own borders*”.<sup>315</sup>

<sup>310</sup> See Chapter 2, subsection 3.1.8.

<sup>311</sup> *In re Monosodium Glutamate*, 2005 WL 2810682,3 (D.Minn.).

<sup>312</sup> See Chapter 2, subsections 3.1.6.4 and 3.1.7.4.

<sup>313</sup> See Chapter 2, section 2.

<sup>314</sup> This District Court is not the adjudicating court that delivered the first decision in the *Empagran* litigation. This is the District Court that was asked to decide the question that the Supreme Court required to be answered before the *Empagran* litigation was enabled to proceed for adjudication before the second Court of Appeals, to which the Supreme Court remanded the *Empagran* litigation for further adjudication. This District Court had to answer the question whether the private plaintiffs in the *Empagran* litigation alleged and preserved the alternative claim theory throughout the *Empagran* litigation. This District Court adjudicated this above mentioned question in the affirmative.

<sup>315</sup> N.311.

Analysing the second Court of Appeals' reasoning demonstrated that such argument was linked to independent foreign injury, and was not presented in general terms as post-*Empagran* cases did.

Post-*Empagran* adjudicating courts made attempts to understand the alternative theory claim. In this regard, they referred to statements in second Court of Appeals' judgment. Within this analysis, post-*Empagran* adjudicating courts referred only to the part of the alternative theory claim that talks about the relationship between anticompetitive prices in the U.S. and prices charged to private plaintiffs outside the U.S.,<sup>316</sup> and to the part of the alternative theory claim that talks about market division agreements.<sup>317</sup> None of the post-*Empagran* cases presented the alternative theory claim in its whole substance.<sup>318</sup>

#### **5.1.4 Tension between the Supreme Court's *Empagran* Decision and the second Court of Appeals' *Empagran* Decision**

The analysis in chapter 2<sup>319</sup> questioned whether the ruling delivered by the second Court of Appeals in the *Empagran* litigation is consistent with the Supreme Court decision on:

- The required nature of the relationship between anticompetitive effects in the U.S. and the litigated foreign private antitrust injury that will enable this antitrust injury to be litigated before the U.S. courts;
- The permissibility of alternative theory claim allegations to be litigated before the U.S. courts;

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<sup>316</sup> *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,538 (8th Cir.2007); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1113-1114 (N.D.Cal.2007) [It is surprising that court here narrowed alternative theory only on prices issues, as the analysis started in wider perception how alternative theory was formulated within the *Empagran* litigation; *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,841 (N.D.Cal.2011); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,6 (N.D.Cal.).

<sup>317</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010).

<sup>318</sup> For further analysis on the post-*Empagran* understanding of the alternative theory claim see subsection below.

<sup>319</sup> See Chapter 2, subsections 3.1.7.4., 3.1.8, and 3.1.10.

- The substance and method on how comity should be applied to private antitrust law enforcement litigation before the U.S. courts in the future.

Therefore, this part of this subsection has the purpose of analyzing whether post-*Empagran* courts addressed the issue of the relationship between the Supreme Court decision and the second Court of Appeals decision in the *Empagran* litigation, and whether post-*Empagran* courts challenged the correctness of the decision of the second Court of Appeals' *Empagran* decision.

There has not been any dispute among the post-*Empagran* courts with regard to the fact that the FTAIA requires adjudicating courts to determine the standard under which (foreign) antitrust injury may be litigated before the U.S. courts.

In chapter 2<sup>320</sup> it was elaborated extensively that the Supreme Court in the *Empagran* case ruled only that independent foreign antitrust injury could not be litigated before the U.S. courts. Apart from that, the Supreme Court did not provide any definitive decision on standard or any guidance on how to satisfy the FTAIA §6a(2) requirement of the relationship between anticompetitive effects in the U.S. and the litigated antitrust injury.<sup>321</sup> In chapter 2 it was also explained that the Supreme Court's reasoning also means that both the alternative theory claim and but-for causation are permissible grounds on which private litigants can litigate their (foreign) antitrust injury.<sup>322</sup>

Therefore, post-*Empagran* case law is correct in stating that the Supreme Court in the *Empagran* litigation left open the issue of the required standard under which foreign private antitrust injury can be litigated before the U.S. courts.<sup>323</sup> At the same time, post-*Empagran* courts recognize that, apart from one

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<sup>320</sup> See Chapter 2, subsections 3.1.6.3. subsection 3.1.7.3.

<sup>321</sup> See Chapter 2, subsection 3.2.

<sup>322</sup> See Chapter 2, subsection 3.1.10.

<sup>323</sup> *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,6 (E.D.Pa.); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,986 (9th Cir.2008); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010).

exemption,<sup>324</sup> that the Supreme Court is the only controlling precedent on the matter.<sup>325</sup>

This means that post-*Empagran* case law considers the Supreme Court's *Empagran* decision as a valid and, consequently, binding precedent on conditions that private plaintiffs are required to satisfy to enable adjudicating courts to decide whether to allow (foreign) private antitrust injury to be litigated before the U.S. courts. Does this recognition of legal importance by post-*Empagran* adjudicating courts of the Supreme Court's *Empagran* decision also mirror their legal reasoning in the adjudication process when post-*Empagran* adjudication courts deliver their judgment?

The analysis of post-*Empagran* case law requires this question to be answered in the negative. Post-*Empagran* case law shows consistency in stating that the only valid legal standard, i.e. the only type of relationship between anticompetitive effects in the U.S. and litigated (foreign) private antitrust injury that enables (foreign) antitrust injury to be litigated before the U.S. courts, is the one of direct (i.e. proximate) causation.

How is it possible that post-*Empagran* case law developed in this direction? This question can be answered by analysing the reasons that post-*Empagran* adjudicating courts used in support of their decision on directness (i.e. proximity) of causation.

The worst post-*Empagran* judgments on the matter are those<sup>326</sup> that just cite all the decisions delivered by the adjudicating courts in the *Empagran* litigation without providing any analysis or explanation of the relationship between them.

Similarly problematic are those statements in post-*Empagran* cases that consider the second Court of Appeals' *Empagran* decision as a leading authority on the issue.<sup>327</sup> As explained above, the leading authority could only be the Supreme

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<sup>324</sup> See analysis below.

<sup>325</sup> *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,6 (E.D.Pa.); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,539 (8th Cir.2007).

<sup>326</sup> *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,29-31 (E.D.N.Y.2013).

<sup>327</sup> *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,785 (N.D.Cal.2007).

Court's *Empagran* decision. This means that post-*Empagran* adjudicating courts were expected to analyze the consistency of the second Court of Appeals' decision with the Supreme Court' decision, and not merely to classify the second Court of Appeals' decision as a leading authority.

Post-*Empagran* cases provide seven reasons why post-*Empagran* adjudicating courts are of the opinion that only direct (i.e. proximate) causation is the required type of relationship that has to exist between anticompetitive effects in the U.S. and (foreign) antitrust injury for this private injury to be litigated before the U.S. courts.

The first reason is that the second Court of Appeals and post-*Empagran* case law rejected 'but-for' (i.e. indirect) causation<sup>328</sup> as insufficient,<sup>329</sup> and consequently required direct (i.e. proximate) type of causation<sup>330</sup>. The problem with this reason is that it considers the second Court of Appeals decision as acceptable, i.e. not problematic, without challenging its validity at all. In addition to this, relying on post-*Empagran* cases as valid precedents<sup>331</sup> is problematic because this post-*Empagran* case law may carry the original sin within itself, i.e. the grounds on which this post-*Empagran* case law determined the direct (i.e. proximate) causation as the valid standard may be problematic as well.

<sup>328</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,989 (9th Cir.2008); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,960 (N.D.Cal.2011) [same situation stating first than *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) precedent but the decision on the required standard was based on post-*Empagran* case law]; *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,840 (N.D.Cal.2011) [same situation stating first than *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) precedent but the decision on the required standard required was based on post-*Empagran* case law].

<sup>329</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552,553 (E.D.Pa.2010); At this point is it worth mentioning that *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,784 (N.D.Cal.2007) is an example where proximate causation is stated as a required standard without any reasons listed in support of this position.

<sup>330</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,560 (E.D.Pa.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,6 (N.D.Cal.); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,2 (N.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,10 (N.D.Ill.).

<sup>331</sup> Examples where post-*Empagran* adjudicating courts relied only on post-*Empagran* case law in support of their position on the direct (i.e. proximate) causation standard include: *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,4 (N.D.Cal.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,316-317 (E.D.N.Y.2012); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,8 (N.D.Ill.).

The second reason listed in post-*Empagran* case law in support of the direct (i.e. proximate) causation standard is the FTAIA text itself.<sup>332</sup> The problem with this type of reasoning is that the text of the FTAIA has been the same throughout the *Empagran* and post-*Empagran* litigation, and the Supreme Court did not place any considerable value on the statutory text; on the contrary. The Supreme Court explicitly stated<sup>333</sup> that the FTAIA language enables various interpretations and consequently cannot be accepted as a basis on which to take the decision.

The third reason that post-*Empagran* case law uses in support of direct (i.e. proximate) causation is that there does not exist pre-*Empagran* case law that would support indirect (i.e. but for) causation.<sup>334</sup> The problem with this reason is that it does not take into consideration that the *Empagran* litigation is one where the adjudicating courts were asked to rule on the required standard and in thus clarify the different interpretations upheld at the time of what type of connection between anticompetitive effects and private antitrust injury is required to exist under the FTAIA. In addition to this, the adjudication courts in the *Empagran* litigation were concerned with the issue of “inextricability” or “dependency” connection between anticompetitive effects in the U.S. and the litigated antitrust injury, and they explicitly ruled in this regard that there exists pre-*Empagran* case law that requires such connection.<sup>335</sup> The adjudication courts in the *Empagran* litigation did not make reference to pre-*Empagran* case law with the purpose of determining whether the required standard is direct (i.e. proximate) or indirect (i.e. but-for) causation. As explained in chapter 2, the *Empagran* litigation was decided under the assumption that the litigated foreign antitrust injury is independent from anticompetitive effects (and antitrust injury) in the U.S.<sup>336</sup> Therefore, this assumed factual situation was such that it did not necessitate the application of pre-*Empagran* case law with the purpose of determining the required type of standard.

The fourth reason that post-*Empagran* case law lists in support of direct (i.e. proximate) causation is that the adoption of any other standard that is less than

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<sup>332</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,560 (E.D.Pa.2010).

<sup>333</sup> See Chapter 2, subsection 3.1.7.3.

<sup>334</sup> *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,539 (8th Cir.2007).

<sup>335</sup> See Chapter 2, subsection 3.1.7.3. and Chapter 7, subsection 3.1.

<sup>336</sup> See Chapter 2, subsections 3.1.6.3. and 3.1.6.4.

proximate causation would “*effectively expand the Sherman Act’s scope beyond that contemplated by the FTAIA*”<sup>337</sup>. The adjudication courts that stated this reason did not provide any explanation of why and how this could happen. The courts did not even make any statement that would enable an assessment of whether they correctly understand the purpose of the U.S. Congress enacting the FTAIA. A similar critique to the one expressed in relation to the third reason above also applies here (i.e. to this fourth reason) in the sense that the purpose of the FTAIA was the same throughout *Empagran* and post-*Empagran* litigation, and the Supreme Court did not adopt the purpose of the FTAIA to formulate the required standard.

The fifth reason that post-*Empagran* cases provide in support of direct (i.e. proximate) causation is “*general antitrust principles*”<sup>338</sup>. This argument is problematic because it relies on the law of causation between antitrust violation and antitrust injury to determine the causation between anticompetitive effects in the U.S. and the litigated (foreign) private antitrust injury. The issue of causation is a matter of substantive antitrust claim and, as explained in the section above,<sup>339</sup> substantive antitrust claim and the subject matter jurisdiction of the U.S. courts are two separate matters.

The sixth reason that post-*Empagran* courts used to reject ‘but-for’ causation and therefore support direct (i.e. proximate) causation is the possibility that the level of price that the private plaintiff paid outside the U.S. to obtain goods outside the U.S. is affected by other reasons (“*factors*”, “*intervening developments*”), not merely by the anticompetitive price which the same type of goods are charged in the U.S.<sup>340</sup> The problem with this reason is that the alternative theory includes elements that are wider<sup>341</sup> than the relationship between anticompetitive prices of the same type of goods in the U.S. and outside the U.S. The existence of factual situations where more factors than just the price of the goods in the U.S. influence the price of the same goods sold

<sup>337</sup> N.334.

<sup>338</sup> *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,538-539 (8th Cir.2007); See also *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,8 (S.D.N.Y.).

<sup>339</sup> See subsection 4.3. of this chapter above.

<sup>340</sup> *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,245 (S.D.N.Y. 2008); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,7 (N.D.Ill.) [cited cases in this regard].

<sup>341</sup> See Chapter 2, subsection 3.1.10.

outside the U.S. does not require on its own that the only type of relationship between anticompetitive effects within the U.S. and the litigated (foreign) private antitrust injury should be one of direct (i.e. proximate) causation. The Supreme Court in the *Empagran* litigation based its decision not on the “causation” requirement, but on the “connection” between anticompetitive effects (and antitrust injury) in the U.S. and anticompetitive effects (and antitrust injury) outside the U.S., and ruled<sup>342</sup> that this connection must not be of an “independent” nature. Therefore, the existence of many factors that influence the price of goods sold outside U.S. may result in a decision where all these factors together establish the required “not independent” type of connections between anticompetitive effects (and antitrust injury) in the U.S. and anticompetitive effects (and antitrust injury) outside the U.S., irrespective of whether causation between anticompetitive effects in the US and foreign antitrust injury is direct or indirect.

The seventh reason that post-*Empagran* adjudication courts used in support of direct (i.e. proximate) causation derives from their understanding that such causation is required by prescriptive “*comity considerations enunciated by the Supreme Court in Empagran litigation*”<sup>343</sup>. As explained several times both in chapter 2<sup>344</sup> and in this chapter above, the Supreme Court used the comity argument only in reaching the decision that independent foreign injury cannot be litigated before the U.S. courts. The Supreme Court did not rule on comity in general. The Supreme Court’s judgment does not provide any grounds on which it could be concluded that comity requires a direct (i.e. proximate) type of causation. In addition to this, comity is not an issue that determines on its own the required type of causation.

This analysis of post-*Empagran* case law enables us to submit that post-*Empagran* adjudication courts have adopted a schizophrenic approach to determine the type of connection that has to exist between anticompetitive effects within the U.S. and (foreign) private antitrust injury in order to allow this antitrust injury to be litigated before the U.S. courts. On the one hand,

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<sup>342</sup> See Chapter 2, subsection 3.1.7.3.

<sup>343</sup> *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,6 (E.D.Pa.); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,538 (8th Cir.2007).

<sup>344</sup> See Chapter 2, subsection 3.1.8.



post-*Empagran* case law recognized the Supreme Court's *Empagran* decision as controlling authority but on the other hand, post-*Empagran* case law accepted the decision delivered by the second Court of Appeals without first conducting any analysis of the consistency of this decision of the second Court of Appeals with the Supreme Court's decision. The position of post-*Empagran* case law on the matter is even worse than merely schizophrenic because the reasons used in post-*Empagran* cases in support of direct (i.e. proximate) causation to be the required legal standard cannot be accepted, as they lack persuasive power.

## 5.2 The Development of the Alternative Theory Claim

The focus of this part of the subsection is analyzing two questions:

- Whether post-*Empagran* adjudicating courts have ever applied the alternative theory claim in delivering their judgments;
- Whether they understood the alternative theory claim in the way as it was presented in its full extent in the *Empagran* litigation.

In chapter 2 it was explained<sup>345</sup> that the Supreme Court did not reject the alternative theory claim in its *Empagran* decision. This thesis submits that the Supreme Court, by not rejecting the alternative theory claim, opened doors, i.e. made it possible to litigate before the U.S. courts private antitrust injury claims that arise from those types of global antitrust cartels that are transborder<sup>346</sup> in their nature.

Unfortunately, the second Court of Appeals did not recognize the opportunity to develop this newly introduced approach further. It was extensively elaborated in chapter 2<sup>347</sup> that the second Court of Appeals should not be solely blamed for the final outcome of the *Empagran* litigation. The private plaintiffs in the *Empagran*

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<sup>345</sup> See Chapter 2, subsection 3.1.10.

<sup>346</sup> See Chapter 5.

<sup>347</sup> See Chapter 2, subsection 3.2.

litigation have also contributed to such an outcome by not being consistent in their allegations and by failing to articulate their claim properly.<sup>348</sup>

Nevertheless, any failures or questions left open in the *Empagran* litigation with regard to the alternative theory should not result in any private antitrust claim based on the alternative theory being automatically rejected in post-*Empagran* cases.

Therefore, it is important to analyze how post-*Empagran* courts understand the substance of the alternative theory and whether they are willing to accept it as valid legal grounds on which private plaintiffs can litigate their (foreign) private antitrust claim before the U.S. courts.

The first fact that the analysis of post-*Empagran* case law reveals is that post-*Empagran* courts gave different names to the alternative theory.

The names present in post-*Empagran* case law that refer to the alternative theory are: global conspiracy theory;<sup>349</sup> global indivisibility theory;<sup>350</sup> arbitrage theory;<sup>351</sup> global cartel theory;<sup>352</sup> arbitrage theory of causation;<sup>353</sup> and “but-for” or indirect causation theory<sup>354</sup>.

The last name given to the alternative theory, i.e. “but-for” or indirect causation theory, is highly suspicious as it may imply that post-*Empagran* adjudicating courts understand the alternative theory and “but-for” causation as one and the same thing. There are few examples of post-*Empagran* case law where it is clearly explained that “but-for” causation and the alternative theory

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<sup>348</sup> Ibid.

<sup>349</sup> N.311.

<sup>350</sup> *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,3 (E.D.Pa.).

<sup>351</sup> *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,445,447 (D.N.J.2007); *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,785 (N.D.Cal.2007); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,961 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,841 (N.D.Cal.2011).

<sup>352</sup> N.264.

<sup>353</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,319,320 (E.D.N.Y.2012).

<sup>354</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,989 (9th Cir.2008); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,539 (8th Cir.2007);

are different matters.<sup>355</sup> Nevertheless, a conclusion about the alternative theory cannot be drawn without analyzing the meaning behind these various names given to the alternative theory in post-*Empagran* case law.

The analysis of post-*Empagran* case law has to start with the post-*Empagran* courts' correct understanding that the alternative theory was recognized by the Supreme Court in the *Empagran* litigation, but was not addressed there.<sup>356</sup>

Post-*Empagran* courts also correctly state that the Supreme Court did not reject "but-for" causation,<sup>357</sup> as the Supreme Court recognized that injury that "depends" on domestic effect involves "but-for" causation<sup>358</sup>.

Post-*Empagran* case law explains that the Supreme Court in the *Empagran* litigation "*did not conclude that foreign purchasers could pursue claims in the United States if their injuries abroad would not have occurred "but for" the domestic effect of the alleged conduct*", and adds that the Supreme Court "*did not make any ruling about what was required for foreign purchasers in foreign commerce to bring a claim under the Sherman Act.*"<sup>359</sup> This means that post-*Empagran* case law is correct to state that the Supreme Court in the *Empagran* litigation "*declined to decide whether this "but for" condition is sufficient to bring the contested price-fixing conduct within the scope of the FTAIA's exception and had remanded the case for further proceedings on the issue*"<sup>360</sup>.

The analysis presented thus far does not support the understanding that the alternative theory and "but-for" causation are unconditionally connected, or even that they mean the same thing.

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*Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,30 (E.D.N.Y.2013).

<sup>355</sup> See the adjudicating court's reasoning in *In re Monosodium Glutamate*, 2005 WL 2810682 (D.Minn.) and also the reasoning in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955 (N.D.Cal.2011); and also the reasoning in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835 (N.D.Cal.2011).

<sup>356</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010).

<sup>357</sup> *Sniado v. Bank Austria AG*, 378 F.3d 210,213 (2d Cir.2004).

<sup>358</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,3 (D.Minn.)).

<sup>359</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,6 (N.D.Cal.).

<sup>360</sup> *Ibid.*

A completely different picture of post-*Empagran* case law starts to emerge when various statements behind the mentioning of the alternative theory are joined together.

According to post-*Empagran* courts' explanation of the alternative theory, this theory enables the application of U.S. antitrust law (through the application of the FTAIA) to "*a foreign injury that is not independent of the foreign conspiracy's effect on United States commerce*"<sup>361</sup>. As long as this sentence is analysed on its own, there is nothing wrong with it. The Supreme Court in the *Empagran* litigation made it clear that independent foreign antitrust injury cannot be litigated before the U.S. courts. Therefore, even in a situation where foreign private antitrust injury is litigated on the basis of the alternative theory, this litigated private antitrust injury must not be independent from anticompetitive effects (and antitrust injury) within the U.S.

The problem arises where post-*Empagran* courts require for the application of the alternative theory not merely that foreign injury should not be independent, "*inextricably linked to domestic restraints of trade*", but also that "*anticompetitive effects in the U.S. have to give rise to litigate foreign private antitrust injury claim*"<sup>362</sup>. According to this explanation, private plaintiffs can litigate their foreign private antitrust injury only if their injury is directly caused by anticompetitive effects in the U.S. Therefore, from this explanation of the alternative theory can be inferred that post-*Empagran* courts try to reduce alternative claim analysis into the "but-for" causation.

Some post-*Empagran* courts made an attempt to understand the substance of the alternative theory. These courts explained the alternative theory in terms of the following requirements: that goods are fungible; that these goods are readily transportable; that adverse effects (i.e. anticompetitive prices in the U.S.) are needed to maintain prices outside U.S.<sup>363</sup> Some post-*Empagran* courts add

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<sup>361</sup> *Sniado v. Bank Austria AG*, 378 F.3d 210,212 (2d Cir.2004).

<sup>362</sup> N.311.

<sup>363</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,2 (S.D.N.Y.); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,988 (9th Cir.2008); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,841 (N.D.Cal.2011); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,319 (E.D.N.Y.2012).

additional requirements that need to be satisfied for an alternative theory claim to be sustained. These requirements are the existence of single global price and the arrangement of barriers to commerce between regions (i.e. between the US and non-US countries).<sup>364</sup>

The problem arises where post-*Empagran* courts first presented the substance of the alternative theory claim in relation to a connection between anticompetitive prices in the U.S. and prices paid outside the U.S. that resulted in antitrust injury to private plaintiff,<sup>365</sup> and in relation to an indivisible global market for the relevant good where anticompetitive effects of a global conspiracy present in the U.S. caused their foreign injuries,<sup>366</sup> but then these courts decided that these facts were insufficient to satisfy “but-for” causation. Post-*Empagran* courts reached the same conclusion with regard to a single global market being a condition to sustain the alternative theory, i.e. that this part of the alternative theory does not fulfil the requirement of “but-for” causation as required by the second Court of Appeals in the *Empagran* litigation.<sup>367</sup> The equation between the alternative theory and “but-for” causation can be noted also in some analysis conducted by some post-*Empagran* adjudicating courts.<sup>368</sup>

There is another exposition in post-*Empagran* case law against the acceptance of the alternative theory. This exposition is problematic because of the reasoning that this post-*Empagran* court used in reaching its decision.<sup>369</sup> This post-*Empagran* court did the following:

1. Classified worldwide conspiracy as pure foreign conspiracy;
2. Stated that the alternative theory claim enables foreign private plaintiffs to access U.S. courts and obtain damages even in situations where the

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<sup>364</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1113-1114 (N.D.Cal.2007); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,552 (E.D.Pa.2010).

<sup>365</sup> N.359.

<sup>366</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,319 (E.D.N.Y.2012).

<sup>367</sup> *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,445,n.6 (D.N.J.2007).

<sup>368</sup> See n.359.

<sup>369</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,8 (N.D.Cal.).

private plaintiffs present unsupported allegations of a global marketplace with the possibility of arbitrage pricing;

3. Stated that the alternative theory allows foreign private plaintiffs to access U.S. courts and obtain damages even in situations where the foreign private plaintiffs do not allege that anticompetitive conduct had any direct impact on U.S. commerce;
4. Stated that the alternative claim should not be sustained because this would result in the U.S. courts' interference with the sovereign authority of other nations, and this type of interference is unreasonable and should therefore be avoided;
5. Stated that the private antitrust claim based on the alternative theory would require the U.S. courts to engage in complex fact-determinations of alleged linkages between foreign and domestic injuries. Requiring this from the U.S. courts would go against the Supreme Court's warning that a jurisdictional test based on the FTAIA should be capable of being applied simply and expeditiously.

It is submitted that all these five points of critique of the permissibility of the alternative theory claim before the U.S. courts can be classified as unfounded. Firstly, as mentioned in this section above, the Supreme Court did not reject the alternative theory claim. Secondly, there must exist anticompetitive effects within the U.S. and there must exist a connection between anticompetitive effects in the U.S. and the litigated foreign antitrust injury for an alternative theory claim to be sustained. Thirdly, the adjudicating courts in the *Empagran* litigation did not state that an adjudication process before U.S. courts would mean unreasonable interference with the sovereign interests of foreign nations in factual situations where the required type of connection exists between anticompetitive effects in the U.S. and the litigated private antitrust injury. Fourthly, it was clearly demonstrated in the previous section that a private plaintiff has to presents his allegations correctly irrespective of the grounds on which he bases his claim.

To conclude, the analysis of post-*Empagran* case law shows that post-*Empagran* courts did not necessarily understand the alternative theory claim correctly. The few elements of alternative theory claim used in their adjudication process show that the post-*Empagran* courts are not aware of the array of elements that were used in the *Empagran* litigation<sup>370</sup> to present the substance of the alternative theory claim. The problem is that there is a reasoning in post-*Empagran* case law that tends to analyse the alternative theory claim within the ‘but-for’ causation framework. The analysis of all post-*Empagran* case law reveals that not a single post-*Empagran* judgment can be found where the adjudication courts decided on the litigated private antitrust injury on the basis of the alternative theory.

### 5.3 The Development of Comity

In chapter 2 it was explained that the Supreme Court used comity as a reason in support of its decision that independent foreign antitrust injury should not be litigated before the U.S. courts.<sup>371</sup> The Supreme Court explained that in a situation where the litigated foreign antitrust injury is independent from anticompetitive effects in the U.S. and is suffered by non-U.S. nationals within non-U.S. countries, it should be these non-U.S. countries where the injury is suffered that protect their own nationals and regulate their nationals’ business.<sup>372</sup>

The Supreme Court made another decision with regard comity, i.e. that comity should no longer be applied on case-by-case basis.<sup>373</sup> Therefore, the consequence of the Supreme Court’s decision is that after the *Empagran* litigation was concluded, two questions remained unresolved with regard to comity:

- Whether and to what extent comity applies in private antitrust law enforcement litigation where the litigated (foreign) antitrust injury is not independent from anticompetitive effects in the U.S.;

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<sup>370</sup> See Chapter 2, subsection 3.1.10.

<sup>371</sup> See Chapter 2, subsection 3.1.8.

<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

- What approach adjudicating courts have to take in deciding comity due to the fact that they are not permitted to apply comity on a case-by-case basis?

This part of the subsection will analyse whether post-*Empagran* case law provides an answer to any of the questions on comity left open in the *Empagran* litigation. The analysis of post-*Empagran* case law reveals that not all post-*Empagran* courts understood the Supreme Court's *Empagran* decision on comity correctly. Therefore, this part of the subsection needs to present separately the statements in post-*Empagran* cases that correctly interpret the *Empagran* ruling on comity and the statements in post-*Empagran* cases that are not necessarily in conformity with the *Empagran* ruling on comity.

### 5.3.1 Correct Understanding

Post-*Empagran* courts repeated the ruling from the *Empagran* litigation correctly in the part that it is consistent with principles of prescriptive comity, i.e. “*it is reasonable to apply U.S. antitrust law to foreign conduct insofar as reflect legislative effort to redress domestic injury*”<sup>374</sup>. “*At the same time it is unreasonable to apply U.S. antitrust law in those situations where anticompetitive conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim*”.<sup>375</sup>

This means that post-*Empagran* courts are correct to state that the Supreme Court limited its invocation of comity to cases where “*foreign conduct ... causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim*”<sup>376</sup>.

With regard to the question of how post-*Empagran* courts developed the question of comity, it is worth noting that post-*Empagran* courts, by relying on the Supreme Court's *Empagran* decision on comity, refused to adjudicate a

<sup>374</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,6 (D.Minn.).

<sup>375</sup> *Ibid.*

<sup>376</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790 (D.Minn.); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,13 (S.D.N.Y.).



private antitrust claim based exclusively on European antitrust law and related to anticompetitive conduct, anticompetitive effects and antitrust injury suffered in the EU.<sup>377</sup> At the same time, post-*Empagran* courts interpreted the Supreme Court's *Empagran* decision on comity as allowing discovery of evidence located outside the U.S.<sup>378</sup>

### 5.3.2 Questionable Understanding

It was mentioned already a few times in the subsections above, and is worth mentioning again,<sup>379</sup> that some post-*Empagran* courts interpreted the Supreme Court's *Empagran* decision on comity and the second Court of Appeals' *Empagran* decision on comity in general terms. In other words, some post-*Empagran* courts did not understand that the courts in the *Empagran* litigation decided the issue of comity only with regard to independent foreign antitrust injury. Consequently, these post-*Empagran* courts used this questionable interpretation of comity to refuse "but-for" causation as a standard.<sup>380</sup> In addition, post-*Empagran* courts also used this questionable interpretation of comity as a reason in support of their decision that proximate causation<sup>381</sup> has to exist between anticompetitive effects in the U.S. and the litigated antitrust injury.

The statements in post-*Empagran* cases are rather problematic where post-*Empagran* courts rely on the comity ruling from the *Empagran* litigation to reject the validity of the alternative theory claim,<sup>382</sup> and to deliver their decision that comity precludes the litigation of foreign injury before the U.S. courts.<sup>383</sup>

<sup>377</sup> *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061 (E.D.N.Y.); *In re Urethane Antitrust Litigation*, 683 F.Supp.2d 1214 (D.Kan.2010).

<sup>378</sup> *In re Aspartame Antitrust Litigation*, 2008 WL 2275531 (E.D.Pa.); *In re Urethane Antitrust Litigation*, 261 F.R.D. 570 (D.Kan.2009).

<sup>379</sup> See analysis that follows.

<sup>380</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,987 (9th Cir.2008).

<sup>381</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,8 (S.D.N.Y.).

<sup>382</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,8 (N.D.Cal.2005).

<sup>383</sup> See *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,782-783 (N.D.Cal.2007); See *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,553 (E.D.Pa.2010); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,824,825 (7th Cir.2015); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842,846 (7th Cir.2014).

Interpreting comity in such a way is erroneous, as the *Empagran* litigation in no way provides grounds for the type of decisions that these post-*Empagran* courts delivered.

Post-*Empagran* courts also applied comity as developed in the *Empagran* litigation to factuals situation that that are the exact opposite of the *Empagran* factual situation. This means that post-*Empagran* courts undertook comity analysis even in those factual situations where the private litigant was a U.S. national who bought and consumed purchased goods within the U.S.<sup>384</sup> This factual situation is of slight concern for this thesis, but it is interesting to note how the use of comity may expand.

### 5.3.3 Conclusion

The analysis of post-*Empagran* case law reveals that not all post-*Empagran* courts understand correctly the Supreme Court's *Empagran* decision and the second Court of Appeals' *Empagran* decision on comity. The most important finding of this analysis is that post-*Empagran* case law does not provide answers to any of the questions on comity that the *Empagran* litigation did not resolve.

## 5.4 The Development of Standing

As explained in chapter 2,<sup>385</sup> the *Empagran* case could serve as a valid precedent with regard to the following statements related to standing:

- Non-U.S. nationals do have standing;
- Standing can also be found for antitrust injury that takes place outside the U.S. and arises from transactions that private plaintiffs conclude outside the U.S.;

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<sup>384</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,842 (N.D.Cal.2011).

<sup>385</sup> See Chapter 2, subsection 3.1.4.

- Standing can be simultaneously granted to U.S. nationals and non-U.S. nationals who suffer antitrust injury out of the same antitrust violation;
- The issue of standing can be adjudicated only after the U.S. adjudication courts establish that the US courts do have subject matter jurisdiction over the litigated (foreign) antitrust injury.

It was also explained in chapter 2<sup>386</sup> that the questions on standing that were left open after the *Empagran* litigation are:

- The relationship between constitutional and antitrust standing;
- The differences in standing analysis in situations where all litigated facts are limited to the U.S. and situations where some facts extend outside the U.S.

Standing is part of private antitrust law enforcement. It is not possible to understand private antitrust law enforcement without understanding the extent to which adjudicating courts, through standing analysis, contributed to the outcome of the litigation. The statutory text (of the Clayton Act) provides remedies to every person who suffered antitrust injury. The U.S. courts narrowed down the Act's ambit and thereby limited who can obtain remedies, and they did so by imposing limitations designed to discourage plaintiffs other than those most apt to fulfil the purposes of the statutes,<sup>387</sup> i.e. the most efficient and effective enforcer.<sup>388</sup> The only explanation that post-*Empagran* courts provide on why the U.S. courts permitted only this limited group of private plaintiffs to claim antitrust remedies is that the U.S. court try to prevent the abuse of antitrust laws in this way,<sup>389</sup> and to ensure that judicial resources are devoted to those disputes in which the parties have a concrete stake<sup>390</sup>.

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<sup>386</sup> Ibid.

<sup>387</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,490 (D.N.J.2014).

<sup>388</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,498 (D.N.J.2014); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464,9-10 (S.D.N.Y.).

<sup>389</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,497 (D.N.J.2014).

<sup>390</sup> *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,9 (S.D.N.Y.).

In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.<sup>391</sup> This is why this thesis includes decisions from courts in the *Empagran* litigation and analyses post-*Empagran* cases on the matter of standing.

Post-*Empagran* courts recognise that the determination of standing can be a nebulous and complex task.<sup>392</sup> This means that antitrust standing is not a concept that can be easily defined.<sup>393</sup> Therefore, it is possible to discern different tests that the U.S. courts developed for antitrust standing.<sup>394</sup>

Post-*Empagran* cases provide some statements on the elements that constitute standing. Therefore, it is explained in post-*Empagran* case law that antitrust injury is part of standing;<sup>395</sup> that some courts sometime combine the related requirements of antitrust injury and antitrust standing;<sup>396</sup> that antitrust injury and antitrust standing are not equivalent but interdependent;<sup>397</sup> that antitrust injury is a necessary but not sufficient element of standing,<sup>398</sup> and that proximate causation is a requirement within standing analysis<sup>399</sup>. Post-*Empagran* case law is not necessarily consistent with this statement. Therefore, the argument is also made that that antitrust injury is not an element of standing but an element on its own, i.e. separate from the element of standing.<sup>400</sup> Post-*Empagran* case law also explains that the elements of standing are different in situations where private plaintiffs claim antitrust damages and in situations

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<sup>391</sup> N.389.

<sup>392</sup> N.388.

<sup>393</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,491 (D.N.J.2014).

<sup>394</sup> N.389.

<sup>395</sup> *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050,1056 (N.D.Cal.2006); See *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,249 (S.D.N.Y.2008); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,15 (E.D.N.Y.).

<sup>396</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,492 (D.N.J.2014).

<sup>397</sup> The concepts of antitrust injury and antitrust standing are distinct – standing has larger question of the scope of antitrust liability (*Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,493 (D.N.J.2014)).

<sup>398</sup> *Korea Kumho Petrochemical v. Flexsys America LP*, 2007 WL 2318906,2,n.1 (N.D.Cal.); *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834,3 (N.D.Cal.); See analysis in *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,938 (N.D.Ill.2009); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,492,493 (D.N.J.2014); *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451,460 (D.C.N.J.1918).

<sup>399</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1116,1117 (N.D.Cal.2007); *American Pan Co. v. Lockwood Mfg., Inc.*, 2008 WL 471685,11 (S.D.Ohio).

where private plaintiffs claim injunctive relief.<sup>401</sup> In a situation where private plaintiffs claim injunctive relief, they face a lower burden than those private plaintiffs who claim treble damages.<sup>402</sup>

The analysis of post-*Empagran* cases reveals that post-*Empagran* courts used as precedents, to decide the issue of standing, those U.S. cases that ruled on standing in factual situations where all litigated facts were limited to the U.S.<sup>403</sup> It follows that in conducting standing analysis, post-*Empagran* courts mentioned very few precedents that have some international elements, but these precedents in no way contributed to the decision in a way that would challenge the validity of case law on standing in relation to its suitability within the international context. This means that no post-*Empagran* court ever opened a legal inquiry into the suitability of applying case law on standing to private antitrust claims where private plaintiffs litigate foreign antitrust injury. This shows that post-*Empagran* courts did not develop further the Supreme Court's indication in the *Empagran* litigation, i.e. that standing analysis in the international context may be altered.<sup>404</sup>

This means that according to post-*Empagran* case law, the standing analysis should be the same irrespective of whether the factual situation is limited entirely to the U.S. or includes some facts that are of non-U.S. nature. Again, post-*Empagran* case law is not necessarily consistent on the type of case law that has to be used for standing purposes. Therefore, it follows that some post-*Empagran* courts did use as precedents case law that involves facts that were

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<sup>400</sup> *American Pan Co. v. Lockwood Mfg., Inc.*, 2008 WL 471685,11 (S.D.Ohio).

<sup>401</sup> *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2010 WL 9543295,9 (N.D.Cal.); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,494 (D.N.J.2014).

<sup>402</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,482,483 (D.N.J.2014).

<sup>403</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,7,8 (D.Minn.) [there was mentioned one case where some facts took place outside the US]; *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,5 (N.D.Cal.); *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050,1056,1060 (N.D.Cal.2006); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,249-251 (S.D.N.Y.2008); *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,938-941 (N.D.Ill.2009); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F.Supp.2d 1011,1023 (N.D.Cal.2010); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,8 (E.D.N.Y.); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195 (E.D.N.Y.2013).

<sup>404</sup> See Chapter 2, subsection 3.1.4.

present outside the U.S.,<sup>405</sup> and case law where the factual situation was of an international character,<sup>406</sup> and one post-*Empagran* court made an explicit statement that only antitrust cases that were considered under the FTAIA came into play for the evaluation of standing<sup>407</sup>.

In post-*Empagran* cases is possible to find decisions on the relationship between subject matter jurisdiction of the U.S. courts and standing requirements.

Therefore, decisions can be found in post-*Empagran* cases according to which antitrust standing and subject matter jurisdiction are separate issues.<sup>408</sup> There does not appear to be anything wrong with such decisions. Unfortunately, there are few decisions in post-*Empagran* case law that addressed the question whether subject matter jurisdiction and standing should undergo the same analysis. Statements can be found in post-*Empagran* cases according to which the “*same considerations that mandate a finding of no subject matter jurisdiction weigh against a finding of antitrust standing*”,<sup>409</sup> or statements that antitrust standing analysis “*implicates many of the same jurisdictional issues under the FTAIA*”,<sup>410</sup> or a statement that the “*analysis of antitrust standing used [can be used] in a way that if plaintiff satisfied the requirement of standing, he would also be granted subject matter jurisdiction*”<sup>411</sup>. These statement cast serious doubt on whether subject matter jurisdiction and standing should still be treated as separate issues.

This confusion is escalated by those statements in post-*Empagran* cases where elements that are genuinely part of standing analysis are used as reasons in

<sup>405</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,563 (D.Del.2006); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,15 (E.D.N.Y.).

<sup>406</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310 (E.D.N.Y.2012).

<sup>407</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,322,n.5 (E.D.N.Y.2012).

<sup>408</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,5 (N.D.Cal.); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1116 (N.D.Cal.2007); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,8-17 (E.D.N.Y.2013).

<sup>409</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,6 (N.D.Cal.); *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,786 (N.D.Cal.2007).

<sup>410</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,563 (D.Del.2006); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1116 (N.D.Cal.2007); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,15 (E.D.N.Y.); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,8 (N.D.Cal.).

<sup>411</sup> *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834,7 (N.D.Cal.).

support of the position that the required type of relationship between anticompetitive effects in U.S. and the litigated private antitrust injury is one of proximate causation.<sup>412</sup> This type of reasoning is quite surprising, as in standing analysis the causation is required to exist between the anticompetitive conduct and the antitrust injury,<sup>413</sup> whereas in subject matter jurisdiction analysis, causation is required to exist between the anticompetitive effects and the litigated private antitrust injury<sup>414</sup>. There also exists a post-*Empagran* decision where the post-*Empagran* court conducted subject matter jurisdiction analysis and the outcome of this analysis was used by the same court to deny standing.<sup>415</sup>

Post-*Empagran* case law is also confusing with regard to the question of how a decision on subject matter jurisdiction influences the adjudication on standing, and vice versa. Decisions can be found in post-*Empagran* cases according to which in a situation where subject matter jurisdiction is not granted, there is no need to consider whether the plaintiff has standing.<sup>416</sup> This decision is exactly the same as the one delivered in the *Empagran* litigation.<sup>417</sup> Unfortunately, the analysis of post-*Empagran* cases reveals that there exist post-*Empagran* decisions where post-*Empagran* courts took a decision on standing despite the fact that subject matter jurisdiction was lacking.<sup>418</sup> There is also a post-*Empagran* case where the post-*Empagran* court undertook standing analysis before adjudicating

<sup>412</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,8 (S.D.N.Y.) [case to explain standing were of domestic nature]; *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,249,250 (S.D.N.Y. 2008); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,988 (9th Cir.2008).

<sup>413</sup> See *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,857 (D.N.J.2008); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166,1195 (N.D.Cal.2009); *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,938 (N.D.Ill.2009); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,8 (E.D.N.Y.); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,8 (N.D.Cal.).

<sup>414</sup> See analysis in sections above and below.

<sup>415</sup> *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,8 (N.D.Cal.).

<sup>416</sup> *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,12 (N.D.Cal.); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,6 (N.D.Cal.); *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,786 (N.D.Cal.2007).

<sup>417</sup> See Chapter 2, subsection 3.1.4.

<sup>418</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,563 (D.Del.2006); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236 (S.D.N.Y. 2008); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166 (N.D.Cal.2009); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,8 (N.D.Cal.) [this despite the fact that uses in its analysis a precedent in which stated that standing inquiry is dependent on finding of subject matter jurisdiction].

whether subject matter jurisdiction exists in a first place.<sup>419</sup> There also exists a post-*Empagran* case where the post-*Empagran* court first adjudicated that the private plaintiff did not have standing and nevertheless continued with the subject matter jurisdiction analysis.<sup>420</sup>

*Post-Empagran* case law provides clarity on the issue of the relationship between the constitutional standing requirement that arises under Article 3 of the U.S. Constitution<sup>421</sup> and antitrust standing that is a statutory standing requirement that arises under legislative (antitrust law) enactment<sup>422</sup>. According to post-*Empagran* case law, the former is of a constitutional nature, and the latter is an element of claim (merit).<sup>423</sup> This means that constitutional standing establishes a justifiable case for or controversy about the jurisdiction of the federal courts, whereas the lack of antitrust standing affects a plaintiff's ability to recover damages, but does not implicate the subject matter jurisdiction of the court.<sup>424</sup> Therefore, statutory standing is simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place. In other words, antitrust standing is a merit issue.<sup>425</sup> It follows that according to post-*Empagran* case law, standing is not an additional jurisdiction element.<sup>426</sup>

Post-*Empagran* cases also provide another distinction between constitutional and antitrust standing. This distinction refers to injury. Constitutional standing requires the existence of injury-in-fact, whereas antitrust standing requires the

<sup>419</sup> *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195 (E.D.N.Y.2013) [in this particular example the issue of subject matter jurisdiction turned out not to be a problem].

<sup>420</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1164897 (N.D.Cal.).

<sup>421</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,496,n.9 (D.N.J.2014).

<sup>422</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,496 (D.N.J.2014).

<sup>423</sup> *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050,1056,n.3 (N.D.Cal.2006); That these are separate issues see also *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907 (N.D.Ill.2009); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,7 (E.D.N.Y.2013).

<sup>424</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,485,497 (D.N.J.2014).

<sup>425</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,485,490,497 (D.N.J.2014).

<sup>426</sup> *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050,1058 (N.D.Cal.2006).



existence of antitrust injury.<sup>427</sup> Therefore, in private antitrust litigation, establishing only constitutional standing is not sufficient; the private plaintiff also has to establish antitrust standing.<sup>428</sup>

In the *Empagran* litigation, the litigated private antitrust injury was foreign, i.e. took place outside the U.S. Foreign antitrust injury is also the focus of this thesis. Therefore, it is important to mention that there exist decisions in post-*Empagran* cases where the foreign nature of the litigated antitrust injury was the reason that post-*Empagran* courts did not grant standing.<sup>429</sup> This ruling clearly goes against the ruling delivered on standing in the *Empagran* litigation.<sup>430</sup> Therefore, it should not come as a surprise that post-*Empagran* case law also holds rulings where post-*Empagran* courts stated that the foreign nature of antitrust injury is not a reason to refuse standing.<sup>431</sup>

To conclude, the only question on standing left open in the *Empagran* litigation and elaborated by post-*Empagran* courts is the one of the relationship between constitutional and antitrust standing. All the other aspects of standing were made less clear by post-*Empagran* case law than they had been at the end of the *Empagran* litigation.

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<sup>427</sup> See *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,8,9 (E.D.N.Y.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,7-9 (E.D.N.Y.2013); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,9 (S.D.N.Y.).

For the explanation of the nature of antitrust injury see *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,494 (D.N.J.2014); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,10 (S.D.N.Y.).

<sup>428</sup> *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,8 (N.D.Cal.).

<sup>429</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,563 (D.Del.2006); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,8,9 (N.D.Cal.).

<sup>430</sup> See Chapter 2, subsection 3.1.4.

<sup>431</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1117 (N.D.Cal.2007); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,16 (E.D.N.Y.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,322 (E.D.N.Y.2012).

## 6 The Reasoning of Post-*Empagran* Courts in Adjudicating Private Antitrust Injury

The analysis of post-*Empagran* cases in the subsections above argues that cases cannot be correctly understood merely by looking at the nationality of the litigants and the destination of good/services obtained by the private plaintiff. This type of analysis does not have any relevance to private antitrust litigation except by indicating that it is possible to talk about inconsistency within the case law only after understanding the reasons why the adjudicating courts delivered a particular type of decision.

For example, situations where private plaintiffs do not succeed with their private antitrust claims because of the lack of subject matter jurisdiction are not the same as situations where their private antitrust claim is denied because of the lack of antitrust standing. Similarly, situations where private plaintiffs are not granted subject matter jurisdiction because of the type of (foreign) private antitrust injury they suffered are not the same as situations where they are not granted subject matter jurisdiction because of the lack of anticompetitive effects. It is also important to bear in mind that the U.S. courts may refuse remedies to private plaintiffs not just because of subject matter jurisdiction or because of a lack of antitrust standing, but also because private plaintiffs may not succeed in presenting a valuable substantive antitrust claim, i.e. proving elements of antitrust violation. Last but not least, the U.S. courts may refuse remedies to private plaintiffs because private plaintiffs made insufficient allegations to establish elements relevant to conducting the adjudication process. That is why it is not possible to understand post-*Empagran* cases without knowing the reasons/grounds on which the adjudication courts delivered their decisions.

The analysis that follows does not address every single aspect of antitrust litigation. This thesis primarily focuses on the required type of relationship between anticompetitive effects within the U.S. and the litigated (foreign) private antitrust injury that has to exist for private plaintiffs to be granted the subject matter jurisdiction of the U.S. courts. Therefore, the analysis in this subsection is limited to three questions. Firstly, what allegations/evidence are

required under the FTAIA to establish anticompetitive effects within the U.S. Secondly, what characteristics of the nature of the relationship between anticompetitive effects within the U.S. and the litigated (foreign) antitrust injury are required under the FTAIA to have this (foreign) private antitrust injury litigated before the U.S. courts. Thirdly, whether post-*Empagran* cases provide guidance for courts and private litigants on what type of (foreign) private antitrust injury can be successfully litigated before the U.S. courts.

Three preliminary remarks are required before addressing the elements of anticompetitive effects and antitrust injury (import, members of antitrust conspiracy, sufficient allegations).

Firstly, the FTAIA does not apply to purely domestic (limited to the U.S.) type of sales transactions.<sup>432</sup> In addition, in situations where the anticompetitive conduct in question is import trade or import commerce,<sup>433</sup> the analysis is excluded under the FTAIA and remains within the scope of the Sherman Act<sup>434</sup>.

To determine whether the factual situation involves import trade or import commerce,<sup>435</sup> the inquiry needs to focus on the conduct of the defendants<sup>436</sup>. In a

<sup>432</sup> *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451,468 (D.C.N.J.1918); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842,844 (7th Cir.2014).

<sup>433</sup> It is important to establish whether there is import commerce or whether the defendant's conduct affects import trade or commerce; *Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834,7 (N.D.Cal.); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,14 (E.D.N.Y.); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,34,35 (E.D.N.Y.); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650,660 (7th Cir.2011).

<sup>434</sup> *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,12 (E.D.N.Y.); *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,927 (N.D.Ill.2009); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,34 (E.D.N.Y.); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430,438 (6th Cir.2012); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,855 (7th Cir.2012); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,317 (E.D.N.Y.2012); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,10 (N.D.Ill.); *U.S. v. Hui Hsiung*, 758 F.3d 1074,1089 (9th Cir.2014); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 4652126,2 (N.D.Cal.); *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358,2,n.2 (W.D.Wash.); *Fenerjian v. Nongshim Company, Ltd.*, 2014 WL 5685562,15,n.16 (N.D.Cal.); *U.S. v. Hui Hsiung*, 778 F.3d 738,754 (9th Cir.2014); *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,521 (D.N.J.2014).

<sup>435</sup> *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358,2,n.2 (W.D.Wash.) ["import trade" and "import commerce" are terms that may have different meanings but that the court will use interchangeably].

<sup>436</sup> *Korea Kumho Petrochemical v. Flexsys America LP*, 2007 WL 2318906,4,n.6 (N.D.Cal.); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,13 (E.D.N.Y.); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,869 (D.N.J.2008); *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907,926,927 (N.D.Ill.2009); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,4 (N.D.Cal.);

situation where the defendants intended for goods to be brought into the U.S. but the goods were actually brought into the U.S. by private plaintiffs who bought them outside the U.S., the activity cannot be considered as import,<sup>437</sup> because a definition of import that would depend on intent would be difficult to apply<sup>438</sup>. This irrelevance of intent to determining import does not have any bearing on classifying situations as import where the defendants may have an intent to suppress and eliminate competition in the U.S. by fixing the prices for goods they sell to customers in the U.S.<sup>439</sup>

What can be classified as import and who is considered to be an importer? Import cannot be defined by reference to statutes other than the FTAIA.<sup>440</sup> For import, it is important that goods or services are brought into the U.S. Therefore, in a situation where payments originate in the U.S., it is not possible to talk about import unless such payments bring goods or services to the U.S.<sup>441</sup> Defendants are importers if they are directly involved in the importation of goods or services into the U.S.<sup>442</sup> These defendants have to be the main force behind the physical movement of goods/services to the U.S.<sup>443</sup> Whether the defendants are this main force behind the physical movement of goods/services can only be decided on a case-by-case basis.<sup>444</sup>

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*Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,35 (E.D.N.Y.); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,4 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616,2 (N.D.Cal.); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,10 (N.D.Ill.); *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881,3 (E.D.Pa.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583,599 (N.D.Cal.2010); *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,363 (D.N.J.2010); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,14 (S.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2014 WL 4652126,3 (N.D.Cal.).

<sup>437</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,818 (7th Cir.2015).

<sup>438</sup> *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,10 (N.D.Ill.).

<sup>439</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1091 (9th Cir.2014).

<sup>440</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616,2 (N.D.Cal.).

<sup>441</sup> *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881,3 (E.D.Pa.).

<sup>442</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,5 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,34 (E.D.N.Y.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616,2 (N.D.Cal.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,317 (E.D.N.Y.2012).

<sup>443</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,5 (N.D.Cal.).

<sup>444</sup> *Ibid.*

The requirement that defendants should be the main force behind the physical movements of goods/services to the U.S. does not require that defendants should be actual physical importers.<sup>445</sup> Being a physical importer may satisfy this requirement, but is not a necessary prerequisite. Rather, the relevant inquiry is whether the defendants' alleged anticompetitive behaviour was directed at an import market.<sup>446</sup> This means that defendants' conduct has to target the import of goods or services,<sup>447</sup> and there must be a clear link between the aim of the defendants' alleged illegal activities and the United States market.<sup>448</sup> In contrast, targeting is not a legal element for import trade under the Sherman Act, but situations where negotiations take place in the U.S. and the significant direct sales are into the U.S. can be considered as targeting the U.S.<sup>449</sup>

Situations that can be classified as import are the following: a non-U.S. entity sells goods to an U.S. customer,<sup>450</sup> but it is important that goods/services enter the U.S. and it is not enough that the purchaser is a U.S. customer for services that the defendant provides outside the U.S.;<sup>451</sup> goods that are manufactured abroad are sold in the U.S.;<sup>452</sup> the defendants are contacted to deliver goods directly, with no intermediate stops<sup>453</sup> at designated locations within the U.S.,<sup>454</sup> but it is also important to consider whether the supply chain is such that the defendants provides components to an entity outside the U.S. and this entity

<sup>445</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,317 (E.D.N.Y.2012).

<sup>446</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,470 (3d Cir.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3763616,2 (N.D.Cal.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,317 (E.D.N.Y.2012); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,14 (S.D.N.Y.).

<sup>447</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,470 (3d Cir.2011); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650,661 (7th Cir.2011).

<sup>448</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,870 (D.N.J.2008).

<sup>449</sup> *U.S. v. Hui Hsiung*, 778 F.3d 738,756 (9th Cir.2014).

<sup>450</sup> *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358,3 (W.D.Wash.); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,817,818 (7th Cir.2015).

<sup>451</sup> *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881,4 (E.D.Pa.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,25 (E.D.N.Y.2013).

<sup>452</sup> *U.S. v. Hui Hsiung*, 758 F.3d 1074,1090 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,755 (9th Cir.2014); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2010 WL 9543295,9 (N.D.Cal.).

<sup>453</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,318 (E.D.N.Y.2012) [in a situation where goods or services are not delivered directly into the U.S., it is not possible to talk about import].

<sup>454</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,317,318 (E.D.N.Y.2012); *U.S. v. Hui Hsiung*, 758 F.3d 1074,1090,n.7 (9th Cir.2014).

incorporates these components into the finished products that the defendants sell to customer in the U.S.<sup>455</sup>

Secondly, the satisfactory determination of anticompetitive effects and antitrust injury may prove to be futile if private plaintiffs do not determine the existence of antitrust conspiracy (antitrust violation) and do not determine who are the defendants.<sup>456</sup> Private plaintiffs are required to make allegations that plausibly suggest that each defendant participated in the alleged conspiracy, without the need to plead detailed, defendant-by-defendant allegations.<sup>457</sup> This means that there is no need to plead each defendant's involvement in the alleged conspiracy in elaborate detail,<sup>458</sup> but private plaintiffs must suggest that each defendant participated in the conspiracy and at least present allegations that are specific to each defendant and the role each defendant has in the alleged conspiracy.<sup>459</sup> The same requirement applies to alleging the elements of antitrust violation.<sup>460</sup>

Thirdly, the outcome of private antitrust litigation does not depend merely on the state of antitrust law and how adjudicating courts understand antitrust law and apply it to the factual situation under adjudication. Private litigants are expected to present facts that support their private antitrust claim and enable adjudicating courts to conduct analysis and determine their plausibility. Therefore, allegations should not be general, conclusive,<sup>461</sup> in the form of labels,

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<sup>455</sup> *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358,3,4 (W.D.Wash.); *U.S. v. Hui Hsiung*, 778 F.3d 738,754 (9th Cir.2014).

<sup>456</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,878 (D.N.J.2008); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,967 (N.D.Cal.2011).

<sup>457</sup> *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F.Supp.2d 1011,1919 (N.D.Cal.2010); *Fenerjian v. Nongshim Company, Ltd.*, 2014 WL 5685562,7 (N.D.Cal.); *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,7 (S.D.N.Y.).

<sup>458</sup> *In re Optical Disk Drive Antitrust Litigation*, 2014 WL 3378336,4 (N.D.Cal.).

<sup>459</sup> *In re Optical Disk Drive Antitrust Litigation*, 2014 WL 3378336,4 (N.D.Cal.); *Fenerjian v. Nongshim Company, Ltd.*, 2014 WL 5685562,9 (N.D.Cal.).

<sup>460</sup> See *Fenerjian v. Nongshim Company, Ltd.*, 2014 WL 5685562,7,9,10,11 (N.D.Cal.).

<sup>461</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,524 (D.N.J.2014).

or formalistic recitation of statutory text<sup>462</sup>. The allegations must be concrete and quantifiable.<sup>463</sup>

Post-*Empagran* cases provide examples where private plaintiffs did not allege facts to demonstrate causation;<sup>464</sup> private plaintiffs did not state anything except depicting a Sherman Act scenario by repackaging their self-serving legal conclusions into a statement sounding like an assertion of fact;<sup>465</sup> private plaintiffs provided merely generalized allegations without any specific factual content to support the asserted proposition that prices outside the U.S. served as a benchmark for prices in the U.S.;<sup>466</sup> the allegations state that prices of products increased around the world, but there is no statement in relation to U.S. commerce,<sup>467</sup> or that defendants were selling products in particular consideration of the U.S.;<sup>468</sup> domestic injury cannot be speculative<sup>469</sup>.

## 6.1 Direct, Substantial, Reasonably Foreseeable Effect in the United States

The FTAIA text requires that adjudicating courts determine first the existence of anticompetitive effects in the U.S. This is because anticompetitive effect has to give rise to foreign antitrust claim.<sup>470</sup> Courts explained that this meant that the market affected by the defendants and the market that is allegedly affected by the plaintiff must be the same,<sup>471</sup> otherwise it would be possible for the

<sup>462</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F.Supp.2d 842,870 (D.N.J.2008); *Laydon v. Mizuho Bank, Ltd.*, Slip Copy, 2014 WL 1280464,12 (S.D.N.Y.).

<sup>463</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,967 (N.D.Cal.2011).

<sup>464</sup> *Commercial Street Express LLC v. Sara Lee Corp.*, 2008 WL 5377815,3 (N.D.Ill.).

<sup>465</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,362 (D.N.J.2010).

<sup>466</sup> *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650,662,663 (7th Cir.2011).

<sup>467</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,338 (D.N.J.2010).

<sup>468</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,345,n.19 (D.N.J.2010).

<sup>469</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 291, March 28, 2010, United States District Court, N.D. California, p.307-308.

<sup>470</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,551 (E.D.Pa.2010).

<sup>471</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227,8 (S.D.N.Y.).

defendants' conduct to cause "ripple" effects which are simply too attenuated to bring the plaintiff's foreign injury within the ambit of the Sherman Act.<sup>472</sup> In a situation where only "ripple effects" exist in the U.S., it is not possible to determine the existence of anticompetitive effects in the U.S.<sup>473</sup> Consequently, it comes as no surprise that the courts rejected these plaintiffs' attempts to convert their foreign injuries into some nebulous effect on U.S. commerce.<sup>474</sup>

In determining the existence of anticompetitive effects in the U.S., it is important to understand that the FTAIA talks about domestic effect, not domestic injury.<sup>475</sup> There are three significant implications of this statement. Firstly, the FTAIA is applied already in a situation where the required type of anticompetitive effect exists in the U.S.<sup>476</sup> Secondly, the required anticompetitive effect within the U.S. is considered to exist already when there is a concluded illegal agreement establishing higher prices to be paid, and not only after these higher prices are paid.<sup>477</sup> Courts focus their inquiry on the concluded agreement, as the agreement is the essence of any antitrust violation, and not on act performed in furtherance of this agreement.<sup>478</sup> Irrespective of this, in a situation where the defendant's conduct is directed at the U.S. market for the price-fixed products and purchasers in the U.S. pay these supra-competitive prices there is certainly even more possible to talk about existence of anticompetitive effect in the U.S.<sup>479</sup> Thirdly, anticompetitive conduct must have had an impact on competition in the U.S.,<sup>480</sup> i.e. economic

<sup>472</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227,10 (S.D.N.Y.).

<sup>473</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,819 (7th Cir.2015); *U.S. v. Hui Hsiung*, 778 F.3d 738,759,760 (9th Cir.2014) – for ripple effect not giving jurisdiction see also *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,561,563 (D.Del.2006).

<sup>474</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,964,967 (N.D.Cal.2011).

<sup>475</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1112 (N.D.Cal.2007).

<sup>476</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,967 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2011 WL 5444261,5 (N.D.Cal.).

<sup>477</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1112 (N.D.Cal.2007); *Fond du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co., Ltd.*, 753 F.Supp.2d 792,795,796 (E.D.Wis.2010).

<sup>478</sup> *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 WL 5958061,13 (E.D.N.Y.); *Precision Associates, Inc. v. Panalpina World Transport (Holding) Ltd.*, 2011 WL 7053807,35 (E.D.N.Y.).

<sup>479</sup> *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,27 (E.D.N.Y.2013).

<sup>480</sup> *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365,6 (N.D.Cal.).



consequences must be felt in the U.S.<sup>481</sup> This means that significance attributed to injury to the market, not to individual firms.<sup>482</sup> In other words, the effects test may be satisfied by allegations that the domestic injury is direct, substantial, and reasonably foreseeable, without regard to whether the U.S. consumers are alone in suffering that injury.<sup>483</sup>

The effect must not be speculative;<sup>484</sup> it has to be shown that there will be a market for goods in the U.S., i.e. that the plaintiff will have a significant sales opportunity in the U.S.,<sup>485</sup> or that the defendants occupy a certain high level of the U.S. market and they decide on the prices and quantity of products for the U.S. This means that in a situation where goods never enter the U.S., it is not possible to talk about anticompetitive effects in the U.S.<sup>486</sup> There may be a situation where the defendants perform various activities outside the U.S. Only where these activities have the U.S. as a geographical target may anticompetitive effects exist.<sup>487</sup>

There exist post-*Empagran* cases where the FTAIA is applied irrespective of the existence of anticompetitive effects. In a situation where a sales transaction takes part in the U.S. there is sufficiency of per se violation.<sup>488</sup> In a situation where per se violation is sufficiently pleaded, there is no need to plead harm to competition.<sup>489</sup> The foreign character of a price fixing conspiracy does not override the long-standing rule that a horizontal price-fixing conspiracy is subject to per se analysis under the antitrust laws.<sup>490</sup>

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<sup>481</sup> *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,9 (N.D.Ill.).

<sup>482</sup> *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2013 WL 368365,6,8 (N.D.Cal.).

<sup>483</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,471 (3d Cir.2011).

<sup>484</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1009 (N.D.Ill.2001).

<sup>485</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942,953 (7th Cir.2003).

<sup>486</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,817,818 (7th Cir.2015).

<sup>487</sup> *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,26 (E.D.N.Y.2013); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1091589,15 (N.D.Cal.); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,319 (E.D.N.Y.2012); *McLafferty v. Deutsche Lufthansa A.G.*, 2009 WL 3365881,4 (E.D.Pa.).

<sup>488</sup> N.426.

<sup>489</sup> *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,8 (S.D.N.Y.).

<sup>490</sup> *U.S. v. Hui Hsiung*, 778 F.3d 738,743,750 (9th Cir.2014); *U.S. v. Hui Hsiung*, 758 F.3d 1074,1085,1086 (9th Cir.2014).

The private plaintiff has to establish the particular type of anticompetitive effect within the U.S. to satisfy the FTAIA requirement. This anticompetitive effect must be direct, substantial and reasonably foreseeable. These are not merely abstract notions without any bearing; on the contrary. The analysis of post-*Empagran* cases reveals that the courts allocated a considerable part of their adjudication to determining whether factual allegations support each of these characteristics of anticompetitive effects.

### **6.1.1 Directness of Anticompetitive Effect**

Post-*Empagran* cases used different approaches to determine the meaning of the requirement that the anticompetitive effect has to be direct. The courts used the help of a dictionary<sup>491</sup> to find the interpretation of directness. The courts also relied on the interpretation of directness provided by other U.S. courts in interpreting the requirement of directness present in another statute.<sup>492</sup> This approach of relying on the interpretation of directness provided in relation to a statute that was not the FTAIA was criticized<sup>493</sup> and ultimately considered as a wrong legal standard<sup>494</sup>.

The use of these two shortcuts (i.e. dictionary, interpretation in relation to different statute) to provide an explanation of directness of anticompetitive effect can simply be considered as isolated examples of courts' poor adjudication. The majority of post-*Empagran* courts displayed considerable dedication to providing a reasonable and applicable interpretation of directness that would fit into the framework of the FTAIA.

There are two distinct approaches the post-*Empagran* courts took in determining whether anticompetitive effects are direct.

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<sup>491</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,337 (D.N.J.2010).

<sup>492</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,337 (D.N.J.2010); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,856 (7th Cir.2012).

<sup>493</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,857 (7th Cir.2012).

<sup>494</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,409,410 (2d Cir.2014).

The first approach is where post-*Empagran* courts classified as direct only anticompetitive effects that were the immediate consequences<sup>495</sup> of the defendants' activities,<sup>496</sup> or of the alleged anticompetitive conduct with no intervening developments<sup>497</sup>. This means that anticompetitive effects cannot be direct in situations where they depend on uncertain intervening developments.<sup>498</sup> This does not mean that only the first sale of the product can satisfy the requirement of directness.<sup>499</sup> For example, in a situation where anticompetitive effects are neither speculative nor separated by multiple disconnected layers of transactions,<sup>500</sup> the effects can be classified as direct. Post-*Empagran* courts are aware that modern manufacturing may take place on a global scale, and the finished products may be made available to U.S. consumers only after passing through different lines of production.<sup>501</sup> Nevertheless, the effect cannot be classified as direct in a situation where income is flowing from a non-U.S. subsidiary to the U.S. parent.<sup>502</sup> This means that post-*Empagran* courts' notion of immediate consequence conveys a sense of intent to affect.<sup>503</sup> Therefore, an effect on U.S. commerce is considered as direct where the effect of the conduct proceeds from one point to another in time or space without deviation or interruption.<sup>504</sup>

<sup>495</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,857 (7th Cir.2012) [critique that such a requirement may be stricter than what the FTAIA requires].

<sup>496</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,337 (D.N.J.2010); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650,662 (7th Cir.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,964 (N.D.Cal.2011); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,856 (7th Cir.2012); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co. Ltd.*, 2013 WL 2099227,7 (S.D.N.Y.); *U.S. v. Hui Hsiung*, 758 F.3d 1074,1094 (9th Cir.2014); *Costco Wholesale Corp. v. AU Optronics Corp.*, Slip Copy, 2014 WL 4718358,2 (W.D.Wash.); *U.S. v. Hui Hsiung*, 778 F.3d 738,758 (9th Cir.2014); *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358,2 (W.D.Wash.).

<sup>497</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,560 (D.Del.2006); *Boyd v. AWB Ltd.*, 544 F.Supp.2d 236,245 (S.D.N.Y. 2008).

<sup>498</sup> *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650,661-662 (7th Cir.2011); *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358,2 (W.D.Wash.).

<sup>499</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,964 (N.D.Cal.2011).

<sup>500</sup> *U.S. v. Hui Hsiung*, 778 F.3d 738,759 (9th Cir.2014); *In re Intel Corp. Microprocessor Antitrust Litigation*, 476 F.Supp.2d 452,456 (D.Del.2007).

<sup>501</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F.Supp.2d 953,964 (N.D.Cal.2011); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842,845 (7th Cir.2014); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842,844 (7th Cir.2014).

<sup>502</sup> *In re Intel Corp. Microprocessor Antitrust Litigation*, 452 F.Supp.2d 555,560 (D.Del.2006).

<sup>503</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,338,n.10 (D.N.J.2010).

<sup>504</sup> N.499.

The second approach is where an anticompetitive effect is considered to be direct only in a situation where there is a reasonably proximate causal nexus<sup>505</sup> between anticompetitive conduct and anticompetitive effect.<sup>506</sup> According to this second approach, foreign anticompetitive conduct can have a statutorily required direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce even if the effect is not an immediate consequence of the defendant's conduct,<sup>507</sup> so long as there is a reasonably proximate causal nexus between the conduct and the effect.<sup>508</sup> This approach addresses the concern of remoteness.<sup>509</sup>

### 6.1.2 Anticompetitive Effect Being Substantial

Post-*Empagran* courts explain that directness and substantiality of anticompetitive effect cannot be understood from the point of view developed in pre-*Empagran* cases.<sup>510</sup> The difference is that the FTAIA does not include the subjective intent requirement present in pre-*Empagran* cases.<sup>511</sup> Therefore, it is rather confusing to note that a post-*Empagran* court<sup>512</sup> explains the element of substantial nature of anticompetitive effect in terms of anticompetitive effect that was intended.

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<sup>505</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,857 (7th Cir.2012); *U.S. v. Hui Hsiung*, 758 F.3d 1074,1094,n.8 (9th Cir.2014).

<sup>506</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,411,412 (2d Cir.2014) [this is supported by reference to the common law concepts of proximate causation and standing analysis].

<sup>507</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,413 (2d Cir.2014) [some perpetrators will design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the United States. Whether the causal nexus between foreign conduct and a domestic effect is sufficiently "direct" under the FTAIA in a particular case will depend on many factors, including the structure of the market and the nature of the commercial relationships at each link in the causal chain].

<sup>508</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,398 (2d Cir.2014); *Lavoho, LLC v. Apple Inc.*, 2014 WL 6791612,2 (S.D.N.Y.).

<sup>509</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,857 (7th Cir.2012); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,819 (7th Cir.2015).

<sup>510</sup> *Animal Science Products, Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 702 F.Supp.2d 320,338,n.10 (D.N.J.2010).

<sup>511</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,471 (3d Cir.2011); *U.S. v. Hui Hsiung*, 758 F.3d 1074,1083 (9th Cir.2014); *U.S. v. Hui Hsiung*, 778 F.3d 738,748 (9th Cir.2014).

<sup>512</sup> N.467.

An example where the element of substantiality turned out to be relevant is where the arrangements by the defendants were such that substantial numbers of finished products were destined for the U.S. and that the practical outcome of the conspiracy was to increase prices for consumers in the U.S. who would purchase these final products.<sup>513</sup>

### **6.1.3 Anticompetitive Effect Being Reasonably Foreseeable**

In contrast to pre-*Empagran* cases, the FTAIA requirement of an anticompetitive effect being reasonably foreseeable imposes an objective standard.<sup>514</sup> The private plaintiff does not need to allege or prove that the defendants' conduct was subjectively intended/consciously meant to produce a consequence in the U.S.<sup>515</sup> This means that the result of defendants' action has to be foreseeable rather than a mere incidental occurrence,<sup>516</sup> and whether it is foreseeable is evaluated from the perspective of an objectively reasonable person.<sup>517</sup>

For example, the reasonable foreseeability analysis was used in a factual situation where an international cartel with a grip on 71% of the world's supply of a homogeneous commodity charged supra-competitive prices, and in the absence of any evidence showing that arbitrage is impossible (and there is none here), those prices (net of shipping costs) would be uniform throughout the world. Higher prices cannot be divorced from reductions in supply, and so the effects alleged here are a rationally expected outcome of the conduct stated in the Complaint.<sup>518</sup>

### **6.1.4 Anticompetitive Effect and Export Commerce**

There is a difference between factual situations where private plaintiffs bring private antitrust claims in relation to antitrust injury they suffered outside the

<sup>513</sup> *U.S. v. Hui Hsiung*, 778 F.3d 738,759 (9th Cir.2014).

<sup>514</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,471 (3d Cir.2011).

<sup>515</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 34 F.Supp.3d 465,523 (D.N.J.2014).

<sup>516</sup> N.467.

<sup>517</sup> N.514.

<sup>518</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,856 (7th Cir.2012).

U.S. in relation to transactions they concluded with defendants, and factual situations where private plaintiffs suffer private antitrust injury in relation to their ability to conduct business (i.e. sell their goods or provide services) outside the U.S. In the latter factual situation, e.g. private plaintiffs can bring private antitrust claims based on foreign sales only if they allege that the price-fixing conspiracy at issue involved foreign trade, that this conspiracy had a direct effect on export transactions in which the plaintiffs were engaged, and that this effect caused the injury on which their claims are premised.<sup>519</sup> This means that in a situation where only non-U.S. consumers suffer antitrust injury, they do not have protection under U.S. antitrust law, unless there is also a sufficiently significant and direct effect on the U.S. market.<sup>520</sup>

The FTAIA does not define export trade. Therefore, post-*Empagran* courts understood export commerce to be commerce between a U.S. seller and a non-U.S. buyer in which goods flow from the U.S. to a non-U.S. country.<sup>521</sup> In a situation where a U.S. exporter's business is affected, this may have a significant effect on the U.S. export market.<sup>522</sup> The U.S. exporter whose export business is affected is entitled under the FTAIA to remedies only in relation to its U.S export business.<sup>523</sup> In a situation where U.S. exporters affect their non-U.S. competitors outside the U.S., these non-U.S. competitors cannot raise private antitrust claims against the U.S. exporter, as the FTAIA forecloses this type of private antitrust actions.<sup>524</sup> In addition, it is important to point out that non-U.S. companies who import goods into the U.S. cannot be classified as exporters and, consequently, cannot base their private antitrust claims on the export provisions of the FTAIA.<sup>525</sup>

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<sup>519</sup> *Lavoho, LLC v. Apple Inc.*, 2014 WL 6791612,3 (S.D.N.Y.).

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.*

<sup>522</sup> *Ibid.*

<sup>523</sup> *TI Inv. Services, LLC v. Microsoft Corp.*, 23 F.Supp.3d 451,469 (D.C.N.J.1918).

<sup>524</sup> *Ibid.*

<sup>525</sup> N.465.

## **6.2 Establishing the Required Type of Connection between Anticompetitive Effects and the Litigated (Foreign) Private Antitrust Injury**

The analysis in the previous sections of this chapter demonstrated that post-*Empagran* cases are inconsistent in interpreting whether the Supreme Court and the second Court of Appeals in the *Empagran* litigation required that anticompetitive effect within the U.S. must be the grounds for the private plaintiff's antitrust injury. Therefore, the analysis of post-*Empagran* cases in this section will be divided accordingly. This means that post-*Empagran* cases that require the existence of proximate causation between anticompetitive effects in the U.S. and the litigated (foreign) private antitrust injury will be analysed with the purpose of understanding how post-*Empagran* courts adjudicated the existence of proximate causation. Therefore, post-*Empagran* cases that do not require the existence of proximate causation will be analysed separately with the purpose of understanding what kind of relationship between anticompetitive effects in the U.S. and the litigated (foreign) private antitrust claim is required.

This thesis is concerned with the protection of private plaintiffs who suffer foreign antitrust injury. Therefore, the analysis in this section will not consider the required type of relationship between anticompetitive effects and litigated (foreign) private antitrust injury in terms of protecting foreign defendants.<sup>526</sup> In general, this thesis submits that private antitrust enforcement cannot be construed correctly unless understood and developed from the perspective of private plaintiffs who suffer private antitrust injury. This is why the transborder standard presented in this thesis requires an adjudicating approach where the primary concern is the protection of the private interests of the parties who suffer antitrust injury.<sup>527</sup>

Post-*Empagran* courts share the common understanding that the requirement of anticompetitive effect in the U.S. must occur first, and only then may there

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<sup>526</sup> As it was the concern of *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,858 (7th Cir.2012).

<sup>527</sup> See Chapter 5, subsection 2.2.

exist foreign antitrust injury.<sup>528</sup> This means that a private antitrust claim cannot sustain protection under the FTAIA in a situation where anticompetitive conduct causes injury to the private plaintiff (e.g. the private plaintiff is excluded from the market) and this consequently has implications for the U.S. market.<sup>529</sup>

### **6.2.1 Dependency Relationship between Anticompetitive Effects and the Litigated Private Antitrust Injury**

Post-*Empagran* cases provide a very limited number of statements that can help to understand the relationship between anticompetitive conduct and the litigated private antitrust injury in term of dependency.

Private plaintiffs cannot establish the dependency relationship merely by stating that their private antitrust injury is dependent on anticompetitive effects within the U.S., as this would be a conclusory inference and as such cannot be accepted.<sup>530</sup> Private plaintiffs are required to sufficiently allege that their foreign antitrust injury is dependent upon, or somehow directly linked to, the domestic effect at issue.<sup>531</sup> Unfortunately, the adjudicating court does not state what private plaintiffs have to allege in this regard to succeed with their claims. Post-*Empagran* courts do not provide any help to private litigants or to courts for future litigation by merely stating that the foreign injury is independent from effects within the U.S. without providing any explanation of how such a conclusion was reached.<sup>532</sup>

There is only one single example where the adjudicating court determined that the plaintiff's harm is directly related to anticompetitive effects within the U.S. This adjudicating court established such connection after concluding that a global cartel operated under a market allocation scheme and at the same time coordinated prices and market shares of goods that were fungible commodities

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<sup>528</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,318-319 (E.D.N.Y.2012); *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,406 (2d Cir.2014).

<sup>529</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,398,414 (2d Cir.2014).

<sup>530</sup> N.357.

<sup>531</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,5 (N.D.Cal.).

<sup>532</sup> N.299.



that were not possible to be obtained in the U.S., all this with the purpose of preventing arbitrage.<sup>533</sup> This means that prices in the U.S. were directly and substantially linked with the prices that the plaintiff paid. In other words, a domestic effect was necessary to achieve the plaintiff's injuries outside the U.S.,<sup>534</sup> i.e. the plaintiff's harm was directly related to adverse anticompetitive effects in the U.S.<sup>535</sup> Unfortunately, it is not possible to state with certainty whether these allegations are sufficient to establish a dependency relationship between anticompetitive effects in the U.S. and the litigated foreign private antitrust injury because later post-*Empagran* courts<sup>536</sup> classified them as insufficient.

### **6.2.2 Proximate Causation between Anticompetitive Effects and the Litigated Private Antitrust Injury**

Surprisingly, there exists a group of post-*Empagran* cases where the adjudicating courts did not conduct any analysis of factual allegations, nor did they provide any explanation of why they had reached a particular type of decision. These adjudicating courts merely stated that the litigated antitrust injury did not arise out of effect in the U.S.;<sup>537</sup> the plaintiffs were unable to allege injury not linked to effects in the U.S.,<sup>538</sup> the plaintiffs are required to allege plausible facts showing that the U.S. effect in question also gives rise to a Sherman Act claim;<sup>539</sup> and the U.S. effect gives rise to an antitrust claim within the meaning of the FTAIA if it proximately causes the claim, and therefore but-for causation is insufficient.<sup>540</sup>

<sup>533</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,1 (D.Minn.).

<sup>534</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,4 (D.Minn.).

<sup>535</sup> *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790,8 (D.Minn.).

<sup>536</sup> *In re Monosodium Glutamate*, 2005 WL 2810682,1.3. (D.Minn.).

<sup>537</sup> *Sniado v. Bank Austria AG*, 174 F.Supp.2d 159,170 (S.D.N.Y. 2001); *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,8 (N.D.Cal.); *In re Monosodium Glutamate*, 2005 WL 2810682,3 (D.Minn.); *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,551 (D.N.J.2005).

<sup>538</sup> *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050,1053 (N.D.Cal.2006).

<sup>539</sup> N.265.

<sup>540</sup> *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358,2 (W.D.Wash.).

Post-Empagran cases where this requirement of proximate causation was adjudicated to exist are the ones where the private plaintiffs concluded transactions within the U.S.,<sup>541</sup> even if the purchaser was of non-U.S. nationality and took the goods purchased in the U.S. outside the U.S.<sup>542</sup> There is a post-Empagran case where the existence of proximate causation was also established where the purchase took place outside the U.S. but the goods were sent (delivered) to the U.S. and the payment for these goods took place in the U.S.<sup>543</sup>

Proximal causation was also established in situations where the inflated price outside the U.S. was caused or set by the inflated price in the U.S., and the two prices were the same and were the product of negotiations that took place within the U.S. Thus the plaintiffs successfully alleged more than merely an arbitrage theory, because the plaintiffs set forth with specificity the manner in which prices for products were set and a direct causal relationship between the anticompetitive conduct, the domestic negotiations and the single global price for the products,<sup>544</sup> and it was certain that the plaintiffs would buy goods outside the U.S. at exactly the negotiated price.<sup>545</sup> A similar reasoning was adopted by the adjudicating court in a situation where the plaintiff's foreign affiliates were bound by negotiations between the plaintiff in the U.S. and the defendants, which resulted in global anticompetitive prices for all products sold to the plaintiff, and these foreign affiliates were not permitted to negotiate the price of products they obtained outside the U.S., nor to alter the total quantity.<sup>546</sup> This means that in a situation where the plaintiff alleges facts that establish

<sup>541</sup> *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,840-841 (7th Cir.2003); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,6 (N.D.Cal.); *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,31 (E.D.N.Y.2013) [purchase services in the U.S.].

<sup>542</sup> *MM Global Services, Inc. v. Dow Chemical Co.*, 329 F.Supp.2d 337,342 (D.Conn.2004); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313,7 (N.D.Cal.).

<sup>543</sup> *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,320,321 (E.D.N.Y.2012).

<sup>544</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,962 (N.D.Cal.2011). It is important to bear in mind that in some cases there may exist intervening steps between the negotiation and signing of a contract, and a plaintiffs' actual expenditure of funds on the product at issue may. In a situation where there these intervening steps are present, the proximal link would be destroyed [*In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,963 (N.D.Cal.2011); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,320 (E.D.N.Y.2012)] Therefore, depends on what actually happened in the particular factual situation under adjudication and how the private plaintiff presents the existence of the proximal link between prices in the U.S. and prices outside the U.S.

<sup>545</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,963 (N.D.Cal.2011).

<sup>546</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,842 (N.D.Cal.2011).

that the negotiated price in the U.S. was identical for purchases both inside and outside the U.S., this is sufficient to establish the necessary proximate link between the effects of the conspiracy in the U.S. and the plaintiff's foreign injury.<sup>547</sup> In this situation, the alleged single global price is effective worldwide, no matter where the delivery of the product occurs. The U.S. prices therefore are not simply the source of the foreign prices; the prices in the U.S. and outside the U.S. are one and the same.<sup>548</sup> It is also important that negotiations on the price and quantity of goods are binding for purchases not only in the U.S. but also outside the U.S.<sup>549</sup>

Post-*Empagran* cases where the requirement of proximate causation was adjudicated not to exist include situations where the services provided inside the U.S. and the services provided outside the U.S. are bound up, but not fungible;<sup>550</sup> where higher prices in non-U.S. markets are not the consequence of any U.S. anticompetitive effect;<sup>551</sup> where there was an alleged global price fixing conspiracy that was necessary for the conspiracy's overall success and, as such, could be maintained without price fixing in the U.S.<sup>552</sup> This means that proximate cause requires more than establishing the conditions for making something possible.<sup>553</sup> The involvement of the U.S. must not be merely necessary for the success of the conspiracy, but has to be significant enough to constitute the direct cause of the plaintiffs' injury; otherwise it would be considered to constitute merely one link in the causal chain.<sup>554</sup> It is also not sufficient that defendants simultaneously cause harm in the U.S. and outside the U.S.<sup>555</sup> This is particularly true in situations where a global conspiracy simultaneously and independently causes harm to the purchasers of products in the U.S. and other non-U.S. countries.<sup>556</sup> Post-*Empagran* courts also ruled that the U.S. parent could

<sup>547</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,843,n.1 (N.D.Cal.2011).

<sup>548</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,843 (N.D.Cal.2011).

<sup>549</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1164897,3 (N.D.Cal.).

<sup>550</sup> *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,6,7 (N.D.Cal.).

<sup>551</sup> *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,783 (N.D.Cal.2007).

<sup>552</sup> *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,4 (E.D.Pa.); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,987,988,989 (9th Cir.2008).

<sup>553</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,554 (E.D.Pa.2010).

<sup>554</sup> *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535,540 (8th Cir.2007).

<sup>555</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,551,555,n.9 (E.D.Pa.2010).

<sup>556</sup> *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,15 (S.D.N.Y.).

not establish the existence of proximate causation by relying on defendants' criminal pleas,<sup>557</sup> or on single enterprise theory,<sup>558</sup> or on agency theory<sup>559</sup> to claim injuries suffered by its foreign subsidiaries, in particular where foreign subsidiaries are independent entities,<sup>560</sup> as these foreign entities are the ones who paid the price outside the U.S. and suffered antitrust injury<sup>561</sup>. In this situation, foreign subsidiaries were injured in foreign commerce (in dealings with other non-U.S. companies) and to give the U.S. parent rights to take the place of its foreign companies and sue on their behalf under U.S. antitrust law would be an unjustified interference with the right of foreign nations to regulate their own economies.<sup>562</sup>

There are post-*Empagran* cases where the existence of proximate causation was rejected because of conclusory allegations,<sup>563</sup> or because no fact was presented except the existence of a global price fixing conspiracy that caused prices in the U.S. and outside the U.S., and that the plaintiff purchased goods outside the U.S.,<sup>564</sup> or because the plaintiff alleged merely the arbitrage theory (i.e. that foreign injury would not have occurred if prices in the U.S. had been competitive)<sup>565</sup>, as direct correlation between prices through the single global price being kept in equipoise by the maintenance of super-competitive prices in

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<sup>557</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,7 (N.D.Cal.).

<sup>558</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166,1185,1186 (N.D.Cal.2009).

<sup>559</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166,1187,1189 (N.D.Cal.2009) [even the courts have conducted analysis with the purpose of establishing whether the parent could be considered to control subsidiaries and whether subsidiaries accepted this].

<sup>560</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166,1189 (N.D.Cal.2009).

<sup>561</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.Supp.2d 1166,1190 (N.D.Cal.2009).

<sup>562</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,824 (7th Cir.2015); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842,845 (7th Cir.2014).

<sup>563</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,13 (S.D.N.Y.).

<sup>564</sup> *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,9 (S.D.N.Y.); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1115 (N.D.Cal.2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,990 (9th Cir.2008); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,7 (N.D.Cal.); *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,6 (N.D.Cal.).

<sup>565</sup> *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,447 (D.N.J.2007); *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,554 (E.D.Pa.2010) [Correlation between higher prices in the U.S. and higher prices in non-U.S. countries is not sufficient - such a correlation or interdependence of markets does not suffice to show that the effect in the U.S. actually gives rise to the plaintiffs' claim in relation to purchases concluded outside the U.S.].

the U.S. is not sufficient,<sup>566</sup> because the plaintiff must establish that the defendants' activities not merely supported the price increase but proximately caused injuries to the plaintiff outside the U.S. in particular.<sup>567</sup>

### **6.3 Differences between Establishing Anticompetitive Effects and Establishing the Relationship between Anticompetitive Effects and Antitrust Injury**

The analysis of post-*Empagran* cases in the subsections above demonstrates that courts were grasping on a case-by-case basis to provide an explanation of their decisions on the existence of anticompetitive effects and of required type of relationship between anticompetitive effects and the litigated antitrust injury. Sometimes the explanation provided gives reasons that reveal the factors that the adjudicating courts considered as relevant in reaching their decision.

The purpose of this subsection is to assess whether the same factors can be used to establish anticompetitive effects and the relationship between anticompetitive effects and antitrust injury. This analysis is relevant in particular with regard to the fact that some<sup>568</sup> post-*Empagran* courts require the existence of directness in relation to anticompetitive effects and proximate (i.e. direct) causation between anticompetitive effects and antitrust injury.

The comparison of those post-*Empagran* cases that required the existence of directness in relation to anticompetitive effects and in relation to the relationship between anticompetitive effects and antitrust injury reveals that arbitrage is sufficient on its own to sustain anticompetitive effects,<sup>569</sup> but not proximate (i.e. direct) causation between anticompetitive effects and antitrust injury.<sup>570</sup>

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<sup>566</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,989 (9th Cir.2008); *In re Korean Air Lines Co., Ltd. Antitrust Litigation*, 2010 WL 3184372,1 (C.D.Cal.).

<sup>567</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,554 (E.D.Pa.2010).

<sup>568</sup> See analysis in subsection 6.1. of this chapter above.

<sup>569</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,859 (7th Cir.2012).

<sup>570</sup> See subsection 6.2.2 of this chapter.

A notable difference in post-*Empagran* courts' approaches exists also in relation to whether the interests of non-U.S. countries are taken into consideration to sustain private antitrust claim. It would seem that the interests of non-U.S. countries do not bear much relevance in situations where global cartels are causing anticompetitive effects within the U.S.,<sup>571</sup> but do have an impact on deciding the existence of the required type of relationship between anticompetitive effects and antitrust injury<sup>572</sup>.

The application of proximate causation in establishing anticompetitive effects in the U.S. accepts as valid the argument that in a modern global economy, the manufacturing process can be complex, it can take place in different countries before products are finished and consequently, anticompetitive injuries can be transmitted through multi-layered supply chains,<sup>573</sup> or perpetrators can design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the U.S.<sup>574</sup> Therefore, it comes as a surprise that this multi-level production process should not be accepted as a valid argument to sustain the existence of proximate causation in the context of the relationship between anticompetitive effects and antitrust injury, and consequently to grant private plaintiffs the right to litigate their foreign private antitrust injury before the U.S. courts.<sup>575</sup>

The analysis of post-*Empagran* cases also clearly shows that the existence of a global conspiracy, together with the market of services being highly concentrated and with high entry barriers and necessity of interconnectedness of the non-U.S. and the U.S. effect on the effect in the U.S. market is considered as sufficient cause for sustaining the existence of anticompetitive effects in the U.S.,<sup>576</sup> but is not sufficient for sustaining proximate causation with the purpose

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<sup>571</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,860 (7th Cir.2012).

<sup>572</sup> See subsection 5.3. of this chapter above.

<sup>573</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,412 (2d Cir.2014).

<sup>574</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,413 (2d Cir.2014).

<sup>575</sup> See subsection 6.2.2. of this chapter above.

<sup>576</sup> *Precision Associates, Inc. v. Panalpina World Transport, (Holding) Ltd.*, 2013 WL 6481195,26 (E.D.N.Y.2013); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,319 (E.D.N.Y.2012).

of allowing foreign private antitrust injury to be litigated before the U.S. courts.<sup>577</sup>

## 6.4 Implications for Private Antitrust Litigation in the Future

The significance of the analysis conducted in this chapter and in the thesis as a whole does not lie solely in highlighting confusion, inconsistency, and lack of persuasiveness in courts' reasoning in delivering their decisions. Knowing why a particular U.S. court delivered its decision is important for understanding the functioning of the system of antitrust law enforcement. The purpose of this knowledge is not to use it to criticize existing case law. The thesis would not fulfil any need or make any valuable, useful contribution to the existing enforcement of antitrust law if its only accomplishment was a critique of existing case law.

Therefore, the analysis undertaken in this section was also conducted with a view to understanding whether post-*Empagran* courts provide any clear, straightforward orientation (guidance) on conditions that have to be fulfilled for having (foreign) private antitrust injury litigated before the U.S. courts.

Primarily, the analysis focused on determining whether post-*Empagran* courts, in delivering their decisions, have clearly indicated what allegations/facts litigants are expected to present to succeed with their claim.

This type of guidance was given in situations where the adjudicating courts explained that the private plaintiff must present that the defendant had such a role in the global conspiracy that they also controlled the operation of anticompetitive conduct in non-U.S. market.<sup>578</sup> Plaintiffs are required to present clearly the role that each defendant had in the antitrust conspiracy, how the conspiracy operated, how negotiations between members of the conspiracy and private plaintiffs were conducted, what was concluded at these negotiations,

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<sup>577</sup> See subsection on 6.2.2. of this chapter above.

<sup>578</sup> See *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017,13 (S.D.N.Y.).

who made purchases of products from the defendants, and why the purchase was conducted in a particular form.<sup>579</sup> Post-*Empagran* courts also reminded private plaintiffs that the prices they had paid for products they had purchased outside the U.S. might not be merely the result of a global conspiracy, but that other actors or forces might have affected these prices too.<sup>580</sup> This means that it is important that a court is presented with the full list of actors and factors that contributed or could not contribute to the price level of goods purchased outside the U.S.

An example where private plaintiffs presented not merely the relationship between prices in the U.S. and outside the U.S. (arbitrage theory), but other factors too that excluded the potential impact of intervening steps between the price set up in the U.S. and the price paid for goods outside the U.S., is where the defendants did not set up a global price on its own, but this price was required to be charged to all transactions where the defendants sold their goods, whether in the U.S. or outside the U.S., and therefore this price was considered to be one and the same,<sup>581</sup> and agreements on prices and the amount of goods to be purchased outside the U.S. were binding.<sup>582</sup>

It is important to note that post-*Empagran* courts do not in general exclude private antitrust claims merely because private plaintiffs suffer their private antitrust injury in relation to goods they purchased and took possession of outside the U.S.<sup>583</sup> It is also important to mention that in a situation where these goods that are purchased and brought into the U.S. are passed on to U.S. customers, these customers cannot bring a private antitrust injury claim.<sup>584</sup>

Not all post-*Empagran* cases provide orientation (guidance) on the conditions that have to be fulfilled for having (foreign) private antitrust injury litigated

<sup>579</sup> See *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 2007 WL 1056783,5 (N.D.Cal.); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,843 (N.D.Cal.2011).

<sup>580</sup> See *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,988 (9th Cir.2008); *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,320 (E.D.N.Y.2012).

<sup>581</sup> See *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 781 F.Supp.2d 955,962,963 (N.D.Cal.2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 785 F.Supp.2d 835,842,843 (N.D.Cal.2011).

<sup>582</sup> See *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 1164897,3 (N.D.Cal.).

<sup>583</sup> See *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310,321 (E.D.N.Y.2012).

<sup>584</sup> See *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816,819,820 (7th Cir.2015); *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,9 (N.D.Ill.).



before the U.S. courts. These cases are of serious concern for two reasons. Firstly, they do not provide any explanation on why certain types of factual allegations are not sufficient to sustain the litigation of (foreign) private antitrust injury. Secondly, they do not provide any guidance to potential future private plaintiffs and courts on what factual allegations have to be brought before the adjudicating courts to have (foreign) private antitrust injury successfully adjudicated by the U.S. courts.

There are many examples of post-*Empagran* decisions that can be considered as conclusory statements with no additional explanation, and consequently without any practical value. This means that all that the adjudicating courts stated was that the injury did not arise out of effects in the U.S.,<sup>585</sup> or that the plaintiffs failed to demonstrate that either exception was applicable to this case,<sup>586</sup> or that the allegations are insufficient to establish the requisite direct causal relationship between the domestic effect of the defendants' alleged anticompetitive behaviour and the foreign injury<sup>587</sup>.

The same is true for the statement that plaintiffs are required to allege plausible facts showing that the U.S. effect in question also gives rise to a Sherman Act claim,<sup>588</sup> or that higher prices in the U.S. caused by the defendants' conduct proximately caused the plaintiff to pay higher prices outside the U.S.,<sup>589</sup> without the adjudicating courts providing any indication of what type of facts can be considered plausible. There are similar problems with an adjudicating court stating that plaintiffs must demonstrate by a preponderance of the evidence that the domestic effects of the defendants' antitrust conduct proximately caused their foreign injuries,<sup>590</sup> and that but-for causation is

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<sup>585</sup> *Sniado v. Bank Austria AG*, 174 F.Supp.2d 159,170 (S.D.N.Y. 2001); *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084,8 (N.D.Cal.); *In re Monosodium Glutamate*, 2005 WL 2810682,3 (D.Minn.); *CSR Ltd. v. CIGNA Corp.*, 405 F.Supp.2d 526,551 (D.N.J.2005).

<sup>586</sup> *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462,465 (3d Cir.2011).

<sup>587</sup> *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp.2d 777,785 (N.D.Cal.2007).

<sup>588</sup> *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F.Supp.2d 1101,1114 (N.D.Cal.2007).

<sup>589</sup> N.561.

<sup>590</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,554,560 (E.D.Pa.2010); *Lavoho, LLC v. Apple Inc.*, 2014 WL 6791612,2 (S.D.N.Y.).

insufficient,<sup>591</sup> as the adjudicating court did not make any attempt to explain what kind of facts and allegations can support such causation.

A post-*Empagran* court also made it clear that in a situation where private plaintiffs merely allege that a worldwide conspiracy is necessary for the conspiracy's overall success, i.e. that it is a single, unified, global price-fixing conspiracy that could not be maintained without price-fixing in the U.S., this does not satisfy the FATIA's requirement that the conspiracy's domestic effect should give rise to the plaintiff's claim.<sup>592</sup> At the same time, this statement does not provide any guidance on what private plaintiffs have to allege in addition to a global conspiracy to have their private antitrust claim litigated before the U.S. courts. Nevertheless, private plaintiffs can still extract guidance out of this statement, i.e. that merely alleging antitrust violation (even if this is in the form of a global conspiracy) is not sufficient.

Particularly challenging are those statements in post-*Empagran* cases where the adjudicating court only states that prices in the U.S. may have been a necessary part of the conspirators' conduct, but merely one link in the causal chain and consequently not significant enough to constitute the direct cause of the plaintiffs' injuries.<sup>593</sup> Similarly problematic is the statement by an adjudicating court that alleging arbitrage theory (i.e. a relationship between prices in the U.S. and outside the U.S.) is not enough;<sup>594</sup> or that prices in the U.S. having facilitated the defendants' scheme to charge super-competitive prices outside the U.S. is not sufficient<sup>595</sup> to show a direct causal relationship between prices in the U.S. and prices outside the U.S.;<sup>596</sup> or that simultaneous effects in the U.S. and outside the U.S. do not constitute proximate cause;<sup>597</sup> or that a global conspiracy simultaneously and independently injuring purchasers of products in

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<sup>591</sup> *Costco Wholesale Corp. v. AU Optronics Corp.*, 2014 WL 4718358,2 (W.D.Wash.); *U.S. v. Hui Hsiung*, 778 F.3d 738,758-759 (9th Cir.2014).

<sup>592</sup> *In Re Graphite Electrodes Antitrust Litigation*, 2007 WL 137684,4 (E.D.Pa.).

<sup>593</sup> N.554.

<sup>594</sup> *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437,447 (D.N.J.2007); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641,7 (N.D.Cal.).

<sup>595</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,989 (9th Cir.2008).

<sup>596</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981,990 (9th Cir.2008).

<sup>597</sup> *In re Hydrogen Peroxide Antitrust Litigation*, 702 F.Supp.2d 548,555,n.9 (E.D.Pa.2010).

the U.S. and outside the U.S. as they had to pay supra-competitive prices, even if the prices were the same, does not establish the required type of causation;<sup>598</sup> or that bound prices in the U.S. and outside the U.S. of products that are not fungible do not establish proximate causation.<sup>599</sup>

This analysis shows that post-*Empagran* courts took an approach where they stated what was insufficient to sustain a private antitrust claim before the U.S. courts. Therefore, private plaintiffs and courts are left on their own to grasp under what conditions it is permitted to litigate (foreign) private antitrust injury before the U.S. courts.

It would seem that post-*Empagran* courts are aware of the problem they caused by being clear on what proximate causation in the FTAIA context does *not* mean, and not articulating clearly what proximate causation does mean in the FTAIA context.<sup>600</sup>

At the same time, post-*Empagran* courts admitted that proximate causation is a notoriously slippery doctrine which has taken various forms over the years and which is not easy to define.<sup>601</sup>

It is beyond the scope of this thesis to undertake analysis to understand why post-*Empagran* courts took this passive (non-constructive) approach to determining the substance of the required type of relationship between anticompetitive effects and the litigated (foreign) private antitrust injury and despite knowing that what they are expecting that private litigants will present before the U.S. courts can be assessed in very questionable manner.

This thesis submits that the requirement for foreign private antitrust injury to be litigated before the U.S. courts is not proximate causation but dependency

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<sup>598</sup> *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894,15 (S.D.N.Y.).

<sup>599</sup> *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 2011 WL 1753738,7 (N.D.Cal.).

<sup>600</sup> *Motorola Mobility, Inc. v. AU Optronics Corporation*, 2014 WL 258154,8 (N.D.Ill.).

<sup>601</sup> *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 753 F.3d 395,412 (2d Cir.2014).

between anticompetitive effects (antitrust injury) in the U.S. and litigated foreign private antitrust injury.<sup>602</sup>

This is why it is even more surprising to note that post-*Empagran* courts never tried to give some guidance on what is expected in order to sustain the requirement of dependency. This is something that the Supreme Courts in the *Empagran* litigation left unanswered.<sup>603</sup> Again, there are statements that do not provide any guidance (explanation) at all. These statements are the following: the plaintiffs cannot sufficiently allege that their foreign injury was dependent upon, or somehow directly linked to, the domestic effect at issue;<sup>604</sup> plaintiffs are unable to allege that their injury was directly linked to acts that caused injury to U.S. commerce;<sup>605</sup> the correlation or interdependence of markets does not suffice to show that the effect in the U.S. gives rise to the plaintiff's claims.<sup>606</sup>

## 7 Conclusion

The analysis of post-*Empagran* cases in this chapter reveals that post-*Empagran* courts:

- Did not address the questions left open by the adjudicating courts in the *Empagran* litigation, and
- Do not provide any help to private plaintiffs to litigate their foreign injury before the U.S. courts.

Post-*Empagran* cases were not analyzed merely by looking at the facts and the outcomes. The analysis in this chapter followed the approach that is used throughout the rest of the thesis, i.e. to understand why the litigants made certain statements, why there existed a specific type of commercial

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<sup>602</sup> See Chapter 2, subsections 3.1.10. and 3.2. and Chapter 5, subsection 3.

<sup>603</sup> See Chapter 2, subsection 3.1.7.3.

<sup>604</sup> *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2006 WL 515629,5 (N.D.Cal.).

<sup>605</sup> *eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F.Supp.2d 1050,1054 (N.D.Cal.2006).

<sup>606</sup> *In re Korean Air Lines Co., Ltd. Antitrust Litigation*, 2010 WL 3184372,1 (C.D.Cal.).

arrangements (that caused antitrust injury) in the real world, why the adjudicating courts made particular decisions.

This type of critical analysis reveals that post-*Empagran* cases:

- Are inconsistent;
- Lack clarity;
- Do not necessarily correctly understand decisions, and consequently the significance, nature and extent of the *Empagran* litigation;
- Do not provide any concrete guidance on conditions that have to be fulfilled for foreign antitrust injury to be litigated before the U.S. courts.

The analysis in this chapter clearly indicates that post-*Empagran* case law is considered as a step away from the Supreme Court's recommendations in the *Empagran* litigation. Consequently, post-*Empagran* case law is not in fact supportive of foreign injury being litigated before the U.S. courts.

The Supreme Court in the *Empagran* litigation permitted foreign antitrust injury to be litigated before the U.S. courts under the condition that this injury is not independent from anticompetitive effects in the U.S. In this regard, the Supreme Court did not reject the alternative theory, and did not reject "but-for" causation.

Post-*Empagran* courts recognize the Supreme Court's *Empagran* decision as the leading binding authority on the question of conditions that have to be fulfilled for foreign antitrust injury to be litigated before the U.S. courts, but at the same time not a single post-*Empagran* court ever conducted adjudication analysis according to the Supreme Court's *Empagran* decision.

Post-*Empagran* courts took for granted that the required relationship between anticompetitive effects in the U.S. and the litigated foreign injury has to be determined not on the basis of 'dependency' (as indicated by the Supreme

Court) but on the basis of ‘proximate (i.e. direct) causation’ (as the *Empagran* litigation was decided by the second Court of Appeals).

No single post-*Empagran* court:

- Challenged the validity of the proximate causation standard;
- Explained how it is possible in real life that anticompetitive effects in the U.S. proximately cause antitrust injury to plaintiffs who conduct business outside the U.S. and who concluded transactions and obtained goods/services outside the U.S.
- Made a comparison between the ‘dependency standard’ and the ‘proximate causation standard’;
- Attempted to comply with the Supreme Court’s instruction in the *Empagran* decision to determine the conditions under which foreign antitrust injury may be considered dependent;
- Undertook adjudication process analysis to consider whether the litigated foreign injury may be dependent from anticompetitive effects in the U.S.;
- Understood correctly (except one post-*Empagran* court) the alternative theory and tried to conduct the adjudication process accordingly;
- Attempted to provide an interpretation of the Supreme Court’s decision that dependent foreign private injury can be litigated before the U.S. courts and that comity must not be decided on a case-by-case basis.

There is another serious concern about how post-*Empagran* case law will develop, irrespective of challenging validity of the proximate causation standard. On the basis of the reasoning of post-*Empagran* courts, it is possible to notice that in general, the courts are not really supportive of foreign antitrust claim. In general, case law does not provide any clear guidance on conditions that private parties have to fulfil to have their injury litigated before the U.S. courts. In fact, the approach of post-*Empagran* courts to determining the

substance of the required type of relationship between anticompetitive effects and litigated (foreign) private antitrust injury is very passive (non-constructive). All post-*Empagran* courts have done is decide that alleged facts do not support proximate causation, without explaining why and without indicating what facts are missing.

A number of factors could seriously undermine the development of private antitrust law enforcement in the future. These include the absence of any guidance on how private plaintiffs can satisfy the required type of relationship between anticompetitive effects and antitrust injury; the misinterpretation of the *Empagran* litigation to mean that the Supreme Court prohibited all, not only independent, foreign private antitrust injury to be litigated before the U.S. courts; the inconsistency within post-*Empagran* case law; the lack of analysis of whether the existing nature of antitrust standing is suitable to be applied in the international context; and the attribution of a nonjurisdictional nature to the FTAIA (on the basis of highly questionable grounds).

Below are listed some explanations of how courts frame the approach to conduct factual analysis. They may be useful tool to understand the courts' reasoning for private plaintiffs considering the litigation their foreign antitrust injury before the U.S. courts.

Alleging a global conspiracy is not enough to succeed with a private antitrust claim. A global conspiracy is merely a type of anticompetitive conduct, and the effects of this conspiracy can be different in different parts of the world. Consequently, despite a global conspiracy, private antitrust injuries may be due to different economic conditions and other factors pertinent only to a specific market.

While proving conspiracy, there are two elements to be bear in mind. Firstly, private plaintiffs need to explain who are defendants and what is the role that defendants have in the conspiracy. Secondly, private plaintiffs need to explain in detail how the conspiracy functioned, why particular defendants were important to the success of the conspiracy, why a particular action had to be taken, and how this action attributed to the success of te conspiracy and, consequently, to effects and injury.

If the private plaintiffs succeed in establishing the existence of a conspiracy, it is important to assess whether the defendants are involved in import trade or import commerce. If import trade or commerce is present, private plaintiffs must prove that the defendants intended and actually caused anticompetitive effects in the U.S.

With regard to all other types of conduct by the defendants (i.e. where there is no import trade or import commerce involved) private plaintiffs do not need to establish the intention of the defendants to cause anticompetitive effects in the U.S. Private plaintiffs have to bear in mind that they first have to prove that the defendants' conduct affected the market, competition, and economic conditions of the market. It is not enough for private plaintiffs to allege that a particular firm was affected, or that the payment for goods/services they had obtained from the defendants was made in the U.S., or that the persons to whom the defendants provided goods/service for use outside the U.S. are from the U.S.

Establishing the existence of anticompetitive effects is also not sufficient to claim compensation for suffered antitrust injury. With this regard, recommendation of this thesis to private plaintiffs would be the following. It is necessary to establish a connection between the litigated private antitrust injury and anticompetitive effects. Post-*Empagran* case law requires this connection to be of proximate causation. This thesis submits that this is not the only way in which this connection can be established. The standard of dependency mentioned in the Supreme Court's *Empagran* decision is wider.

U.S. case law unambiguously states that the only type of injury that can be compensated before the U.S. courts on the basis of U.S. antitrust law is antitrust injury. Antitrust standing is another requirement that private plaintiffs have to comply with. Case law on antitrust standing is difficult to grasp, as assessment is done on case-by-case basis and not every court may take the same approach. Antitrust injury that is suffered outside the U.S. is of a different nature from antitrust injury suffered in the U.S. Therefore, according to the Supreme Court's *Empagran* decision, this fact on its own should be sufficient evidence that antitrust standing does not play a conclusive role in the international context, but post-*Empagran* cases post to opposite direction. Private plaintiffs should also be reminded that the U.S. courts are not expected in delivering their decision to



take into consideration the nationality of the litigants, the place of transactions between the private plaintiffs and the defendants, and the movement of good/services (i.e. their final destination).

Unfortunately, post-*Empagran* cases do not provide guidance on how to successfully establish the required type of connection between anticompetitive effects and antitrust injury with regard to either the proximity standard or the dependency standard. Nevertheless, private plaintiffs should know that they are expected to allege more than merely that there is global conspiracy, that this conspiracy caused anticompetitive effects in the U.S. and outside the U.S., and that the prices in the U.S. and outside the U.S. are such to prevent arbitrage.

Private plaintiffs are also reminded that providing general statements, conclusions, and abstract and vague citations of statutory text is not sufficient. Private plaintiffs must explain very clearly how every single element - the conspiracy, the actions of the defendants, the nature of the effect, and the market situation - contributed to antitrust injury. Private plaintiffs must exclude every single possibility that other elements, not connected to the conspiracy or its effects, have caused the litigated private antitrust injury. This thesis presents in chapter 5 that every fact of antitrust conspiracy, anticompetitive effects, and antitrust injury has to be simultaneous and sine-qua-non (i.e. essential) to have foreign private antitrust injury litigated before the U.S. courts. The requirement of 'simultaneous' means that all the facts have to fall into place together and there cannot be situation where, for example, one fact emerges only because the conspirators adapted to the market situation, because markets adapted to other market situations. The requirement of 'sine-qua-non' means that every fact that forms antitrust conspiracy, and/or anticompetitive effects, and/or antitrust injury, is of such importance that without this fact, anticompetitive effects and antitrust injury would not exist. In some post-*Empagran* cases, the private plaintiffs did not successfully establish the required type of connection between their litigated foreign antitrust injury and anticompetitive effects in the U.S. because they were alleging that some fact were necessary, or that some fact were substantial, or that some fact were significant. But none of them ever alleged that the alleged facts are such that they satisfy all these requirements together. This is why the expression

‘simultaneous and sice-qua-non’ is used to determine the transborder standard in Chapters 5, 6, and 7.

# Chapter 4: The Concept of International Private Antitrust Law Enforcement

## 1 Introduction

The primary aim of this thesis is to identify and theorise a new legal concept, ‘transborder standard’.<sup>1</sup> This thesis proposes this standard as a novel legal category that should be added to the existing analytical framework.<sup>2</sup>

The analysis in this thesis is focused on factual situations and antitrust violations that are of a transborder nature and where litigants suffer private antitrust injury outside the U.S.<sup>3</sup>

Does the existing literature provide an analytical framework that adequately addresses this type of factual situation? If the answer is negative, the question that follows is, what is the required legal concept that would overcome the theoretical and practical problems of the existing analytical framework?<sup>4</sup> These questions require an unusual methodological approach, i.e. that existing relevant literature is analysed separately from existing case law.<sup>5</sup> The existing relevant literature is the object of analysis in this chapter.

The structure of this chapter is the following. Section 2 presents a critique of academic literature in relation to the *Empagran* litigation. It is not the purpose of this analysis to describe every single available opinion. The research presented in this chapter is more focused on the question whether academics provide a uniform critique of the *Empagran* litigation, in particular with regard to its impact on future antitrust litigation. The analysis in Section 2 is based on the consideration that the Supreme Court’s *Empagran* decision is a binding precedent on the possibility of foreign injury being litigated before the U.S.

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<sup>1</sup> See Chapter 1, section 1.

<sup>2</sup> Ibid.

<sup>3</sup> See Chapter 1, subsections 3.2. and 3.3.

<sup>4</sup> See Chapter 5.

<sup>5</sup> See Chapter 1, subsection 3.2.

courts.<sup>6</sup> Consequently, the analysis in section 3 will help to understand whether academics have a uniform opinion on the plausibility of private antitrust law enforcement operating in the international context. Section 4 presents a critique of, or, rather, a response to the issues presented in sections 2 and 3 with a view to encouraging further analysis that may extend beyond this thesis. A conclusion is provided in section 5.

## 2 Views on the *Empagran* Litigation

### 2.1 Importance of the *Empagran* Litigation

It is commonly agreed that prior to the *Empagran* litigation, courts did not provide a uniform interpretation<sup>7</sup> of the provisions of the FTAIA §6a(2)<sup>8</sup>. The courts were left on their own to interpret<sup>9</sup> the FTAIA, either to mean that the FTAIA gives protection to defendants (i.e. makes it more difficult for plaintiffs to litigate their injuries), or that the FTAIA opens possibilities for more private plaintiffs to bring their claims before the courts (i.e. brings more plaintiffs before the courts). The *Empagran* litigation was expected to resolve this inconsistency in the interpretation of FTAIA provisions.

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<sup>6</sup> See analysis of post-*Empagran* cases in Chapter 3.

<sup>7</sup> Ryan A. Haas, "Act Locally, Apply Globally: Protecting Consumers From International Cartels By Applying Domestic Antitrust Law Globally," *Loyola Consumer Law Review* 15, no. 2 (2003), 106.

<sup>8</sup> For an explanation of the FTAIA being badly worded, without providing clear rules, see Andrew Stanger, "Analyzing U.S. Antitrust Jurisdiction Over Foreign Parties After *Empagran* S.A. V. F. Hoffman-Laroche, Ltd.," *Brigham Young University Law Review* 2003, no. 4 (2003), 1453, 1488; Edward D. Cavanagh, "The Ftaia and Subject Matter Jurisdiction Over Foreign Transactions Under Antitrust Laws: The New Frontier in Antitrust Litigation," *SMU Law Review* 56, no. 4 (2003); Daniel J. Bennett, "Killing One Bird With Two Stones: The Effect of *Empagran* and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 on Detecting and Deterring International Cartels," *The Georgetown Law Journal* 93, no. 4 (2005), 1428; Max Huffman, "A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act," *Houston Law Review* 44, no. 2 (2007), 287; Eric Taffet, "The Foreign Trade Antitrust Improvements Act's Domestic Injury Exception: A Nullity for Private Foreign Plaintiffs Seeking Access to American Courts," *Columbia Journal of Transnational Law* 50, no. 1 (2011), 218.

<sup>9</sup> Kareen O'Brein, "Giving Rise to a Claim: Is FTAIA's Section 6a(2) an Antitrust Plaintiff's Key to the Courthouse Door," *Southwestern Journal of Law and Trade in the Americas* 9, no. 2 (2003), 422; Kevin O'Malley, "Does U.S. Antitrust Jurisdiction Extend to Claims of Independent/dependent Foreign Injury?," *Temple International and Comparative Law Journal* 20, no. 1 (2006), 234; Kelly L. Tucker, "In the Wake of *Empagran* - Lights Out on Foreign Activity Falling Under Sherman Act Jurisdiction - Courts Carve Out a Prevailing Standard," *Fordham Journal of Corporate & Financial Law* 15, no. 3 (2010), 824; Taffet, "50 Colum. J. Transnat'l L. 216," 239.

The courts in the *Empagran* litigation provided a certain interpretation<sup>10</sup> of these FTAIA provisions. Academics are not convinced that the interpretation of the FTAIA that the *Empagran* courts provided is necessarily final and that it cannot be altered.<sup>11</sup>

Academics do not disagree only on the validity of the decision.<sup>12</sup> Their opinion on the contribution of *Empagran* to the development of antitrust laws is not shared by everyone either.

The academics that assessed the *Empagran* litigation positively, in particular the role of the Supreme Court in it, are those<sup>13</sup> who stated that the Supreme Court decided the litigation reasonably and thus clarified the extraterritorial limits of U.S. antitrust laws. This view might be challenged.<sup>14</sup> It has also been argued<sup>15</sup> that the Supreme Court's *Empagran* decision may have a relatively limited reach as a precedent because the jurisdictional limits of U.S. antitrust law were determined only in relation to independent foreign antitrust injury.

Another view that can be granted support is the view<sup>16</sup> that the Supreme Court has provided new legal ground that broke with the then commonly held perception that foreign plaintiffs could not bring claims under U.S. antitrust law for injuries suffered as a result of their non-domestic transactions, regardless of whether domestic trade or commerce were affected.<sup>17</sup>

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<sup>10</sup> The elements of the *Empagran* litigation that are mostly assessed among academics are provided in subsections below.

<sup>11</sup> See below.

<sup>12</sup> See also subsection below.

<sup>13</sup> Siddharth Fernandes, "F. Hoffman - La Roche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide," *Connecticut Journal of International Law* 20, no. 2 (2005), 267,294,295.

<sup>14</sup> See subsection below.

<sup>15</sup> Marissa Fitzpatrick, "Hoffman-La Roche Ltd. v. Empagran S.A.: The Supreme Court Trusts That Foreign Nations Can Preserve Competition Without American Interference," *Tulane Journal of International and Comparative Law* 13(2005), 376; O'Malley, "20 Temp. Int'l & Comp. L.J. 219," 243.; Evan Malloy, "Closing the Antitrust Door on Foreign Injuries: U.S. Jurisdiction Over Foreign Antitrust Injuries in the Wake of Empagran," *Texas Tech Law Review* 38, no. 2 (2006), 406.

<sup>16</sup> See analysis in Chapters 2 and 6.

<sup>17</sup> Thomas Dr. Köster and H. Harrison Wheeler, "Appellate Courts Split on the Interpretation of the Foreign Trade Antitrust Improvements Act: Should the Floodgates be Opened," *Indiana International & Comparative Law Review* 14, no. 3 (2004), 718.

Does this mean that the *Empagran* litigation is one of those litigations whose judgment is positively accepted by litigants as well as academics? The answer is negative. It seems that there is more negative than positive critique of the Supreme Court's decision. One line of critique<sup>18</sup> addresses the Supreme Court's decision to remand the case for further litigation despite all allegations being present before the court, so the court could have delivered a decision on the relationship between anticompetitive effect and antitrust injury. Another critique is connected with the Supreme Court's failure to determine what it means for foreign injury to be independent. The lack of such an explanation will cause great confusion among courts that will be left free to engage in judicial imperialism.<sup>19</sup> In addition, the lack of clarity on the substance of this condition for foreign injury to be litigated before the U.S. courts will also result in courts producing inconsistent judgments.<sup>20</sup>

The critique of the Supreme Court's *Empagran* decision goes beyond the purely legal (technical) issue of the definition of independent injury being left unresolved. The Supreme Court is criticized for not expressing clearly its position on principles of international law, and not deciding on relevance to include them in the litigation before the U.S. courts.<sup>21</sup> In contrast, some academics<sup>22</sup> understand this passivity on the part of the Supreme Court to decide the litigation in its full extent, as an indication that the Supreme Court prefers to resolve disputes involving foreign injury on comity grounds through cooperation between public regulatory agencies and judicial tribunals.

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<sup>18</sup> Ronald W. Davis, "Empagran and International Cartels - a Comity of Errors," *Antitrust* 19, no. 1 (2004), 58,63,64.

<sup>19</sup> Susan E. Burnett, "U.S. Judicial Imperialism Post *Empagran* v F. Hoffmann-Laroche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust," *Emory International Law Review* 18, no. 2 (2004), 608.

<sup>20</sup> Sam Foster Halabi, "The 'Comity' of *Empagran*: The Supreme Court Decides That Foreign Competition Regulation Limits American Antitrust Jurisdiction Over International Cartels," *Harvard International Law Journal* 46, no. 1 (2005), 292; S. Lynn Diamond, "Empagran, the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking," *Brooklyn Journal of International Law* 31, no. 3 (2006), 829.

<sup>21</sup> John K. Setear, "Forest With No Trees: The Supreme Court and International Law in the 2003 Term," *Virginia Law Review* 91, no. 3 (2005), 585,606,610.

<sup>22</sup> Burnett, "18 Emory Int'l L. Rev. 555," 642; Alvin K. Klevorick and Alan O. Sykes, "United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on *Empagran*," *Journal of Competition Law and Economics* 3, no. 3 (2007).

The presentation of critiques would not be complete without mentioning the view<sup>23</sup> that criticizes the Supreme Court for paying too much attention to comity, because the application of comity in situations like the one litigated in the *Empagran* litigation will result in the U.S. market and U.S. consumers remaining without protection. The fact is that the global cartel in the *Empagran* case affected the U.S. market and not just a non-U.S. market. Consequently, not allowing foreign plaintiff to address these consequences of anticompetitive activity makes defendants less willing to comply with U.S. law and, consequently, less willing to apply for advantage of amnesty program.<sup>24</sup> In other words, in a situation where the members of an antitrust cartel know that customers who suffer antitrust injury outside the U.S. cannot sue them before the U.S. courts, the members of the cartel will not be so concerned about violating U.S. antitrust law. This means the possibility of them being found liable under U.S. antitrust law diminishes. Because of this, defendants feel no need to cooperate with U.S. antitrust authorities and therefore receive beneficial treatment.

One interesting observation by academics is<sup>25</sup> that the application of comity to anticompetitive conduct that operates on a global scale will result in this conduct (global cartel) being under-deterred. This is the type of approach the Supreme Court took in *Empagran*. On this basis, the Supreme Court was criticized for ignoring economic logic.<sup>26</sup>

If the Supreme Court did not follow economic logic, does this mean that it applied comity correctly instead? The analysis that follows<sup>27</sup> shows that the Supreme Court did not necessarily act rightly on this issue either.

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<sup>23</sup> Halabi, "46 Harv. Int'l L.J. 279," 289.

<sup>24</sup> Grant Butler, "Supreme Court's Destruction of Incentive to Participate in the Justice Department's Cartel Leniency Program," *Boston University Public Interest Law Journal* 15, no. 1 (2005), 160,170.

<sup>25</sup> Fernandes, "20 Conn. J. Int'l L. 267," 268.

<sup>26</sup> Ibid.

<sup>27</sup> See section below.

## 2.2 Comity

Some academics argue that *Empagran* was decided exclusively on comity grounds,<sup>28</sup> or that comity was at least one of the grounds.<sup>29</sup>

Therefore, it would make it highly challenging to understand the Supreme Court decision if it turned out that the courts might not apply these comity grounds correctly.

The Supreme Court was criticized for its failure to accept the argument of amici curie without scrutinizing it first.<sup>30</sup> The Court's decision is difficult to understand in situation where facts pointed to defendants' conduct being illegal not only under U.S. antitrust law, but also the law of the countries where the act were performed. Surprisingly, the Court did not consider that because of its rejection of foreign injury claim, the cartel members will be better off.<sup>31</sup> It is very difficult to understanding why foreign amici curie tried to persuade the courts to reject the claim, as under U.S. and under their (i.e. the amici curie's) law, the cartel's existence was considered as antitrust violation.<sup>32</sup> Last but not least, even the transactions that harmed private plaintiffs did not take place in the amici curie's county.<sup>33</sup>

Academics tried to make sense of this questionable application of comity by the Supreme Court by arguing that the amici curie attempted to shape the international regulatory system with the help of the Supreme Court.<sup>34</sup> This means that the amici curie requested and the Supreme Courts approved the

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<sup>28</sup> Davis, "19 Antitrust 58," 58.

<sup>29</sup> Robert E. Draba, "International Antitrust: Supreme Court Decides the Meaning of "gives Rise to a Claim" and "foreign Tribunal"," *Loyola University Chicago International Law Review* 2, no. 1 (2004), 146; Symeon C. Symeonides, "Choice of Law in the American Courts in 2004: Eighteenth Annual Survey," *The American Journal of Comparative Law* 52(2004), 941. O'Malley, "20 Temp. Int'l & Comp. L.j. 219," 239-43.

<sup>30</sup> Köster and Wheeler, "14 Ind. Int'l & Comp. L. Rev. 717," 60.

<sup>31</sup> Ibid.

<sup>32</sup> Halabi, "46 Harv. Int'l L.j. 279," 290.

<sup>33</sup> Hannah L. Buxbaum, "Territory, Territoriality, and the Resolution of Jurisdictional Conflict," *American Journal of Comparative Law* 57, no. 3 (2009), 670.

<sup>34</sup> Buxbaum, "57 Am. J. Comp. L. 631," 670.



request that the U.S. must allow foreign legal competition structures to develop.<sup>35</sup>

The question that immediately follows<sup>36</sup> is whether it is really the role of the court to take away the protection of the U.S. market and of those who suffer injury from global anticompetitive practice merely with the purpose of helping other countries to develop their own antitrust enforcement systems. Does this mean that the private antitrust law enforcement system should be sacrificed just because this may help other countries to develop their own antitrust enforcement mechanisms? The question that immediately follows is, who guarantees that these foreign countries will grant the affected private parties the right to compensation? A related question is, who can reassure that foreign countries will have the knowledge, resources, and interest to deal with global conspiracies? Theoretically, private plaintiffs may be refused protection before the U.S. courts and at the same time non-U.S. countries may not have a mechanism in place to protect or to grant compensation to these affected private parties.

Another aspect of comity that raised some questions in the literature is how the Supreme Court interpreted comity. This refers to the Supreme Court reasoning that it accepted comity, but rejected interest balancing.<sup>37</sup> Some commentators interpreted this part of the decision to mean that the Supreme Court gave priority to comity compared to deterrence,<sup>38</sup> or as a shift from civil to criminal prosecution.<sup>39</sup> This explanation was further developed to include the idea that the main actors of antitrust enforcement on a global level should be national competition agencies that cooperate on an international level.<sup>40</sup>

It seems that commentators tried to construe the *Empagran* litigation as grounds against the development of private antitrust law enforcement on an

<sup>35</sup> Taffet, "50 Colum. J. Transnat'l L. 216," 249.

<sup>36</sup> For a similar critique see Joel R. Paul, "The Transformation of International Comity," *Law and Contemporary Problems* 71, no. 3 (2008), 38.

<sup>37</sup> Burnett, "18 Emory Int'l L. Rev. 555," 605.

<sup>38</sup> Fernandes, "20 Conn. J. Int'l L. 267," 295.

<sup>39</sup> Note, "Comity and Extraterritoriality in Antitrust Enforcement," *Harvard Law Review* 124(2011), 1277.

<sup>40</sup> Taffet, "50 Colum. J. Transnat'l L. 216," 249; Note, "124 Harv. L. Rev. 1269," 1278.

international level. The rejection of the balancing of interests, not exercising jurisdiction, and the introduction of proximate causation are considered to be obstacles imposed on plaintiffs,<sup>41</sup> and the extent of jurisdiction being narrowed<sup>42</sup>.

The only time when commentators did consider the need to protect private parties in elaborating arguments on comity was where they reminded courts to value the interests of the countries where plaintiffs come from and not where the defendants are domiciled.<sup>43</sup> This makes sense, as victims should be protected. Nevertheless, the question still remains whether the interests of ‘the plaintiff’s country’ are the same as the interests of ‘the plaintiff being compensated’.

## 2.3 Standard to Apply

As mentioned already at the beginning of this section, the Supreme Court was criticized for not providing a definition of independent foreign injury. Commentators agree that this standard of ‘independent foreign injury’ is crucial to understanding whether to grant private plaintiffs the jurisdiction of the U.S. courts. Despite this standard being crucial, it was left undecided and consequently became ambiguous.<sup>44</sup>

Therefore, the interpretation of independent foreign injury was left to the courts’ discretion,<sup>45</sup> as was the determination of facts that were brought before them for adjudication accordingly. This discretion of the adjudicating courts brings inconsistent judgment.<sup>46</sup> This interpretation can go so far that even in a

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<sup>41</sup> Note, “124 Harv. L. Rev. 1269,” 1272, 1273.

<sup>42</sup> Note, “124 Harv. L. Rev. 1269,” 1273.

<sup>43</sup> Fernandes, “20 Conn. J. Int’l L. 267,” 314.

<sup>44</sup> Draba, “2 Loy. U. Chi. Int’l L. Rev. 129,” 145; Burnett, “18 Emory Int’l L. Rev. 555”; Patrick Harrison, “Empagran Proves to be an Anti-Climax,” *European Lawyer* 42(2004), 8; Edward D. Cavanagh, “The FTAIA and Empagran: What Next?,” *SMU Law Review* 58, no. 4 (2005), 1419. Stephanie A. Casey, “Balancing Deterrence, Comity Considerations, and Judicial Efficiency: The Use of the D.C. Circuit’s Proximate Cause Standard for Determining Subject Matter Jurisdiction Over Extraterritorial Antitrust Cases,” *American University Law Review* 55, no. 2 (2005), 589.

<sup>45</sup> Draba, “2 Loy. U. Chi. Int’l L. Rev. 129,” 150.

<sup>46</sup> Halabi, “46 Harv. Int’l L.J. 279,” 292.

situation where injury is dependent, the subject matter jurisdiction of the U.S. courts may still be refused.<sup>47</sup>

Commentators are repeatedly pointing out that the Supreme Court did not completely resolve the claim of the foreign purchasers.<sup>48</sup> This is correct,<sup>49</sup> but it does not mean that post-*Empagran* courts and commentators cannot step in and help to resolve this mystery. This thesis certainly aims to do so.

Commentators also argue that the Supreme Court did not decide how to apply comity.<sup>50</sup> This is another issue on which this thesis cannot agree more with the commentators. Nevertheless, this thesis argues that there is no place for comity in private antitrust law enforcement.<sup>51</sup>

A question that was never raised in the *Empagran* litigation<sup>52</sup> or in any of the post-*Empagran* cases<sup>53</sup> is the question of the relationship between private antitrust claims and public enforcement. This is why it is surprising that academics<sup>54</sup> should raise this question at this point in time. If there exists a valid and operational system of private antitrust law enforcement, the efficiency of private antitrust law enforcement should not be challenged by comparing it with public antitrust law enforcement. Public antitrust law enforcement is not concerned with the protection (compensation) of affected private parties.

Academics are right to point out<sup>55</sup> that since the *Empagran* litigation, U.S. courts perceive proximate causation<sup>56</sup> to be a standard for litigating foreign injury before the U.S. courts, and that outcomes reached by different circuits are

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<sup>47</sup> Michelle A. Wyant, "Reconsidering the D.C. Circuit's Proximate Cause Standard for Extraterritorial Jurisdiction: Precluding the Globalization Theory to Promote Global Enforcement," *Richmond Journal of Global Law and Business* 7, no. 1 (2008), 42.

<sup>48</sup> Hannah L. Buxbaum, "National Courts, Global Cartels: *F. Hoffman-Laroche Ltd. v. Empagran, S.a.* (U.S. Supreme Court 2004)," *German Law Journal* 5, no. 9 (2004), 1103.

<sup>49</sup> See analysis in Chapters 2 and 3.

<sup>50</sup> Buxbaum, "5 German L.J. 1095," 1104.

<sup>51</sup> See Chapters 2 and 6.

<sup>52</sup> See Chapter 2.

<sup>53</sup> See Chapter 3.

<sup>54</sup> N.50.

<sup>55</sup> See analysis in Chapter 3.

<sup>56</sup> Diamond, "31 Brook. J. Int'l L. 805," 834; Taffet, "50 Colum. J. Transnat'l L. 216," 226.

difficult to accommodate<sup>57</sup>. Proximate causation is criticized for being cursory and inadequate,<sup>58</sup> and post-*Empagran* courts for using this concept of proximate causation in a conclusory and unexamined manner<sup>59</sup>. This explanation of post-*Empagran* cases law becomes even more interesting after realising that the second Court of Appeals was actually asked to decide on dependent foreign injury.<sup>60</sup>

Academics also stress that the Supreme Court left room for different interpretations of the required standard.<sup>61</sup>

It seems that academics, with a few exceptions,<sup>62</sup> are reluctant to challenge the suitability of proximate causation for regulating the litigation of foreign injury before the U.S. courts. On the contrary, they try to justify the suitability of proximate causations by invoking the purpose of law and deterrence,<sup>63</sup> by expressing concern only for U.S. consumers, by giving priority to relations with foreign nations, and by arguments for saving the U.S. courts from being overburdened.<sup>64</sup>

It is also an opinion expressed in the literature that in a situation where the foreign private antitrust injury is dependent from anticompetitive effects in the U.S., subject matter jurisdiction should not be granted to foreign plaintiffs.<sup>65</sup> This opinion relies on legislative history, statutory construction and pre-*Empagran* case law. These three arguments can be rejected for going against the reasoning in the *Empagran* litigation.<sup>66</sup> Other arguments for not granting

<sup>57</sup> Lacey M. Donovan, "Importing Plaintiffs: The Extraterritorial Scope of the Sherman Act After *Empagran*," *Iowa Law Review* 91, no. 2 (2006), 734.

<sup>58</sup> Erica Seigmund, "Extraterritoriality and the Unique Analogy Between Multinational Antitrust and Securities Fraud Claims," *Virginia Journal of International Law* 51, no. 4 (2011), 150,163.

<sup>59</sup> Jeremy M. Suhr, "Keeping the Door Ajar for Foreign Plaintiffs in Global Cartel Cases After *Empagran*," *Michigan Law Review* 105, no. 4 (2007), 795.

<sup>60</sup> Seigmund, "51 Va. J. Int'l L. 1047," 163,164.

<sup>61</sup> Diamond, "31 Brook. J. Int'l L. 805," 834; Wyant, "7 Rich. J. Global L. & Bus. 15," 43.

<sup>62</sup> Max Huffman, "A Standing Framework for Private Extraterritorial Antitrust Enforcement," *SMU Law Review* 60, no. 1 (2007); Taffet, "50 Colum. J. Transnat'l L. 216."

<sup>63</sup> Donncadh Woods, "Private Enforcement of Antitrust Rules - Modernization of the EU Rules and the Road Ahead," *Loyola Consumer Law Review* 16, no. 4 (2004), 266.

<sup>64</sup> Casey, "55 Am. U. L. Rev. 585," 603. see also Wyant, "7 Rich. J. Global L. & Bus. 15," 36-40.

<sup>65</sup> Malloy, "38 Tex. Tech L. Rev. 395," 406.

<sup>66</sup> See Chapter 2.

jurisdiction even for dependent foreign antitrust injury are similar to the ones used against private antitrust law enforcement in an international context, i.e. the increased number of lawsuits in the U.S., tension in relations with foreign nations, and hindering deterrence through the lack of cooperation within amnesty.<sup>67</sup> Surprisingly, in addition to the arguments just listed, it is also argued in the literature that even comity is a reason for not allowing dependent foreign private antitrust injury be litigated before the U.S. courts.<sup>68</sup>

Those academics are strongly against proximate causation who state that proximate causation is conclusory and ill-reasoned to apply in disputes of a foreign plaintiff's claim in global cartel cases,<sup>69</sup> and argue that foreign plaintiffs can never meet the proximate cause standard.<sup>70</sup>

It seems that academics do not object merely to proximate causation but also to the Supreme Court raising possibility that markets may be independent. This type of reasoning allegedly goes against the arguments of those academics who support the view that on a global level, markets are interconnected<sup>71</sup> and cannot be independent. This means that the Supreme Court's independency argument is unconvincing and inapplicable to real-world transactions.<sup>72</sup> This independency argument ignores the economic logic of functioning of markets and deterrence,<sup>73</sup> as perpetrators in foreign countries may retain their profits, in particular where antitrust law enforcement is not sufficient.

Is economic logic the only plausible one that courts are expected to follow? This question exceeds the limits of this thesis. Nevertheless, it is worth remembering that there was a time in history of U.S. antitrust law when economics and its models (artificial, out of touch with reality) influenced not only substantive U.S. antitrust law, but also courts imposing limitations to private antitrust law enforcement.

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<sup>67</sup> See Chapter 2.

<sup>68</sup> O'Malley, "20 Temp. Int'l & Comp. L.J. 219," 245.

<sup>69</sup> Suhr, "105 Mich. L. Rev. 779," 795.

<sup>70</sup> Taffet, "50 Colum. J. Transnat'l L. 216," 222.

<sup>71</sup> Kenneth S. Reinker, "Recent Development, Case Comment, *Roche v. Empagran*," *Harvard Journal of Law & Public Policy* 28, no. 1 (2004), 303.

There are certain arguments in the literature that are rather unclear, or, rather, of no much help for future litigation. One such example is the argument that the subject matter jurisdiction of the U.S. courts exists in linked global cases,<sup>74</sup> but there is no explanation of how to determine which cases are 'linked global' ones.

What is relevant for further analysis in this thesis is the recognition by academics of the need for a workable definition of "intertwined effects" for today's interdependent world economy, in which everything affects everything else,<sup>75</sup> but no academic has attempted to provide such a definition.

### 3 Private Antitrust Law Enforcement in an International Context

At this stage of the development of antitrust law, the U.S. is not the only country anymore<sup>76</sup> that has a private antitrust law enforcement system and that applies is antitrust laws within the international context (extraterritorially). This means that more countries have private antitrust law enforcement systems.<sup>77</sup>

In the section above it was indicated that the existence of a private antitrust law enforcement system does not automatically mean that its application within the international context is supported.

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<sup>72</sup> Reinker, "28 Harv. J.I. & Pub. Pol'y 297," 304.

<sup>73</sup> Fernandes, "20 Conn. J. Int'l L. 267."

<sup>74</sup> Suhr, "105 Mich. L. Rev. 779," 797.

<sup>75</sup> Wolfgang Wurmnest, "Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law," *Hastings International & Comparative Law Review* 28, no. 2 (2005), 227.

<sup>76</sup> Andrew S. Marovitz, "Empagran and the Globalization of the Sherman Act," *Business Law International* 2003, no. 3 (2003), 201.

<sup>77</sup> Clifford A. Jones, "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market," *Loyola Consumer Law Review* 16, no. 4 (2004), 430.

### 3.1 Arguments in Support of Private Antitrust Law Enforcement in an International Context

There are two lines of argument that academics put forward for the operation of a private antitrust law enforcement system in an international context.

In the first line of reasoning, justifications are elaborated on the basis of how effective private antitrust law enforcement is for dealing with anticompetitive conduct that operates on a global level. According to this view, private antitrust law enforcement should operate internationally because the condemnation of cartels has to be uniform and not split into separate isolated litigations to achieve deterrence.<sup>78</sup> Only in this way is it possible to take profits away from perpetrators.<sup>79</sup>

This line of reasoning also explains that global cartels are difficult to detect, which is why all victims should be allowed to sue, otherwise global cartels will be inadequately deterred.<sup>80</sup>

Last but not least, this line of supporting private antitrust law enforcement in the international context also takes into consideration that antitrust laws may be under-enforced in some countries,<sup>81</sup> and that there may exist differences in policies with regard to the implementation of antitrust law,<sup>82</sup> and that fines may not reflect the injuries caused<sup>83</sup>.

In the second line of reasoning in support of private antitrust law enforcement on an international level, academics merely provide isolate statements or

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<sup>78</sup> Michael D. Hausfeld, "Five Principles of Common Sense Why Foreign Plaintiffs Should be Allowed to Sue Under U.S. Antitrust Laws," *Loyola Consumer Law Review* 16, no. 4 (2004); John M. Connor and Darren Bush, "How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism," *Penn State Law Review* 112, no. 3 (2008).

<sup>79</sup> Wurmnest, "28 Hastings Int'l & Comp. L. Rev. 205"; Fernandes, "20 Conn. J. Int'l L. 267," 312; O'Malley, "20 Temp. Int'l & Comp. L.J. 219," 245,246.

<sup>80</sup> Fernandes, "20 Conn. J. Int'l L. 267," 311.

<sup>81</sup> Hannah L. Buxbaum, "Jurisdictional Conflict in Global Antitrust Enforcement," *Loyola Consumer Law Review* 16, no. 4 (2004), 367; Wurmnest, "28 Hastings Int'l & Comp. L. Rev. 205," 226.

<sup>82</sup> Buxbaum, "16 Loy. Consumer L. Rev. 365," 369.

<sup>83</sup> Wurmnest, "28 Hastings Int'l & Comp. L. Rev. 205," 226.

general observations that this private antitrust law enforcement would benefit the U.S. and the rest of the world,<sup>84</sup> that it would increase deterrence,<sup>85</sup> that it would protect the U.S. public,<sup>86</sup> and that it would conserve scarce judicial resources<sup>87</sup>.

Academics have not forgotten to ask the questions about the efficiency of private antitrust law enforcement compared to public enforcement in dealing with anticompetitive behaviour.<sup>88</sup> Therefore, amnesty is considered not to be efficient, as violators obtain profit but do not pay enough fines.<sup>89</sup> Leniency is said to work primarily for directors, and this aspect of leniency protection is not affected by having more private enforcement.<sup>90</sup> On the contrary, increased vigilance by foreign enforcers will benefit leniency,<sup>91</sup> because broader jurisdiction has wider deterrence as more members of a cartel aware that they may be litigated in the U.S.<sup>92</sup> It should also not be neglected that private antitrust law enforcement contributes to the development of antitrust law at both domestic and international levels.<sup>93</sup>

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<sup>84</sup> Jones, "16 Loy. Consumer L. Rev. 409," 430.

<sup>85</sup> Salil K. Mehra, "'A' is for Anachronism: The FTAIA Meets the World Trading System," *Dickinson Law Review* 107, no. 4 (2003), 770; Salil K. Mehra, "Foreign-Injured Antitrust Plaintiffs in U.S. Courts: Ends and Means," *Loyola Consumer Law Review* 16, no. 4 (2004), 348; Wurmnest, "28 Hastings Int'l & Comp. L. Rev. 205," 206.

<sup>86</sup> William J. Tuttle, "The Return of Timberlane?: The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust," *Vanderbilt Journal of Transnational Law* 36 (2003), 321.

<sup>87</sup> Mehra, "16 Loy. Consumer L. Rev. 347," 348; Fernandes, "20 Conn. J. Int'l L. 267," 313.

<sup>88</sup> Buxbaum, "16 Loy. Consumer L. Rev. 365," 367.

<sup>89</sup> Fernandes, "20 Conn. J. Int'l L. 267," 311.

<sup>90</sup> Butler, "15 B.U. Pub. Int. L.J. 169," 183.

<sup>91</sup> *Ibid.*

<sup>92</sup> Salil K. Mehra, "More is Less: A Law-and-economics Approach to the International Scope of Private Antitrust Enforcement," *Temple Law Review* 77, no. 1 (2004).

<sup>93</sup> Buxbaum, "57 Am. J. Comp. L. 631," 661-62; Robert H. Lande and Joshua P. Davis Davis, "Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases," *University of San Francisco Law Review* 42, no. Spring (2008).



## 3.2 Arguments against Private Antitrust Law Enforcement in an International Context

These arguments simply give priority to public enforcement in general. According to this view, public authorities are better enforcers,<sup>94</sup> therefore even on an international level it should be left to them to enforce antitrust law.<sup>95</sup> Consequently, under this view, the efficiency of antitrust enforcement lies in public authorities, so allowing private antitrust law enforcement would affect the operation of amnesty, immunity, and leniency programs.<sup>96</sup>

Academics are of the view that granting respect to foreign markets and authorities to enforce antitrust laws on those markets will maximize deterrence.<sup>97</sup> It seems that these academics do not acknowledge the research findings that show that private antitrust law enforcement benefits are substantial,<sup>98</sup> and in the public interest.<sup>99</sup>

It is rather surprising to note the argument being made that allowing foreign private plaintiffs to bring their private antitrust claim before the U.S. courts would not only affect the operation of a leniency program in non-U.S. countries, but will also affect the operation of private antitrust law enforcement in those countries, and increase cartel activities and other anticompetitive behaviour in non-U.S. countries.<sup>100</sup> This argument is difficult to follow as the U.S. courts do not grant jurisdiction to all foreign plaintiffs but only to those that have a link with the U.S. (if there is a connection between anticompetitive effects in the U.S. and the litigated private antitrust injury). In addition, private litigation

<sup>94</sup> Köster and Wheeler, "14 Ind. Int'l & Comp. L. Rev. 717," 728.

<sup>95</sup> Taffet, "50 Colum. J. Transnat'l L. 216," 241; Anderw Guzman, "The Case for International Antitrust," *Berkeley Journal of International Law* 22(2004).

<sup>96</sup> Marovitz, "2003 Bus. L. Int'l 197," 203; Margaret Bloom, "Should Foreign Purchasers Have Access to U.s. Antitrust Damages Remedies? A Post-Empagran Perspective From Europe," *New York University Annual Survey of American Law* 61, no. 3 (2005), 436; Bloom, "61 N.Y.U. Ann. Surv. Am. L. 433."

<sup>97</sup> Donovan, "91 Iowa L. Rev. 719."

<sup>98</sup> Robert H. Lande and Joshua P. Davis, "Comparative Deterrence From Private Enforcement and Criminal Enforcement of the U.s. Antitrust Laws," *Brigham Young University Law Review* 2011, no. 2 (2011), 348.

<sup>99</sup> Joshua P. Davis and Robert H. Lande, "Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement," *Seattle University Law Review* 36 (2013).

<sup>100</sup> Bloom, "61 N.Y.U. Ann. Surv. Am. L. 433."

before the U.S. courts does not affect non-U.S. competition authorities conducting their proceedings outside the U.S. Furthermore, the research behind this thesis has not found any obstacle to private plaintiffs who litigate private antitrust injury before the U.S. courts also litigating their antitrust injury before non-U.S. courts.

Public enforcement being the only option would prevent private plaintiffs from forum shopping,<sup>101</sup> and would negatively affecting comity<sup>102</sup>. Giving the right of action to a wider array of plaintiffs would increase expenses and place a burden on the courts system.<sup>103</sup>

In general, it seems that academics<sup>104</sup> favour public enforcement more than private, and that regulating enforcement on an international level through cooperation is considered as the only plausible solution to.<sup>105</sup>

### 3.3 Future Development of Private Antitrust Law Enforcement in an International Context

One proposition is that each country should have private antitrust law enforcement.<sup>106</sup> It is not important that their operation may be different or that remedies imposed on perpetrators may cause conflict among different countries.<sup>107</sup>

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<sup>101</sup> Burnett, "18 Emory Int'l L. Rev. 555," 615; Huffman, "60 S.M.U. L. Rev. 103," 14.

<sup>102</sup> Burnett, "18 Emory Int'l L. Rev. 555," 625.

<sup>103</sup> Deborah J. Buswell, "Foreign Trade Antitrust Improvements Act: A Three Ring Circus - Three Circuits, Three Interpretations," *Delaware Journal of Corporate Law* 28, no. 3 (2003), 997; Cavanagh, "56 S.M.U. L. Rev. 2151," 2188-89; Wurmnest, "28 Hastings Int'l & Comp. L. Rev. 205."

<sup>104</sup> Fernandes, "20 Conn. J. Int'l L. 267," 310; Michael D. Hausfeld, "Global Enforcement of Anticompetitive Conduct," *Sedona Conference Journal* 10 (2009), 14; Fernandes, "20 Conn. J. Int'l L. 267," 310.

<sup>105</sup> Burnett, "18 Emory Int'l L. Rev. 555," 627; Diamond, "31 Brook. J. Int'l L. 805," 843-55; Hausfeld, "10 Sedona Conf. J. 9," 14; O'Malley, "20 Temp. Int'l & Comp. L.J. 219"; Harry First, "The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law," *Antitrust Law Journal* 68, no. 3 (2001), 727.

<sup>106</sup> Diane P. Wood, "Antitrust At the Global Level," *The University of Chicago Law Review* 72 (2005), 323.

<sup>107</sup> Wurmnest, "28 Hastings Int'l & Comp. L. Rev. 205."

Apart from this general statement, the literature can be divided into two groups according to how they perceive the functioning of private antitrust law enforcement in an international context.

One group of academics argues that foreign antitrust injury should be adjudicated through antitrust standing analysis.<sup>108</sup> The problem with this view is that it requires private plaintiffs to be competitors or consumers in the U.S.<sup>109</sup> This requirement would go against the rationale of *Empagran*<sup>110</sup> and post-*Empagran* case law<sup>111</sup> that grants the jurisdiction of the U.S. courts to private plaintiffs who suffered foreign antitrust injury outside the U.S. and out of transactions concluded outside the U.S.

Even the proposal of prudential standing doctrine does not seem to adequately address the litigation of foreign antitrust injury. This doctrine adds comity and inverse deterrence to antitrust standing analysis.<sup>112</sup> Whether this type of analysis is suitable for the international context is questionable, as the doctrine itself recognizes that analysis within the standing framework cannot be explained consistently<sup>113</sup>.

In contrast to standing, other academics recommend as an option that foreign private antitrust injury should be analysed within the forum non conveniens framework. It is rather surprising that such a solution should be proposed, because even those who make such a proposal are aware of the problems related to the balancing of interests and to the position that antitrust issues may not be appropriate to decide within the forum non conveniens<sup>114</sup>. In addition, analysis

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<sup>108</sup> Suhr, "105 Mich. L. Rev. 779," 800.

<sup>109</sup> Suhr, "105 Mich. L. Rev. 779," 801,802.

<sup>110</sup> See Chapter 2.

<sup>111</sup> See Chapter 3.

<sup>112</sup> Huffman, "60 S.M.U. L. Rev. 103," 139,141.

<sup>113</sup> Huffman, "60 S.M.U. L. Rev. 103," 156.

<sup>114</sup> Diamond, "31 Brook. J. Int'l L. 805," 848-55; Jonathan T. Schmidt, "Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels," *Yale Journal of International Law* 31, no. 1 (2006), 256.

within the *forum non conveniens* does not create a consistent, predictable, national policy on international antitrust jurisdiction.<sup>115</sup>

It is rather surprising to observe that no other options were presented in the literature of how to conduct private antitrust law enforcement in an international context. In addition, both of these proposals have one aspect in common, i.e. they do not give legal certainty and do not guarantee predictability of which private plaintiffs may litigate their foreign antitrust injury before the U.S. courts.

## 4 Critical Comments

Antitrust law enforcement in an international context should not be concerned merely with protecting the public interests of countries and with anticompetitive effects within the territory of the adjudicating court. Competition is global, and that market may be global too. Consequently, questions like, e.g. ‘Which market to protect?’; ‘When should courts refrain from providing protection?’ are not suitable for dealing with global anticompetitive conduct.

The fact is that private antitrust law enforcement exists. This means that it should not be the task of adjudicating courts to determine its operation. The operation of private antitrust law enforcement should not depend on whether the facts are limited to one country. Consequently, the application of private antitrust law enforcement cannot depend on where the private party comes from, whether foreign injury is affected, and whether other countries have private antitrust law enforcement.

Whether certain elements of private antitrust law enforcement have to be re-defined or adjusted to be suitable for application in the international context is a separate matter. This requires further analysis that would exceed the scope of this thesis.

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<sup>115</sup> Schmidt, “31 Yale J. Int’l L. 211,” 246.

It is also important to explain that if U.S. courts grant jurisdiction for foreign injury, this should not prevent non-U.S. countries from developing their own system of private antitrust law enforcement. This non-U.S. system of private antitrust law enforcement can be operational alongside the U.S. one and could operate even in situations where the private plaintiffs do not establish a sufficient connection with the U.S. to have their private antitrust claim litigated there. This may sound like repetition, but not all global cartels can be litigated in the U.S.

Non-U.S. countries may oppose the wider jurisdiction of the U.S. courts, but it seems that they do not realise that sometimes the functioning of the cartel can be efficiently stopped only if private plaintiffs litigate where the source of the cartel is located, i.e. where the perpetrators perform their activities, and if the source of the cartel is in the U.S., only the U.S. courts can prevent its operation.

Non-U.S. countries should also realize that the U.S. courts give additional protection to non-U.S. private plaintiffs, as plaintiffs are not prohibited from starting another procedure before non-U.S. courts.

The whole purpose of granting subject matter jurisdiction to private plaintiffs who suffer foreign antitrust injury is to enforce U.S. antitrust law because of the affected market conditions. In this way market conditions will be restored, plaintiffs compensated, and perpetrators prevented from further engaging in anticompetitive conduct. Therefore, it is difficult to understand the position of non-U.S. countries that object to this. It seems that non-U.S. countries are more concerned with the protection of perpetrators.

At the same time, any international initiative that addresses antitrust enforcement at the international level should start to consider how to protect the interests of private parties too.

## 5 Conclusion

The analysis of the literature reveals that no attempt was made to provide a standard under which dependent foreign antitrust injury can be litigated before the U.S. courts.

The literature does not generally support the possibility that private antitrust law enforcement may operate in an international context. It is difficult to understand the opposition, as private antitrust law enforcement is merely one way of enforcing antitrust law, which is the only law that provides compensation for suffered antitrust injury.

It seems that academics are also beginning to realise that private antitrust law enforcement exists on an international level. The only question is whether they will help to develop it, or they will provide arguments and theoretical analysis with the purpose of persuading courts to make the functioning of private antitrust law enforcement on an international level difficult.

Hopefully, the criticism of private antitrust law enforcement that is present within the domestic context will not expand to the international context too.

## Chapter 5: The Transborder Standard – Definition and Explanation

### 1 Introduction

This thesis submits that a transborder standard is the only approach to private antitrust law litigation in an international context that:

- a.) is consistent with the Supreme Court’s approach in the *Empagran* litigation;
- b.) deals adequately with a new type of commercial practice that triggers antitrust concerns at an international level;
- c.) addresses the situation where private parties conduct antitrust litigation with regard to the same anticompetitive practice simultaneously before U.S. and non-U.S. courts.

The purpose of the chapter is to:

- present the proposed transborder standard;
- elaborate the way in which a transborder standard affects private antitrust law litigation in an international context;
- challenge the adequacy of the existing paradigm of “extraterritorial application of antitrust laws” in relation to a modern type of commercial practice that extends beyond the national territorial borders of several countries.

The chapter is the natural response to the practical needs<sup>1</sup> that exist at the current stage of antitrust law enforcement. Consequently, the structure of the chapter, setting out the substance of a transborder standard, and providing

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<sup>1</sup> See section 3 of this chapter below.

guidance as to how this transborder standard should become part of antitrust litigation, takes into consideration the U.S. antitrust regime from a systematic point of view. This means that the chapter presents the transborder standard in a way that fits well within the existing U.S. antitrust law regime.<sup>2</sup> In addition, the transborder standard will be explained so that both litigants and courts can apply the standard directly to the antitrust litigation before them without waiting for further elaboration or guidance on the essence of the transborder standard and the way in which this standard determines the adjudication process.

## 1.1 Structure

It is important to mention that the presentation of the transborder standard is divided into three separate chapters, as this is a new concept which needs to be set out clearly. The transborder standard concept does not exist yet, therefore, as the analysis of existing case law shows,<sup>3</sup> the adjudicating process is not conducted according to the proposed transborder standard.

Therefore, this chapter sets out the foundations of the transborder standard, explains the substance of the transborder standard, determines the novelty of the contribution that the transborder standard brings to antitrust litigation, and provides basic orientation as to what the transborder standard requires from litigants and adjudicating courts during the adjudication process.

The relationship between the transborder standard and the rationale of adjudicating courts in pre-*Empagran* cases is the raw material of the next chapter (Chapter 6). The novelty of the transborder standard requires clear analysis and presentation of the issues in the pre-*Empagran* cases that might have been decided differently if the proposed transborder standard had been

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<sup>2</sup> For further elaboration of the compatibility of the transborder standard with the existing system of antitrust law enforcement, see Chapter 7.

<sup>3</sup> Both the analysis of post-*Empagran* cases (see Chapter 3) and the analysis of pre-*Empagran* cases (see Chapter 6 and Chapter 7).



applied. At the same time, the analysis provides additional insights<sup>4</sup> into the changes that the *Empagran* litigation<sup>5</sup> and post-*Empagran* cases<sup>6</sup> bring to the system of antitrust law enforcement within the international context as is understood on the basis of pre-*Empagran* cases.

The thesis seeks to be of practical value. The analysis and the solutions are elaborated to help litigants, legislators and adjudicating courts in future litigation. Therefore, this thesis analyses whether the proposed transborder standard is compatible with the existing U.S. antitrust law enforcement regime and, consequently, whether it can be applied directly to future antitrust litigation without any need for legislative or structural changes. This analysis is the substance of Chapter 7.

Each of these three chapters that addresses the transborder standard has its own structure in accordance with the issues that are considered as relevant to provide a comprehensive, sufficient, but not necessarily exhaustive<sup>7</sup> elaboration of the transborder standard. The structure of each of the chapters is presented separately in each chapter.

The structure of this chapter (Chapter 5) follows the logical development of the argument throughout the thesis.

In Chapter 2 it was submitted that the U.S. Supreme Court in the *Empagran* decision recognised a new stage in the development of private antitrust law enforcement. It was further submitted that the reason for such recognition by the Supreme Court lies in the significant expansion of private antitrust law enforcement with an international context<sup>8</sup> and the possibility of (foreign)

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<sup>4</sup> I.e. apart from the critique that was already presented in Chapter 2 in relation to how adjudicating courts throughout the *Empagran* litigation interpreted pre-*Empagran* cases used as precedents in delivering decisions in the *Empagran* litigation.

<sup>5</sup> See Chapter 2, with regard to the decision of the Supreme Court in the *Empagran* litigation on the state of the law that all the U.S. courts are expected to comply with.

<sup>6</sup> For a critique of the development of the law in post-*Empagran* cases, i.e. this not being in conformity with the transborder standard as elaborated in this thesis, see Chapter 3.

<sup>7</sup> This is due to the fact that this thesis defines for the first time the concept of transborder standard and, therefore, the present analysis may not necessarily predict and thus address all potential questions that may arise during antitrust litigation in the future.

<sup>8</sup> See Chapter 6, subsections 2.1.3. and subsection 3.4.

private parties litigating their foreign antitrust injury before the U.S. courts.<sup>9</sup> Chapter 2 analysed in depth the reasoning of the adjudicating courts in the *Empagran* litigation and the relationship between the various judicial reasonings with the purpose of clearly presenting the nature, extent and significance of the Supreme Court's *Empagran* decision. After presenting the reasons why the Supreme Court's *Empagran* decision is given such importance, Chapter 2 identified questions that require answers.

The focus of Chapter 3 was twofold. Firstly, it considered how the law in post-*Empagran* cases was developed. Secondly, it examined whether the post-*Empagran* cases provide answers to the questions that were left open in the *Empagran* litigation. The analysis of post-*Empagran* cases shows a departure from the Supreme Court's approach in the *Empagran* litigation. It is also submitted that the adjudicating courts in the post-*Empagran* cases introduced obstacles which make the litigation of foreign private antitrust injury before the U.S. courts more difficult than one would have expected from the Supreme Court's judgment. In addition, post-*Empagran* cases do not provide answers to questions left open in the *Empagran* litigation, and do not provide any guidance to the U.S. courts and to private litigants as to how to litigate their foreign antitrust injury before the U.S. courts.

Chapter 4 was a logical step in the research process, i.e. moving from a consideration of the relevant case law to the relevant literature. The focus of Chapter 4 was to analyse the following: how the relevant literature perceives *Empagran's* contribution to the development of antitrust law; whether the literature considers the problems present in post-*Empagran* cases; whether the literature provides clear answers and substantial guidance in support of the opportunity afforded by the Supreme Court's decision in the *Empagran* litigation which private litigants and U.S. courts can apply in future antitrust adjudication. This analysis showed that the relevant literature is not greatly useful. Apart from some vague and confusing arguments, there are also statements that are highly questionable. Nevertheless, the overall assessment presented in Chapter 4 is that the literature does not provide plausible answers to how private antitrust law enforcement is expected to operate in the international context.

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<sup>9</sup> See Chapter 6, subsections 2.1.3. and subsection 3.4.

Consequently, the analysis in this chapter (Chapter 5) needs to start with presenting the substance of the transborder standard (section 2). It was submitted above that a transborder standard is the appropriate response to the Supreme Court's contribution to the development of private antitrust law enforcement within the international context. Therefore, the analysis throughout this chapter cannot be understood without first defining the essence of the transborder standard.

It is admitted that the present thesis is complex and dense. The main reason is that the analysis of existing cases and literature and the formulation of suitable solutions require an understanding of the substance of, the reasons for and the connections between three independently analysed areas of antitrust law, i.e. substantive antitrust law, private antitrust law enforcement, and subject matter jurisdiction in the context of antitrust law. Therefore, section 3 below will explain the grounds (reasons) why the transborder standard is proposed as a solution to private antitrust law enforcement within an international context.

A transborder standard may be perceived as quite a radical change to the existing system of antitrust law enforcement. Therefore, it is important to provide a clear line between the existing functioning of the antitrust law enforcement within an international context and the changes that a transborder standard will bring to the system. The explanation of these changes is the substance of section 4.

## **2 The Concept of the Transborder Standard**

At the beginning of this section it is important to make three remarks with the purpose of preventing confusion or misunderstandings about the concept of the transborder standard.

The first remark is that the transborder standard is conceptualized in this thesis within the limits set by the research question. This means that the concept of a transborder standard addresses a specific type of antitrust litigation and a specific factual situation. In other words, the concept of a transborder standard is formulated with the purpose of being applied in litigation where private

parties litigate their foreign (private) antitrust injuries before the U.S. courts in a specific type of international antitrust situation, i.e. in a transborder type of antitrust cases.

This thesis does not rule out the possibility that the concept of a transborder standard may be applied in other categories of antitrust litigation or of international antitrust cases. However, such analysis is beyond the scope of the present research question.<sup>10</sup>

The second remark concerns the classification of the standard as ‘transborder’. The use of the word ‘transnational’ is not new within the area of law.<sup>11</sup> In addition, the word ‘transnational’ is used in a different context.<sup>12</sup> Therefore, it is important to emphasize that this thesis attributes a specific meaning to the word ‘transborder’. The subsection that follows will explain that ‘transborder’ is used to describe a very specific type of international antitrust cases. This means that a ‘transborder’ antitrust case is international in nature, but not every international antitrust case can be classified as ‘transborder’.

The third remark is that the concept of a transborder standard is not a substantive legal rule in the sense that it determines the legality of the commercial activity being carried out in an international context. The concept of a transborder standard is a combination of different approaches (and guidance) designed to:

<sup>10</sup> Nevertheless, itthe possibility cannot be automatically excluded that certain aspects of the transborder standard developed within this thesis may be applied in antitrust litigation where the plaintiff is a public authority, or ininter-governmental activities (e.g. bilateral or multilateral agreements, competition networks) where representatives from different countries around the world discuss the application of antitrust law at the international level..

<sup>11</sup> See Guliano Amato, *Antitrust and the Bounds of Power; the Dilemma of Liberal Democracy in the History of the Market* (Oxford, UK: Hart Publishing, 1997), 126; Alan. D. Neale and M. L. Stephens, *International Business and National Jurisdiction* (New York, US: Clarendon Press, Oxford University Press, 1988), 4; Herwing C.H. Hofmann, “Transnational and Trans-Territorial Rule-Making, a Basic Framework,” *Missouri Law Review* 78, no. 2 (2013); Joseph P. Griffin, “United States Antitrust Laws and Transnational Business Transactions: An Introduction,” *International Lawyer* 21 (1987).

<sup>12</sup> See e.g. the author first uses this term in relation to trade between the EU member states (Assimakis P. Komninos, *EC Private Antitrust Enforcement; Decentralised Application of EC Competition Law By National Courts* (Oxford and Portland, Oregon, US: Hart Publishing, 2008), 239), but then uses this term in relation to trade between the EU and non-EU member states (p.250). See also e.g. Note, “Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms,” *Harvard Law Review* 103, no. 6 (1990)..

- encompass a factual situation in its integrity and complexity (subsections 1 and 2 below);
- understand the functioning of commercial activities and their consequences (subsection 3 below);
- resolve antitrust litigation from the perspective of the rights of private parties (subsection 4 below) in;
- correct, fair, and just way (subsection 5 below).

## 2.1 Transborder Classification of a Factual Situation

The current approach to antitrust law enforcement in an international context is that it is conducted and presented through the lenses of “domestic” and “foreign”. This means that every aspect of the antitrust situation (i.e. litigants, anticompetitive conduct, anticompetitive effect, antitrust injury) is classified either as “domestic” or as “foreign”, and the analysis that follows is conducted accordingly. This dichotomy of “domestic” and “foreign” is applied by the U.S. courts<sup>13</sup> and is equally widespread in the relevant literature.

The present thesis submits that this dichotomy between “domestic” and “foreign” is problematic for three reasons.

Firstly, this dichotomy requires adjudicating courts to modify the reality of the factual situation to such an extent as to make the facts fit into either one of these two categories.<sup>14</sup> Consequently, it is submitted that this modification leads to an adjudication process and final decision that may potentially result in an incorrect, unfair and unjust result.

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<sup>13</sup> See the presentation of pre-*Empagran* cases in Chapter 6, where it is shown that the only categories the U.S. courts use in delivering their decisions are ‘U.S.’ and ‘non-U.S.’ character. In addition, see also the analysis in Chapter 7, where it is presented that despite a factual situation in the case under adjudication where the facts simultaneously exist in U.S. and non-U.S. countries, adjudication courts reach their decision by considering as relevant only the facts that are related to the U.S. and treating all the other facts as non-existent.

<sup>14</sup> See Chapter 7.

Secondly, commercial activities today are such that they can simultaneously take place and raise antitrust concerns in several countries around the world (e.g. global cartels).<sup>15</sup> This type of commercial activity can be so interconnected and cause a variety of anticompetitive consequences (i.e. anticompetitive effects and antitrust injury) anywhere in the world that it is impossible to divide the activity into parts that will fit precisely into the classification of “domestic” or “foreign”. Such classification would distort the nature of the commercial activity and its anticompetitive consequences. The part of the Supreme Court’s *Empagran* decision where it did not reject the legal validity of the alternative theory claim<sup>16</sup> can be interpreted as supporting the proposed novel approach.

Thirdly, this dichotomy between “domestic” and “foreign” may be suitable for the era when the U.S. was the leading authority on the enforcement of antitrust law in an international context.<sup>17</sup> At the current level of development of antitrust law systems throughout the world, it is likely that other countries (jurisdictions, e.g. the EU) do enforce their antitrust laws within the international context (extraterritorially). Consequently, this thesis submits that it is no longer appropriate to approach antitrust law enforcement from the view of ‘we protect ours, we do not care about others’, but it should be approached from the view of ‘we need to respect each others and together protect what we all care about’. It is submitted that the support for this proposed change can be found both in the *Empagran* litigation<sup>18</sup> and in post-*Empagran* cases<sup>19</sup> where no U.S. adjudicating court denied the subject matter jurisdiction of the U.S. courts on the grounds that either the plaintiffs were non-U.S. nationals, or the private parties who suffered foreign antitrust injury could not be granted the subject matter jurisdiction of the U.S. courts. The element of ‘foreign’ on its own did not have any determinative role in the adjudication process.

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<sup>15</sup> See Chapter 7, subsection 3.4.

<sup>16</sup> See the analysis in Chapter 2.

<sup>17</sup> About the hegemonic role that the U.S. played within the area of antitrust law see Robert T. Kudrle, “Hegemony Strikes Out: The U.S. Global Role in Antitrust, Tax Evasion, and Illegal Immigration,” *International Studies Perspective* 4 (2003); Courtney G. Lytle, “A Hegemonic Interpretation of Extraterritorial Jurisdiction in Antitrust: From American Banana to Hartford Fire,” *Syracuse Journal of International Law and Commerce* 24 (1997)..

<sup>18</sup> See Chapter 2, subsection 3.2.

<sup>19</sup> See Chapter 3, subsection 6.4. and section 7.

Consequently, the thesis submits that a third category of antitrust situations has to be introduced, i.e. a transborder factual situation. This category is not intended to replace either the “domestic” or the “foreign” type of antitrust situation, but to be added to them. This means that litigants, courts and academics will have the possibility to correctly present the factual situation either as “domestic”, “foreign”, or “transborder”.

## 2.2 The Nature of the Connection Between Facts

The subsection above demonstrated the necessity of introducing a new category of factual situation, i.e. a “transborder” one. This subsection seeks to answer the question of what is the determinative factor in classifying a factual situation as “domestic”, “foreign”, or “transborder”. Is an arrangement between two separate multinational companies on how they will run their commercial activities globally sufficient to classify such an arrangement on its own as a “transborder global cartel”?

It is submitted that the mere existence of global factual situations (anticompetitive conduct, anticompetitive effect, antitrust injury) which include the U.S. market<sup>20</sup> is not sufficient on its own to classify the factual situation as “transborder”. The crucial factor is the nature of the connection between the three elements that arise in several countries, including the U.S.

This submission is supported by the Supreme Court’s reasoning in *Empagran* where the Supreme Court explained that the mere existence of a global cartel is not sufficient to grant subject matter jurisdiction to the U.S. courts, but there has to be a certain connection (dependency) between the foreign antitrust injury and the anticompetitive effects (antitrust injury) in the U.S.<sup>21</sup>

The Supreme Court in the *Empagran* decision did not set out the conditions that have to be fulfilled to satisfy such a connection. The Supreme Court stated that U.S. courts do not have subject matter jurisdiction in a situation where the litigated foreign antitrust injury is independent from the anticompetitive effects

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<sup>20</sup> See the definition of “transborder” in subsections 2.1. and subsection 2.2. of this chapter above.

<sup>21</sup> See the analysis in Chapter 2, subsections 3.1.2. and 3.1.7.3.

(antitrust injury) in the U.S.<sup>22</sup> The Supreme Court in its analysis mentioned on several occasions cases where adjudicating courts reasoned that the foreign injury has to be “inextricably” connected with the anticompetitive effects in the U.S. before the U.S. courts could declare themselves to have subject matter jurisdiction.<sup>23</sup> Unfortunately, neither the cases that the Supreme Court cited as precedents<sup>24</sup> nor the decision of the Supreme Court itself explained under what conditions the connection can be classified as “inextricable”.

Post-*Empagran* cases departed from the necessity to determine the conditions for such a connection of “dependency” between facts that are present outside the U.S. and facts that are present in the U.S.<sup>25</sup> The second Court of Appeals in the *Empagran* litigation<sup>26</sup> and all the post-*Empagran* courts<sup>27</sup> turned the requirement set up by the Supreme Court in the *Empagran* litigation of “dependent type of connection” between facts present outside the U.S. (antitrust injury) and facts present within the U.S. (anticompetitive effects) into the “causation requirement” between facts present within the U.S. (anticompetitive effects) and facts present outside the U.S. (antitrust injury).

This chapter will propose appropriate conditions for satisfying the required type of connection that the Supreme Court’s *Empagran* decision failed to address.

It is submitted that to classify a connection as “dependent” and consequently as “transborder”, the connection between facts present outside the U.S. and facts present within the U.S. must be such that the facts within the U.S. and those outside the U.S. exist simultaneously and are essential (*sine-qua-non*) for their mutual co-existence. Further and detailed explanation of these two conditions will be presented in Chapter 7.

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<sup>22</sup> See Chapter 2, subsection 3.1.7.3.

<sup>23</sup> See the analysis in Chapter 2, subsection 3.1.7.3.

<sup>24</sup> See analysis in Chapter 7, subsection 3.1.

<sup>25</sup> See the analysis in Chapter 3, subsections 6.2. and 6.4.

<sup>26</sup> See Chapter 2, subsection 3.1.7.4.

<sup>27</sup> See Chapter 3, subsection 6.2.



## 2.3 Understanding Commercial Arrangements

It is strongly submitted that it is not possible to determine the correct nature of the connection between facts (anticompetitive conduct, anticompetitive effect, antitrust injury) that exist globally without a prior understanding of the reasons why a specific commercial activity was arranged (put into operation). In addition, the analysis of the connection between the facts is feasible only after the existence of anticompetitive effects (antitrust injury) has been established. This is particularly true where the anticompetitive consequences (i.e. anticompetitive effects of an antitrust injury) are alleged to be present in non-U.S. countries.

At this point it is necessary to explain that understanding why some activities (arrangements) were put into operation and why private parties suffered antitrust injuries has nothing to do with the “purpose” (i.e. subjective element) that has been in the past required in connection with some substantive antitrust law violations<sup>28</sup> or with the effect test requirement applied to establish the subject matter jurisdiction of the U.S. courts<sup>29</sup>.

In a situation where the adjudicating courts understand why the defendants set up a particular type of commercial arrangement, it will be easier for the courts to decide whether these commercial arrangements are a necessary method of competition on the global market (e.g. goods sold on different markets at different prices because of differences in purchasing power of the consumers), or whether these commercial arrangements were designed with the purpose of establishing and successfully conducting an anticompetitive cartel on global level (e.g. goods are sold on different markets at different prices but at the same time goods are not allowed to be sold to customers for use in other market than the one where the purchase took place).

Similarly, it is necessary e.g. for adjudicating courts to understand why the private parties suffered (foreign) antitrust injury. The central issue in this analysis is to establish whether the (foreign) antitrust injury is a consequence of

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<sup>28</sup> See Chapter 6, subsection 3.2.2.

<sup>29</sup> See Chapter 6, subsection 3.2.1.

the anticompetitive commercial arrangement, or of other factors on the market.<sup>30</sup> For example, there is a difference between a factual situation where private parties allege that they have suffered (foreign) antitrust injuries because of a transborder global cartel, and a factual situation where private parties ceased to compete after a non-U.S. government required them to dissolve because of their monopoly position on the non-U.S. market.

It is submitted that only by conducting the analysis of the factual situation with the purpose of understanding the reasons behind the facts will a court be able to establish correctly whether the connection between the facts is simultaneous and sine-qua-non essential and, consequently, transborder, as explained in the subsection above.

## **2.4 Resolving Antitrust Litigation from the Perspective of the Rights of Private Parties**

This characterization of the context of a transborder standard is a necessary response:

- the existing nature of private antitrust law enforcement, and
- the existing approach to antitrust law enforcement in an international context.

The U.S. courts established the nature of the U.S. private antitrust law enforcement, and formulated the goals of private antitrust law enforcement.<sup>31</sup>

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<sup>30</sup> This question is in conformity with the reasoning expressed by some post-*Empagran* courts; see Chapter 3, subsections 6.2 and 6.4. The relevance of the difference in conditions on different markets (countries) is also mentioned in some pre-*Empagran* cases (see Chapter 7, subsection 3.4.).

<sup>31</sup> For the argument that the U.S. courts formulated the substance of U.S. antitrust law see William H. Page, "The Scope of Liability for Antitrust Violations," *Stanford Law Review* 37 (1985), 1707-08; Comment, "Fifty Years of Sherman Act Enforcement," *The Yale Law Journal* 49, no. 2 (1939), 286.. For the argument that the U.S. courts formulated the nature and goals of U.S. private antitrust law enforcement see Ping Lin et al., "The US Antitrust System and Recent Trends in Antitrust Enforcement," *Journal of Economic Surveys* 14, no. 3 (2000); Spencer Weber Waller, "Prosecution By Regulation: The Changing Nature of Antitrust Enforcement," *Oregon Law Review* 77 (1998); Robert B. Reich, "The Antitrust Industry," *The Georgetown Law Journal* 68 (1980); Charles A. Sullivan, "Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action," *Seton Hall Law Review* 14 (1983); Joseph Bauer, "The Stealth

The judges, however, have followed the economic analysis of law movement in determining the balance between private and public antitrust law enforcement.<sup>32</sup> The U.S. courts also introduced the requirement of antitrust injury<sup>33</sup> and antitrust standing<sup>34</sup> and in this way restricted the group of private plaintiffs who can invoke the protection of their suffered harm on the basis of U.S. antitrust laws<sup>35</sup>. In addition, U.S. judges have been inconsistent in conducting antitrust standing analysis,<sup>36</sup> which has contributed to the lack of legal predictability and legal clarity.

The U.S. courts also had a determinative role in formulating the nature of antitrust law enforcement in an international context. Judges formulated various tests for establishing the subject matter jurisdiction of the U.S. courts.<sup>37</sup> The analysis in Chapters 2 and 3 shows that the U.S. courts interpreted differently the FTAIA statute which was enacted, *inter alia*, with the purpose<sup>38</sup> of clarifying the conditions under which U.S. courts can be granted subject matter jurisdiction. The analysis in this thesis in relation to all the above issues supports<sup>39</sup> the view that the U.S. courts also tend to find difficulties in the functioning of private antitrust law enforcement in an international context. One recently introduced difficulty described in Chapter 3 is the requirement of “direct causation” between anticompetitive effects in the U.S. and foreign antitrust injury. Other examples of similar difficulties include the lack of clarity

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Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing,” *University of Pittsburgh Law Review* 62 (2001); William Breit and Kenneth G. Elzinga, “Private Antitrust Enforcement: The New Learning,” *Journal of Law and Economics* 28, no. 2 (1985); Lee Loevinger, “Private Action - the Strongest Pillar of Antitrust,” *The Antitrust Bulletin* 3 (1958); John D. Guilloil, “Private Enforcement of U.S. Antitrust Law,” *The Antitrust Bulletin* 10 (1965); Kenneth W. Dam, “Fortner Enterprises v. United States: “Neither a Borrower, Nor a Leader be”,” *The Supreme Court Review* 1969 (1969).

<sup>32</sup> See Chapter 3, n.369.

<sup>33</sup> See Robert Pitofsky, “Antitrust in the Next 100 Years,” *California Law Review* 75 (1987), 313; Bauer, “62 U. Pitt. L. Rev. 437,” 439; William E. Kovacic, “The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/harvard Double Helix,” *Columbia Business Law Review* 2007, no. 1 (2007), 56.

<sup>34</sup> See Bauer, “62 U. Pitt. L. Rev. 437”.

<sup>35</sup> See Bauer, “62 U. Pitt. L. Rev. 437”; Page, “37 Stan. L. Rev. 1445”; Elizabeth T. Lear, “Federalism, Forum Shopping, and the Foreign Injury Paradox,” *William and Mary Law Review* 51, no. 1 (2009); Sullivan, “14 Seton Hall L. Rev. 17”, and analysis in Chapter 6, subsection 4.2.2.

<sup>36</sup> See Chapter 2, n.113.

<sup>37</sup> See Chapter 6, subsection 3.2.

<sup>38</sup> See Chapter 3, n.228 and analysis of the FTAIA in Chapter 6, subsection 3.1.1.

<sup>39</sup> See analysis in Chapter 3.

(guidance) as to how causation can be satisfied, and references to comity without clearly stating how comity should be applied in a transborder type of factual situations.<sup>40</sup>

Consequently, it is submitted that the development of U.S. private antitrust law enforcement and the application of U.S. antitrust law in an international context has not been beneficial to private litigants. Nevertheless, it is still be hoped that the *Empagran* litigation and post-*Empagran* cases may serve as an indication that the trend is moving in the opposite direction, i.e. towards being more generous to private parties and allowing the litigation of (foreign) antitrust injury before the U.S. courts.

These indications are: the Supreme Court's refusal in *Empagran* to rely on the goals of deterrence to decide the subject matter jurisdiction of the U.S. courts;<sup>41</sup> the refusal by the Supreme Court in *Empagran* to rely on the leniency program to formulate its ruling;<sup>42</sup> the decision by the Supreme Court in *Empagran* that both domestic and foreign antitrust injury can simultaneously satisfy the antitrust standing requirement;<sup>43</sup> the absence of any kind of statement by the adjudicating courts in the *Empagran* litigation and post-*Empagran* cases that antitrust injury cannot be litigated before the U.S. courts merely because it is foreign (i.e. suffered outside the U.S.), or because it is suffered by foreign (i.e. of non-U.S. nationality) private litigants,<sup>44</sup> or because transborder transaction

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<sup>40</sup> See below.

<sup>41</sup> See Chapter 2, subsection 3.1.9. There is an awareness that this can be a very challenging argument. On the one hand, the rejection of deterrence as an argument in support of the subject matter jurisdiction of the U.S. courts may be interpreted as the Supreme Court giving priority to the goal of compensation of private parties who suffer antitrust injury. On the other hand, deterrence was used in the *Empagran* litigation as an argument for expanding subject matter jurisdiction of the U.S. courts and thereby giving more private parties who suffer (foreign) antitrust injury the possibility to obtain compensation through the U.S. courts.

<sup>42</sup> See Chapter 2, subsections 3.1.9. and 3.1.7.3. The argument on the relationship between the compensation of damages to private parties who suffer antitrust injury and tackling an anticompetitive situation by reliance on the cooperation of perpetrators is the argument used within the discussion of whether priority should be given to private or to public antitrust law enforcement.

<sup>43</sup> See Chapter 2, subsection 3.1.4.

<sup>44</sup> See Chapter 2, subsection 3.2. and Chapter 3, subsection 6.4. and section 7.

between litigants took place outside the U.S. for products that were intended to be consumed outside the U.S.<sup>45</sup>

The trend just described shows that the protection of private parties operating globally who have suffered antitrust injury outside the U.S. has increased in importance. This means that the (public) interests<sup>46</sup> of non-U.S. countries are no longer the only objects<sup>47</sup> of U.S. antitrust law protection.

Consequently, the thesis argues that in a factual situation where the litigants are conducting private antitrust law litigation before the U.S. courts, the U.S. courts must assess the facts and conduct the adjudication process from the perspective of protecting the rights of private litigants<sup>48</sup> and not only consider the interests of non-US countries whose citizens decide to litigate before U.S. courts.

<sup>45</sup> There is a degree of inconsistency between some post-*Empagran* cases on this argument (see Chapter 3, subsections 4.2., 4.3. and 6.2.) but the *Empagran* litigation provides clear guidance in this regard.

<sup>46</sup> The application of U.S. antitrust law within the international context prior to *Empagran* was explained by the protection of the U.S. market and of U.S. nationals conducting business outside the U.S. See David J. Gerber, *Law and Competition in Twentieth Century Europe; Protecting Prometheus* (Oxford University Press, 1998), 420; Amato, *Antitrust and the Bounds of Power; the Dilemma of Liberal Democracy in the History of the Market*, 24-25; Andrew J. McElaney, Jr., "Robinson-Patman Act, Section 2(d): The Expanded Definition of 'Customer'," *Boston College Industrial and Commercial Law Review* 10 (1968), 312; Thomas E. Kauper, The Treatment of Cartels under the Antitrust Laws of the United States in Chia-Jui Cheng, Lawrence S. Lui, and Chih-Kang Wang, eds. *International Harmonization of Competition Laws* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1995), 83; Auke Haagsma, International Competition Policy as a Means to create an Open Global Market Place in Cheng, Lui, and Wang, *International Harmonization of Competition Laws*, 418,419; Erik Bond, Trade Policy and Competition Policy: Conflit vs. Mutual Support in Manfred Neumann and Jürgen Weigand, eds. *The International Handbook of Competition* (Cheltenham, UKNorthampton, Massachusetts, USA: Edward, Elger, 2004), 116,117; Renato Nazzini, *Concurrent Proceedings in Competition Law; Procedure, Evidence, and Remedies* (New York, US: Oxford University Press, 2004), 101.

It is submitted that even in those situations were the beneficiary of protection under U.S. antitrust law was a U.S. national, the U.S. courts actually delivered their decisions from the position of the protection of the U.S., i.e. public interests.

<sup>47</sup> For the claim that pre-*Empagran* cases do not provide a uniform explanation of the subject and object of protection under U.S. antitrust laws see Chapter 6, subsection 4.2.2.

<sup>48</sup> It is important to emphasize that this to be distinguished from the private interests of litigants, as the purpose of antitrust laws is the protection of private interests only to the extent that they are related to the protected public interests. See Donald I. Baker, "Revisiting History - What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?," *Loyola Consumer Law Review* 16, no. 4 (2004); William L. Monts, "Antitrust Litigation: Initial Evaluation of the Case," Practising Law Institute, Corporate Law and Practice Course Handbook Series, PLI Order No. B0-00D3 November(1998); Richard J. Favretto, "Private Antitrust Enforcement: The Defense Perspective," *Antitrust Law Journal* 58, no. 2 (1989); Breit and Elzinga, "28 J.I. & Econ. 405," 419.

The proposed shift of focus from protecting the public interest (i.e. the interests of the U.S. as a country and as a market within a global community) to the protection of the interests of private litigants (i.e. those who have suffered antitrust injury due to the violation of the U.S. antitrust laws) can be described as a necessary paradigm change.

## 2.5 Appropriate Adjustments before an Adjudicating Court Delivers a Final Decision

An issue that may arise in private antitrust law enforcement in transborder factual situations is the assessment of anticompetitive effects and antitrust injury present in non-U.S. markets. Therefore, the U.S. courts may be tempted, similarly to academics,<sup>49</sup> to misinterpret exiting U.S. antitrust law. The reason for this tendency may be difficulties in understanding why foreign nationals are entitled to protection before the U.S. courts, and how to conduct the adjudicating process where the same antitrust situation is litigated simultaneously before the U.S. and non-U.S. courts.

It is submitted that this concern is not difficult to resolve. The U.S. courts are expected to enforce U.S. antitrust laws. U.S. antitrust laws do not provide protection depending on whether the private litigants are U.S. nationals,<sup>50</sup> or whether the plaintiffs are public or private<sup>51</sup>. In addition, U.S. courts should bear in mind that the purpose of private antitrust law enforcement is not merely to compensate victims, but also to prevent illegality that may cause harm in the future, that is, future deterrence.<sup>52</sup> Consequently, if the source of illegality (i.e. the anticompetitive conduct) is partially located or managed from the U.S. market, then private parties who suffer foreign injury should be more than

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<sup>49</sup> See Chapter 4.

<sup>50</sup> The *Empagran* litigation (see Chapter 2 and analysis there), post-*Empagran* litigation (see Chapter 3, subsection 6.4. and section 7) and pre-*Empagran* litigation (see section 5 of this chapter below) are in conformity on the matter.

<sup>51</sup> The analysis of pre-*Empagran* cases provided in Chapter 6, subsection 2.2 and Chapter 7 support this conclusion. It is not possible to find a reasoning in pre-*Empagran* cases by which a U.S. court granted or refused to grant protection merely because of the public or private nature of the plaintiff. The Supreme Court's reasoning in *Empagran* may point in the opposite direction. This thesis does not share the Supreme Courts' opinion in this regard. For the analysis of the argument see Chapter 2.

<sup>52</sup> See Chapter 2, n.367.

welcome to start antitrust litigation before the U.S. courts. This remains valid as long as the anticompetitive effects (and the antitrust injury) are also present also within the U.S. market,<sup>53</sup> and the required connection<sup>54</sup> between the anticompetitive effects (antitrust injury) within the U.S. and the antitrust injury located outside the U.S. is established. It is important to understand that the enforcement of U.S. antitrust laws in this category of private antitrust litigation benefits not only the (foreign) private plaintiffs who bring their private antitrust claim before the U.S. courts, but also the U.S. market and the companies and individuals who are present within the U.S. and have suffered anticompetitive consequences as a result of the anticompetitive conduct of the defendants. The U.S. courts also need to be reminded that the existence of parallel proceedings before the U.S. and non-U.S. courts is normal, as different countries' courts are autonomous and independent. In addition, *res judicata* does not have international validity.<sup>55</sup>

The matter on which the U.S. courts do need to be guided relates to the question of how to prevent the possible misuse of U.S. antitrust litigation by private parties who may have suffered foreign antitrust injury. This is why the context of a transborder standard requires the U.S. courts to make appropriate adjustments in their adjudication analysis (reasoning) before delivering their final decisions.

At this point it is important to make three remarks in relation to these adjustments that are nothing more than the result of awareness on the part of adjudicating courts that the same antitrust violation may be litigated by the same private parties in separate (concurrent) proceedings before national courts of other non-U.S. countries.

Firstly, appropriate adjustments are necessary to make the outcome of the antitrust litigation correct, fair, and just for the litigants (both the plaintiffs and

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<sup>53</sup> The existence of anticompetitive effects within the U.S. is one of the essential conditions for the subject matter jurisdiction of the U.S. courts, both before the enactment of the FTAIA and under the FTAIA. Compare Chapter 6, subsection 3.1. with Chapter 3, subsection 6.1.

<sup>54</sup> See subsection 2.2. of this chapter above.

<sup>55</sup> See Tanya J. Monestier, "Transnational Class Actions and the Illusory Search for Res Judicata," *Tulane Law Review* 86, no. 1 (2011); Christer Söderlung, "Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings," *Journal of International Arbitration* 22, no. 4 (2005).

the defendants) and for non-U.S. countries where part of the anticompetitive effects and antitrust injury are located. This means that a decision delivered by U.S. courts should not be perceived as an intrusion into non-U.S. markets or as the U.S. intension being to expand the jurisdiction of its antitrust law regime.

Secondly, appropriate adjustments are inherent to a transborder standard. As explained above, a transborder standard is a “combination of different approaches (and guidance)”. Consequently, appropriate adjustments do not interfere with the substance of antitrust law. The appropriate adjustment is a matter of approach. This means that it is part of the reasoning in the adjudicating process that help judges to understand and apply U.S. substantive antitrust laws to the factual situation before them.

Thirdly, appropriate adjustments should not be perceived as part of comity. It is explained in the sections below that comity should not form part of private antitrust law enforcement in the international context. In addition, as explained above, appropriate adjustments are intended to prevent misuse or abuse of U.S. private antitrust law enforcement. This prevention does not say anything about respect, acceptance, commitments, and generosity towards non-U.S. countries (U.S. courts).

Examples of factual situations where the application of the appropriate adjustments may be required are given below.

*Example 1. Private parties who suffer direct antitrust injury and private parties who suffer indirect antitrust injury bring a private antitrust claim before non-U.S. courts and obtain antitrust damages for injuries suffered. Following this successful private antitrust litigation before the non-U.S. courts, the private parties who suffer direct antitrust injury bring the same private antitrust claim before the U.S. court, but this time in addition to claiming damages for the suffered direct antitrust injury, they also claim damages for indirect antitrust injuries.*

*Example 2. Private parties who suffer antitrust injury bring a private antitrust claim against members of a global cartel, including U.S. nationals, before a non-U.S. court. The non-U.S. court awards the private*



*litigants compensation in the form of antitrust damages and requires the perpetrators to stop the anticompetitive conduct in the market where the private plaintiffs suffered the antitrust injury. Following this successful private antitrust litigation, the private litigants bring a private antitrust claim for the same injury, but this time before a U.S. court.*

*Example 3. A non-U.S. national private party is a competitor of the global cartel and competes with this global cartel by different commercial arrangements in several countries. This private party brings a private antitrust claim against the U.S. members of the global cartel before the U.S. courts claiming structural remedies for non-U.S. countries and compensation in the form of antitrust damages for antitrust injuries that the private plaintiff suffered in all the countries (the U.S. and non-U.S.) where the plaintiff competes with the members of the cartel.*

For comparison, the following exemplary situation is provided where the U.S. courts may decide not to invoke any appropriate adjustments:

*Example 4. Private parties suffer foreign antitrust injury because of the anticompetitive activities of a global cartel operating outside the U.S. The private parties first decide not to bring a private antitrust claim before the non-U.S. court but to leave the prosecution of the global cartel to public antitrust authorities outside the U.S. After a while, the public antitrust authorities drop all the charges against the members of the global cartel. The reasons behind this decision were never disclosed to the private parties who suffer antitrust injury. Consequently, the private parties bring a private antitrust claim against the members of the global cartel before the U.S. courts.*

The U.S. courts may have legitimate concerns that the application of appropriate adjustments places additional burden on the adjudication process. It is submitted that such concerns can be easily resolved. Firstly, it should be remembered that appropriate adjustments are not a matter of substantive law, but part of the approach that judges should take in their reasoning process while conducting antitrust litigation. Secondly, appropriate adjustments are proposed

primarily for the benefit of private litigants and non-U.S. countries. Therefore, the burden is on private litigants to provide the U.S. courts with all the necessary information that may help the adjudicating court in the application of appropriate adjustments.

### 3 The Foundations of a Transborder Standard

This thesis aims to respond to practical needs. In addition, it is submitted that the research, arguments, and solutions that are proposed can be directly applied in future antitrust litigation.

The practical needs to which the thesis responds are commercial and legal in nature.

The commercial needs relate to the modern nature of commercial arrangements where activities and results co-exist in several countries all over the world. Therefore, entities performing these commercial activities, private parties who are affected by the activities, and the U.S. courts should have adequate tools and useful guidance on how U.S. antitrust laws apply to new types of factual situations. The enforcement of U.S. antitrust law should address these situations adequately and should not be changed or modified so as to fit into existing legal-analytical structures based on classifying the factual situation as either ‘domestic’ (i.e. of U.S. nature) or ‘foreign’ (i.e. of non-U.S. nature).<sup>56</sup>

The legal nature needs are those that either emerged from the *Empagran* litigation but were not resolved by the courts, or have arisen in post-*Empagran* cases. This section will not repeat the extensive, in-depth analysis of the *Empagran* litigation or the questions that the litigation raised, resolved, and left open.<sup>57</sup> The same applies to post-*Empagran* cases.<sup>58</sup> Instead, this section will set out the legal reasons why a transborder standard is proposed as a solution to private antitrust litigation in an international context.

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<sup>56</sup> For further explanation see subsection 2.1. of this chapter above.

<sup>57</sup> For this see Chapter 2, subsection 3.2.

<sup>58</sup> For this see Chapter 3, subsection 6.4. and section 7.

Firstly, the Supreme Court in the *Empagran* case permitted foreign antitrust injury to be litigated before the U.S. courts. The only requirement that has to be fulfilled is that the foreign injury is “not independent” from the anticompetitive effects and the antitrust injury present within the U.S. The alternative theory claim<sup>59</sup> fits well with the Supreme Court’s reasoning based on a required type of “connection” between the foreign antitrust injury and the anticompetitive effects (antitrust injury) present within the U.S. The Supreme Court in *Empagran* did not provide any list of or guidance on the conditions under which a foreign antitrust injury can be determined as “not independent”.<sup>60</sup> Post-*Empagran* cases did not adopt the Supreme Court’s reasoning based on a “connection” between the foreign antitrust injury and the anticompetitive effects (antitrust injury) within the U.S., but they adopted the reasoning of the second Court of Appeals, which is based on “causation” between anticompetitive effects within the U.S. and foreign antitrust injury.<sup>61</sup> In Chapters 2 and 3 it was elaborated in depth that this reasoning by the Second Court of Appeals in the *Empagran* litigation<sup>62</sup> and by the post-*Empagran* adjudicating courts<sup>63</sup> is highly problematic and is based on unconvincing arguments. This thesis argues for a transborder standard as a response to the questions left open by the Supreme Court in *Empagran* and as a correcting tool to enable the development of private antitrust law enforcement in line with the Supreme Court’s approach.

Secondly, the arguments that adjudicating courts used in the *Empagran* litigation and in post-*Empagran* cases in support of their conclusions show that the legal issues developed and applied in private antitrust law litigation within the U.S. change their nature when applied to an international context. These legal issues concern the goals of private antitrust law enforcement, antitrust causation, and the relationship between private and public antitrust law enforcement. A similar change of nature also occurred with regard to the legal issues of anticompetitive effects and comity. Originally, these legal issues were developed in relation to

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<sup>59</sup> The Supreme Court did not reject the alternative theory claim in its *Empagran* decision, but referred its adjudication back to the Second Court of Appeals with the question to assess whether the factual situation in the *Empagran* litigation satisfies the alternative theory claim (see analysis in Chapter 2, subsection 3.1.10.).

<sup>60</sup> See Chapter 2, subsections 3.1.7.3 and 3.2.

<sup>61</sup> See Chapter 3, subsection 6.2.2.

<sup>62</sup> See Chapter 2, subsection 3.1.7.4.

<sup>63</sup> See Chapter 3, section 6.

the interests of the countries who are the main actors in the international context.<sup>64</sup> Therefore, adjudicating courts in the *Empagran* litigation and in post-*Empagran* cases were expected to consider whether the existing approach to antitrust law enforcement is suitable for private antitrust law litigation within an international context. The courts failed to conduct such an inquiry.<sup>65</sup> In addition, the right of private parties to litigate their foreign antitrust injury before the U.S. courts may cause the co-existence of parallel, simultaneous (private) antitrust law litigations before the U.S. and non-U.S. courts. This is a completely new legal situation that was not previously considered. Consequently, the present thesis remedies this lack of legal analysis on all the legal issues presented above by promoting a transborder standard and providing an appropriate response.

The research into how adjudicating courts in *Empagran*<sup>66</sup> and post-*Empagran* cases<sup>67</sup> developed their argument revealed that the arguments in the relevant literature at the time did not have a decisive role in the courts' reasoning.<sup>68</sup> This thesis will not analyse the reasons why adjudicating courts did not show more awareness of the arguments to be found in the relevant literature. Such analysis is beyond the scope of this thesis, although the thesis cannot completely ignore the relevant literature which existed at the time of the *Empagran* litigation. Nevertheless, the focus of the analysis in Chapter 4<sup>69</sup> was on the response of academics to the *Empagran* litigation and to *Empagran* case law, and their ability to provide a clear, precise, coherent, applicable, and holistic approach to private antitrust law enforcement in an international context. In particular, the analysis in Chapter 4 assessed whether academics provide guidance to private litigants and courts which is in conformity with the wider system of antitrust law enforcement. Thus, the presentation of the arguments in the literature and their

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<sup>64</sup> See presentation in Chapter 5.

<sup>65</sup> See the analysis in Chapter 2, section 4, and Chapter 3.

<sup>66</sup> See Chapter 2.

<sup>67</sup> See Chapter 3, section 6.

<sup>68</sup> U.S. courts relied heavily on the arguments presented in the literature in the development of substantive antitrust law and in formulating private antitrust law enforcement. See John C. Jr. Coffee, "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working," *Maryland Law Review* 42, no. 2 (1983); Waller, "77 Or. L. Rev. 1383.", Reich, "68 Geo. L.J. 1053."

<sup>69</sup> See Chapter 4.

critique are to be found in Chapter 4<sup>70</sup> and will not be repeated here. In this section it is sufficient to reiterate that the existing relevant literature does not adequately address private antitrust law enforcement within an international context, nor does it address the issues considered above which require the introduction of the concept of a transborder standard.

## **4 The Novelty of a Transborder Standard**

The structure of the thesis corresponds to the purpose of the research and provides answers to the research questions. Therefore, every single chapter is submitted to contribute to the state of the art within the area of antitrust law and to existing knowledge. Consequently, all the chapters in this thesis are interconnected as each of them provides an understanding and offers further development of the substance presented in other chapters.

Each chapter in this thesis follows a similar pattern of presenting the substance. First they presents the existing knowledge, then they offer a critique of the existing knowledge, and they end with an elaboration of novelty. The same pattern is applied in this chapter.

The concept of a transborder standard and the reasons for it have been presented in the sections above. In situations where further explanation was required for the sake of clarity, the contribution that a transborder standard brings to private antitrust law litigation in an international context was also examined.

Nevertheless, it may be useful to list in simple words, without repeating the analysis submitted above, what a transborder standard actually brings to private antitrust litigation. These contributions can be grouped into four categories: 1.) a transborder standard is considered as an adjustment to existing antitrust law enforcement, 2.) a transborder standard can serve as a cornerstone for further development of antitrust law enforcement within an international context, 3.) a transborder standard provides guidance to courts and private parties for future

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<sup>70</sup> Ibid.

antitrust litigation, 4.) a transborder standard requires an analysis starting with the question “why” so as to deliver consistent and reasonable conclusions or provide sustainable propositions for future developments.

## 4.1 Adjustment to Antitrust Law Enforcement

As explained in section 2 above, the concept of a transborder standard does not replace the existing dichotomy between “domestic” and “foreign” concepts where U.S. antitrust laws are enforced in an international context.

The concept of a transborder context represents an adjustment, a correction to the existing system in that it:

- adds the category of “transborder”;
- addresses the question of the protection of private parties under U.S. antitrust law within an international context;
- recalls the need to take into consideration simultaneous parallel antitrust litigations before non-U.S. courts.

## 4.2 The Cornerstone of Private Antitrust Law Enforcement within an International Context

The concept of a transborder standard requires private antitrust law enforcement and subject matter jurisdiction in antitrust law (commonly perceived as extraterritoriality<sup>71</sup>) to be analyzed together.

As explained in section 3 above, private antitrust law enforcement was developed to be applied within the U.S. The analysis of the *Empagran* litigation

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<sup>71</sup> This thesis submits that the use of the term “extraterritoriality” is not appropriate within the area of U.S. antitrust law, as the perpetrators were not caused because of their activity outside the U.S. territory but because of the consequences the perpetrators produced within the U.S. Therefore, the term “extraterritoriality” was applied to situations that were completely different from historical situations where U.S. citizens were called before the U.S. courts because they were “carrying” U.S. law with them and consequently could be found liable for whatever action or consequence they produced outside the U.S.

and post-*Empagran* case law reveals that these issues are given different meanings when U.S. adjudicating courts apply them in an international context. In addition, in section 3 above it was also argued that the subject matter jurisdiction concept in U.S. antitrust law was developed from the perspective of the public interests of non-US countries. Therefore, it is submitted that certain changes are required to accommodate the equally important interests of private parties.

Thus, private antitrust law enforcement and the subject matter jurisdiction concept require further analysis. Such analysis will provide explanations, guidance, and adjustments which are much needed. The concept of a transborder standard may serve as a starting point for this new development.

One of the questions that requires in-depth analysis but is not within the scope of the thesis is, for example, the issue of “directness”. Private plaintiffs must satisfy the requirement of “directness” four times throughout an antitrust litigation to have their private antitrust claim adjudicated. Firstly, “directness” is one of the requirements mentioned in the FTAIA<sup>72</sup> for establishing the existence of anticompetitive effects within the U.S. Secondly, “directness” is also a required relationship (that this thesis argues against<sup>73</sup>) that has to exist between the anticompetitive effects within the U.S. and the foreign antitrust injury in order for the foreign antitrust injury to be allowed to be litigated before the U.S. courts. Thirdly, “directness” is then established as the nature of the causation that has to exist between the defendant’s conduct and the plaintiff’s injury.<sup>74</sup> Fourthly, “directness” is also used in the analysis of antitrust standing, in relation to the question whether private plaintiffs are the direct victims of antitrust violation or, for example, direct purchasers.<sup>75</sup> The questions that this thesis will not address are why the existence of “directness” is required to be analysed at so many stages throughout the antitrust litigation, and whether the fulfilment of the “directness” requirement at some stages in the

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<sup>72</sup> Before the FTAIA was enacted, the U.S. courts formulated it through active interpretation of the Sherman Act.

<sup>73</sup> See Chapter 2, subsection 3.1.7.4., and Chapter 3.

<sup>74</sup> See Note, “Antitrust Injury and Standing: A Question of Legal Cause,” *Minnesota Law Review* 67 (1983).

<sup>75</sup> Compare Page, “37 Stan. L. Rev. 1445,” 1447., Bauer, “62 U. Pitt. L. Rev. 437,” 443., Lear, “51 Wm. & Mary L. Rev. 87,” 384; Sullivan, “14 Seton Hall L. Rev. 17,” 63.

antitrust litigation does not require assessment of “directness” at other stages of antitrust litigation.

### **4.3 Provision of Guidance**

In section 3 above the practical and legal needs that lead to the development of a transborder standard were considered. Among these needs are open legal questions to which the U.S. courts have not yet provided any answers. The thesis is aware of these open questions and by developing a transborder standard the thesis proposes answers to at least some of the questions.

### **4.4 Raising Awareness that the Understanding, Enforcement and Development of Antitrust Law Have to Stand on Solid Foundations**

A considerable part of the analysis in Chapters 2 and 3 was dedicated to explaining that it is not sufficient to know the rule of law that an adjudicating court delivers with its judgment. It was argued in these two chapters that it is equally important to understand the reasons for a decision, the way judges and litigants reason (by looking at their arguments), and the way in which antitrust litigation developed.

In order to understand correctly the substance and limitations of the courts’ decisions, the analysis throughout this thesis starts with the question ‘why’. The same approach is applied in the analysis of cases<sup>76</sup> and of the relevant literature. Where the analysis of judgments enables the clear identification of the adjudicating courts’ (and the litigants’) reasons for their conclusions, the research undertaken can contribute to the development of antitrust law in a constructive way. This contribution can provide additional arguments, opinions, views, and solutions.

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<sup>76</sup> Not only in Chapter 2 and Chapter 3, but also in all the chapters that follow.



This approach to analysis which requires understanding ‘why’ something was decided (or stated) is also beneficial from a purely practical point of view, i.e. it encourages additional self-critique. This critique is more necessary in situations where it leads to a fundamental development of antitrust law, i.e. private antitrust law enforcement in an international context.

## 5 Conclusion

This chapter presented the concept of a transborder standard. The concept of a transborder standard is elaborated as a response to commercial arrangements of a global nature and to legal needs triggered by developments in antitrust law enforcement.

The concept of a transborder standard is a combination of different approaches (and guidance) and not a matter of substantive antitrust law. This means that the concept of a transborder standard introduces an advanced structure to the analysis of factual litigious situations, and requires a slight change in the paradigm where the litigants in a private antitrust law litigation are private parties.

This chapter merely introduced the concept of a transborder standard. Therefore, in order to understand the substance of the concept and its operation, this thesis will present it in comparison with the reasoning elaborated by U.S. adjudicating courts in pre-*Empagran* cases. This analysis is offered in Chapters 6 and 7.

## Chapter 6: Transborder Standard – Application to Pre-*Empagran* Cases

### 1 Introduction

In this chapter, a case study or controlled experiment of the application of the proposed transborder standard will be undertaken. For the purpose of this exercise, the proposed test will be applied to some pre-*Empagran* cases<sup>1</sup> to assess whether pre-*Empagran* U.S. antitrust case law that was developed in factual situations that extended beyond the U.S. territorial borders would have been decided differently if the U.S. courts had relied on the proposed transborder standard as a reference upon which to base their adjudication analysis.

In other words, would the development of subject matter jurisdiction in the area of antitrust law be different if the concept of a transborder standard, as developed throughout this thesis, had been recognized and applied by the U.S. courts since the beginning of the application of U.S. antitrust law to an international context? These are the questions that this chapter will seek to answer.

In Chapter 5, it was argued that the concept of a transborder standard can be properly understood through an explanation of its adoption in antitrust litigation. Therefore, this chapter's purpose is to examine the extent to which a transborder standard corrects discrepancies between pre-*Empagran* and post-*Empagran* approaches to subject matter jurisdiction. Without pre-empting the analysis that follows, the pre-*Empagran* approach to subject matter jurisdiction concentrated on the conduct of the defendants and the consequences of their conduct, whereas the post-*Empagran* approach switches the focus of subject matter jurisdiction analysis on to the plaintiffs and the type of antitrust injury the plaintiffs allege to have suffered. This switch in the focus of the analysis from defendants to plaintiffs in the post-*Empagran* era may favour the

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<sup>1</sup> The selection of pre-*Empagran* cases for the purpose of analysis in this chapter was undertaken according to the methodology explained in Chapter 1, subsection 3.3.

defendants and place a further burden on the plaintiffs. Any changes in the development of antitrust law that constitute a burden on plaintiffs<sup>2</sup> may result in the alleged antitrust violation not being proven and consequently any anticompetitive effects on the market and/or antitrust injury suffered by individuals will continue. The proposed transborder standard tends to adjust the balance between the defendants and the plaintiffs by ensuring that the same rules apply irrespective of where (inside or outside the U.S.) the alleged anticompetitive behaviour took place.

## **1.1 Reasons Supporting the Assessment of the Application of a Transborder Standard**

There are three reasons to assess the application of a transborder standard to pre-*Empagran* cases: to complete the presentation of the thesis; because a transborder factual situation cannot be correctly analysed by fragmenting it into categories of ‘domestic’ (i.e. the U.S. nature) and ‘foreign’ (i.e. non-U.S. nature) parts; and the contribution of the transborder standard to private antitrust law enforcement.

### **1.1.1 To Complete the Presentation of the Thesis**

The analysis in this thesis started by critically evaluating the *Empagran* litigation. This was the focus of Chapter 2. The assessment of the arguments used by the litigants and the adjudicating courts in reaching their decisions in the *Empagran* litigation was undertaken with reference to the precedents explicitly referred to throughout the *Empagran* litigation, and with reference to existing antitrust case law precedents that were not referred to either by the adjudication courts or by the litigants.

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<sup>2</sup> Compare William Letwin, *Law and Economic Policy in America; the Evolution of the Sherman Antitrust Act* (Edinburgh University Press, 1966), 14 with Kevin E. Grady. Lessons learned from the U.S. Experience in Private Enforcement of Competition Laws in Philip Marsden, ed. *Handbook of Research in Trans-Atlantic Antitrust* (Cheltenham, UK Northampton, Massachusetts, USA: Edward Elgar, 2006), 518-22.

Chapter 2 concluded with presenting what is submitted to be the valid U.S. antitrust law position on subject matter jurisdiction with regard to private antitrust law enforcement. Chapter 3 assessed the impact of the *Empagran* litigation on the development of U.S. antitrust law with regard to the subject matter jurisdiction of U.S. courts in private antitrust law enforcement litigation.

The next stage in developing this thesis is the evaluation of the application of the newly developed transborder standard set out in Chapter 5 to selected pre-*Empagran* cases. This is the focus of this chapter. This chapter is not going to repeat the issues and questions that have already been presented and analysed in Chapter 2. In Chapter 2, pre-*Empagran* cases were analyzed as precedents with the purpose of establishing their impact, consistency, and discrepancy vis-à-vis decisions reached by the adjudication courts in the *Empagran* litigation. In this chapter, pre-*Empagran* cases are used as case studies to demonstrate the impact, the novelty, and the difference in result that the adoption of a transborder standard would bring to antitrust law enforcement.

This chapter does not assess the application of a transborder standard to post-*Empagran* cases for two reasons. Firstly, a critique of post-*Empagran* cases has already been offered in Chapter 3. Secondly, post-*Empagran* case law has been addressed in Chapter 3 and is highly confusing and not yet settled. In contrast, pre-*Empagran* case law is settled. This means that litigants in pre-*Empagran* cases cannot invoke the Supreme Court's *Empagran* decision and challenge the validity of decisions reached by U.S. adjudicating court in pre-*Empagran* cases.

### ***1.1.2 Transborder Factual Situation as a New Category***

One of the characteristics that the concept of a transborder standard introduces into the existing adjudication process analysis of antitrust law enforcement<sup>3</sup> is that a factual situation that is truly transborder in nature cannot be correctly analyzed by fragmenting it into categories of domestic and foreign parts.

As explained in Chapter 2, in the *Empagran* case the Supreme Court required the foreign antitrust injury to be dependent on an anticompetitive effect/antitrust

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<sup>3</sup> See Chapter 5, subsection 2.1.

injury taking place within the U.S before U.S. courts could adjudicate. It was submitted that the nature of the dependency between facts that took place outside and within the U.S. could not be properly assessed unless they were looked at as a whole. Thus, it is not sufficient to limit the adjudication analysis only to anticompetitive conduct or anticompetitive effects that take place within the U.S. It is submitted that the adjudication analysis has to consider the relationship between facts (i.e. anticompetitive conduct, anticompetitive effect, antitrust injury) within the U.S. and facts (i.e. anticompetitive conduct, anticompetitive effect, antitrust injury) outside the U.S. Where this relationship can be classified as transborder, those who have suffered antitrust injury in an international context may be able to bring their case before U.S. courts.<sup>4</sup>

### ***1.1.3 Contribution to Private Antitrust Law Enforcement***

In relation to the statement above, i.e. that the adoption of a transborder standard might benefit some litigants, it is submitted that such a development should be received positively as enhancing U.S. private enforcement law.

The *Empagran* litigation concerned private parties who suffered antitrust injury and brought an antitrust claim before the U.S. courts. Therefore, the question of subject matter jurisdiction in the area of U.S. antitrust law is, for the purposes of this thesis, limited to private antitrust law enforcement.

It is submitted that where the plaintiffs are private parties, the questions of subject matter jurisdiction cannot be adjudicated independently, i.e. without taking into consideration the purpose and the nature of private antitrust law enforcement. Therefore, this chapter will analyze what elements of private antitrust enforcement are present in judgments dealing with the subject matter jurisdiction of the U.S. courts, and how each adjudicating court ruled on these elements. The analysis will end by demonstrating the impact that the adoption of a transborder standard would have on each element of private antitrust law enforcement. In particular, it will demonstrate the extent to which a transborder standard makes it easier for plaintiffs to obtain remedies and eliminate the antitrust violation.

## 1.2 Limitations of the Assessment of the Consequences of Adopting a Transborder Standard

The way in which a transborder standard would be applied to antitrust litigation is assessed only with the purpose of presenting what contribution (i.e. novelty) the transborder standard brings to the areas of subject matter jurisdiction and private antitrust law enforcement. The purpose of the chapter is not to rewrite the decisions in pre-*Empagran* cases but to select a number of such cases and apply the standard to them in order to identify the differences and novelty that the adoption of the proposed transborder standard would bring to the judgments and to private enforcement in the U.S. The pre-*Empagran* case studies were selected based on the following criteria:

- a.) Cases relied on as precedents in the *Empagran* litigation;
- b.) Cases not necessarily cited in the *Empagran* litigation, but which are considered as cornerstones in the development of subject matter jurisdiction in U.S. antitrust law, and
- c.) Cases that were used as precedents in cases that fall into the categories “a.)” and “b.)” which concern an antitrust law issue but have a non-U.S. factual element, e.g. one of litigants is a non-U.S. national or at least some of the anticompetitive conduct, or anticompetitive effects, or antitrust injury, took place outside U.S. territory.

It is not an objective of this chapter to criticize the existing case law. In addition, neither the thesis nor this chapter seek to challenge the validity of pre-*Empagran* case law.<sup>5</sup> The pre-*Empagran* cases are used merely as case studies to test the application of the newly proposed transborder standard. The facts, outcome (i.e. decisions) and the reasoning in the selected cases are used to provide an understanding of the nature of subject matter jurisdiction in U.S.

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<sup>4</sup> See further analysis in this chapter and in Chapter 7, section 3.

<sup>5</sup> The analysis that follows will not examine the pre-*Empagran* judgments with the purpose of assessing whether they are correct, whether they should be appealed, whether there were problems in the reasoning on the part of either the litigants or the adjudicating courts. This type of analysis may be found in the existing literature already.

antitrust law and of the system of antitrust law enforcement in the international context that was in place before the *Empagran* litigation.

This thesis is focused on the litigation of (foreign) antitrust injury before the U.S. courts and the contribution that the *Empagran* litigation introduced in this regard. Therefore, pre-*Empagran* cases may include issues, questions and reasoning that extend beyond the scope of the thesis and, therefore, will not be raised in this chapter. The analysis that follows is limited to matters that are considered relevant for litigating (foreign) antitrust injury before the U.S. courts in the light of the *Empagran* litigation. These issues are the ones that have to be presented from the perspective of pre-*Empagran* case law and require an explanation of the likely impact of the adoption of a transborder standard on them.<sup>6</sup>

Another limitation of the analysis is the question of the adequacy of pre-*Empagran* cases. The *Empagran* litigation and a transborder standard introduce an approach and set up a type of analysis that requires factual data that might not be found in pre-*Empagran* cases. The lack of this type of data is consequence of either pre-*Empagran* adjudicating courts not considering it relevant to conduct such an inquiry, or because the law to be applied has changed since then. Therefore, the analysis of the application of a transborder standard that follows may highlight to certain aspects of pre-*Empagran* cases that remain the same even under the transborder standard analysis, or to those aspects of pre-*Empagran* cases that, according to the transborder standard analysis, may require further inquiry or analysis. Therefore, this thesis will not speculate on whether the decision in a particular pre-*Empagran* case would be different if the adjudicating courts had conducted the analysis after applying the transborder standard.

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<sup>6</sup> In addition, the present thesis sets up the transborder standard and introduces basic guidance on how this standard should be applied in future private antitrust law litigation. Therefore, it would be overambitious and unrealistic to provide already at this stage of the research an all-inclusive, complete determination of the application of a transborder standard to every possible factual situation or legal problem that may arise during private antitrust law litigation in the future.

## 1.3 Structure of the Chapter

This chapter is divided into three main sections: 1.) Overview of pre-*Empagran* cases setting out the relevant facts and the grounds upon which the final decisions were made, 2.) Analysis of the grounds on which the subject matter jurisdiction of the U.S. courts was established in these cases, 3.) Identification of the private antitrust enforcement elements the adjudicating courts decided alongside the determination of subject matter jurisdiction, and the reasoning the courts used in this regard.

Each of the three main sections includes a subsection where the extent to which a transborder standard brings novelty to antitrust litigation is compared to the law and the reasoning found in pre-*Empagran* cases.

## 2 Overview of Pre-*Empagran* Cases

There are two reasons why the analysis in this chapter has to start with an overview of pre-*Empagran* antitrust cases. Firstly, the presentation of a wide array of factual situations that include U.S. and non-U.S. elements which were decided by the U.S. courts helps to understand the novelty of the proposed new standard test for subject matter jurisdiction. Secondly, pre-*Empagran* cases cannot be correctly understood merely by looking at the factual situation and the outcome reached by the U.S. courts. An important element of every single judgment is the grounds (i.e. main reason why) upon which the final judgment is based. The determination of these grounds is necessary to understand whether a transborder standard introduces anything new to private antitrust law enforcement in the international context.

The factual situations and grounds on which final judgments were delivered in pre-*Empagran* cases may differ from those in the *Empagran* litigation, but this is not important given that the focus of the research is to find pre-*Empagran* cases that addressed the issue of litigating (foreign) antitrust injury before the U.S. courts and the issue of the relationship between anticompetitive effects within the U.S. and litigated (foreign) private antitrust injury.



## 2.1 Factual Situations in Pre-*Empagran* Cases

There are three groups of pre-*Empagran* cases:

- 1.) Cases where the issue of private antitrust injury did not arise in the course of adjudicating the subject matter jurisdiction of U.S. courts;
- 2.) Cases where the issue of antitrust injury was considered as part of the adjudication process in establishing the jurisdiction of U.S. courts. In this category of cases, a distinction has to be made between private antitrust injury that was domestic (i.e. took place within the U.S.) and injury that was foreign (i.e. took place outside the U.S.). The nationality of the plaintiffs is irrelevant to determining whether the antitrust injury is foreign or domestic;
- 3.) Cases that have non-U.S. elements (i.e. at least one of the litigants is of a non-U.S. nationality, or some of the anticompetitive conduct or the anticompetitive effects took place outside the U.S., or the litigated private antitrust injury took place outside the U.S.), but are not automatically considered as transborder. They may be classified as such only if the factual situation satisfies the requirements of the proposed transborder standard set out in Chapter 5.<sup>7</sup>

Analysing pre-*Empagran* cases according to whether the private litigants who litigated (foreign) private antitrust injury were granted the subject matter jurisdiction of U.S. courts may yield misleading results, as the grounds or reasoning of adjudicating courts for delivering a particular type of judgment may vary. For example, a U.S. company may suffer injury in relation to its activities

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<sup>7</sup> Chapter 5, subsection 2.1. stated that the U.S. adjudicating courts did not undertake adjudicating process analysis in classifying factual situations as 'transborder'. The U.S. adjudicating courts considered fact as either 'domestic' or 'foreign'. As mentioned above, the purpose of presenting the overview of pre-*Empagran* cases is to find potential similarities between the factual situation in the *Empagran* litigation and the factual situations in pre-*Empagran* cases, and to establish the pre-*Empagran* legal understanding of the required type of relationship between anticompetitive effects within the U.S. and litigated (foreign) antitrust injury. Therefore, the overview will not determine which facts in pre-*Empagran* cases can be classified as 'transborder'. The analysis required to present an overview of pre-*Empagran* cases does not require the introduction of this type of category. Consequently, the overview will use the same terms to explain the factual situations in pre-*Empagran* cases as were used by the U.S. adjudicating courts.

outside the U.S. A U.S. court may find a violation of U.S. antitrust law by the defendants because of the illegal functioning of a U.S. export cartel. This outcome does not in itself say anything about (foreign) private antitrust injury or the relationship between the litigated antitrust injury and anticompetitive effects within the U.S.

### ***2.1.1 Pre-Empagran Cases Where the Element of Private Antitrust Injury Did Not Form Part of the Adjudication Process in Delivering the Decision on Subject Matter Jurisdiction***

The factual situations in pre-*Empagran* cases litigated before the U.S. courts that included a non-U.S. element but where the issue of private antitrust injury was not raised can be divided into two categories according to the place whether the anticompetitive conduct took place (within the U.S. or outside the U.S.). The cases falling within these categories that will be analyzed in this chapter are set out below.

#### ***2.1.1.1 Pre-Empagran Cases where the Adjudicating Courts Considered Anticompetitive Conduct to Have Taken Place within the U.S.***

Competition between companies within the U.S. that export goods to non-U.S. markets;<sup>8</sup> agreement between the U.S. and non-U.S. companies to divide up the world market through patent pooling and patent exchange;<sup>9</sup> arrangements between the U.S. parties at different levels of the production chain with regard to the conditions under which they are allowed to conduct their commercial activities within non-U.S. markets;<sup>10</sup> U.S. companies competing between themselves with the purpose of obtaining a competitive advantage within the non-US market;<sup>11</sup> commercial arrangements between the U.S. and non-U.S. entities on conditions as to how to conduct commercial activity as shipping

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<sup>8</sup> *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911); *Swift & Co. v. U.S.*, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1905).

<sup>9</sup> *U.S. v. National Lead Co.*, 63 F.Supp. 513 (S.D.N.Y.1945).

<sup>10</sup> *U.S. v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 64 S.Ct. 805, 816, 88 L.Ed. 1024 (1944).

<sup>11</sup> *U.S. v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968).

carriers;<sup>12</sup> the U.S. company limits its competitor in exporting goods from the U.S. to a non-U.S. country;<sup>13</sup> non-U.S. company limits the possibility of the U.S. company performing a commercial activity in competition with this non-U.S. company within the U.S.;<sup>14</sup> a U.S. company withdraws from competing within the U.S.;<sup>15</sup> a non-U.S. company tries to terminate business relationship with its distributor in the U.S. and take over the distribution itself;<sup>16</sup> performance of commercial activity by a non-U.S. company within a non-U.S. market is affected by a competitor of non-U.S. nationality within the non-U.S. market;<sup>17</sup> commercial arrangement between the U.S. company and non-U.S. company with the purpose of creating a better competitive position within the U.S.;<sup>18</sup> arrangement between the U.S. company and non-U.S. companies to obtain competitive advantage within the industry sector;<sup>19</sup> the U.S. company and non-U.S. companies agree on the conditions of how the U.S. company can compete on non-U.S. markets by putting other U.S. companies in competitive disadvantage in conducting their business within these non-U.S. markets;<sup>20</sup> the U.S. company conducts activities within non-U.S. markets to obtain competitive advantage that this U.S. company then uses to bring goods produced outside the U.S. into the U.S.<sup>21</sup>

<sup>12</sup> *Thomsen v. Cayser*, 243 U.S. 66, 37 Sup.Ct. 353, 61 L.Ed. 597, Ann. Cas. 1917D, 322 (1914) Argued April 28 and 29, 1914, Restored to docket for argument before full bench June 21, 1915, Reargued January 19 and 22, 1917, Decided March 6, 1917, Supreme Court of the United States.

<sup>13</sup> *Daishowa Intern. v. North Coast Export Co.*, 1982 WL 1850 (N.D.Cal.).

<sup>14</sup> *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F.Supp. 70 (S.D.N.Y.1965).

<sup>15</sup> *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir.1981).

<sup>16</sup> *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012 (Del.Super.).

<sup>17</sup> *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080 (D.C.Cir.1998).

<sup>18</sup> *U.S. v. Aluminum Co. of America*, 91 F.Supp. 333 (S.D.N.Y.1950); *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir.1945).

<sup>19</sup> *U.S. v. Sisal Sales Corp.*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1927); *American Tobacco Co. v. U.S.*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

<sup>20</sup> *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003 (10th Cir.2002); *Lantec, Inc. v. Novell, Inc.*, 146 F.Supp.2d 1140 (D.Utah 2001).

<sup>21</sup> *El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F.Supp. 626 (S.D.N.Y.1982).

### 2.1.1.2 Pre-Empagran Cases Where Adjudicating Courts Considered Anticompetitive Conduct to Have Taken Place Outside the U.S.

A U.S. company obtains patents for non-U.S. countries in these non-U.S. countries by fraud, so that other U.S. companies are deprived of exporting to these non-U.S. countries;<sup>22</sup> a U.S. company takes advantage of another U.S. company, makes products and unfairly sells them in non-U.S. countries to non-U.S. and to U.S. customers who buy these products in non-U.S. countries;<sup>23</sup> U.S. companies act outside the national territory of the U.S. thereby preventing another U.S. company from obtaining goods outside the U.S. and importing these goods into the U.S.;<sup>24</sup> a U.S. company cannot obtain goods in a non-U.S. country with the purpose of importing these goods into the U.S. because of the agreement between the non-U.S. supplier of these goods and the U.S. company who is already selling the same goods within the U.S.;<sup>25</sup> a non-U.S. company makes arrangements to preserve its position in the production, import, export, sale and distribution of goods in many countries, including the U.S.;<sup>26</sup> non-U.S. companies determine the conditions under which products have to be sold in the U.S.;<sup>27</sup> U.S. companies and non-U.S. companies influence the production of goods outside the U.S. by another U.S. company and the importation of these goods into the U.S. by the latter U.S. company;<sup>28</sup> a non-U.S. company tries to obtain data from another non-U.S. company outside the U.S. with the intent to launch a new product in the non-U.S. market;<sup>29</sup> agreement between two non-U.S. companies about the production of goods in a non-U.S. market and selling these goods

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<sup>22</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir.1979).

<sup>23</sup> *Steele v. Bulova Watch Co.*, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 319 (1952).

<sup>24</sup> *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D.Cal.1971); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir.1983).

<sup>25</sup> *I. S. Joseph Co., Inc. v. Mannesmann Pipe & Steel Corp.*, 408 F.Supp. 1023 (D.Minn.1976).

<sup>26</sup> *U.S. v. The Watchmakers of Switzerland Information Center*, 1962 U.S. Dist. LEXIS 5816 (S.D.N.Y.).

<sup>27</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir.1997).

<sup>28</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453 (N.D.Cal.1983); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 749 F.2d 1378 (9th Cir.1984); *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597 (9th Cir.1976).

<sup>29</sup> *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464 (S.D.N.Y.1997); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir.1998); *Filetech S.A. v. France Telecom, S.A.*, 212 F.Supp.2d 183 (S.D.N.Y. 2001); *Filetech S.A. v. France Telecom S.A.*, 304 F.3d 180 (2d Cir.2002).

around the world;<sup>30</sup> a non-U.S. company bars U.S. individuals from taking part in activities outside the U.S.;<sup>31</sup> a U.S. company and non-U.S. companies divide up the world market by the use of patent pooling and exclusive license, and consequently restrain and monopolize trade;<sup>32</sup> agreement between non-U.S. producers (exporters) and U.S. importers under which non-U.S. exporters sell products only to the U.S. importers that are party to this agreement, all the other U.S. importers or direct purchasers in the U.S. are excluded from obtaining the same products from these non-U.S. exporters;<sup>33</sup> agreement between a U.S. company and non-U.S. companies on the protection of their patents within designated territories;<sup>34</sup> a U.S. company provides services to consumers outside the U.S. under conditions that are unfair, and in this way affects other U.S. companies who provide the same service;<sup>35</sup> a U.S. company is in possession of raw material located outside the U.S. and stops supplying this material to another U.S. company who imported products into the U.S., but starts to produce the products itself;<sup>36</sup> U.S. companies form an export company and at the same time establish production within non-U.S. countries, which affects export from the U.S. by other U.S. companies who are not members of this arrangement;<sup>37</sup> a non-U.S. company makes an arrangement that helps the U.S. company to maintain competitive conditions within the U.S.;<sup>38</sup> commercial arrangements between a U.S. company and non-U.S. companies with the purpose of the U.S. company retaining a monopoly position in the U.S., and at the same time the parties to the agreement agree on the production, price, and territories where the U.S. company and non-U.S. companies are allowed to export;<sup>39</sup> agreements between non-U.S. ship-owners and U.S. ship-owners with the purpose of preserving the existing transport of goods between the U.S. and

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<sup>30</sup> *Vespa of America Corp. v. Bajaj Auto Ltd.*, 550 F.Supp. 224 (N.D.Cal.1982).

<sup>31</sup> *National Hockey League v. Plymouth Whalers Hockey*, 166 F.Supp.2d 1155 (E.D.Mich.2001).

<sup>32</sup> *U.S. v. National Lead Co.*, 63 F.Supp. 513 (S.D.N.Y.1945); *U.S. v. National Lead Co.*, 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947).

<sup>33</sup> *U.S. v. R. P. Oldham Co.*, 152 F.Supp. 818 (N.D.Cal.1957).

<sup>34</sup> *U.S. v. Singer Mfg. Co.*, 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963).

<sup>35</sup> *Branch v. F.T.C.*, 141 F.2d 31 (7th Cir.1944).

<sup>36</sup> *Sanib Corp. v. United Fruit Co.*, 135 F.Supp. 764 (S.D.N.Y.1955).

<sup>37</sup> *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947 (D.Mass.1950).

<sup>38</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

non-U.S. ports;<sup>40</sup> a U.S. company competes within non-U.S. markets by unfair practices that affect the position (reputation) of another U.S. company,<sup>41</sup> or affects the reputation of a U.S. company and non-U.S. companies within those non-U.S. markets;<sup>42</sup> U.S. companies and non-U.S. companies agree to fix the prices of products they produce in the world market;<sup>43</sup> agreement between U.S. companies to eliminate competition in the transportation services they provide between the U.S. and non-U.S. countries;<sup>44</sup> U.S. companies and non-U.S. companies make arrangements to eliminate from the market a non-U.S. company who was providing services in and outside the U.S.;<sup>45</sup> a U.S. company prevents a non-U.S. company from importing goods into the U.S.;<sup>46</sup> a U.S. importer of goods is precluded from obtaining goods in a non-U.S. country directly from the producers, but is required to obtain the goods only from a non-U.S. export cartel;<sup>47</sup> arrangements between a non-U.S. company and a U.S. company to exclude a non-U.S. company as a competitor in providing a service between the U.S. and non-U.S. markets;<sup>48</sup> U.S. companies and non-U.S. companies agree to divide up the world market between themselves, to fix the prices of their products that they sell in designated markets, and to help each other to eliminate competition within these markets;<sup>49</sup> agreement between a

<sup>39</sup> *U.S. v. General Electric Co.*, 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926); *U.S. v. General Elec. Co.*, 80 F.Supp. 989 (S.D.N.Y.1948); *U.S. v. General Elec. Co.*, 82 F.Supp. 753 (D.N.J.1949); *U.S. v. General Elec. Co.*, 115 F.Supp. 835 (D.N.J.1953).

<sup>40</sup> *U.S. v. Prince Line*, 220 F. 230 (S.D.N.Y.1915).

<sup>41</sup> *Vacuum Oil Co. v. Eagle Oil Co.*, 122 F. 105 (C.C.N.J.1903); *Vacuum Oil Co. v. Eagle Oil Co. of New York*, 154 F. 867 (C.C.N.J.1907); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 358 F.Supp. 1065 (D.Nev.1973); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406 (9th Cir.1977); *American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n*, 701 F.2d 408 (5th Cir.1983); *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F.Supp. 594 (S.D.Cal.1956).

<sup>42</sup> *Scotch Whiskey Ass'n. v. Barton Distilling Co.*, 489 F.2d 809 (7th Cir.1973).

<sup>43</sup> *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir.1980); *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138 (N.D.Ill.1979).

<sup>44</sup> *U.S. v. Pacific & A R & Nav Co.*, 228 U.S. 87, 33 S.Ct. 443, 57 L.Ed. 742 (1913); *In re Grand Jury Investigation of the Shipping Industry*, 186 F.Supp. 298 (D.D.C. 1960); *U.S. v. Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft*, 200 F. 806 (S.D.N.Y.1911); *U.S. v. Hamburg-American S.S. Line*, 216 F. 971 (S.D.N.Y.1914).

<sup>45</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C.Cir.1984).

<sup>46</sup> *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F.Supp. 81 (S.D.N.Y.1995).

<sup>47</sup> *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 942 F.Supp. 905 (S.D.N.Y.1996); *Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Products Holdings (North America) Inc.*, 954 F.Supp. 733 (S.D.N.Y.1997).

<sup>48</sup> *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority*, 442 F.Supp. 1201 (S.D.N.Y.1978).

<sup>49</sup> *U.S. v. Timken Roller Bearing Co.*, 83 F.Supp. 284 (N.D.Ohio 1949); *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951).

U.S. company and a non-U.S. company under which cooperation in providing services within the U.S. and in non-U.S. markets is exclusively limited to the parties of this agreement;<sup>50</sup> a non-U.S. company performs activities that result in the monopolization and price fixing of the transportation of goods from the U.S. to non-U.S. markets;<sup>51</sup> a U.S. company and non-U.S. companies divided up the world market by allocating exclusive territories to themselves and by setting up a joint company to conduct business in other territories;<sup>52</sup> U.S. companies form an export association through which they export goods out of the U.S. and at the same time make arrangements with non-U.S. companies to divide up the world market, assign international quotas and fix prices for goods outside the U.S.;<sup>53</sup> exchange of patents between a U.S. company and non-U.S. companies with the purpose of becoming the exclusive provider of goods in U.S. and non-U.S. markets accordingly;<sup>54</sup> exchange of non-exclusive patents between U.S. companies and non-U.S. companies.<sup>55</sup>

### **2.1.1.3 Assessment of Pre-*Empagran* Cases Where the Element of Private Antitrust Injury Was Not of Adjudication Concern Under a Transborder Standard**

An overview of the various factual situations of the cases above shows that some pre-*Empagran* cases include scenarios where either U.S. companies and non-U.S. companies or both might be harmed in conducting their commercial activities.

Nevertheless, challenging these categories of pre-*Empagran* cases by applying a transborder standard would extent the scope of this thesis, as it would require the application of a transborder standard to situations where the pre-*Empagran* adjudication courts did not consider it relevant to determine the issue of antitrust injury.

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<sup>50</sup> *U.S. v. Associated Press*, 52 F.Supp. 362 (S.D.N.Y.1943); *Associated Press v. U.S.*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1944).

<sup>51</sup> *Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement*, 451 F.2d 727 (2nd Cir.1971).

<sup>52</sup> *American Tobacco Co. v. U.S.*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

<sup>53</sup> *U.S. v. U.S. Alkali Export Ass'n.*, 86 F.Supp. 59 (S.D.N.Y.1949).

<sup>54</sup> *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215 (S.D.N.Y.1952).

<sup>55</sup> *U.S. v. Westinghouse Electric Corporation & Mitsubishi*, 471 F. Supp. 532 (N.D.Cal.1978).

In addition, assuming the existence of private antitrust injury in factual situations where companies were affected in performing their commercial activities, and consequently attempting to analyze the application of a transborder standard to every single possible pre-*Empagran* case stated above, would make the analysis confusing and would not bring any added value to the thesis. For example, there is no need for the introduction of a transborder standard in factual situations where anticompetitive conduct takes place within the U.S. between the U.S. companies (and non-U.S. companies) with the purpose of preventing other U.S. companies exporting from the U.S. to non-U.S. countries. The introduction of a transborder standard does not have any relevance either to factual situations where U.S. companies (and non-U.S. companies) compete with other U.S. companies (and non-U.S. companies) outside the U.S. through anticompetitive conduct to obtain the competitive advantage in these non-U.S. markets where competitive conditions (or the products sold) are different from the competitive conditions (or products sold) in the U.S. The application of a transborder standard to the factual situations listed in the two subsections above would be possible only to determine whether judgments delivered by adjudication courts in the pre-*Empagran* cases listed above furnish sufficient data to enable a transborder analysis in the first place. If the pre-*Empagran* cases listed above do not provide data on the relationship between facts that are present within the U.S. and facts that are present outside the U.S., the application of the transborder standard is not possible. If judgments in the pre-*Empagran* cases presented above provide such data, the only outcome that the analysis of these pre-*Empagran* cases under a transborder standard would be able to furnish is the explanation whether the anticompetitive conduct present in those pre-*Empagran* cases could be classified as transborder. Since the pre-*Empagran* cases listed above do not provide data on antitrust injury, the analysis of the application of a transborder standard would not provide any beneficial insight into how private plaintiffs in these cases might have benefitted from formulating their private antitrust suits under a transborder standard.



### **2.1.2 Pre-Empagran Cases Where the Litigated Private Antitrust Injury Was Suffered within the U.S.**

The factual situations in pre-*Empagran* cases where some non-U.S. elements are present (either in terms of the nationality of litigants or in terms of anticompetitive conduct or anticompetitive effects) and a private plaintiff brings a private antitrust suit before the U.S. courts for the private antitrust injury suffered within the U.S. are the following.

U.S. companies and non-U.S. companies make arrangements to maintain their position within non-U.S. markets, and the products enter different countries, one of these countries being the U.S.;<sup>56</sup> a U.S. producer limits the U.S. distributor with regard to exporting (and thereby competing) to a market outside the U.S.;<sup>57</sup> a non-U.S. entity buys goods within the U.S. under anticompetitive conditions;<sup>58</sup> activities affecting the introduction of a new competitive way of trade and, consequently, of the way in which foreign goods can be present within the U.S.;<sup>59</sup> carriers fix rates and return commission to loyal shippers, so shippers have to pay more than the reasonable rate;<sup>60</sup> non-U.S. producers of goods agree on the quantity and prices of goods, which consequently affect the prices for which these goods can be obtained in the U.S.;<sup>61</sup> a non-U.S. company terminates an exclusive dealership contract with one U.S. company for the distribution of goods in the U.S. and appoints another U.S. company as distributor;<sup>62</sup> U.S. companies buy and obtain goods in the U.S. from companies who form a global conspiracy;<sup>63</sup> a U.S. company cannot obtain goods from a non-U.S. manufacturer anymore for the distribution of these goods in the U.S., as the non-U.S.

<sup>56</sup> *Long Island Lighting Co. v. Standard Oil Co. of California*, 390 F.Supp. 1172 (S.D.N.Y.1975); *Long Island Lighting Co. v. Standard Oil Co. of California*, 521 F.2d 1269 (2d Cir.1975).

<sup>57</sup> *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 383 F.Supp. 586 (E.D.Pa.1974).

<sup>58</sup> *Pfizer, Inc. v. Government of India*, 550 F.2d 396 (8th Cir.1976); *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978); *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir.1975).

<sup>59</sup> *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62 (3d Cir.2000).

<sup>60</sup> *Thomsen v. Union Castle Mail S.S. Co.*, 166 F. 251 (2d Cir.1908).

<sup>61</sup> *International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553 (C.D.Cal.1979); *International Ass'n of Machinists and Aerospace Workers, (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354 (9th Cir.1981).

<sup>62</sup> *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F.Supp. 221 (S.D.N.Y.1975).

manufacturer has its own companies in the U.S. for the distribution of its own goods in the U.S.;<sup>64</sup> a U.S. distributor cannot obtain goods from a non-U.S. manufacturer for distribution in the U.S., as the non-U.S. manufacturer ceased to produce goods to be exported to the U.S. market;<sup>65</sup> a U.S. company cannot obtain goods outside the U.S. and import them into the U.S. due to a conspiracy between U.S. and non-U.S. companies;<sup>66</sup> a U.S. company provides goods and services to another U.S. company who incorporates these goods into final products that are sold globally, but then the latter U.S. company starts to produce the necessary goods and services itself;<sup>67</sup> a non-U.S. company concludes an insurance agreement with a U.S. insurance company for coverage of damage;<sup>68</sup> a U.S. company buys goods in the U.S. that originated from a non-U.S. country, but are brought into the U.S. by another U.S. company.<sup>69</sup>

### **2.1.2.1 Assessment under a Transborder Standard of Pre-*Empagran* Cases Where the Litigated Private Antitrust Injury Was Suffered within the U.S.**

In a factual situation where the claimed private antitrust injury is suffered within the U.S., whether by U.S. nationals or non-U.S. nationals, the question is whether the application of a transborder standard contributes anything new to the private antitrust law litigation or increases the chances for private plaintiffs to be granted the subject matter jurisdiction of U.S. courts and, consequently, obtain remedies for their suffered antitrust injury.

Without interfering with the analysis that follows, pre-*Empagran* case law does not seem to require anything different for private antitrust injury suffered within the U.S. to be litigated before the U.S. courts than required for private antitrust injury that is suffered in factual situations where all elements of

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<sup>63</sup> *In re: Vitamins Antitrust Litigation*, 2001 WL 755852 (D.D.C.).

<sup>64</sup> *Metro Industries, Inc. v. Sammi Corporation*, 82 F.3d 839 (9th Cir.1996).

<sup>65</sup> *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499 (E.D.Mich.1974); *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 519 F.2d 119 (6th Cir.1975).

<sup>66</sup> *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir.1982).

<sup>67</sup> *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir.1980).

<sup>68</sup> *CSR Ltd. v. Cigna Corp.*, 2005 WL 3132188 (D.N.J.).

<sup>69</sup> *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808 (E.D.N.Y.1980).

antitrust conduct, all members of the cartel and all victims, and all anticompetitive effects and all private antitrust injury are limited exclusively to the U.S. This means that the *Empagran* litigation does not bring anything new to the private litigation of private antitrust injury suffered within the U.S.

Does this mean that in factual situations where private plaintiffs suffer private antitrust injury within the U.S., a transborder standard is not needed? The answer is negative. Firstly, accepting the possibility of the existence of transborder antitrust conduct encourages the U.S. courts to look beyond national territorial borders of the U.S. This means that only such a wider inquiry can help to determine properly whether there exists anticompetitive conduct. The same is true for the process of determining the existence of anticompetitive effects. Without the existence of either anticompetitive conduct or anticompetitive effect, U.S. courts may have subject matter jurisdiction to hear a private antitrust claim for private antitrust injury suffered within the U.S., but may not adjudicate remedies.

What about the need to classify the litigated private antitrust injury that is suffered within the U.S. as transborder? To be granted the right to litigate the private antitrust injury suffered within the U.S., there is no need to classify the litigated private antitrust injury as transborder. The classification of the litigated private antitrust injury suffered within the U.S. as transborder becomes relevant only in a situation where the private plaintiff claims that the private antitrust injury suffered within the U.S. is only part of a wider private antitrust injury that extends beyond the national territorial borders of the U.S.

### ***2.1.3 Pre-Empagran Cases Where Litigated Private Antitrust Injury Was Suffered Outside the U.S.***

The factual situations in pre-*Empagran* cases where some non-U.S. elements are present (either in terms of the nationality of litigants or in terms of anticompetitive conduct or anticompetitive effects) and a private plaintiff brings a private antitrust suit before the U.S. courts for the private antitrust injury suffered outside the national territorial borders of the U.S. are the following.

Non-U.S. nationals purchase products under questionable conditions;<sup>70</sup> non-U.S. nationals purchase products outside the U.S. under conditions influenced by conditions within the U.S. market;<sup>71</sup> non-U.S. nationals obtain services outside the U.S. under conditions that are not determined by anything that happens within the U.S. market;<sup>72</sup> non-U.S. nationals are prevented from obtaining goods from the U.S.;<sup>73</sup> non-U.S. nationals do not have the possibility to obtain goods (services) from the U.S. providers located within the U.S.;<sup>74</sup> a non-U.S. entity buys goods outside the U.S. from a U.S. company, as there are no other options to obtain the goods;<sup>75</sup> a non-U.S. company buys goods within the U.S. market and has them delivered outside the U.S.;<sup>76</sup> U.S. carriers form a conspiracy and join conference to eliminate other U.S. carriers from participating in the transportation of good between non-U.S. ports;<sup>77</sup> or non-U.S. carriers form a conspiracy to eliminate a non-U.S. carrier;<sup>78</sup> a U.S. company buys goods outside the U.S. and the court perceives the market to be one with the U.S. market;<sup>79</sup> U.S. companies buy and obtain goods outside the U.S. from companies who form a global conspiracy;<sup>80</sup> a U.S. individual purchases goods outside the U.S.;<sup>81</sup> a U.S. individual has to pay for services in relation to activities that take place outside the U.S.;<sup>82</sup> a non-U.S. company cannot obtain goods outside the U.S. to distribute these goods outside the U.S. due to a conspiracy in which U.S. companies were involved;<sup>83</sup> agreement between a U.S. company and a non-U.S. company to provide services and deliver goods outside the U.S.;<sup>84</sup> agreement

<sup>70</sup> *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702 (D.Md.2001).

<sup>71</sup> *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510 (S.D.N.Y.1985).

<sup>72</sup> *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829 (E.D.Pa.2001).

<sup>73</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003 (N.D.Ill.2001).

<sup>74</sup> *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

<sup>75</sup> *In re Antibiotic Antitrust Actions*, 333 F.Supp. 315 (S.D.N.Y. 1971).

<sup>76</sup> *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 738 F.Supp. 1472 (S.D.N.Y.1990).

<sup>77</sup> *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C.Cir.1968).

<sup>78</sup> *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir.1987).

<sup>79</sup> *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875 (W.D.Wis.2000); *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836 (7th Cir.2003).

<sup>80</sup> N.63.

<sup>81</sup> *Sniado v. Bank Austria AG*, 174 F.Supp.2d 159 (S.D.N.Y. 2001); *Sniado v. Bank Austria AG*, 352 F.3d 73 (2d Cir.2003); *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir.2004).

<sup>82</sup> *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071 (S.D.N.Y.1988).

<sup>83</sup> *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir.1981).

<sup>84</sup> *Industria Siciliana Asfalti v. Exxon Research and Engineering, Co.*, 1977 WL 1353 (S.D.N.Y.).

between a U.S. company and a non-U.S. company under which the U.S. company requires the non-U.S. company to be the distributor only of the goods produced by this U.S. company;<sup>85</sup> a U.S. individual provides services outside the U.S.;<sup>86</sup> agreement under which a non-U.S. company manufactures goods for a U.S. company outside the U.S.;<sup>87</sup> non-U.S. companies buy goods outside the U.S. from members of a worldwide conspiracy and this conspiracy includes the allocation of the world market and the amount of goods that may be sold in each of the countries;<sup>88</sup> a non-U.S. company obtains services from another non-U.S. company outside the U.S. alleging that the companies who provide these services form part of a global conspiracy;<sup>89</sup> buyers and sellers at auctions outside the U.S. had to pay higher prices and commissions due to a conspiracy between non-U.S. and U.S. auction houses;<sup>90</sup> the competitive position of a non-U.S. company outside the U.S. is challenged by patent-related activities of non-U.S. and U.S. companies;<sup>91</sup> a non-U.S. company distributes and sells goods outside the U.S. in violation of the agreement this company concluded with the non-U.S. manufacturer of these goods;<sup>92</sup> a non-U.S. company claims payment for goods that are produced and distributed outside the U.S.;<sup>93</sup> a U.S. company is deprived of compensation for business conducted outside the U.S. because of a conspiracy between a U.S. company and a non-U.S. company outside the U.S.;<sup>94</sup> a U.S. company cannot obtain goods outside the U.S. and import them into the U.S. due to a conspiracy between a U.S. company and a non-U.S. company;<sup>95</sup> one U.S. company obtains production facilities in a non-U.S. country and consequently another competing U.S. company cannot get access to these facilities;<sup>96</sup> a U.S.

<sup>85</sup> *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494, June 11 (M.D.N.C.1987).

<sup>86</sup> *Liamuiga Tours, Div. of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd.*, 617 F.Supp. 920 (E.D.N.Y.1995).

<sup>87</sup> *S. Megga Telecommunications Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413 (D.Del.).

<sup>88</sup> *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498 (N.D.Cal.).

<sup>89</sup> *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir.2001).

<sup>90</sup> *Kruman v. Christie's Intern. PLC*, 284 F.3d 384 (2d Cir.2002).

<sup>91</sup> *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F.Supp. 864 (S.D.N.Y.1986).

<sup>92</sup> *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102 (S.D.N.Y.1984).

<sup>93</sup> *Raubal v. Engelhard Minerals & Chemicals Corp.*, 364 F.Supp. 1352 (S.D.N.Y.1973).

<sup>94</sup> *Power East Ltd. v. Transamerica Delaval Inc.*, 558 F.Supp. 47 (S.D.N.Y.1983).

<sup>95</sup> N.66.

<sup>96</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

company and a non-U.S. company agree on non-U.S. patent pooling so that another U.S. company who would like to distribute its products outside the U.S. cannot obtain the license to do this;<sup>97</sup> a U.S. company sells goods in a non-U.S. country under a trade name that is similar to the trade name used by another U.S. company;<sup>98</sup> a U.S. company agrees with a non-U.S. company that the non-U.S. company will obtain raw materials for future production only from this U.S. company and that it will not cooperate with other U.S. companies (competitors), and in addition, they agree on the territory where final products will be put on the market;<sup>99</sup> one U.S. company provides goods and services to another U.S. company that incorporates these into final products that are then sold globally, but then the latter U.S. company starts to produce the necessary goods and services itself;<sup>100</sup> agreement between a U.S. company and a non-U.S. company to eliminate another non-U.S. company that provides services in a non-U.S. market;<sup>101</sup> a non-U.S. company stops providing raw materials to another U.S. company that the latter U.S. company needs to produce goods that this latter U.S. company exports to non-U.S. markets, and the same non-U.S. company conspires with other companies (including U.S. ones) to exclude the U.S. company from non-U.S. markets;<sup>102</sup> U.S. companies and non-U.S. companies make an agreement on how to behave towards a non-U.S. government with the purpose of preserving their production of goods outside the U.S. and despite this agreement, the U.S. company remains without production opportunities within non-U.S. markets;<sup>103</sup> non-U.S. companies buy goods from a U.S. company who allegedly fixed prices and arranged the allocation of the world market;<sup>104</sup> a U.S. company conducts business in a non-U.S. market and by making arrangements

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<sup>97</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

<sup>98</sup> *George W. Luft Co. v. Zande Cosmetic Co.*, 142 F.2d 536 (2d Cir.1944).

<sup>99</sup> *Sulmeyer v. Seven-Up Co.*, 411 F.Supp. 635 (S.D.N.Y.1976).

<sup>100</sup> N.67.

<sup>101</sup> *National Bank of Canada v. Interbank Card Ass'n.*, 507 F.Supp. 1113 (S.D.N.Y.1980); *National Bank of Canada v. Interbank Card Ass'n.*, 666 F.2d 6 (2d Cir.1981).

<sup>102</sup> *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

<sup>103</sup> *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 4 (S.D.N.Y.1975); *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10 (S.D.N.Y.1975); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.1977); *Hunt v. Mobil Oil Corp.*, 444 F.Supp. 68 (S.D.N.Y.1977).

<sup>104</sup> *Ferromin Intern. Trade v. UCAR Intern., Inc.*, 153 F.Supp.2d 700 (E.D.Pa.2001).

with non-U.S. companies and authorities in this non-U.S. market eliminates another U.S. company who is its competitor in that non-U.S. market.<sup>105</sup>

### **2.1.3.1 Assessment under a Transborder Standard of Pre-*Empagran* cases Where the Litigated Private Antitrust Injury Was Suffered Outside the U.S.**

A brief look at the factual situations listed above reveals that private plaintiffs brought private antitrust suits before the U.S. courts for private antitrust injury they suffered outside the U.S. even before the *Empagran* litigation. This means that the private plaintiffs in the *Empagran* litigation are not the first ones that tried to obtain remedies before the U.S. courts for private antitrust injury they suffered outside the national territory of the U.S. In addition, the list of factual situations decided in pre-*Empagran* cases shows that private antitrust injury that private plaintiffs may suffer outside the U.S. can take various forms, and not only the form litigated in the *Empagran* litigation.

Nevertheless, this list of factual situations decided in pre-*Empagran* cases does not reduce the importance of the *Empagran* litigation in development of private antitrust law enforcement of (foreign) antitrust injury before the U.S. courts. It is important to bear in mind that merely on the basis of factual situations in which foreign antitrust injury was litigated in pre-*Empagran* cases it cannot automatically be concluded that the issues and questions raised and decided throughout the *Empagran* litigation had already been decided by pre-*Empagran* cases. Such a conclusion would be absolutely wrong and completely unfounded. Firstly, the factual situations in pre-*Empagran* cases were not exactly the same as it was in the *Empagran* case. Therefore, the adjudication process in pre-*Empagran* cases concentrated on issues and legal questions different from the ones that required adjudication in the *Empagran* case. Secondly, even in situations where pre-*Empagran* cases may potentially have similar facts to the *Empagran* case,<sup>106</sup> the issues, questions, and legal grounds on which pre-

<sup>105</sup> *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680 (S.D.N.Y.1979).

<sup>106</sup> In addition to pre-*Empagran* cases that were used as precedents in the *Empagran* litigation and have therefore already been presented in Chapter 2, there may be *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498 (N.D.Cal.).

*Empagran* cases were decided were different from the ones decided in the *Empagran* litigation.

Without pre-empting the analysis below, the issues, questions and legal grounds on which the *Empagran* case was decided were not decided in pre-*Empagran* cases. *Empagran* is the first antitrust case where the U.S. Supreme Court explicitly decided what type foreign private antitrust injury cannot be litigated before the U.S. courts, at the same time leaving open the possibility for the U.S. courts to have subject matter jurisdiction in factual situations where a (foreign) private plaintiff litigates a private antitrust injury suffered outside the U.S. against a (foreign) defendant if there exists a required relationship between anticompetitive effects/antitrust injury within the U.S. and anticompetitive effects/antitrust injury outside the U.S.

In contrast, the factual situations in pre-*Empagran* cases presented in previous subsections reveal that private antitrust injury suffered outside the U.S. was litigated by: U.S. nationals whose competitive position was affected by anticompetitive arrangements by other U.S. companies (and non-U.S. companies); U.S. companies or non-U.S. companies against the U.S. companies with whom they were in commercial contractual arrangement; U.S. companies or non-U.S. companies because of limitations in obtaining goods from the U.S. or because of limitations in their ability to import goods into the U.S.

Therefore, the introduction of a transborder standard into private antitrust law litigation benefits in particular those private plaintiffs who suffer antitrust injury outside the U.S. In a situation where private plaintiffs do not have the possibility to classify their private antitrust injury as transborder, the U.S. courts can consider their antitrust injury only as foreign, and consequently may refuse to grant subject matter jurisdiction. In contrast, in a situation where private plaintiffs succeed in establishing that the private antitrust injury they suffered outside the U.S. is of a transborder nature, the U.S. courts cannot refuse to grant private plaintiffs subject matter jurisdiction.



## 2.2 Relevant Issues That Determined the Outcome of Adjudication Processes in Pre-*Empagran* Cases

As mentioned in the subsection above, the relationship between the *Empagran* case and pre-*Empagran* cases cannot be correctly understood merely by looking at factual situations and the final outcome of the antitrust litigation in pre-*Empagran* cases. Pre-*Empagran* cases cannot be properly understood and analyzed without understanding issues, questions and legal grounds on which pre-*Empagran* courts delivered their judgments. This means that the analysis in this chapter applies the same methodology as was applied in the previous chapter in order to understand why particular decisions or statements were made.

The reasons based on which adjudicating courts in pre-*Empagran* cases delivered their judgments are numerous and diverse. They are the following.

The adjudicating court finds insufficient data to decide the matter of the litigated case;<sup>107</sup> agreements by members of a cartel are concluded within the U.S. and as such they constitute a violation of U.S. antitrust law because they divide up the (world) market;<sup>108</sup> members of cartel implement a group boycott within the U.S. against anyone who may directly or indirectly make it possible for non-U.S. goods to enter the U.S.;<sup>109</sup> an antitrust conspiracy is set up and performed in the U.S.;<sup>110</sup> the adjudicating court does not find it necessary to decide on the international issue raised in antitrust litigation;<sup>111</sup> the existence of negative effects on U.S. public budget;<sup>112</sup> an anticompetitive combination performs activities within the U.S.;<sup>113</sup> effects are present in the U.S.;<sup>114</sup> activities

<sup>107</sup> *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 506, 523 31 S.Ct. 279, 55 L.Ed. 310 (1911).

<sup>108</sup> *U.S. v. National Lead Co.*, 63 F.Supp. 513, 531 (S.D.N.Y. 1945).

<sup>109</sup> *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 74, 75 (3d Cir. 2000).

<sup>110</sup> *American Tobacco Co. v. U.S.*, 328 U.S. 781, 786, 798, 804, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

<sup>111</sup> *Swift & Co. v. U.S.*, 196 U.S. 375, 397, 25 S.Ct. 276, 49 L.Ed. 518 (1905); *U.S. v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 716, 64 S.Ct. 805, 816, 88 L.Ed. 1024 (1944).

<sup>112</sup> *U.S. v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 209, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968).

<sup>113</sup> *Thomsen v. Cayser*, 243 U.S. 66, 88, 37 Sup.Ct. 353, 61 L.Ed. 597, Ann. Cas. 1917D, 322 (1914).

and effects are within the U.S.;<sup>115</sup> the adjudicating court does not take a decision on jurisdiction;<sup>116</sup> the plaintiffs do not provide sufficient data in support of their claim;<sup>117</sup> a transaction takes place outside the U.S. and the parties are of non-U.S. nationality;<sup>118</sup> lack of standing;<sup>119</sup> lack of causation between the alleged antitrust violation and injury;<sup>120</sup> the flow of commerce of goods leaving the U.S. is affected;<sup>121</sup> goods are purchased within the U.S.;<sup>122</sup> lack of effects in the U.S.;<sup>123</sup> (un)reasonableness is irrelevant if federal antitrust law prohibits certain types of arrangements;<sup>124</sup> operation and effect are within the U.S.;<sup>125</sup> U.S. nationals by their activity (masterminded and directed from the U.S.<sup>126</sup>) cause anticompetitive effects within the U.S.;<sup>127</sup> anticompetitive conduct on the part of one U.S. company affects another U.S. company,<sup>128</sup> and in addition, the

<sup>114</sup> *Daishowa Intern. v. North Coast Export Co.*, 1982 WL 1850,6 (N.D.Cal.); *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080,1086 (D.C.Cir.1998); *U.S. v. Aluminum Co. of America*, 91 F.Supp. 333,392,393 (S.D.N.Y.1950).

<sup>115</sup> *U.S. v. Sisal Sales Corp.*, 274 U.S. 268,276, 47 S.Ct. 592, 71 L.Ed. 1042 (1927).

<sup>116</sup> *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F.Supp. 70 (S.D.N.Y.1965); *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944); *In re Antibiotic Antitrust Actions*, 333 F.Supp. 315 (S.D.N.Y. 1971).

<sup>117</sup> *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229,1237,1239 (6th Cir.1981); *Long Island Lighting Co. v. Standard Oil Co. of California*, 390 F.Supp. 1172,1176 (S.D.N.Y.1975); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003,1029 (10th Cir.2002); *El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F.Supp. 626,631,632 (S.D.N.Y.1982); *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,833 (E.D.Pa.2001).

<sup>118</sup> *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702,715 (D.Md.2001).

<sup>119</sup> *Long Island Lighting Co. v. Standard Oil Co. of California*, 390 F.Supp. 1172,1176 (S.D.N.Y.1975); *Long Island Lighting Co. v. Standard Oil Co. of California*, 521 F.2d 1269,1273 (2d Cir.1975); *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,514,516 (S.D.N.Y.1985); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864,868 (10th Cir.1981); *Raubal v. Engelhard Minerals & Chemicals Corp.*, 364 F.Supp. 1352,1357 (S.D.N.Y.1973); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1468 (N.D.Cal.1983); *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,823,824 (E.D.N.Y.1980).

<sup>120</sup> *Long Island Lighting Co. v. Standard Oil Co. of California*, 390 F.Supp. 1172,1176 (S.D.N.Y.1975).

<sup>121</sup> *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 383 F.Supp. 586,587 (E.D.Pa.1974).

<sup>122</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308,314,318, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978); *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 738 F.Supp. 1472,1476 (S.D.N.Y.1990).

<sup>123</sup> *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,844 (E.D.Pa.2001); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1009,1020 (N.D.Ill.2001).

<sup>124</sup> *Thomsen v. Union Castle Mail S.S. Co.*, 166 F. 251,253 (2d Cir.1908).

<sup>125</sup> *Thomsen v. Union Castle Mail S.S. Co.*, 166 F. 251,253 (2d Cir.1908); *Steele v. Bulova Watch Co.*, 344 U.S. 280,286, 73 S.Ct. 252, 97 L.Ed. 319 (1952).

<sup>126</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1302 (3d Cir.1979).

<sup>127</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1291,1292 (3d Cir.1979).

<sup>128</sup> *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804,814 (D.C.Cir.1968).

defendant is of U.S. nationality;<sup>129</sup> application of the act of state doctrine under which it is not allowed to research the motives for the actions of foreign states;<sup>130</sup> engagement in a combination and conspiracy that has the intent and effect of unreasonably restraining foreign and interstate trade and commerce of the U.S.;<sup>131</sup> activities compelled by non-U.S. nations;<sup>132</sup> and non-U.S. sovereigns are not to be held liable under competition laws;<sup>133</sup> the plaintiffs' failure to show the required causal connection between anticompetitive conduct and the alleged injury;<sup>134</sup> non-U.S. nations have supreme sovereignty over their natural resources;<sup>135</sup> transactions by the injured plaintiffs took place within the U.S., both those purchases that take place within the U.S. and those purchases that take place outside the U.S., but are coordinated by a U.S. parent company;<sup>136</sup> insufficient contact and effect within the U.S.;<sup>137</sup> comity;<sup>138</sup> the plaintiff fails to present the cause of action (part of substantive law requirements);<sup>139</sup> the plaintiff is not an exporter so cannot rely on the effect on export trade from the U.S.;<sup>140</sup> lack of alleged effects on U.S. commerce;<sup>141</sup> the affected market is outside the U.S.;<sup>142</sup> the consequences suffered by plaintiffs cannot be concluded

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<sup>129</sup> Ibid.

<sup>130</sup> *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92,97,111 (C.D.Cal.1971); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449,453 (2d Cir.1987); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404,407 (9th Cir.1983).

<sup>131</sup> *U.S. v. The Watchmakers of Switzerland Information Center*, 1962 U.S. Dist. LEXIS 5816,152,154 (S.D.N.Y.); *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F.Supp. 221,227 (S.D.N.Y.1975).

<sup>132</sup> *International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553,570 (C.D.Cal.1979).

<sup>133</sup> *International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553,571,572 (C.D.Cal.1979).

<sup>134</sup> *International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553,572,574 (C.D.Cal.1979).

<sup>135</sup> *International Ass'n of Machinists and Aerospace Workers, (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354,1361 (9th Cir.1981).

<sup>136</sup> *In re Vitamins Antitrust Litigation*, 2001 WL 755852,2 (D.D.C.).

<sup>137</sup> *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864,868-870 (10th Cir.1981).

<sup>138</sup> *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864,871 (10th Cir.1981); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 749 F.2d 1378,1384 (9th Cir.1984).

<sup>139</sup> *Industria Siciliana Asfalti v. Exxon Research and Engineering, Co.*, 1977 WL 1353,9,14 (S.D.N.Y.).

<sup>140</sup> *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494,499,500 (M.D.N.C.1987).

<sup>141</sup> *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa)*, 518 F.Supp. 270,276,280 (W.D.Pa.1981).

<sup>142</sup> *Liamuiga Tours, Div. of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd.*, 617 F.Supp. 920,922,924,925 (E.D.N.Y.1995); *Power East Ltd. v. Transamerica Delaval Inc.*, 558 F.Supp. 47,49 (S.D.N.Y.1983).

to be the result of anticompetitive practices;<sup>143</sup> the plaintiffs' allegations establish minimal impact on competition within the U.S.,<sup>144</sup> but when analyzed in connection with the merit, there is no injury to competition or consumers within the U.S.;<sup>145</sup> the U.S. market was never intended to be supplied with non-U.S. goods in first place, so there is no effect within the U.S. of these goods not being produced for the U.S.;<sup>146</sup> the plaintiffs fail to support substantive antitrust claim;<sup>147</sup> plaintiffs claim a matter already litigated before non-U.S. courts;<sup>148</sup> intended and actual effects are present within the U.S.;<sup>149</sup> the commerce of goods that are imported into the U.S. is affected;<sup>150</sup> the defendants perform acts outside the U.S. and consequently U.S. antitrust law cannot apply to them;<sup>151</sup> activity by a non-U.S. sovereign power in a territory outside the U.S. (i.e. within its - foreign - jurisdiction);<sup>152</sup> a conspiracy is entered and actions are performed by the defendants within the U.S.;<sup>153</sup> the defendants are of U.S. nationality;<sup>154</sup> activity by U.S. companies within the U.S.;<sup>155</sup> defendants of U.S. nationality perform activities that begin in the U.S. and are consumed outside the U.S.;<sup>156</sup>

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<sup>143</sup> *Liamuiga Tours, Div. of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd.*, 617 F.Supp. 920,925 (E.D.N.Y.1995).

<sup>144</sup> *Metro Industries, Inc. v. Sammi Corporation*, 82 F.3d 839,847 (9th Cir.1996).

<sup>145</sup> *Metro Industries, Inc. v. Sammi Corporation*, 82 F.3d 839,848 (9th Cir.1996).

<sup>146</sup> *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499,527,528,541 (E.D.Mich.1974).

<sup>147</sup> *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499,542,543 (E.D.Mich.1974); *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 519 F.2d 119,123 (6th Cir.1975).

<sup>148</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1471 (N.D.Cal.1983).

<sup>149</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416,444 (2d Cir.1945).

<sup>150</sup> *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,883 (5th Cir.1982).

<sup>151</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347,357,359, 29 S.Ct. 511, 53 L.Ed. 826 (1909); *George W. Luft Co. v. Zande Cosmetic Co.*, 142 F.2d 536,539, (2d Cir.1944) [defendant performed acts outside the U.S. that were valid under trade mark of foreign state where they were performed].

<sup>152</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347,357,358, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

<sup>153</sup> *U.S. v. National Lead Co.*, 63 F.Supp. 513,524 (S.D.N.Y.1945); *Vacuum Oil Co. v. Eagle Oil Co. of New York*, 154 F. 867,874 (C.C.N.J.1907) [it is correct to mention that some of acts were done also outside the U.S.]; *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215,237 (S.D.N.Y.1952).

<sup>154</sup> *U.S. v. R. P. Oldham Co.*, 152 F.Supp. 818,821 (N.D.Cal.1957); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100,113, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

<sup>155</sup> *U.S. v. Singer Mfg. Co.*, 374 U.S. 174,192-194, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963); *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F.Supp. 594,601 (S.D.Cal.1956).

<sup>156</sup> *Branch v. F.T.C.*, 141 F.2d 31,35 (7th Cir.1944).

defendants of U.S. nationality perform some of their actions in the U.S.;<sup>157</sup> effects on U.S. commerce with non-U.S. countries and on the plaintiff's business and property in the U.S.;<sup>158</sup> intended and actual effects on U.S. commerce;<sup>159</sup> conspiracy agreed within the U.S. and performed through actions within the U.S. and outside the U.S. to suppress competition in the U.S.;<sup>160</sup> anticompetitive effect on competition in the U.S.;<sup>161</sup> performance of illegal acts by U.S. companies;<sup>162</sup> participation of U.S. companies (i.e. having impact) in formulating the essence of an illegal activity by non-U.S. companies to be performed outside the U.S.;<sup>163</sup> the activities by U.S. defendants and the damage suffered by plaintiffs take place within the U.S.;<sup>164</sup> U.S. companies and non-U.S. companies act within the U.S. and outside the U.S. with the intention of affecting the U.S. market;<sup>165</sup> effects in the U.S.;<sup>166</sup> intended and actual effect in the U.S.;<sup>167</sup> U.S. consumers and creditors and business in the U.S. are affected;<sup>168</sup> the U.S. courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants;<sup>169</sup> a plaintiff being indirect purchaser;<sup>170</sup> conduct and effects within the U.S.;<sup>171</sup> conduct in the U.S.;<sup>172</sup>

<sup>157</sup> *Sulmeyer v. Seven-Up Co.*, 411 F.Supp. 635,639 (S.D.N.Y.1976); *Sanib Corp. v. United Fruit Co.*, 135 F.Supp. 764,766 (S.D.N.Y.1955); *Scotch Whiskey Ass'n. v. Barton Distilling Co.*, 489 F.2d 809,812 (7th Cir.1973).

<sup>158</sup> *Sulmeyer v. Seven-Up Co.*, 411 F.Supp. 635,639 (S.D.N.Y.1976).

<sup>159</sup> *Sanib Corp. v. United Fruit Co.*, 135 F.Supp. 764,766 (S.D.N.Y.1955).

<sup>160</sup> *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,952,961,962,964 (D.Mass.1950).

<sup>161</sup> *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342,1354 (5th Cir.1980).

<sup>162</sup> *U.S. v. General Elec. Co.*, 80 F.Supp. 989,1004,1005,1006,1012 (S.D.N.Y.1948).

<sup>163</sup> *U.S. v. General Elec. Co.*, 82 F.Supp. 753,837,838,843,887 (D.N.J.1949).

<sup>164</sup> *CSR Ltd. v. Cigna Corp.*, 2005 WL 3132188,492,493 (D.N.J.).

<sup>165</sup> *In re Uranium Antitrust Litigation*, 617 F.2d 1248,1254 (7th Cir.1980).

<sup>166</sup> *U.S. v. Pacific & A R & Nav Co.*, 228 U.S. 87,105, 33 S.Ct. 443, 57 L.Ed. 742 (1913); *National Bank of Canada v. Interbank Card Ass'n.*, 507 F.Supp. 1113,1120,1121 (S.D.N.Y.1980).

<sup>167</sup> *In re Grand Jury Investigation of the Shipping Industry*, 186 F.Supp. 298,313 (D.D.C. 1960).

<sup>168</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,924,925 (D.C.Cir.1984).

<sup>169</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,927,929,930 (D.C.Cir.1984), as the U.S. courts must control access to their forums, what is part of the public policy of the forum (see p.931,935).

<sup>170</sup> *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,817 (E.D.N.Y.1980).

<sup>171</sup> *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406,429 (9th Cir.1977).

<sup>172</sup> *Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811,814,815 (D.C.1983); *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority*, 442 F.Supp. 1201,1204-1206 (S.D.N.Y.1978).

anticompetitive effects within the U.S.;<sup>173</sup> intended and actual effects in the U.S.;<sup>174</sup> application of the act of state doctrine, foreign sovereign compulsion, international comity;<sup>175</sup> plaintiffs do not show that there exist anticompetitive effects on U.S. commerce;<sup>176</sup> anticompetitive activities and anticompetitive results;<sup>177</sup> a U.S. company performs activities in and outside the U.S.;<sup>178</sup> anticompetitive result (monopoly) in the U.S.;<sup>179</sup> agreement or combination to create a monopoly within the U.S.;<sup>180</sup> presence, activities and type of trade within the U.S.;<sup>181</sup> the adjudicating court introduces a new test of subject matter jurisdiction and consequently remands adjudication to a lower court;<sup>182</sup> being a party to an anticompetitive agreement;<sup>183</sup> the foreign commerce of the U.S. is affected;<sup>184</sup> the arrangements by the defendants are legal assessed under substantive antitrust laws;<sup>185</sup> anticompetitive effects on those exporting out of the U.S.;<sup>186</sup> U.S. companies and non-U.S. companies conclude anticompetitive agreements;<sup>187</sup> a U.S. company and a non-U.S. company enter into a conspiracy in the U.S., perform some actions in the U.S., and cause anticompetitive effects in the U.S.;<sup>188</sup> the plaintiff has standing;<sup>189</sup> application of the act of state

<sup>173</sup> *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F.Supp. 81,85 (S.D.N.Y.1995).

<sup>174</sup> *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 942 F.Supp. 905,915 (S.D.N.Y.1996).

<sup>175</sup> *Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Products Holdings (North America) Inc.*, 954 F.Supp. 733,736 (S.D.N.Y.1997).

<sup>176</sup> *National Bank of Canada v. Interbank Card Ass'n.*, 666 F.2d 6,8,9 (2d Cir.1981).

<sup>177</sup> *U.S. v. Timken Roller Bearing Co.*, 83 F.Supp. 284,318 (N.D.Ohio 1949); *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593,599, 71 S.Ct. 971, 95 L.Ed. 1199 (1951).

<sup>178</sup> *American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n*, 701 F.2d 408,417 (5th Cir.1983).

<sup>179</sup> *U.S. v. Associated Press*, 52 F.Supp. 362,374 (S.D.N.Y.1943).

<sup>180</sup> *Associated Press v. U.S.*, 326 U.S. 1,12, 65 S.Ct. 1416, 89 L.Ed. 2013 (1944).

<sup>181</sup> *Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement*, 451 F.2d 727,729 (2nd Cir.1971).

<sup>182</sup> *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597,615 (9th Cir.1976).

<sup>183</sup> *American Tobacco Co. v. U.S.*, 328 U.S. 781,814, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

<sup>184</sup> *U.S. v. Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft*, 200 F. 806,807 (S.D.N.Y.1911).

<sup>185</sup> *U.S. v. Hamburg-American S.S. Line*, 216 F. 971,974 (S.D.N.Y.1914); *Hunt v. Mobil Oil Corp.*, 654 F.Supp. 1487,223 (S.D.N.Y.1987).

<sup>186</sup> *U.S. v. U.S. Alkali Export Ass'n.*, 86 F.Supp. 59,67 (S.D.N.Y.1949).

<sup>187</sup> *U.S. v. U.S. Alkali Export Ass'n.*, 86 F.Supp. 59,77 (S.D.N.Y.1949); *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215,222,226 (S.D.N.Y.1952).

<sup>188</sup> *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,706, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

<sup>189</sup> *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10,19,22 (S.D.N.Y.1975).

doctrine;<sup>190</sup> the litigants are of U.S. nationality, some of the anticompetitive conduct takes place in the U.S., there are anticompetitive effects on U.S. consumers.<sup>191</sup>

As explained in Chapter 2, the *Empagran* litigation arose out of opposing interpretations of the FTAIA by the Courts of Appeals from different districts with regard to the required type of relationship between anticompetitive effects in the U.S. and the litigated private antitrust injury.<sup>192</sup>

Therefore, the overview of pre-*Empagran* cases requires separate consideration of the grounds on which the U.S. adjudicating courts delivered their judgments in those pre-*Empagran* litigations where the adjudicating courts did make reference to the FTAIA. In these pre-*Empagran* cases the grounds on which the adjudicating courts delivered their judgments are the following. Plaintiffs are not injured by effects in the U.S. market;<sup>193</sup> plaintiffs are injured by transactions that take place within the U.S. market;<sup>194</sup> plaintiffs do not prove anticompetitive effects present in the U.S.;<sup>195</sup> consideration of comity;<sup>196</sup> lack of allegations that the U.S. market is affected,<sup>197</sup> injury to plaintiff takes place outside the U.S.;<sup>198</sup> international cartel causes anticompetitive effects within the U.S. market;<sup>199</sup> lack of standing by non-U.S. plaintiff as there are other plaintiffs within the U.S. and the non-U.S. plaintiff is neither a competitor nor a consumer within the

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<sup>190</sup> *Hunt v. Mobil Oil Corp.*, 550 F.2d 68,73,76,77 (2d Cir.1977).

<sup>191</sup> *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680,688 (S.D.N.Y.1979).

<sup>192</sup> See Chapter 2, section 2.

<sup>193</sup> *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,882,883,887,888 (W.D.Wis.2000); *Sniado v. Bank Austria AG*, 174 F.Supp.2d 159,166,170 (S.D.N.Y. 2001); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,426-428 (5th Cir.2001).

<sup>194</sup> *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,841,842 (7th Cir.2003).

<sup>195</sup> *Sniado v. Bank Austria AG*, 174 F.Supp.2d 159,163 (S.D.N.Y. 2001); *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071,1077,1078 (S.D.N.Y.1988).

<sup>196</sup> *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071,1077,1079 (S.D.N.Y.1988); *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464,479,480,481 (S.D.N.Y.1997); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922,932 (2d Cir.1998).

<sup>197</sup> *S. Megga Telecommunications Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413,8 (D.Del.); *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F.Supp. 864,868,869 (S.D.N.Y.1986).

<sup>198</sup> *S. Megga Telecommunications Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413,9 (D.Del.).

<sup>199</sup> *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498,2,3 (N.D.Cal.).

U.S.;<sup>200</sup> anticompetitive effects outside the U.S.;<sup>201</sup> plaintiffs fail to allege any effect within the U.S. resulting from the defendants' alleged conduct;<sup>202</sup> non-commercial activities by a non-U.S. sovereign;<sup>203</sup> existence of anticompetitive effects within the U.S. and existence of injury to private plaintiff;<sup>204</sup> intended and substantial actual effect in the U.S.;<sup>205</sup> non-U.S. plaintiffs do not show that anticompetitive effects within the U.S. caused injury to them.<sup>206</sup>

### **2.2.1 Assessment under a Transborder Standard**

An examination of the grounds on which pre-*Empagran* cases were decided reveals diversity and confusion. The examination intentionally kept the form of reasoning as delivered by the adjudicating courts. This is relevant because it is important to understand that different wordings may require different elements to be proved by the litigants. The differences that different wordings can produce are the subject of analysis in the following two sections of this chapter, i.e. subject matter jurisdiction and private antitrust law enforcement. The analysis of awareness of the need for a transborder standard in pre-*Empagran* cases is the subject of Chapter 7.

In addition, it is also important to understand that the same wording may in some pre-*Empagran* cases be the main basis on which the adjudicating court delivered its judgment, whereas in other pre-*Empagran* cases the same wording may be merely one among many issues decided by adjudicating court and therefore not the principal basis on which the adjudicating court delivered its judgment.

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<sup>200</sup> *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498,4 (N.D.Cal.).

<sup>201</sup> *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F.Supp. 864,869 (S.D.N.Y.1986).

<sup>202</sup> *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1106,1107 (S.D.N.Y.1984).

<sup>203</sup> *Filetech S.A. v. France Telecom, S.A.*, 212 F.Supp.2d 183 (S.D.N.Y. 2001); *Filetech S.A. v. France Telecom S.A.*, 304 F.3d 180,181 (2d Cir.2002).

<sup>204</sup> *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,401 (2d Cir.2002).

<sup>205</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) [the question of determining the existence of 'true conflict' between the U.S. and foreign law (see p.798,799) that consequently determines the legality of the acts performed by the defendants under U.S. and foreign law did not alter the finding of relevance of the existence of intended and factual anticompetitive effects within the U.S.].

<sup>206</sup> *Ferromin Intern. Trade v. UCAR Intern., Inc.*, 153 F.Supp.2d 700,705,706 (E.D.Pa.2001).



Therefore, at this stage of the analysis it is not yet possible to provide a consistent, reasonable and applicable explanation of how the application of a transborder standard affects the grounds on which pre-*Empagran* judgments were delivered. Such analysis is possible only after gathering similar issues together, and after diagnosing differences in their understanding and application. This is the subject of the subsections that follow.

### 3 Subject Matter Jurisdiction

This section presents decisions in pre-*Empagran* cases on subject matter jurisdiction. In other words, the focus of the analysis in this section is establishing the conditions that litigants in pre-*Empagran* cases were expected to fulfil to be granted subject matter jurisdiction of the U.S. courts.

These findings are then used as a springboard for explaining the changes that the *Empagran* litigation and a transborder standard bring to the adjudication analysis of the subject matter jurisdiction of the U.S. courts.

This section is divided into three subsections: a.) Pre-*Empagran* decisions on the FTAIA, b.) Characteristics of the grounds on which pre-*Empagran* courts determined the subject matter jurisdiction of the U.S. courts, c.) Comity in pre-*Empagran* cases.

#### 3.1 Pre-*Empagran* Decisions on the FTAIA

As mentioned in the section above, that the *Empagran* litigation and its outcome are closely connected with the interpretation of the FTAIA. Therefore, the analysis of pre-*Empagran* cases needs to assess all types of interpretations and decisions by pre-*Empagran* courts with regard to the FTAIA. This type of analysis enables the identification of any additional reasons<sup>207</sup> that may shed light on the decisions reached by the adjudicating courts in the *Empagran* litigation.

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<sup>207</sup> Apart from the ones already presented and analysed in Chapter 2.

### 3.1.1 Purpose of the FTAIA and Words Used

Pre-*Empagran* courts interpreted the purpose of the FTAIA in relation to export business and in relation to clearing legal standard with regard to the required type of effects within the U.S.<sup>208</sup> that have to be present to obtain subject matter jurisdiction of the U.S. courts. Despite this purpose and the method of interpretation under which every statute (FTAIA included) has to be construed in a way that every word in the statute has some operative effect,<sup>209</sup> pre-*Empagran* courts state that the FTAIA was phrased inelegantly<sup>210</sup>.

Irrespective of this purpose attributed to the FTAIA, pre-*Empagran* courts interpreted it as granting protection to U.S. consumers and U.S. exporters, not foreign consumers or producers.<sup>211</sup>

It is a less problematic statement in pre-*Empagran* cases that the FTAIA requires the effect to be of an anticompetitive<sup>212</sup> nature. The importance of effects is also obvious in the decision where the pre-*Empagran* court ruled that the effect is required even in a situation where the conduct originates in the U.S. or involves U.S.-owned entities operating abroad.<sup>213</sup>

<sup>208</sup> *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702,714 (D.Md.2001); *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,832 (E.D.Pa.2001); *Liamuiga Tours, Div. of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd.*, 617 F.Supp. 920,924 (E.D.N.Y.1995); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,428,n.27 (5th Cir.2001); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1105 (S.D.N.Y.1984); *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62,71 (3d Cir.2000); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1008 (N.D.Ill.2001); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449,455 (2d Cir.1987) (dissenting opinion); *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,882 (W.D.Wis.2000).

<sup>209</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1024 (N.D.Ill.2001).

<sup>210</sup> *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62,69 (3d Cir.2000); *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir.1997); *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702,714,715 (D.Md.2001).

<sup>211</sup> *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494,498 (M.D.N.C.1987); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1008 (N.D.Ill.2001).

<sup>212</sup> *Sniado v. Bank Austria AG*, 174 F.Supp.2d 159,166 (S.D.N.Y. 2001); *Liamuiga Tours, Div. of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd.*, 617 F.Supp. 920,924 (E.D.N.Y.1995); *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,394 (2d Cir.2002).

<sup>213</sup> *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498,2 (N.D.Cal.); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1106 (S.D.N.Y.1984); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1009 (N.D.Ill.2001).

### **3.1.2 Relationship Between the FTAIA and Pre-FTAIA Law Developed by the U.S. Courts While Interpreting the Sherman Act**

The only commonly agreed explanation with regard to the relationship between the FTAIA and pre-FTAIA law that was a result of the interpretation of the Sherman Act is that the FTAIA applies only in a situation where there is non-import trade. Consequently, in a situation of imports (trade and commerce) the old Sherman applies,<sup>214</sup> unless there is an effect on import trade or commerce with foreign nations.<sup>215</sup>

Apart from that, there is no consistency in pre-*Empagran* cases on the question of the relationship between pre-FTAIA law and the FTAIA. This means that some pre-*Empagran* courts are of the opinion that there is consistency between pre-FTAIA law and the FTAIA.<sup>216</sup> It means that FTAIA does not alter the prior FTAIA law.<sup>217</sup> In opposition, there are also pre-*Empagran* courts that stated that the FTAIA introduces a new standard,<sup>218</sup> and some pre-*Empagran* courts that could not decide whether the FTAIA amends existing law or merely codifies it.<sup>219</sup>

In relation to the opinions according to which the FTAIA is a new formulation of the law, pre-*Empagran* courts stated that the FTAIA determines U.S. antitrust jurisdiction,<sup>220</sup> and explained that the test for subject matter jurisdiction is

<sup>214</sup> *Ferromin Intern. Trade v. UCAR Intern., Inc.*, 153 F.Supp.2d 700,703 (E.D.Pa.2001); *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62,69,71 (3d Cir.2000); *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F.Supp. 81,85 (S.D.N.Y.1995); *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 942 F.Supp. 905,916 (S.D.N.Y.1996).

<sup>215</sup> *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62,69 (3d Cir.2000).

<sup>216</sup> *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,832 (E.D.Pa.2001).

<sup>217</sup> *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,389 (2d Cir.2002).

<sup>218</sup> *Sniado v. Bank Austria AG*, 174 F.Supp.2d 159,166 (S.D.N.Y. 2001).

<sup>219</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993); *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080,1085 (D.C.Cir.1998).

<sup>220</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1008,1009,1021 (N.D.Ill.2001); *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071,1077 (S.D.N.Y.1988); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1105 (S.D.N.Y.1984); *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1995 WL 767164,2 (D.D.C.); *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,517,n.20 (S.D.N.Y.1985); *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,882 (W.D.Wis.2000); *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,840 (7th Cir.2003); *Ferromin Intern. Trade v. UCAR Intern., Inc.*, 153 F.Supp.2d 700,705 (E.D.Pa.2001).

stricter under the FTAIA than it was before it.<sup>221</sup> This FTAIA test is classified as a stricter single objective test,<sup>222</sup> whose purpose is to provide a single standard when U.S. antitrust law applies to extraterritorial transactions.<sup>223</sup> The enactment of the FTAIA is considered as beneficial because it simplified the history of the existing body of case law at the time, which was confusing and unsettled.<sup>224</sup> This means that FTAIA clarifies the application of U.S. antitrust law on conduct that produces the requisite effects in the U.S.<sup>225</sup> These effects have to fulfil the requirements of being direct, substantial, and reasonably foreseeable effects on the domestic (i.e. U.S.) market.<sup>226</sup>

In relation to export from the U.S., pre-*Empagran* courts stated that the FTAIA made it clear that under the export prong of the FTAIA only U.S. exporters can be granted jurisdiction of the U.S. courts.<sup>227</sup>

The analysis of pre-*Empagran* cases shows that pre-*Empagran* courts are not uniform in relation to the question whether the FTAIA expands or narrows down the subject matter jurisdiction of the U.S. courts. There exist explanations that the FTAIA expands subject matter jurisdiction, as the FTAIA encompasses not only conduct exhibited outside the United States having effects within the United States, but also conduct exhibited within the United States having effects

<sup>221</sup> *Liamuiga Tours, Div. of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd.*, 617 F.Supp. 920,924 (E.D.N.Y.1995).

<sup>222</sup> *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1105 (S.D.N.Y.1984).

<sup>223</sup> *Filetech S.A. v. France Telecom, S.A.*, 212 F.Supp.2d 183,189 (S.D.N.Y. 2001); *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464,479 (S.D.N.Y.1997); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449,451 (2d Cir.1987).

<sup>224</sup> *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,424 (5th Cir.2001).

<sup>225</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,946 (D.C.Cir.1984); *Ferromin Intern. Trade v. UCAR Intern., Inc.*, 153 F.Supp.2d 700,703 (E.D.Pa.2001).

<sup>226</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1009,1024 (N.D.Ill.2001); *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1995 WL 767164,2 (D.D.C.).

<sup>227</sup> *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,833 (E.D.Pa.2001); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1106,n.5 (S.D.N.Y.1984); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449,456 (2d Cir.1987) (dissenting opinion); *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,884 (W.D.Wis.2000).

both within and outside the United States.<sup>228</sup> In contrast, other pre-*Empagran* courts are of the position that the FTAIA limits subject matter jurisdiction.<sup>229</sup>

Statements in pre-*Empagran* cases about whether the FTAIA amends only Sherman Act and Federal Trade Commission Act, not Clayton Act,<sup>230</sup> or whether the FTAIA, although specifically amending the Sherman Act and the Federal Trade Commission Act, establishes requirements that apply to actions brought under Section 4 of the Clayton Act for violations of the Sherman Act,<sup>231</sup> are not as pertinent to the present thesis.

Therefore, the approach taken by the courts in the *Empagran* litigation whereby they considered themselves to be in a position where they needed to produce a new interpretation of the FTAIA is a natural development of the law.

### **3.1.3 Pre-*Empagran* Interpretation of the FTAIA on the Type of Antitrust Injuries That May Be Litigated Before the U.S. Courts**

This part of pre-*Empagran* case analysis is closely related to the part of the analysis in Chapter 2 where the thesis tried to understand why different courts in the *Empagran* litigation produced different interpretations of the FTAIA on the required type of relationship between anticompetitive effects in the U.S and the litigate (foreign) private antitrust injury.

Pre-*Empagran* courts provided so many different and, to a certain extent, conflicting interpretations of the FTAIA on the required type of relationship between anticompetitive effects and antitrust injury that it is impossible to discern any reasonable connection between these interpretations.

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<sup>228</sup> N.118.

<sup>229</sup> *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,838 (7th Cir.2003); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1021,1022 (N.D.Ill.2001).

<sup>230</sup> *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494,498,n.4 (M.D.N.C.1987).

<sup>231</sup> *Ferromin Intern. Trade v. UCAR Intern., Inc.*, 153 F.Supp.2d 700,703,n.3 (E.D.Pa.2001).

Some pre-*Empagran* courts stated that the plaintiff has to be injured by effects on the U.S market<sup>232</sup> to be granted subject matter jurisdiction of the U.S. courts.

A slightly different interpretation of the FTAIA is where a pre-*Empagran* court precludes subject matter jurisdiction of the U.S. courts over claims by non-U.S. plaintiffs against defendants in a situation where the situs of the injury is overseas (i.e. outside the U.S.) and the injury arises from effects in a non-domestic (i.e. non-U.S.) market.<sup>233</sup> This statement is sometimes explained by claiming that the U.S. courts are not forums for non-U.S. plaintiffs injured abroad by effects felt abroad and not in the U.S. market even if the wrongdoers' conduct produced further anticompetitive effects in the U.S.<sup>234</sup>

A completely different interpretation of the FTAIA is found in pre-*Empagran* cases where the courts required plaintiffs to have suffered actual antitrust injury within the U.S.<sup>235</sup>

A decision radically distinct from the ones just listed above is that it is sufficient to focus on injuries to U.S. commerce that reflect the anticompetitive effects either of the violation or of anticompetitive acts made possible by the violation.<sup>236</sup>

One of the questions raised in Chapter 2 of this thesis is, how is it possible to have so many conflicting interpretations of the FTAIA, as there also exist decisions according to which the FTAIA does not preclude all persons or entities injured abroad from recovering under the Sherman Act.<sup>237</sup> This means that all

<sup>232</sup> *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,887,888 (W.D.Wis.2000); *Ferromin Intern. Trade v. UCAR Intern., Inc.*, 153 F.Supp.2d 700,703,704,706 (E.D.Pa.2001); *Sniado v. Bank Austria AG*, 174 F.Supp.2d 159,166,170 (S.D.N.Y. 2001); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,428 (5th Cir.2001); *In re Vitamins Antitrust Litigation*, 2001 WL 755852,1 (D.D.C.) case (explained by transaction concluded in the U.S. market, p.2).

<sup>233</sup> *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,833 (E.D.Pa.2001).

<sup>234</sup> *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,887 (W.D.Wis.2000).

<sup>235</sup> *S. Megga Telecommunications Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413,9 (D.Del.); *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,841 (7th Cir.2003) (Effects in the U.S. domestic market and if you transaction take place in the U.S. you suffer injury in the U.S.).

<sup>236</sup> *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,394 (2d Cir.2002).

<sup>237</sup> *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F.Supp. 864,868 (S.D.N.Y.1986); *Ferromin Intern. Trade v. UCAR Intern., Inc.*, 153 F.Supp.2d 700,703,706 (E.D.Pa.2001).

purchasers (U.S. and non-U.S.) are protected under the FTAIA if the required effects are present within the U.S., even if some of these purchasers take title abroad or suffer economic injury abroad.<sup>238</sup> This protection that the FTAIA grants to private parties is not merely a passive statement in statute. Pre-*Empagran* courts ruled that the FTAIA does not preclude all persons or entities injured outside the U.S. from recovering under U.S. antitrust laws if the activity complained of has a demonstrable effect on U.S. domestic or import commerce. In this situation, non-U.S. corporations injured outside the U.S. may seek recovery under the Sherman Act.<sup>239</sup> It is important to mention that this protection is granted not merely to non-U.S. entities, but to everyone, regardless of nationality or the situs of the business.<sup>240</sup>

Unfortunately, pre-*Empagran* cases are inconsistent in this part of the interpretation too. One pre-*Empagran* court explained that the FTAIA was enacted for the protection of U.S. consumers and U.S. exporters.<sup>241</sup> Another pre-*Empagran* court granted protection to purchasers irrespective of nationality, but added that the FTAIA did not intend to entitle all non-U.S. consumers to bring Sherman Act claims, but only those who participate in the U.S. market, i.e. at least some aspect of the sales transaction should take place in the U.S.<sup>242</sup>

In searching for pre-*Empagran* decisions on the required type of relationship between anticompetitive effects and antitrust injury, it is interesting to come across pre-*Empagran* courts' own attempts to find guidance on this matter. For example, one pre-*Empagran* court explained that the U.S. courts had had no occasion to address this issue because up to that point in time in each case the plaintiffs' injuries had arisen out of the same effects.<sup>243</sup> This state of the law derives from the understanding of subject matter jurisdiction as valid before the enactment of the FTAIA in the sense that the subject matter jurisdiction of the U.S. courts over anticompetitive conduct that takes place outside the U.S. exists

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<sup>238</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1009 (N.D.Ill.2001); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1106 (S.D.N.Y.1984).

<sup>239</sup> *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1106 (S.D.N.Y.1984).

<sup>240</sup> N.238.

<sup>241</sup> *S. Megga Telecommunications Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413,8 (D.Del.).

<sup>242</sup> N.118.

<sup>243</sup> *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,883 (W.D.Wis.2000).

only where that conduct has intended effects on the U.S. market.<sup>244</sup> Another indication why the search for the correct interpretation of the FTAIA lasted so long may be those pre-*Empagran* cases where judges refused to provide an interpretation of the FTAIA, because they could reach a decision in the litigation before them without answering this question.<sup>245</sup>

There is no need for this chapter<sup>246</sup> to address the conflict in the interpretation of the FTAIA between different circuits that triggered the *Empagran* litigation. The fact that the interpretation of the FTAIA is left entirely to the adjudicating courts can also be seen from the statement of one of the pre-*Empagran* courts that whatever interpretation an adjudicating court adopts, if and when the need arises, it will simply be a matter of choosing sides on an existing issue.<sup>247</sup>

At this stage in development of antitrust law with regard to the proper interpretation of the FTAIA, i.e. with regard to the required type of relationship between anticompetitive effects in the U.S. and the litigated (foreign) private antitrust injury, there is no need to spend more time presenting statements in pre-*Empagran* cases on this issue.

The *Empagran* litigation put an end to this confusing pre-*Empagran* era and marked a fresh new start by providing a proper interpretation of the required type of relationship between anticompetitive effects in the U.S. and the litigated (foreign) private antitrust injury.

### **3.2 Grounds on Which Subject Matter Jurisdiction was Attributed to the U.S. Courts in Pre-*Empagran* Cases**

This thesis introduces a transborder standard in response to the Supreme Court's *Empagran* decision according to which (foreign) antitrust injury can be litigated before the U.S. courts (i.e. a private plaintiff can be granted subject matter

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<sup>244</sup> *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,884 (W.D.Wis.2000).

<sup>245</sup> *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,840 (7th Cir.2003).

<sup>246</sup> This conflict between broad and narrow interpretation of the required type of relationship between antitrust effects in the U.S. and the litigated (foreign) private antitrust injury was described in Chapter 2, subsection 3.1.7.

<sup>247</sup> *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,839,840 (7th Cir.2003).



jurisdiction of the U.S. courts) under that condition that this litigated private antitrust injury is ‘not independent’ from anticompetitive effects in the U.S. The transborder standard is introduced as an approach to help to indentify this required ‘dependency’ connection between anticompetitive effects in the U.S. and the litigated (foreign) private antitrust injury.<sup>248</sup>

In simple words, this thesis tries to elaborate the conditions under which a private plaintiffs can be granted subject matter jurisdiction of the U.S. courts for their (foreign) private antitrust injury.

This thesis cannot merely introduce a transborder standard without taking into consideration the decisions of the U.S. courts on subject matter jurisdiction in the area of antitrust law. The Supreme Court’s *Empagran* decision is submitted to be a new benchmark in the development of antitrust law enforcement within the international context. Therefore, it is important to compare it with the law as elaborated in pre-*Empagran* cases. This comparison is beneficial for two reasons. Firstly, it enables the clear identification of the changes that the Supreme Court introduced into antitrust law enforcement. Secondly, it enables looking for support in the implementation of a transborder standard.

This thesis does not consider it important to provide an explanation of how case law on subject matter jurisdiction has been changing over time. There exists even a pre-*Empagran* decision that presented the chronology of developing approaches to jurisdiction.<sup>249</sup> Arranging changes of case law along a time scale does not provide any explanation of relationship between different tests for subject matter jurisdiction. In addition, a chronological presentation is not a suitable response to the research question that generally understands the grounds on which (foreign) private antitrust injury can be litigated before the U.S. courts.

Therefore, this subsection is divided into four parts according to the grounds on which pre-*Empagran* courts granted the subject matter jurisdiction of the U.S. courts. These grounds are: a.) Anticompetitive effect; b.) Anticompetitive

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<sup>248</sup> See Chapter 5, subsection 3.

<sup>249</sup> *The ‘In’ Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494,497 (M.D.N.C.1987).

intent; c.) Anticompetitive conduct; d.) Signing and Implementation of Anticompetitive agreement.

At the beginning of the analysis of pre-*Empagran* cases on subject matter jurisdiction, it is important to determine the nature of subject matter jurisdiction itself. In the area of antitrust law, law was enacted in a form that the determination of subject matter jurisdiction was left to the U.S. courts.<sup>250</sup> Consequently, the U.S. courts were left on their own in the struggle to find out where to draw the limits of the reach of U.S. antitrust laws.<sup>251</sup> On one end of the spectrum they were considering presumption against extraterritoriality,<sup>252</sup> meaning that legislation (antitrust law included), unless Congress determines contrary intent, applies only within the territorial jurisdiction (i.e. national territorial borders) of the U.S. On the other end of the spectrum there is an intention to stop or deter any conduct that reduces competition within the U.S. market regardless of where this conduct occurs and whether this conduct is also directed at non-U.S. markets.<sup>253</sup>

This means that the U.S. courts were entrusted with immense power to determine the reach of U.S. antitrust laws. Therefore, it comes as no surprise that the history of this body of case law is confusing and unsettled.<sup>254</sup>

As mentioned in Chapter 5,<sup>255</sup> this thesis is a response to practical needs. One aspect of these practical needs is a pretention that litigants and adjudicating courts can use the analysis and solutions elaborated in this thesis in future antitrust litigation. This is why it is worth mentioning that the issue of subject matter jurisdiction is the question that adjudicating courts have to resolve

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<sup>250</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1291 (3d Cir.1979); *Vespa of America Corp. v. Bajaj Auto Ltd.*, 550 F.Supp. 224,228 (N.D.Cal.1982); *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa)*, 518 F.Supp. 270,275 (W.D.Pa.1981).

<sup>251</sup> *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,842 (7th Cir.2003).

<sup>252</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,3 (1st Cir.1997).

<sup>253</sup> *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,393 (2d Cir.2002).

<sup>254</sup> *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,423,424 (5th Cir.2001); *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa)*, 518 F.Supp. 270,275 (W.D.Pa.1981) (mentioning that there exist various tests for subject matter jurisdiction).

<sup>255</sup> See Chapter 5, subsection 3.

first,<sup>256</sup> i.e. before addressing the issue of substantive antitrust law violation.<sup>257</sup> Nevertheless, pre-*Empagran* cases pointed to situations where despite subject matter jurisdiction and violation being separate<sup>258</sup> but not wholly independent issues,<sup>259</sup> in some contexts the final decision on jurisdiction must await clarification on substantive offense<sup>260</sup>.

### 3.2.1 Anticompetitive Effects

There are many pre-*Empagran* cases where the decision on subject matter jurisdiction was determined in relation to anticompetitive effects within the U.S. These cases are based on the understanding that for subject matter jurisdiction, it is not the controlling (i.e. determinative) situs (i.e. place, location) of the defendant's conduct that have to be considered, but the situs where the anticompetitive effects of that conduct are felt.<sup>261</sup> In other words, what is crucial is the situs of the effects and not the situs of the conduct.<sup>262</sup> This means that to adjudicate subject matter jurisdiction, it is irrelevant whether the conduct is in the U.S. or whether the conduct is exhibited by U.S. companies.<sup>263</sup>

<sup>256</sup> *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F.Supp. 221,226 (S.D.N.Y.1975); *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,881 (W.D.Wis.2000); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1460 (N.D.Cal.1983); *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464,472 (S.D.N.Y.1997); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922,929 (2d Cir.1998); *Metro Industries, Inc. v. Sammi Corporation*, 82 F.3d 839,845 (9th Cir.1996).

<sup>257</sup> For a critique of post-*Empagran* courts not always following this procedure see Chapter 3, subsection 4.3.

<sup>258</sup> *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92,113 (C.D.Cal.1971); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922,929 (2d Cir.1998).

<sup>259</sup> *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464,472 (S.D.N.Y.1997); *Metro Industries, Inc. v. Sammi Corporation*, 82 F.3d 839,845 (9th Cir.1996).

<sup>260</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1300 (3d Cir.1979) (concurring decision); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1461 (N.D.Cal.1983).

<sup>261</sup> *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,833 (E.D.Pa.2001); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1005,n.3 (S.D.N.Y.1984); *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,393,394 (2d Cir.2002).

<sup>262</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1009 (N.D.Ill.2001).

<sup>263</sup> N.221.

Unfortunately, this wide array of cases does not provide a consistent answer on the nature and amount of these anticompetitive effects that need to exist for subject matter jurisdiction to be granted.

This means that private litigants might have serious difficulties understanding what pre-*Empagran* courts expected them to allege and prove to get their private antitrust claims heard.

The case law in pre-*Empagran* cases on subject matter jurisdiction has the following wording.

Adjudicating courts require: sufficient negative impact on commerce in the U.S.;<sup>264</sup> harmful effect within the U.S.;<sup>265</sup> anticompetitive effects on U.S. commerce;<sup>266</sup> directly affected competitiveness of domestic (i.e. the U.S.) markets.<sup>267</sup>

Other adjudicating courts found that the element of anticompetitive effects is not sufficient, and also added to it the element of intent. These pre-*Empagran* courts required: intended and some actual effects;<sup>268</sup> meant to produce and did in fact produce some substantial effect in the U.S.;<sup>269</sup> intended and actual effects on U.S. foreign commerce;<sup>270</sup> actual or intended anticompetitive effect on U.S. commerce, either foreign or interstate;<sup>271</sup> intended and actual effects on interstate and foreign commerce;<sup>272</sup> effect on U.S. foreign commerce;<sup>273</sup>

<sup>264</sup> *Metro Industries, Inc. v. Sammi Corporation*, 82 F.3d 839,843 (9th Cir.1996).

<sup>265</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,922 (D.C.Cir.1984).

<sup>266</sup> *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1995 WL 767164,2 (D.D.C.); *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,832 (E.D.Pa.2001).

<sup>267</sup> *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,393 (2d Cir.2002); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

<sup>268</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416,444 (2d Cir.1945); *In re Uranium Antitrust Litigation*, 617 F.2d 1248,1253 (7th Cir.1980).

<sup>269</sup> N.236.

<sup>270</sup> *In re Grand Jury Investigation of the Shipping Industry*, 186 F.Supp. 298,313,314 (D.D.C. 1960).

<sup>271</sup> *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F.Supp. 864,868 (S.D.N.Y.1986); *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F.Supp. 81,85 (S.D.N.Y.1995).

<sup>272</sup> *U.S. v. The Watchmakers of Switzerland Information Center*, 1962 U.S. Dist. LEXIS 5816,140-146 (S.D.N.Y.); *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F.Supp. 221,226 (S.D.N.Y.1975); *In re Grand Jury Investigation of the Shipping Industry*, 186 F.Supp. 298,313 (D.D.C. 1960).

intended and actual effect on eliminating competition (even if only part of commerce is stifled);<sup>274</sup> not necessary that it should inhibit competition in all objects of trade;<sup>275</sup> direct and substantial restraint on the interstate and foreign commerce of the U.S.;<sup>276</sup> intended and actual effects on U.S. imports or exports;<sup>277</sup> intended and substantial effects on U.S. commerce;<sup>278</sup> meant to produce and did produce some substantial effect in the U.S.;<sup>279</sup> that such effects must not be spillover (i.e. that effect on foreign first and then affect the U.S.);<sup>280</sup> intended effects to damage protected economic interests within the U.S. and these effects being reasonably significant.<sup>281</sup>

Pre-*Empagran* cases also provide unclear and confusing law with regard to the extent of anticompetitive effects that have to be present for subject matter jurisdiction to be granted. This was recognized even by some pre-*Empagran* courts in the sense that they pointed out clearly that there exist different formulations of the nature and extent of required effects.<sup>282</sup> The requirements that are present in pre-*Empagran* cases in this regard are the following:

Impact on the U.S. commerce has to be substantial;<sup>283</sup> some substantial;<sup>284</sup> sufficient (i.e. some consequences have to be present in the U.S. even if de minimis);<sup>285</sup> unnecessary to be both substantial and direct as long as it is not de

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<sup>273</sup> *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597,610 (9th Cir.1976).

<sup>274</sup> *U.S. v. Timken Roller Bearing Co.*, 83 F.Supp. 284,307 (N.D.Ohio 1949).

<sup>275</sup> *Associated Press v. U.S.*, 326 U.S. 1,17, 65 S.Ct. 1416, 89 L.Ed. 2013 (1944).

<sup>276</sup> *U.S. v. R. P. Oldham Co.*, 152 F.Supp. 818,833 (N.D.Cal.1957).

<sup>277</sup> N.127.

<sup>278</sup> *In re Vitamins Antitrust Litigation*, 2001 WL 755852,1 (D.D.C.).

<sup>279</sup> *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498,2 (N.D.Cal.).

<sup>280</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1014 (N.D.Ill.2001).

<sup>281</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,923 (D.C.Cir.1984), (used classification of 'substantial').

<sup>282</sup> *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102,1105,n.3 (S.D.N.Y.1984); see also *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597,611 (9th Cir.1976) where the adjudicating court explained that this shows that there is no consensus on how far the U.S. jurisdiction should go.

<sup>283</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1292 (3d Cir.1979); *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,394 (2d Cir.2002); *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,959,963 (D.Mass.1950) (here the commerce embraced goods moving from the U.S. to foreign markets); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,925 (D.C.Cir.1984).

<sup>284</sup> N.279.

<sup>285</sup> *El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F.Supp. 626,629 (S.D.N.Y.1982).

minimis;<sup>286</sup> to be direct and substantial;<sup>287</sup> any demonstrable effect on U.S. commerce is sufficient as it is not de minimis;<sup>288</sup> some effect;<sup>289</sup> some effect on U.S. imports and exports;<sup>290</sup> (reasonably) significant effects;<sup>291</sup> undefined degree of effect on U.S. commerce to satisfy the intended effect test;<sup>292</sup> significant and more than temporary harmful effect on competition;<sup>293</sup> (that) competition should be adversely affected in the U.S.;<sup>294</sup> (that) there must be at least some anticompetitive effects (anticompetitive effects must be shown to outweigh any precompetitive effects);<sup>295</sup> injuries to U.S. commerce that reflect anticompetitive effects of violation or anticompetitive acts made possible by violation;<sup>296</sup> anticompetitive price within the U.S.;<sup>297</sup> impact on the U.S. market<sup>298</sup>.

Some pre-*Empagran* courts went further to provide guidance on how to concretely assess the extent of anticompetitive effects. Even in this aspect of assessment the courts' statements are conflicting. These statements are the following: to assess effects, the characteristics of the market must be considered, and dollar value is not in itself of compelling significance;<sup>299</sup> not the dollar volume but the percentage [relative effects of percentage vary] of the business controlled and the strength of the remaining competition on the market

<sup>286</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1464 (N.D.Cal.1983).

<sup>287</sup> *U.S. v. R. P. Oldham Co.*, 152 F.Supp. 818,822 (N.D.Cal.1957); *U.S. v. General Elec. Co.*, 82 F.Supp. 753,891 (D.N.J.1949).

<sup>288</sup> *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F.Supp. 864,868 (S.D.N.Y.1986).

<sup>289</sup> N.149.

<sup>290</sup> *Liamuiga Tours, Div. of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd.*, 617 F.Supp. 920,923 (E.D.N.Y.1995).

<sup>291</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,923 (D.C.Cir.1984).

<sup>292</sup> *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa)*, 518 F.Supp. 270,275 (W.D.Pa.1981).

<sup>293</sup> N.161.

<sup>294</sup> *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,438 (5th Cir.2001) (dissenting opinion).

<sup>295</sup> *National Bank of Canada v. Interbank Card Ass'n.*, 666 F.2d 6,8 (2d Cir.1981).

<sup>296</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1463 (N.D.Cal.1983); *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,394,395,401 (2d Cir.2002); *National Bank of Canada v. Interbank Card Ass'n.*, 666 F.2d 6,8 (2d Cir.1981).

<sup>297</sup> N.115.

<sup>298</sup> *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499,541 (E.D.Mich.1974).

<sup>299</sup> *U.S. v. Aluminum Co. of America*, 91 F.Supp. 333,345 (S.D.N.Y.1950).

must be considered, as well as whether the effects on the market spring from business requirements or an intention to monopolize;<sup>300</sup> the amount of commerce affected is measured in dollar value;<sup>301</sup> the flow of money into the U.S. is not a decisive element;<sup>302</sup> payment in the U.S. may contribute to the element of effect;<sup>303</sup> affect the balance of payment of the U.S.<sup>304</sup>

The core task of this thesis is to provide guidance on the required type of relationship between anticompetitive effects in the U.S. and the litigated (foreign) antitrust injury. Therefore, the analysis of pre-*Empagran* cases must address the question whether pre-*Empagran* cases provide any insight into how pre-*Empagran* courts interpreted the required type of relationship between anticompetitive effects and the litigated private antitrust injury within the adjudication of subject matter jurisdiction. Pre-*Empagran* cases provide the following statements on the interaction between anticompetitive effects and antitrust injury: there has to be antitrust injury to the market or competition in general, not merely to individuals or individual firms;<sup>305</sup> if the only interests involved are those of the plaintiff, jurisdiction does not exist, as the primary objective of antitrust laws is to preserve competition, and thus ultimately to protect the interests of the U.S. consumers;<sup>306</sup> there was interference with the plaintiff's business where his business was taken over by other competitors;<sup>307</sup> the plaintiff has to show that he was prevented by the defendants from marketing goods in the U.S. to demonstrate an anticompetitive effect on U.S. commerce;<sup>308</sup> jurisdiction does not apply if the elimination of competition is between two foreign corporations, operating entirely in foreign markets.<sup>309</sup>

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<sup>300</sup> *U.S. v. General Elec. Co.*, 80 F.Supp. 989,1010 (S.D.N.Y.1948).

<sup>301</sup> *Lantec, Inc. v. Novell, Inc.*, 146 F.Supp.2d 1140,1146 (D.Utah 2001).

<sup>302</sup> N.285.

<sup>303</sup> *Texas Trading & Mill. Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 2d Cir.1981).

<sup>304</sup> N.167.

<sup>305</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1009 (N.D.Ill.2001); *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071,1078 (S.D.N.Y.1988).

<sup>306</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,924 (D.C.Cir.1984).

<sup>307</sup> *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92,103 (C.D.Cal.1971).

<sup>308</sup> N.173.

<sup>309</sup> N.121.

For the sake of comprehensive analysis, it must be mentioned that there are also pre-*Empagran* rulings on jurisdiction according to which the effect test by itself is incomplete because it fails to consider other nations' interests.<sup>310</sup>

### 3.2.2 Anticompetitive Intent

As mentioned in the subsection above, some pre-*Empagran* courts added the element of intent to the element of anticompetitive effects in order to adjudicate on subject matter jurisdiction.

The analysis of pre-*Empagran* cases shows that anticompetitive intent was not adjudicated merely in connection with anticompetitive effect. There are pre-*Empagran* cases where anticompetitive intent was relied on in the adjudication on its own to establish the existence of subject matter jurisdiction of the U.S. courts. The rulings in pre-*Empagran* cases in this regard are the following: in a domestic context, the existence of intent to produce unlawful results does not classify the act as unlawful or as an attempt, as for this certain parameters of proximity and degree are required;<sup>311</sup> the general intent to affect commerce can be satisfied by the rule that a person is presumed to intend the natural consequences of his actions;<sup>312</sup> intent was inferred from the assignment of exclusive distributorship rights in the U.S.;<sup>313</sup> there may be per se violation in the international context and intent does not need to be shown;<sup>314</sup> intent is treated in the same way whether the intent is to put an end to existing competition or to prevent prospective competition,<sup>315</sup> but this intent is not treated as a specific intent but is classified as an intent to perform the forbidden act, and therefore what is relevant to liability is whether this is criminal or civil;<sup>316</sup> alleged

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<sup>310</sup> *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597,611 (9th Cir.1976).

<sup>311</sup> *Swift & Co. v. U.S.*, 196 U.S. 375, 402 25 S.Ct. 276, 49 L.Ed. 518 (1905).

<sup>312</sup> *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F.Supp. 221,227 (S.D.N.Y.1975).

<sup>313</sup> *Ibid.*

<sup>314</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,7 (1st Cir.1997).

<sup>315</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416,429 (2d Cir.1945).

<sup>316</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416,432 (2d Cir.1945).



conspirators as they have a possibility to prove not having such intent to perform forbidden acts<sup>317</sup>.

### 3.2.3 Anticompetitive Conduct

A full analysis of subject matter jurisdiction requires a mention that at the initial stages of the development of subject matter jurisdiction in the area of the U.S. antitrust law, the determinative role was attributed to anticompetitive conduct in the sense that legality of conduct was determined by the law of the territory where the acts had been performed.<sup>318</sup> This understanding of subject matter jurisdiction leads to the adjudication that even if a conspiracy is in the U.S., but acts in furtherance of this conspiracy are performed outside the U.S. and these acts are lawful where they are performed, then the conspiracy that is formed in the U.S. is also considered lawful.<sup>319</sup>

Since then, pre-*Empagran* case law on the matter has towards adjudicating subject matter jurisdiction on the basis of anticompetitive conduct not necessarily being sufficient.<sup>320</sup> For example, one of the statements in a pre-*Empagran* case is that no relevance is attributed to the fact that some of the conduct occurred in the U.S., but relevance is attributed to economic consequences that gravely impaired significant U.S. interests.<sup>321</sup>

Nevertheless, there are examples in pre-*Empagran* cases where anticompetitive conduct was still given relevance in further stages of the development of case law on subject matter jurisdiction. The statements in pre-*Empagran* cases that support this finding are the following: there is no particular problem with determining subject matter jurisdiction in a situation where the conduct was

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<sup>317</sup> See n.149.

<sup>318</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347,356, 29 S.Ct. 511, 53 L.Ed. 826 (1909); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326,1339 (2d Cir.1972); *Vacuum Oil Co. v. Eagle Oil Co.*, 122 F. 105,122 (C.C.N.J.1903).

<sup>319</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347,359, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

<sup>320</sup> See subsection 3.2.1. of this chapter above.

<sup>321</sup> N.291.

domestic (i.e. within the US),<sup>322</sup> or initiated in the US and then consummate outside the U.S.,<sup>323</sup> or initiated or concluded in the U.S.;<sup>324</sup> the same reasoning can be seen where a foreign company enters the U.S. and becomes a competitive factor within the U.S.;<sup>325</sup> to a certain degree, activities within the U.S. were also considered relevant where the alleged conspirators become parties to a contract, combination and conspiracies within the U.S. and also performed other deliberate acts on their own within the U.S.;<sup>326</sup> relevance of conduct including actions within the U.S. (so that part of the conduct was exhibited outside the U.S.);<sup>327</sup> the fact that part of the conduct was happening in the U.S. was not relevant then, but relevance was attributed to the conduct outside the U.S.,<sup>328</sup> but this statement was overruled by the Court of Appeals in the same case with the statement that transaction under illegal conditions took place within the U.S.;<sup>329</sup> purchases within the U.S. (at least some of them) or coordinated by the U.S. parent for subsidiaries outside the U.S. were sufficient for granting subject matter jurisdiction.<sup>330</sup>

When talking about anticompetitive conduct, it is important to be aware of the distinction that is clearly elaborated in *pre-Empagran* cases between anticompetitive conduct and activities performed in furtherance (i.e.

<sup>322</sup> *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62,75 (3d Cir.2000); *Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811,814,815 (D.C.1983); *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F.Supp. 594,601 (S.D.Cal.1956).

<sup>323</sup> *Branch v. F.T.C.*, 141 F.2d 31,34,35 (7th Cir.1944); *Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement*, 451 F.2d 727,729 (2nd Cir.1971).

<sup>324</sup> *In re Grand Jury Investigation of the Shipping Industry*, 186 F.Supp. 298,314 (D.D.C. 1960).

<sup>325</sup> *U.S. v. Aluminum Co. of America*, 91 F.Supp. 333,392,393,398 (S.D.N.Y.1950); *U.S. v. General Elec. Co.*, 115 F.Supp. 835,878 (D.N.J.1953).

<sup>326</sup> N.115 (it is important to mention that the adjudicating courts also talked about conduct outside the U.S., about the U.S. nationality of these conspirators, and about causing anticompetitive effects within the U.S.).

<sup>327</sup> *Sulmeyer v. Seven-Up Co.*, 411 F.Supp. 635,639 (S.D.N.Y.1976); *Scotch Whiskey Ass'n. v. Barton Distilling Co.*, 489 F.2d 809,812 (7th Cir.1973); *U.S. v. Pacific & A R & Nav Co.*, 228 U.S. 87,105, 33 S.Ct. 443, 57 L.Ed. 742 (1913); *In re Grand Jury Investigation of the Shipping Industry*, 186 F.Supp. 298,314 (D.D.C. 1960); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406,429 (9th Cir.1977); *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215,237 (S.D.N.Y.1952) (adding that trade and commerce were also affected); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,706, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68,74 (2d Cir.1977); *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680,688 (S.D.N.Y.1979) (this listed, along with the parties of U.S. nationality, the affected U.S. nationals).

<sup>328</sup> N.234.

<sup>329</sup> *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,840,841 (7th Cir.2003).

<sup>330</sup> N.136.

implementation) of this conduct. Pre-*Empagran* courts attributed relevance to conduct and not to acts that were considered as the implementation of conduct.<sup>331</sup> In connection with this statement, it is important to bear in mind that some acts, when assessed together, may lead to anticompetitive conduct.<sup>332</sup>

Irrespective of the fact that adjudicating courts may attribute relevance to the element of anticompetitive effects, it is important to bear in mind that in a situation where the adjudicating court attributes importance to conduct, to classify this conduct as relevant it has to be adjudicated as illegal<sup>333</sup> (i.e. anticompetitive).

### **3.2.4 Signing and Implementation of Anticompetitive Agreement**

Why is there a need to analyze pre-*Empagran* cases in terms of the relevance pre-*Empagran* courts attributed to anticompetitive agreements between perpetrators? In connection to this question, another question is raised, namely, why is there a need to establish whether pre-*Empagran* courts attribute any relevance to anticompetitive agreements in adjudication on subject matter jurisdiction?

These two questions arise from the nature of the reasoning by the adjudication courts in the *Empagran* litigation<sup>334</sup> and from the conflicting statements of pre-*Empagran* courts in relation to providing an interpretation of the FTAIA<sup>335</sup> on the relevance of the location where the private plaintiff obtained title on goods received from the perpetrators, and consequently on the location where this private plaintiff suffered private antitrust injury. The most important reason for this analysis derives from the aim of this thesis, i.e. to explain the conditions

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<sup>331</sup> *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,398,399 (2d Cir.2002); *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215,237 (S.D.N.Y.1952) added that the unlawful agreement that was made in the U.S. was also partially consummated in the U.S.; same in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,706, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

<sup>332</sup> See Chapter 7, subsection 3.3.

<sup>333</sup> *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,398 (2d Cir.2002); *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215,237 (S.D.N.Y.1952).

<sup>334</sup> See Chapter 2, subsections 3.1.1. and 3.1.2.

<sup>335</sup> See subsection on the pre-*Empagran* interpretation of the FTAIA above.

under which facts outside the U.S. can be considered as connected with facts within the U.S.<sup>336</sup>

At this stage of the analysis, two precautionary remarks have to be made. Firstly, an anticompetitive agreement between the perpetrators may be a different type of agreement from one concluded between a private party and (some of) the perpetrators.<sup>337</sup> Secondly, a formal agreement does not necessarily constitute an unlawful conspiracy.<sup>338</sup>

The analysis of pre-*Empagran* cases shows that pre-*Empagran* courts paid attention to the type and nature of agreements between perpetrators, and the analysis of these contracts helped courts to adjudicate on the existence of antitrust violation. The analysis of pre-*Empagran* cases shows that even<sup>339</sup> on the issue of anticompetitive agreements, there is inconsistency in case law.

The statements made in pre-*Empagran* cases on anticompetitive agreements in relation to the subject matter jurisdiction of the U.S. courts are the following: contracts were concluded in the U.S. to help an international cartel;<sup>340</sup> a combination was formulated outside the U.S., but put into operation in the U.S.;<sup>341</sup> a cartel agreement was made outside the U.S., but affected trade between the U.S. and non-U.S. countries,<sup>342</sup> so that the place of formulation of the agreement turns out to be immaterial;<sup>343</sup> (some) agreements were entered into outside the U.S., but many of the acts of the defendants in furtherance of the conspiracy took place in the U.S.;<sup>344</sup> contract, combination and conspiracy

<sup>336</sup> See Chapter 5, subsection 2.2.

<sup>337</sup> See subsection 3.2.3. of this chapter above.

<sup>338</sup> *American Tobacco Co. v. U.S.*, 328 U.S. 781,809, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

<sup>339</sup> I.e. the same as on any other issue analysed within subsection 3.2. of this chapter.

<sup>340</sup> *U.S. v. National Lead Co.*, 63 F.Supp. 513,525,531 (S.D.N.Y.1945).

<sup>341</sup> *U.S. v. Pacific & A R & Nav Co.*, 228 U.S. 87,88, 33 S.Ct. 443, 57 L.Ed. 742 (1913); *Thomsen v. Union Castle Mail S.S. Co.*, 166 F. 251,253 (2d Cir.1908); *U.S. v. Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft*, 200 F. 806,807 (S.D.N.Y.1911).

<sup>342</sup> *U.S. v. Timken Roller Bearing Co.*, 83 F.Supp. 284,309 (N.D.Ohio 1949).

<sup>343</sup> *Thomsen v. Union Castle Mail S.S. Co.*, 166 F. 251,253 (2d Cir.1908); *U.S. v. Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft*, 200 F. 806,807 (S.D.N.Y.1911).

<sup>344</sup> *U.S. v. The Watchmakers of Switzerland Information Center*, 1962 U.S. Dist. LEXIS 5816,148,151,153 (S.D.N.Y.); *Alfred Bell & Co. v. Catalda Fine Arts*, 74 F.Supp. 973,977 (D.C.N.Y.1947).

entered into in the U.S. and made effective by acts in the U.S.;<sup>345</sup> agreements were made, planned, entered into, and partly administered in the U.S.;<sup>346</sup> a conspiracy was formed in the U.S. and acts by which this conspiracy was effectuated were performed in the U.S. and outside the U.S.;<sup>347</sup> a conspiracy and the acts in furtherance of it were conceived, carried out and made effective partly in the U.S. and partly outside the U.S.<sup>348</sup>

As mentioned above, one of the reasons for conducting analysis on the issue of anticompetitive agreements in pre-*Empagran* cases is to find out whether the adjudicating analysis indicates an awareness among pre-*Empagran* adjudicating courts of the existence of interconnections between facts outside the U.S. and facts within the U.S. If this analysis of pre-*Empagran* cases demonstrates such awareness among pre-*Empagran* judges, this finding can support the determination of the substance of the transborder standard introduced with this thesis.

The analysis of pre-*Empagran* cases shows that there are statements in pre-*Empagran* case law where the adjudicating courts assessed anticompetitive agreements within wider commercial arrangements among perpetrators. These statements are the following: a contract is seen as part of an entire transaction, along with negotiations and execution, which is why the location where contract is concluded is not a decisive factor on its own;<sup>349</sup> an agreement is not to be viewed as an isolated and independent incident, but it must be considered in the chain of circumstances and conduct of companies involved in the arrangements and dealings;<sup>350</sup> this approach is also present where a contract is formulated and

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<sup>345</sup> *U.S. v. Sisal Sales Corp.*, 274 U.S. 268,276, 47 S.Ct. 592, 71 L.Ed. 1042 (1927); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449,453,n.8 (2d Cir.1987); *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 4,5,7,8 (S.D.N.Y.1975).

<sup>346</sup> *In re Grand Jury Investigation of the Shipping Industry*, 186 F.Supp. 298,313 (D.D.C. 1960), but it is important to state that the adjudicating court on p.311 also attributed importance to potential effects of these agreements on U.S. commerce with foreign nations.

<sup>347</sup> N.188.

<sup>348</sup> *Sanib Corp. v. United Fruit Co.*, 135 F.Supp. 764,766 (S.D.N.Y.1955); *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215,237 (S.D.N.Y.1952).

<sup>349</sup> *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533,546,547, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

<sup>350</sup> *U.S. v. General Elec. Co.*, 82 F.Supp. 753,887 (D.N.J.1949), on p.890 this approach to understanding the nature of the arrangement was mentioned along with conduct and effect within the U.S.

executed outside the U.S. but there exists a presumable intention of the natural consequences of concluding and effectuating this contract that affect U.S.,<sup>351</sup> and in a situation where the contract itself is concluded in the U.S., but there were other activities before and after signing the contract that took place not only in the U.S., but also outside the U.S.<sup>352</sup>

Special attention has to be paid to those statements in pre-*Empagran* cases where the factual nature of commercial arrangements was analyzed by looking behind the form of conduct that visibly existed. This means that pre-*Empagran* courts were aware that they needed to look not at the face of the agreement but at reality.<sup>353</sup> The examples that indicate the intention of pre-*Empagran* courts to assess the real nature of (anticompetitive) commercial arrangements are the following: a contract being signed outside the U.S., not including the U.S., and the name of the U.S. conspirator not being written in the contract does not mean that the U.S. party is not a member of the conspiracy, as the arrangements can produce anticompetitive results in the U.S.;<sup>354</sup> the substance of the contract was agreed with the U.S. conspirator whose name was not on the contract.<sup>355</sup>

### 3.2.5 Nationality of Litigants

The issue of the nationality of antitrust litigants does not have any relevance to the adjudication of subject matter jurisdiction. This position has been valid since the *Empagran* litigation, as neither the adjudicating courts in the *Empagran* litigation<sup>356</sup> nor post-*Empagran* courts<sup>357</sup> made any decision on subject matter jurisdiction that was determined by the nationality of the litigants.

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<sup>351</sup> *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F.Supp. 221,227,229 (S.D.N.Y.1975).

<sup>352</sup> *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494,496 (M.D.N.C.1987).

<sup>353</sup> *U.S. v. General Elec. Co.*, 82 F.Supp. 753,842,845 (D.N.J.1949); *U.S. v. U.S. Alkali Export Ass'n.*, 86 F.Supp. 59,73 (S.D.N.Y.1949).

<sup>354</sup> *U.S. v. General Elec. Co.*, 82 F.Supp. 753,792,793 (D.N.J.1949); *U.S. v. U.S. Alkali Export Ass'n.*, 86 F.Supp. 59,73 (S.D.N.Y.1949).

<sup>355</sup> *U.S. v. General Elec. Co.*, 82 F.Supp. 753,837 (D.N.J.1949); *U.S. v. U.S. Alkali Export Ass'n.*, 86 F.Supp. 59,74 (S.D.N.Y.1949).

<sup>356</sup> See Chapter 2, subsection 3.2.

<sup>357</sup> See Chapter 3, subsection 6.4. and section 7.

Nevertheless, for the sake of a complete analysis on subject matter jurisdiction, it must be established whether the position of pre-*Empagran* courts on the relevance of the nationality of litigants to a decision on subject matter jurisdiction was different.

It seems that the nationality of the litigants played an important part in adjudication on subject matter jurisdiction. This is supported by the following statements in pre-*Empagran* cases: importance has to be attributed to the interests of parties of U.S. nationality;<sup>358</sup> importance has to be attributed to the fact that the defendants were of U.S. nationality;<sup>359</sup> the application of law to U.S. nationals outside the U.S. is not a legislative power, but one of construction;<sup>360</sup> U.S. nationals act within the U.S. and the parties affected are U.S. nationals within the U.S.;<sup>361</sup> the plaintiffs and defendants are U.S. corporations.<sup>362</sup>

Unfortunately, pre-*Empagran* courts were not consistent even on the element of nationality of litigants. These statements contradict the ones listed above: the nationality of the parties is only one factor to consider, not the paramount or controlling factor;<sup>363</sup> jurisdiction is based on the power that a country has over its territory (domestic forum) and consequently can regulate the right of its own (i.e. U.S.) nationals and give right to foreign (i.e. non-U.S.) nationals;<sup>364</sup> it is not the nationality of plaintiffs and defendants that plays a decisive role in granting

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<sup>358</sup> *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804,814,n.31 (D.C.Cir.1968).

<sup>359</sup> *U.S. v. R. P. Oldham Co.*, 152 F.Supp. 818,821 (N.D.Cal.1957); *Scotch Whiskey Ass'n. v. Barton Distilling Co.*, 489 F.2d 809,812 (7th Cir.1973).

<sup>360</sup> *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F.Supp. 594,600 (S.D.Cal.1956).

<sup>361</sup> N.154.

<sup>362</sup> *Sulmeyer v. Seven-Up Co.*, 411 F.Supp. 635,639 (S.D.N.Y.1976), this stated alongside the facts that part of the conduct also took place within the U.S. and that the plaintiff's business in the U.S. was affected along with affected trade and commerce between US and non-US countries; *American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n*, 701 F.2d 408,413 (5th Cir.1983); *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680,688 (S.D.N.Y.1979) case, but it is important to state that relevance was attributed to the nationality as well as the facts that some of the activities were performed in the U.S. and that some of the U.S. nationals were affected by these activities.

<sup>363</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,935 (D.C.Cir.1984), on p.936 explaining the negative consequences of giving predominant importance to nationality, as this encourages chauvinism and discrimination without enhancing international comity.

<sup>364</sup> See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,935,936 (D.C.Cir.1984).

jurisdiction, but the place where the parties in dispute performed their activities<sup>365</sup>.

### 3.3 Comity in Pre-*Empagran* Cases

It is submitted that the element of comity is the most challenging aspect of subject matter jurisdiction to analyze. The statements from pre-*Empagran* cases that follow show that everything in relation to it is confusing. This applies to its substance, nature, legality, and the method of its application. Therefore, it is no surprise that the adjudicating courts in the *Empagran* litigation<sup>366</sup> and post-*Empagran* courts<sup>367</sup> were not of the same opinion on the impact that comity should have on the possibility of (foreign) antitrust injury being litigated before the U.S. courts.

Irrespective of the difficulty that the analysis of comity poses for the researcher, it is still important to be aware of the variety of decisions that pre-*Empagran* courts made in relation to comity. Understanding correctly the element of comity enables this thesis to submit two radically outstanding conclusions on comity. Firstly, there is no place for comity in private antitrust law litigation within the international context.<sup>368</sup> Secondly, the existence of simultaneous private antitrust law litigation before national courts of different countries around the world between the same private litigants in relation to the same antitrust violation requires an approach by national courts that has nothing to do with comity.<sup>369</sup>

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<sup>365</sup> *Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811,814,815 (D.C.1983).

<sup>366</sup> The Supreme Court in the *Empagran* litigation used comity as one of the arguments in support of its decision that independent foreign private antitrust injury cannot be litigated before the U.S. courts (see analysis in Chapter 2).

<sup>367</sup> Post-*Empagran* courts' interpretation of the *Empagran* litigation is that comity was determined throughout the *Empagran* litigation as a reason why foreign antitrust injury cannot be litigated before the U.S. courts (see analysis in Chapter 3).

<sup>368</sup> See analysis in Chapter 2, subsection 3.1.10.

<sup>369</sup> See explanation of the transborder standard in Chapter 5, where it is presented that in a situation where U.S. courts are asked to adjudicate private antitrust litigation in relation to a transborder type of factual situation, they are still required to implement U.S. antitrust laws.



The statements in pre-*Empagran* cases on the legal validity of comity are the following: it is more an aspiration than a fixed rule;<sup>370</sup> it is more a matter of grace than a matter of obligation;<sup>371</sup> it is neither a matter of absolute obligation,<sup>372</sup> nor of mere courtesy and good will upon the other.<sup>373</sup>

The statements in pre-*Empagran* cases that put limitations on the application of comity are the following: the U.S. court is not compelled to apply comity in situations where this would frustrate significant policies of the domestic forum;<sup>374</sup> the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.<sup>375</sup>

The statements in pre-*Empagran* cases that give adjudicating courts absolute power to decide the existence of comity in every single antitrust litigation are the following: neither the Sherman act nor legislative history defines the point where the potential international repercussions of asserting jurisdiction outweigh the impact of a particular foreign conduct (i.e. conduct outside the U.S.) on U.S. commerce, and therefore such determination is left to the courts;<sup>376</sup> the application of the law (i.e. whether to entertain the suit) should not be left to the discretion of the trial judge but must be based on solid legal grounds (i.e. questions of law that fully reviewable on appeal).<sup>377</sup>

The statements in pre-*Empagran* cases that question the suitability of courts to adjudicate the element of comity are the following: the judiciary is the most ill-equipped branch of the U.S. government to do so;<sup>378</sup> there are inherent limitations on the judiciary's ability to adjust national priorities in light of

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<sup>370</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,8 (1st Cir.1997).

<sup>371</sup> N.9.

<sup>372</sup> *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449,451,n.3 (2d Cir.1987).

<sup>373</sup> Ibid.

<sup>374</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,915 (D.C.Cir.1984).

<sup>375</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,916 (D.C.Cir.1984).

<sup>376</sup> *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa)*, 518 F.Supp. 270,275 (W.D.Pa.1981) case; *Vespa of America Corp. v. Bajaj Auto Ltd.*, 550 F.Supp. 224,228 (N.D.Cal.1982).

<sup>377</sup> *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,884,n.7 (5th Cir.1982).

<sup>378</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1465 (N.D.Cal.1983).

directly contradictory foreign policies, and there is little the judiciary may do directly to resolve the conflict;<sup>379</sup> it is a herculean task of accommodating conflicting, mutually inconsistent national regulatory policies while minimizing the amount of interference with the judicial processes of other nations that our courts will permit;<sup>380</sup> discretionary decision not to apply the antitrust laws must be based on solid legal grounds - the question is one of interpreting the scope that Congress intended to give to antitrust laws, i.e. it is a question of law that is fully reviewable on appeal;<sup>381</sup> the conflict of jurisdiction is one generated by the political branches of the governments, so there is simply no room for accommodation, and conflict, if there is any, will be purely between the laws of the two countries, for which neither court is responsible;<sup>382</sup> it is an unsuitable situation when courts are forced to choose between a domestic law [designed to protect domestic interests] and foreign law [which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law];<sup>383</sup> contacts purport to provide a basis for distinguishing between competing bases of jurisdiction - thus crucial to the balancing process - generally incorporate purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing;<sup>384</sup> the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, and therefore such a balancing test is inherently unworkable.<sup>385</sup>

In order to make this thesis of much practical significance to private antitrust law litigation, it is important to explain the stage in antitrust litigation where the element of comity played a role in pre-*Empagran* cases. The statements in pre-*Empagran* cases on this question are the following: international comity factors are part of the threshold jurisdictional decision rather than a separate,

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<sup>379</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,916,949,950 (D.C.Cir.1984).

<sup>380</sup> N.375.

<sup>381</sup> N.377.

<sup>382</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,948 (D.C.Cir.1984).

<sup>383</sup> *Ibid.*

<sup>384</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,949 (D.C.Cir.1984).

<sup>385</sup> *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138,1145 (N.D.Ill.1979).

subsequent matter viewed within an abstention framework;<sup>386</sup> comity is taken into consideration in determining the existence of U.S. jurisdiction in transborder cases;<sup>387</sup> the question of comity do not arise unless subject matter jurisdiction is first established.<sup>388</sup>

These statements reveal that there is no uniform understanding among pre-*Empagran* courts of the stage of antitrust litigation at which the element of comity comes into operation. The distinction between these two views was made explicit in the *Vespa of America* case.<sup>389</sup>

Another problem in pre-*Empagran* case law is the question whether comity still has any role in antitrust litigation within the international context. This question arose after the Supreme Court's *Hartford Fire* decision. In *Hartford Fire*, the Supreme Court assumed the application of the principle of international comity,<sup>390</sup> and stated that jurisdictional rule of reason analysis was applied and in this analysis, the principle of international comity did not bar the exercising of jurisdiction,<sup>391</sup> and stated that the only substantial question in the litigation was whether there was in fact true conflict between U.S. and foreign law.<sup>392</sup> After the Supreme Court concluded that such conflict does not exist,<sup>393</sup> the court decided that there was no need to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity.<sup>394</sup> The fact that the *Hartford Fire* case did not rule out

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<sup>386</sup> *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa)*, 518 F.Supp. 270,275 (W.D.Pa.1981) case; *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 749 F.2d 1378,1382,1383 (9th Cir.1984); *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597,614 (9th Cir.1976).

<sup>387</sup> *Vespa of America Corp. v. Bajaj Auto Ltd.*, 550 F.Supp. 224,227 (N.D.Cal.1982).

<sup>388</sup> *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464,472 (S.D.N.Y.1997); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922,932 (2d Cir.1998); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,797, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) case and also mentioning case that states the opposite; *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 749 F.2d 1378,1384 (9th Cir.1984).

<sup>389</sup> *Vespa of America Corp. v. Bajaj Auto Ltd.*, 550 F.Supp. 224,227,n.1 (N.D.Cal.1982).

<sup>390</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,770, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

<sup>391</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,779, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

<sup>392</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,798, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

<sup>393</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,799, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

<sup>394</sup> *Ibid.*

jurisdictional rule of reason or comity factors in the *Timberlane*<sup>395</sup> case, but there exists an explanation that international comity comes into play only if there exists a true conflict between U.S. antitrust and foreign law is present in *Filetech*<sup>396</sup> case, which means that international comity applies even after the FTAIA.<sup>397</sup>

It was submitted above that comity is not the answer to the emerging possibility that there may be several private antitrust law litigations before the national courts of different countries around the world between the same private litigants and in relation to the same antitrust violation that is of a transborder nature. Nevertheless, it is important to analyze whether pre-*Empagran* courts were aware of the suitability of comity to address commercial arrangements of international dimensions. Few statements can be found in pre-*Empagran* cases where the courts did consider the suitability of comity in this type of factual situations. These statements are the following: 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, the principle of comity should not shield prosecution in a situation where the conspirators exhibit conduct that is illegal under U.S. and foreign law;<sup>398</sup> when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through the satisfaction of mutual expectations;<sup>399</sup> comity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation states;<sup>400</sup>

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<sup>395</sup> *Metro Industries, Inc. v. Sammi Corporation*, 82 F.3d 839,846,n.5 (9th Cir.1996); *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464,475,477 (S.D.N.Y.1997); *Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Products Holdings (North America) Inc.*, 954 F.Supp. 733,737 (S.D.N.Y.1997).

<sup>396</sup> See *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464,478 (S.D.N.Y.1997).

<sup>397</sup> See *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464,479 (S.D.N.Y.1997).

<sup>398</sup> N.370.

<sup>399</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,937 (D.C.Cir.1984).

<sup>400</sup> *Ibid.*

comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations.<sup>401</sup>

These last statements necessarily raise a question about the definition of comity. The statements in pre-*Empagran* cases that attempt to explain the definition of comity are the following: comity is a complex and elusive concept;<sup>402</sup> it is the recognition which one nation allows within its territory of the legislative, executive, or judicial acts of another nation, having due regard both for international duty and convenience, and for the rights of its own citizens or of other persons who are under the protection of its laws;<sup>403</sup> no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce;<sup>404</sup> the degree of deference that a domestic forum must pay to the act of a foreign government is not otherwise binding on the forum.<sup>405</sup>

In relation to the question of the definition of the element of comity, it is important to mention those statements in pre-*Empagran* cases that point to the lack of legal predictability of the adjudication process where courts undertake comity analysis. In a situation where the adjudication process applies the element of comity, the adjudicating court cannot automatically apply substantive U.S. antitrust law, including situations where there is a per se area of antitrust violation.<sup>406</sup> In the application of comity the answer will not be the same in each instance, i.e. the matter cannot be resolved as a unitary one.<sup>407</sup> Comity varies according to the factual circumstances surrounding each claim, therefore the absolute boundaries of the duties it imposes are inherently uncertain.<sup>408</sup>

These statements necessarily raise the question whether there is any place for the interests of private parties in the application of comity. It would seem that

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<sup>401</sup> Ibid.

<sup>402</sup> Ibid.

<sup>403</sup> N.372.

<sup>404</sup> N.399.

<sup>405</sup> Ibid.

<sup>406</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1297 (3d Cir.1979).

<sup>407</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1298 (3d Cir.1979).

<sup>408</sup> N.399.

the interests of private parties do not have any place in the application of comity. This supports the submission of this thesis that there is no place for comity in private antitrust law enforcement within the international context. The statements in pre-*Empagran* cases that can be used in support of this statement are the following: comity is used as grounds to adjudicate that U.S. courts respect the territorial principle and foreign sovereign, and therefore the conduct can be classified as legal under the law of the territory where it is committed (i.e. even if it is committed outside the U.S.);<sup>409</sup> courts evaluate the interests of foreign government;<sup>410</sup> interests in relation to foreign nations (foreign policy, reciprocity, comity, limitations of judicial power);<sup>411</sup> consider the purpose of U.S. antitrust statutes;<sup>412</sup> the legislation and policy of each nation is not likely to be the same - the individual interests and policies of each foreign nation differ and must be balanced against our nation's legitimate interest in regulating anticompetitive activity;<sup>413</sup> consider potential international repercussions of asserting jurisdiction;<sup>414</sup> reactions of other countries;<sup>415</sup> respecting another country's basic laws and policies;<sup>416</sup> judicial process of other nations;<sup>417</sup> and in this relation annoyance, causing a sovereign state embarrassment by reopening matters which have been afforded full and fair process before a non-U.S. court, which would require looking into a non-U.S. court process and internal workings;<sup>418</sup> importance is to be given to significant policies of the U.S. forum;<sup>419</sup> law and public policy of the forum state;<sup>420</sup> national regulatory policies;<sup>421</sup> the public policy of the U.S. is involved, which enjoys an

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<sup>409</sup> See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347,356, 29 S.Ct. 511, 53 L.Ed. 826 (1909); same approach applied also in *Vacuum Oil Co. v. Eagle Oil Co.*, 122 F. 105,122 (C.C.N.J.1903).

<sup>410</sup> *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 738 F.Supp. 1472,1477 (S.D.N.Y.1990).

<sup>411</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1296 (3d Cir.1979).

<sup>412</sup> *Ibid.*

<sup>413</sup> N.407.

<sup>414</sup> N.292.

<sup>415</sup> N.387.

<sup>416</sup> *Ibid.*

<sup>417</sup> N.375.

<sup>418</sup> N.378.

<sup>419</sup> N.374.

<sup>420</sup> *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F.Supp. 81,89 (S.D.N.Y.1995).

<sup>421</sup> N.375.

overriding public interest and violations of which carry penal sanctions;<sup>422</sup> avoid needless tensions with foreign states;<sup>423</sup> the industry in the foreign state is heavily regulated;<sup>424</sup> in the balance of interests of private parties and interests of the U.S. legal system, priority is given to the interests of the U.S. as public interest,<sup>425</sup> and on this basis assessment whether the U.S. interests are such to assert jurisdiction;<sup>426</sup> weighing took place between the U.S. interests to grant the U.S. jurisdiction and negative ramifications if U.S. antitrust law is applied to conduct that took place outside the U.S.;<sup>427</sup> whether the interests and links to the U.S., including the magnitude of the effect on U.S. foreign commerce, are sufficiently strong vis-à-vis those of other nations;<sup>428</sup> weighs the impact of the foreign conduct on U.S. commerce against the potential international repercussions of asserting jurisdiction.<sup>429</sup>

In contrast to the statements just listed that can be used in support of the argument that there is no place for the interests of private parties in the application of comity, there are four examples in pre-*Empagran* cases that may potentially indicate that there is a place for private interests in comity analysis.

The first example is the statement under which a pre-*Empagran* court stated that in this jurisdictional rule of reason,<sup>430</sup> before embarking on an international comity prong, it is interesting to observe that the extent of the required anticompetitive effect in the U.S. should present a cognizable injury to the

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<sup>422</sup> N.181.

<sup>423</sup> N.148.

<sup>424</sup> Ibid.

<sup>425</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1463 (N.D.Cal.1983).

<sup>426</sup> N.286.

<sup>427</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1465 (N.D.Cal.1983); *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597,613 (9th Cir.1976).

<sup>428</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 749 F.2d 1378,1384 (9th Cir.1984).

<sup>429</sup> *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680,687 (S.D.N.Y.1979).

<sup>430</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 749 F.2d 1378,1382,1383,1384 (9th Cir.1984).

plaintiff.<sup>431</sup> A critical assessment of this statement indicates that in a situation of private litigation, adjudicating courts may determine that private antitrust injury exists, but after the application of comity, the courts may decide not to proceed with the private antitrust litigation. This means that this example reiterates the position in pre-*Empagran* cases where the interests of private litigants are of no (or merely of secondary) importance in the application of comity.

The second example is the *National Bank of Canada* case where the foreign plaintiff was granted subject matter jurisdiction despite the effect being present in the U.S. and abroad, despite the private plaintiff suffering foreign injury, and despite the application of comity.<sup>432</sup> This example is interesting because it is in contrast with post-*Empagran* case law.<sup>433</sup> Nevertheless, this case has to be addressed with prudence as there was no adjudication analysis conducted on the type of litigated private antitrust injury and on the type of connection between this litigated private antitrust injury and anticompetitive effects within the U.S.

The third example is the *Pfizer* case, where the Supreme Court used comity as grounds on which to decide that a foreign government who enters the U.S. market as a purchaser of goods or services can bring a private antitrust claim before the U.S. courts.<sup>434</sup> The use of comity to protect the interests of the private plaintiff in this pre-*Empagran* case should be assessed with caution. There are two reasons for this. Firstly, this case was dealing with the issue of defining the nature of the private plaintiff who can bring a private antitrust claim. Therefore, comity was used merely as an argument in support of the final decision on this issue. Secondly, the private plaintiff in this case was a purchaser who purchased and obtained goods within the U.S. market. Therefore, the final decision could be the same irrespective of mentioning the element of comity.

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<sup>431</sup> See *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 749 F.2d 1378,1383 (9th Cir.1984) case; *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597,613 (9th Cir.1976).

<sup>432</sup> *National Bank of Canada v. Interbank Card Ass'n.*, 507 F.Supp. 1113,1120,1121 (S.D.N.Y.1980).

<sup>433</sup> See Chapter 3, subsection 5.3.

<sup>434</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308,319, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).



The fourth example is the *Pacific Seafarers* case where the adjudication court mentioned comity merely in an abstract way, and based the entire adjudication on the argument of the nationality of the parties, stating that interests of non-U.S. parties are insubstantial.<sup>435</sup> This case is difficult to analyze as the adjudicating court did not specify the definition of comity so it is not possible to understand what the court meant when it referred to the element of comity.

As mentioned above, pre-*Empagran* courts considered the element of comity to be part of the jurisdictional rule of reason<sup>436</sup> analysis. The *Fitelech*<sup>437</sup> case, for example, provides a list of cases in which the adjudicating courts used the jurisdictional rule of reason. The factual situations in pre-*Empagran* cases where the jurisdictional rule of reason was applied are the following: a situation where anticompetitive conduct took place in the U.S. and a transaction between the parties (i.e. in furtherance of conduct as understood from the section above) was taking place outside the U.S.;<sup>438</sup> a situation where the U.S. was an important locus, if not the hub, of the defendants' alleged manipulation;<sup>439</sup> a situation where two U.S. companies were considered to be competitors on the market outside the U.S.;<sup>440</sup> the opinion that comity should apply only where foreign law requires conduct that is inconsistent with that mandated by U.S. antitrust law;<sup>441</sup> comity does not shield prosecution where only the U.S. market is targeted;<sup>442</sup> comity is used as additional grounds to decline to exercise jurisdiction where the U.S. national is affected by conduct that was performed by a non-U.S. company and this conduct was limited to the territory outside the U.S. and had no effect within the U.S.;<sup>443</sup> comity was mentioned in a situation but considered as less

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<sup>435</sup> N.358.

<sup>436</sup> *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597,613,614 (9th Cir.1976).

<sup>437</sup> *Filetech S.A.R.L. and Filetech U.S.A. v. France Telecom and France Telecom*, 978 F.Supp. 464,474 (S.D.N.Y.1997).

<sup>438</sup> *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 738 F.Supp. 1472,1477,1478 (S.D.N.Y.1990); *Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement*, 451 F.2d 727,729 (2nd Cir.1971).

<sup>439</sup> *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 738 F.Supp. 1472,1478 (S.D.N.Y.1990).

<sup>440</sup> N.411.

<sup>441</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1301,n.9 (3d Cir.1979) (concurring opinion).

<sup>442</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,12 (1st Cir.1997) (concurring opinion).

<sup>443</sup> *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071,1078,1079 (S.D.N.Y.1988).

compelling where a foreign company exported goods and conducted business in the U.S.;<sup>444</sup> comity cannot be applied to confer exclusive jurisdiction on foreign courts in a situation where the defendants are U.S. nationals and the type of commerce affected is the importation of goods into the U.S.;<sup>445</sup> comity analysis is applied in a situation where foreign companies conducted themselves in a way to affect the market within the U.S.;<sup>446</sup> comity is applied in a situation where a foreign company conducted business in the U.S. and this anticompetitive conduct affected not only the foreign company, but also U.S. consumers and lenders, and the U.S. needed to protect its jurisdiction;<sup>447</sup> comity is applied in a litigation between two U.S. nationals over conduct that took place outside the U.S.;<sup>448</sup> comity analysis was applied in a situation where one U.S. company prevented a foreign company within a foreign market from performing activities.<sup>449</sup>

Apart from the element of comity, there are other factors to take into consideration<sup>450</sup> in performing a jurisdictional rule of reason assessment of subject matter jurisdiction. This thesis deals with private antitrust law enforcement. Therefore, the analysis of jurisdictional rule of reason only requires an answer to the question whether there are any factors among these that may be directly related to private antitrust law enforcement. Such factors do indeed exist, and are the following:

- a.) The availability of remedy abroad and pendency of litigation there;<sup>451</sup>  
access to or recourse in a foreign court provided it has meaningful

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<sup>444</sup> N.148.

<sup>445</sup> *U.S. v. R. P. Oldham Co.*, 152 F.Supp. 818,821 (N.D.Cal.1957).

<sup>446</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,797,798, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

<sup>447</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,938,939,942 (D.C.Cir.1984).

<sup>448</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1464,1465,1469,1470 (N.D.Cal.1983); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 749 F.2d 1378,1383,1384 (9th Cir.1984); *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597,615 (9th Cir.1976).

<sup>449</sup> *National Bank of Canada v. Interbank Card Ass'n.*, 507 F.Supp. 1113,1120 (S.D.N.Y.1980).

<sup>450</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1297 (3d Cir.1979); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1464,1465 (N.D.Cal.1983); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 749 F.2d 1378,1384,1385 (9th Cir.1984).

<sup>451</sup> N.406.

opportunities for the redress of its allegations;<sup>452</sup> injured parties had adequate and fair process before the non-U.S. court and appropriate remedies were available under non-U.S. law;<sup>453</sup>

- b.) Whether the defendant was required to perform illegal acts in either country or been subject to conflicting requirements by both countries;<sup>454</sup>
- c.) Whether the U.S. court can make an order that is effective;<sup>455</sup> or whether the enforcement of (antitrust law) would be expected to achieve compliance;<sup>456</sup>
- d.) Whether an order made by a foreign nation would be acceptable in the U.S.;<sup>457</sup>

These factors may be perceived as an indication that there is some importance attributed to private antitrust law enforcement. Unfortunately, it is not possible to grant support to such an understanding. The problem is that there is no measure that may serve as a guidance, indication, ultima ratio, on the basis of which adjudicating courts will know which factor to give priority to, and there is no final goal these factors are intended to reach, e.g. whether the U.S. should always be determined as a forum, or U.S. nationals should always obtain a remedy, or private antitrust law enforcement should always be available.

The statement in pre-*Empagran* cases that indicate this type of problem are the following: interest balancing in this context is hobbled by two primary problems: 1) substantial limitations - the court's ability to conduct a neutral balancing of the competing interests, 2) interest balancing is unlikely to achieve its goal of promoting international comity;<sup>458</sup> another example where private interests were mentioned as objects of protection that would not be preserved if comity

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<sup>452</sup> N.378.

<sup>453</sup> *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1470 (N.D.Cal.1983).

<sup>454</sup> N.407.

<sup>455</sup> Ibid.

<sup>456</sup> N.428.

<sup>457</sup> N.407.

<sup>458</sup> N.382.

shielded the prosecution before the U.S. courts;<sup>459</sup> in a situation where there is a clear conflict between the U.S. and a non-U.S. country, the proper course is to avoid unnecessary irritants of private antitrust action by declining to exercise the jurisdiction of the U.S. courts;<sup>460</sup> an example where the a U.S. court considered the protection of private interests in determining comity where as regards the issue of comity prohibiting the application of antitrust law to foreign nationals, the court said that an examination is needed of whether the antitrust laws were clearly intended to reach the injury charged in the complaint,<sup>461</sup> and continued that in the case of a positive answer, U.S. courts have to apply the law, otherwise significant U.S. interests would be evaded, but if the effects are not appreciable, then contacts with the U.S. are attenuated, and strong foreign interests exist.<sup>462</sup>

In contrast, there exists a statement in a pre-*Empagran* case that can be understood to be in favour of private antitrust law enforcement, i.e. that comity never obligates a national forum to ignore the rights of its own citizens or of other persons who are under the protection of its laws, so U.S. creditors and consumers are entitled to the protection of U.S. antitrust laws.<sup>463</sup> However, there is also a statement where relevance is attributed only to the right of the residents of the forum (i.e. the U.S.),<sup>464</sup> and the statement that a court may stay a proceeding based on comity and judicial efficiency even if the outcome of the foreign proceeding would not resolve all of the issues pending in the American action.<sup>465</sup>

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<sup>459</sup> N.442.

<sup>460</sup> *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071,1079 (S.D.N.Y.1988).

<sup>461</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,938 (D.C.Cir.1984).

<sup>462</sup> *Ibid.*

<sup>463</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,934 (D.C.Cir.1984).

<sup>464</sup> N.420.

<sup>465</sup> *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F.Supp. 81,90 (S.D.N.Y.1995).

### 3.4 Significance of the Transborder Standard in Relation to the Pre-*Empagran* Understanding of Subject Matter Jurisdiction

The analysis of pre-*Empagran* case law on subject matter jurisdiction provided in the subsections above shows that pre-*Empagran* case law is very contradictory and is therefore difficult to sum up in a consistent and commonly accepted way. The introduction of a transborder standard in this thesis tries to offer an approach to private antitrust litigation in the future where adjudicating courts would not be left on their own without any guidance on how to conduct adjudication analysis to determine subject matter jurisdiction.

Each of the subsections above started with the explanation of the reasons to undertake the analysis and on the position of the *Empagran* courts and post-*Empagran* courts on the issue under analysis. Therefore, there is no need to repeat those findings again.

In relation to the transborder standard, the analysis of pre-*Empagran* cases shows that the *Empagran* litigation is in fact the first example where the Supreme Court opened the door to (foreign) private antitrust injury being litigated before the U.S. courts, despite this injury arising between non-U.S. nationals, out of transactions that were concluded outside the U.S. of goods that were obtained and were to be consumed outside the U.S. The analysis of pre-*Empagran* cases showed that the Supreme Court in the *Empagran* case was the first to rule that (foreign) private antitrust injury can be litigated before the U.S. courts under the condition that it is ‘not independent’ from anticompetitive effect (antitrust injury) within the U.S.

The analysis of pre-*Empagran* cases show that those pre-*Empagran* cases where the U.S. courts adjudicated subject matter jurisdiction by an interpretation of the Sherman Act are of not use in elaborating guidance on the relationship between private antitrust injury and anticompetitive effects. These pre-*Empagran* cases were concerned, apart from some other things, only with anticompetitive effects. No adjudication analysis was conducted in these cases on the conditions for private antitrust injury to be granted subject matter

jurisdiction. At least, there were no pre-*Empagran* decisions based on the Sherman Act where the relationship between private antitrust injury and anticompetitive effects was explained in terms of causation.<sup>466</sup> The Supreme Court's position in the *Empagran* decision and on what this thesis submits as grounds for introducing a transborder standard is that the classification of 'dependency' is related to the nature of 'co-existence' and cannot be properly explained with 'causation'. The only existing pre-*Empagran* cases that can be cited in limited support of this position are the ones listed in the subsection on anticompetitive effects<sup>467</sup> where the adjudicating courts interpreted the antitrust injury suffered by the plaintiff as anticompetitive effects.

More support for transborder standard can be found in those pre-*Empagran* cases<sup>468</sup> that point to the distinction between anticompetitive agreements and acts in furtherance of this agreement. These cases can be used as arguments in support of the important element of the transborder standard, i.e. that the reality of a whole situation has to be assessed, including the full range of facts present within the U.S. and as well as outside the U.S.

The analysis of comity in pre-*Empagran* cases also lends immense support to the transborder standard.<sup>469</sup> This analysis shows that comity was not designed with the purpose of protecting the private interests of litigants, and the eventual application of comity to private antitrust litigation may result in private plaintiffs being deprived of any protection, which would consequently enable potential perpetrators to continue their antitrust violation.

It is also important to point out that there is no pre-*Empagran* case where subject matter jurisdiction was adjudicated by reference to the goals of U.S. antitrust laws and the purpose of private antitrust law enforcement.

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<sup>466</sup> Something that the Second Court of Appeals did in the *Empagran* litigation (see Chapter 2, subsection 3.1.8.) and something that is blindly followed by post-*Empagran* courts (see Chapter 3, subsection 6.2.2.).

<sup>467</sup> See subsection 3.2.1. of this chapter above.

<sup>468</sup> See subsection 3.2.3. of this chapter above.

<sup>469</sup> See subsection 3.3. of this chapter above.

## 4 Private Antitrust Law Enforcement

### 4.1 Reasons for This Section

The analysis of case law on subject matter jurisdiction in pre-*Empagran* cases reveals<sup>470</sup> that subject matter jurisdiction in the area of antitrust law is determined without taking into consideration the nature of the submitted antitrust claim,<sup>471</sup> the goals of U.S. antitrust law, and the purpose of private antitrust law enforcement.

Every single chapter in this thesis tries to emphasize that to understand the existing law, it is not sufficient to look merely at factual situations and decisions made by adjudicating courts. The crucial part of the analysis is to understand why a factual situation is exactly how it is, why the litigants said or did something, why the litigants and the courts delivered particular statements, and why the adjudicating courts reached a particular type of decision.

Applying this critical analysis to understand the reasoning behind the decisions of the U.S. courts on subject matter jurisdiction causes a vacuum in understanding. Therefore, this thesis submits that in private antitrust litigation, subject matter jurisdiction must be adjudicated in connection with the purpose of private antitrust law enforcement.

Therefore, it is important to understand whether pre-*Empagran* courts attributed to the elements of private antitrust law enforcement a nature different than these elements have when they are adjudicated in private antitrust litigation where the factual situation is limited entirely to the national territory of the U.S.

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<sup>470</sup> See section 3 of this chapter above.

<sup>471</sup> A different position is taken by the Supreme Court in the *Empagran* litigation. For this position and its critique, see the analysis in Chapter 2, subsection 3.1.7.3.

## 4.2 Elements of Private Antitrust Law Enforcement

### Addressed in Pre-*Empagran* Cases dealing with the Subject Matter Jurisdiction of the U.S. Courts

#### 4.2.1 Aims of Antitrust Law Enforcement

Pre-*Empagran* cases provide explanations on by whom and how the goals of U.S. antitrust laws and, consequently, of antitrust law enforcement were determined. The statement in pre-*Empagran* cases that provide such explanations are the following: the U.S. Congress made an economic judgement in enacting Sherman<sup>472</sup> (in the long run competition is a more effective stimulus for production and a more trustworthy regulator of prices than even an enlightened combination<sup>473</sup>) and it is not for U.S. courts to question the validity of this economic judgment;<sup>474</sup> the motives for passing the act were not only economic but also social, and moral,<sup>475</sup> e.g. the organization of industry in small units;<sup>476</sup> the same applies to the U.S. Congress enacting the law including elements of policy, and continues that law is its own measure of right and wrong and the judgments of courts cannot be set up against it;<sup>477</sup> courts do not have the function of supervising such legislation from the standpoint of wisdom or policy;<sup>478</sup> if any exceptions are to be written into the Sherman Act, they must come from Congress and not the courts;<sup>479</sup> if economic consequences warrant the relaxation of the scope of enforcement of antitrust law, it is a policy matter

<sup>472</sup> *U.S. v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199,206, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968).

<sup>473</sup> *U.S. v. National Lead Co.*, 63 F.Supp. 513,525 (S.D.N.Y.1945).

<sup>474</sup> N.472.

<sup>475</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416,427 (2d Cir.1945); *U.S. v. National Lead Co.*, 63 F.Supp. 513,531 (S.D.N.Y.1945).

<sup>476</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416,428,429 (2d Cir.1945); *U.S. v. National Lead Co.*, 63 F.Supp. 513,531 (S.D.N.Y.1945) (in the long run, it frees business from private regimentation and secures it against those who would trammel it).

<sup>477</sup> *Thomsen v. Cayser*, 243 U.S. 66,85, 37 Sup.Ct. 353, 61 L.Ed. 597, Ann. Cas. 1917D, 322 (1914).

<sup>478</sup> *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533,562, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

<sup>479</sup> *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533,561, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).



committed to congressional or executive resolution<sup>480</sup> - this is not in the province of the courts, whose function is to apply existing law;<sup>481</sup> the U.S. Congress, in enacting the U.S. antitrust law, did not intend to violate international law;<sup>482</sup> an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.<sup>483</sup>

The statements just listed generally point to the conclusion that the U.S. Congress was the one who clearly determined the substance of U.S. antitrust law and, consequently, all the U.S. courts have to do is to apply (enforce) it. Unfortunately, this is not the case. In reality, there were U.S. courts that determined the real substance of U.S. antitrust laws. The way they did this was by attributing relevance to the spirit and intent of a statute even if the substance of such adjudication was not in literal terms of a statute.<sup>484</sup> Another pre-*Empagran* court stated that the broad, general language of the federal antitrust laws and their un-illuminating legislative history confer a special interpretive responsibility upon the judiciary.<sup>485</sup> Other statements in pre-*Empagran* cases that point to the active role of the U.S. courts in determining the substance of U.S. antitrust laws include the following: it is a mistake to assume that courts are never called upon to make similar choices, i.e. to appraise and balance the value of opposed interests and to enforce their preference;<sup>486</sup> the U.S. Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case;<sup>487</sup> antitrust laws give the federal enforcement agencies a relatively blank check, so the development of antitrust law has been largely shaped by the cases that the executive branch chooses - or does not choose - to bring;<sup>488</sup> changing economic conditions, as well as different political agendas, mean that antitrust policies may change from

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<sup>480</sup> *U.S. v. Singer Mfg. Co.*, 374 U.S. 174,195, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963).

<sup>481</sup> *Ibid.*

<sup>482</sup> N.128.

<sup>483</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,9 (1st Cir.1997) (dissenting opinion).

<sup>484</sup> N.52.

<sup>485</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,9 (1st Cir.1997) (concurring opinion).

<sup>486</sup> *U.S. v. Associated Press*, 52 F.Supp. 362,370 (S.D.N.Y.1943).

<sup>487</sup> *Ibid.*

<sup>488</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,9,10 (1st Cir.1997) (concurring opinion).

administration to administration;<sup>489</sup> while courts speak of determining congressional intent when interpreting statutes, the meaning of the antitrust laws has emerged through the relationship between all three branches of government.<sup>490</sup>

At this point, it is necessary to move from the question of by whom and how the goals of U.S. antitrust are determined to the question of what the goals of U.S. antitrust law are and, consequently, what private litigants are expected to prove in order to obtain compensation for suffered antitrust injury.

Statements in pre-*Empagran* cases that provide an answer to this question are the following: antitrust action is a form of tort action;<sup>491</sup> the plaintiff must allege harm to competition, not just harm to itself as a plaintiff,<sup>492</sup> because any other rule would raise a spectre of antitrust remedy being used as a remedy for any tortuous conduct during the course of competition;<sup>493</sup> antitrust laws do not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce;<sup>494</sup> a plaintiff who alleges unfair competition or other business tort must prove injury to competition;<sup>495</sup> the U.S. courts are extremely reluctant to allow an antitrust claim for treble damages that rests solely on allegations of business tort;<sup>496</sup> the statute must not be read to encourage all who suffer injury to business or property through an alleged business tort to bring suit under sections 1 or 2 of the Sherman Act;<sup>497</sup> antitrust laws are not simply high-powered versions of the laws relating to breach of contract, to be used whenever one is possessed of a particularly passionate grievance growing out of a business relationship;<sup>498</sup> the cause of action cannot be bottomed on contract

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<sup>489</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,10 (1st Cir.1997) (concurring opinion).

<sup>490</sup> *Ibid.*

<sup>491</sup> *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229,1236 (6th Cir.1981).

<sup>492</sup> *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1995 WL 767164,2,n.2 (D.D.C.).

<sup>493</sup> *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1995 WL 767164,2,n.2 (D.D.C.); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1463 (N.D.Cal.1983).

<sup>494</sup> *Ibid.*

<sup>495</sup> *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342,1350 (5th Cir.1980).

<sup>496</sup> *Ibid.*

<sup>497</sup> *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342,1358 (5th Cir.1980).

<sup>498</sup> *Ibid.*

but there have to be allegations of violations of antitrust laws;<sup>499</sup> the interests at state in the enforcement of antitrust laws are interests of the parties and of the U.S. public;<sup>500</sup> antitrust does not deal only with private rights but also with public interest;<sup>501</sup> public policy is embodied in antitrust laws<sup>502</sup> in the sense that the Sherman Act is the U.S. charter of economic liberty and national policy against monopolies,<sup>503</sup> and an act of preservation of economic freedom and the U.S. free-enterprise system.<sup>504</sup> All these statements can be summarized by saying that U.S. antitrust laws have the aims to bulwark the national economy and insist that individual interests give way to the benefit of all.<sup>505</sup>

More detailed statements in pre-*Empagran* cases on what actually constitutes the protection of competition (market) as opposed to the protection of individual antitrust injury include the following: there has to be a connection between the injury and the aims of the antitrust laws;<sup>506</sup> business enterprises are required to compete actively, but not unfairly, with each other;<sup>507</sup> the purpose of antitrust laws is not to protect business from the workings of the market but to protect the public from the failures of the market;<sup>508</sup> law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself;<sup>509</sup> antitrust law does not solicitude for private concerns but out of concern for the public interest;<sup>510</sup> antitrust acts

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<sup>499</sup> *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499 (E.D.Mich.1974).

<sup>500</sup> *Hunt v. Mobil Oil Corp.*, 444 F.Supp. 68,71 (S.D.N.Y.1977).

<sup>501</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1293 (3d Cir.1979); public interest (i.e. the Sherman Act being the U.S. charter of economic liberty and national policy against monopolies) also paid an important role also in *Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811,817 (D.C.1983); the cornerstones of the U.S. nation's economic policies are the preservation of economic freedom and the U.S. free-enterprise system In re Uranium Antitrust Litigation, 480 F.Supp. 1138,1154 (N.D.Ill.1979).

<sup>502</sup> N.429.

<sup>503</sup> *Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811,817 (D.C.1983).

<sup>504</sup> *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138,1154 (N.D.Ill.1979).

<sup>505</sup> *U.S. v. Timken Roller Bearing Co.*, 83 F.Supp. 284,310 (N.D.Ohio 1949).

<sup>506</sup> *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229,1235 (6th Cir.1981).

<sup>507</sup> *U.S. v. Aluminum Co. of America*, 91 F.Supp. 333,415 (S.D.N.Y.1950).

<sup>508</sup> *Lantec, Inc. v. Novell, Inc.*, 146 F.Supp.2d 1140,1149 (D.Utah 2001).

<sup>509</sup> *Ibid.*

<sup>510</sup> *Lantec, Inc. v. Novell, Inc.*, 146 F.Supp.2d 1140,1149 (D.Utah 2001); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,1293 (3d Cir.1979).

do not purport to formulate a code of business morality;<sup>511</sup> antitrust laws are not tablets of stone for the conduct of business generally, but are directed at one aspect of business life and one only, i.e. the preservation of free competition;<sup>512</sup> foster competition in our domestic market and promote competition;<sup>513</sup> defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete;<sup>514</sup> the primary purpose of U.S. antitrust laws is to ensure customers the benefit of price competition, and to protect the economic freedom of the participants in the relevant market.<sup>515</sup>

Some of the pre-*Empagran* cases that had to adjudicate subject matter jurisdiction paid some attention to the purpose of private antitrust law enforcement. They stated in this regard that: the purpose of section 4 of the Clayton Act is to deter violators, deprive them of the fruits of their illegality, and compensate the victims of antitrust violations for their injuries;<sup>516</sup> deterrence is one of the congressional intents;<sup>517</sup> private action is a major component in the enforcement mechanism;<sup>518</sup> the treble damage aspect of private recoveries is the centrepiece of that enforcement mechanism;<sup>519</sup> treble damages are incentives for those who suffer antitrust injury<sup>520</sup> and disincentive to would-be violators;<sup>521</sup> the U.S. Congress specifically intended to encourage civil antitrust actions by allowing private litigants to gain certain estoppel advantages from government antitrust actions;<sup>522</sup> self-interest normally motivates private parties who suffer antitrust injury to vindicate the public

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<sup>511</sup> *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499,544 (E.D.Mich.1974).

<sup>512</sup> Ibid.

<sup>513</sup> N.253.

<sup>514</sup> *Swift & Co. v. U.S.*, 196 U.S. 375, 400 25 S.Ct. 276, 49 L.Ed. 518 (1905); *Swift & Co. v. U.S.*, 308 F.2d 849,853 (7th Cir.1962).

<sup>515</sup> *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498,3 (N.D.Cal.).

<sup>516</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308,314,315, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

<sup>517</sup> *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,518 (S.D.N.Y.1985).

<sup>518</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,945 (D.C.Cir.1984).

<sup>519</sup> Ibid.

<sup>520</sup> N.517.

<sup>521</sup> Ibid.

<sup>522</sup> N.504.

interest;<sup>523</sup> individuals have the role of private attorney generals;<sup>524</sup> litigating issues in which there is a public as well as a private interest<sup>525</sup>.

All the statements presented up to this point on the goals of U.S. antitrust law, on the aims and extent of antitrust law enforcement, and on the nature and goals of private antitrust law enforcement were produced in pre-*Empagran* cases where adjudicating courts had to deliver judgments on subject matter jurisdiction. These statements show that none of the statements was influenced by a factual situation under adjudication that had some international elements. This is particularly interesting to discover because the Supreme Court in its *Empagran* decision explicitly rejected<sup>526</sup> the goals of private antitrust law enforcement to be relevant to making a decision on subject matter jurisdiction for (foreign) private antitrust injury to be litigated before the U.S. courts.

In addition to the statements above that merely repeated the law<sup>527</sup> that is commonly applied in private antitrust law enforcement in factual situations that are entirely of a U.S. nature, there are a few statements in pre-*Empagran* cases that are delivered in relation to the particularities of the international context. These statements are the following: the primary purpose of U.S. antitrust laws is the protection of U.S. (foreign and domestic) commerce;<sup>528</sup> the suppression of competition in international trade is in and of itself public injury;<sup>529</sup> the strong public policy embodied in antitrust laws would be undermined if extraterritorial jurisdiction was denied;<sup>530</sup> extraterritorial application to both criminal and civil cases is based on the same language in the same section of the same statute<sup>531</sup> -

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<sup>523</sup> N.517.

<sup>524</sup> Ibid.

<sup>525</sup> *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499,520 (E.D.Mich.1974).

<sup>526</sup> See Chapter 2, subsection 3.1.9.

<sup>527</sup> Compare Herbert Hovenkamp, "Antitrust's Protected Classes," *Michigan Law Review* 88 (1989) with William Breit and Kenneth G. Elzinga, "Private Antitrust Enforcement: The New Learning," *Journal of Law and Economics* 28, no. 2 (1985); Stephen Calkins, "Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System," *Georgetown Law Journal* 74 (1986); William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix," *Columbia Business Law Review* 2007, no. 1 (2007).

<sup>528</sup> N.515.

<sup>529</sup> N.428.

<sup>530</sup> N.429.

<sup>531</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,4,6 (1st Cir.1997).

that courts should interpret uniformly the same language in the same section of the same statute is suggested by common sense,<sup>532</sup> but it is not necessary to rely on common sense alone as identical words or terms used in different parts of the same act are intended to have the same meaning;<sup>533</sup> questions of general policy with regard respect to foreign sovereign are beyond the remit of the judicial branch, which lacks any explicit legislative authority.<sup>534</sup>

### **4.2.2 Subject and Object of Antitrust Law Protection**

Pre-*Empagran* cases provide rather diverse and inconsistent statements with regard to what U.S. antitrust laws protect and who is entitled to this protection. Therefore, statements from pre-*Empagran* cases will be divided here according to their content.

#### **4.2.2.1 Extent of Protection**

To what extent can adjudicating court's decisions address antitrust violation? In other words, at what stage of the alleged antitrust violation can potential affected private parties bring their private antitrust suit before the U.S. courts?

Pre-*Empagran* cases provide quite a clear answer to these questions. According to the case law on this matter, the U.S. courts grant protection not only when antitrust violation produces anticompetitive consequences, but already when there is evidence that these anticompetitive consequences will arise. The statements in pre-*Empagran* cases in support of this position are the following: U.S. antitrust laws target dangerous probability and completed result;<sup>535</sup> it makes no difference whether existing competition is put an end to, or whether prospective competition is preserved;<sup>536</sup> the statute does not condemn forms of

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<sup>532</sup> *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1,4 (1st Cir.1997).

<sup>533</sup> *Ibid.*

<sup>534</sup> *International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553,572 (C.D.Cal.1979).

<sup>535</sup> *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n. of North America*, 274 U.S. 37,54, 47 S.Ct. 522, 71 L.Ed. 916, 54 L.Ed. 791 (1927).

<sup>536</sup> N.315.

combination or particular means, but results to be achieved;<sup>537</sup> the Sherman Act enjoins restraint of trade and the means through which restraint is accomplished;<sup>538</sup> the Sherman Act makes illegal only those contracts or combinations which constitute unreasonable or undue restraints of trade.<sup>539</sup>

#### 4.2.2.2 Approach in Providing Protection

One of the challenges that the transborder standard has to address is the question of methods to detect facts that may then serve as grounds for the analysis of whether the factual situation is of a transborder nature. In practical terms, the dilemma is whether to search for the relevant facts on the basis of activity by the perpetrators, or on the basis of those who were affected by the activity of the perpetrators.

The analysis of this issue shows that pre-*Empagran* cases do not provide consistent answers. Therefore, on the one hand, there are statements in pre-*Empagran* cases that dictate that the focus should be on the perpetrators' conduct. These statements are the following: in assessing the nature of conduct, the focus is on the defendants' conduct rather than the plaintiff's function, e.g. whether we can talk about import trade or commerce;<sup>540</sup> whether the defendants' conduct is such that plaintiffs' products cannot enter the U.S. and thus cause anticompetitive effects within the U.S.<sup>541</sup> or injury to the plaintiffs<sup>542</sup>. In contrast, pre-*Empagran* cases also point to the approach that the focus of analysis should start from the affected plaintiffs' perspective. The statements in pre-*Empagran* cases that support this view are the following: importance is given

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<sup>537</sup> N.338.

<sup>538</sup> *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n. of North America*, 274 U.S. 37,53, 47 S.Ct. 522, 71 L.Ed. 916, 54 L.Ed. 791 (1927).

<sup>539</sup> *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F.Supp. 221,227 (S.D.N.Y.1975); *U.S. v. Aluminum Co. of America*, 148 F.2d 416,427 (2d Cir.1945).

<sup>540</sup> *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62,71 (3d Cir.2000).

<sup>541</sup> *Papst Motoren GmbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F.Supp. 864,868 (S.D.N.Y.1986); *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F.Supp. 81,85 (S.D.N.Y.1995).

<sup>542</sup> *Kruman v. Christie's Intern. PLC*, 284 F.3d 384,398 (2d Cir.2002).

to the nature of the commerce in which the plaintiffs are involved, e.g. engaged in foreign - export - commerce,<sup>543</sup> or are contracting heavy lift barge services.<sup>544</sup>

An issue that may be useful to mention at this point with the purpose of helping to overpass this conflict is the issue of relevant market. In other words, the approach used by pre-*Empagran* courts to determine the (global) relevant market cannot be ignored<sup>545</sup>.

#### 4.2.2.3 Competition as Object of Protection

Determining competition from the perspective of a transborder standard is a rather challenging task. Irrespective of whether the analysis on competition is addressed from the position of subject matter jurisdiction,<sup>546</sup> or from the position of private antitrust law enforcement,<sup>547</sup> it seems that pre-*Empagran* courts understand competition as the one that is present in the U.S. market (i.e. within the national territory of the U.S.). In addition, the analysis of pre-*Empagran* cases on the matter of subject matter jurisdiction<sup>548</sup> mentioned pre-*Empagran* case law under which the U.S. courts refrain from regulating competition (i.e. competitive conditions) in non-U.S. markets. In contrast, from the position of the transborder standard, the relevant market to assess and consequently to protect competition encompasses not merely the national territory of the U.S., but also the national territories of other non-U.S. countries. This means that from the transborder standard perspective, the U.S. courts would be entrusted with the protection of competition on the wider (global) market. Consequently, the nature of competition on this wider (global) market may determine the nature of competition within the U.S. Therefore, commercial arrangements that may be assessed as illegal because they affect competition within the U.S. can turn out to be legal (i.e. not affecting competition) if considered within the wider (global) context.

<sup>543</sup> *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804,813 (D.C.Cir.1968).

<sup>544</sup> *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,428 (5th Cir.2001).

<sup>545</sup> For the analysis of how pre-*Empagran* courts determined the relevant market in the international context, see Chapter 7, subsection 3.4.

<sup>546</sup> See subsection 3.2.1. of this chapter above.

<sup>547</sup> This is the focus of this subsection.

<sup>548</sup> See subsection 3.2.1. of this chapter above.



Statements in pre-*Empagran* cases that can be used in support of the position that the U.S. courts in general do protect competition are the following: antitrust laws are enacted for the protection of competition, not competitors;<sup>549</sup> the primary objective of antitrust laws is to preserve competition;<sup>550</sup> the violation of antitrust legislation is an offense against public policy and necessarily harmful to a substantial public interest, so there is no requirement to present proof of specific damage or harm to any competitor;<sup>551</sup> the maintaining of competition in our commerce, not the protection of buyers or sellers as such, so that if a restraint sufficiently impacts our commerce, this restraint is covered by the Sherman Act regardless of the nationality of the persons or markets hit;<sup>552</sup> the plaintiff failed to present evidence demonstrating any detrimental effect upon competition outside the U.S.;<sup>553</sup> the suppression of competition in international trade is in and of itself a public injury;<sup>554</sup> an antitrust plaintiff must allege harm to competition, not just harm to itself as a plaintiff<sup>555</sup> - the reason for this is that otherwise, raise the spectre of an antitrust action being used as a remedy for any tortuous conduct during the course of competition does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce;<sup>556</sup> civil antitrust action is allowed only to those who have suffered some diminution of their ability to compete, meaning that a private plaintiff must allege and prove that illegal restraint injured his competitive position in the business in which he is or was engaged;<sup>557</sup> the plaintiff is required to prove antitrust injury to the market or to competition in general, not merely injury to individuals or individual firms;<sup>558</sup> purpose of protecting the public interest in free

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<sup>549</sup> *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1995 WL 767164,2 (D.D.C.); *El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F.Supp. 626,633 (S.D.N.Y.1982); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1020 (N.D.Ill.2001); *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499 (E.D.Mich.1974).

<sup>550</sup> N.306.

<sup>551</sup> *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215,225 (S.D.N.Y.1952).

<sup>552</sup> *Industria Siciliana Asfalti v. Exxon Research and Engineering, Co.*, 1977 WL 1353,12 (S.D.N.Y.).

<sup>553</sup> *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1995 WL 767164,2 (D.D.C.).

<sup>554</sup> N.551.

<sup>555</sup> N.492.

<sup>556</sup> See cases cited in this regard in n.492.

<sup>557</sup> *Long Island Lighting Co. v. Standard Oil Co. of California*, 390 F.Supp. 1172,1176,1177 (S.D.N.Y.1975).

competition;<sup>559</sup> injury to the individual entrepreneur's competitive position is of concern only inasmuch as it is indicative of a concomitant public injury;<sup>560</sup> the primary objective of antitrust laws is to preserve competition, and thus ultimately protect the interests of American consumers;<sup>561</sup> it is required to demonstrate that inability for its goods to enter the U.S. market caused by the defendants resulted in the existence of anticompetitive effects on U.S. commerce.<sup>562</sup>

#### 4.2.2.4 Competitors as Subjects of Protection

Is the protection of competition the same as the protection of competitors? In other words, why is it not sufficient to only determine 'competition' as the object of protection of U.S. antitrust law? This question may seem to be of theoretical relevance only. If the analysis is applied to factual situations in which all the relevant facts are limited exclusively to the national territory of the U.S., there is not much difference between the protection of 'competition' and the protection of 'competitors'. In contrast, in protecting 'competitors' within the international context, in particular where the U.S. courts protect competitors of U.S. nationality, 'competition' and 'competitors' become two completely separate and distinct objects of protection.

The analysis of pre-*Empagran* cases shows that the protection of 'competitors' in reality has nothing to do with competition itself, but primarily with protecting U.S. companies in the international market. The statements in pre-*Empagran* cases that serve as grounds for this critique are the following: the concern of the antitrust laws is the protection of American consumers and American exporters, not foreign consumers or producers;<sup>563</sup> a U.S. firm denying another U.S. firm access in supplying service in international trade;<sup>564</sup> one U.S. firm affecting the

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<sup>558</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1020 (N.D.Ill.2001).

<sup>559</sup> *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 499,541,n.149 (E.D.Mich.1974).

<sup>560</sup> *Ibid.*

<sup>561</sup> N.306.

<sup>562</sup> See n.173.

<sup>563</sup> N.553.

<sup>564</sup> *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804,811 (D.C.Cir.1968).

business of its U.S. competitors;<sup>565</sup> a non-U.S. firm hindered from entering a foreign market by U.S. and non-U.S. firms;<sup>566</sup> eliminating a U.S. competitor from a non-U.S. market;<sup>567</sup> the competitive position of the U.S. company providing services to U.S. and non-U.S. consumers in non-U.S. markets is affected by other U.S. (and non-U.S.) companies;<sup>568</sup> U.S. firms are affected in competing in non-U.S. markets by other U.S. firms who are part of a U.S. export cartel;<sup>569</sup> it is the interests of parties and the interest of the U.S. public<sup>570</sup> that are at stake in the enforcement of antitrust laws.

#### 4.2.2.5 Consumers as Subjects of Protection

*Pre-Empagran* cases do provide sufficient grounds to argue that consumers (of U.S. nationality?) constitute a separate category of persons protected under U.S. antitrust laws. Unfortunately, these *pre-Empagran* cases do not provide any basis on which to assess whether consumers do have advantage in protection compared to competitors or competition.

This means that *pre-Empagran* cases merely provide grounds for establishing that consumers do get protection even in factual situations that have international elements. The statements in *pre-Empagran* cases that can be used in support of this finding are the following: the reduction of competition does not invoke the Sherman Act until it harms consumer welfare;<sup>571</sup> the concern of antitrust laws is the protection of American consumers and American exporters, not foreign consumers or producers;<sup>572</sup> the ruling that the concern of antitrust laws is the protection of American consumers and American exporters, not

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<sup>565</sup> *Branch v. F.T.C.*, 141 F.2d 31,35 (7th Cir.1944); *Vacuum Oil Co. v. Eagle Oil Co. of New York*, 154 F. 867,874 (C.C.N.J.1907).

<sup>566</sup> *National Bank of Canada v. Interbank Card Ass'n.*, 507 F.Supp. 1113,1122,1123 (S.D.N.Y.1980) (adjudicating court engaged into rule of reason analysis with this regard).

<sup>567</sup> *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,707, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

<sup>568</sup> *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680,688 (S.D.N.Y.1979).

<sup>569</sup> N.186.

<sup>570</sup> N.492.

<sup>571</sup> N.145.

<sup>572</sup> *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1995 WL 767164,2 (D.D.C.); *S. Megga Telecommunications Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413,8 (D.Del.).

foreign consumers or producers, is not strictly accurate, as the critical question is not the nationality of the plaintiff but the location of the marketplace in which he participated;<sup>573</sup> the U.S. Congress did not intend to make the treble-damages remedy available only to consumers in our own country;<sup>574</sup> the requirement that actual injury to the plaintiff is within the U.S.;<sup>575</sup> the primary purpose of antitrust laws is to protect American consumers (and American foreign and American domestic commerce);<sup>576</sup> not to preclude all persons or entities injured abroad from recovering under United States antitrust laws<sup>577</sup> - “main significance” of the FTAIA - concern of the antitrust laws protection of American consumers and American exporters, not foreign consumers or producer;<sup>578</sup> the finances of the plaintiffs’ American parent companies are protected;<sup>579</sup> the finances of the plaintiffs’ American parent companies are not protected, as transactions between foreign firms do not fall within the scope of American antitrust laws merely because the foreign firms are American-owned;<sup>580</sup> the principal purpose of antitrust laws is the protection of American consumers (and American export and investment opportunities);<sup>581</sup> the application of antitrust laws would directly benefit American consumers;<sup>582</sup> antitrust action is primarily an effort to satisfy its creditors, who ultimately bear the brunt of the injury allegedly inflicted upon the plaintiff, whose principal creditors are Americans;<sup>583</sup> antitrust injury to the plaintiff ultimately harms U.S. consumers who suffered antitrust injury<sup>584</sup> (here the U.S. consumers were in the U.S.); the consumers that are affected are U.S. consumers (and others) who used services provided by the plaintiff outside the U.S.<sup>585</sup> (here the U.S.

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<sup>573</sup> *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702,716 (D.Md.2001).

<sup>574</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308,313, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

<sup>575</sup> N.198.

<sup>576</sup> *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,517 (S.D.N.Y.1985).

<sup>577</sup> N.262.

<sup>578</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1023 (N.D.Ill.2001).

<sup>579</sup> N.63.

<sup>580</sup> *Sniado v. Bank Austria AG*, 174 F.Supp.2d 159,170 (S.D.N.Y. 2001).

<sup>581</sup> *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864,869 (10th Cir.1981).

<sup>582</sup> N.306.

<sup>583</sup> *Ibid.*

<sup>584</sup> *See Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080,1087 (D.C.Cir.1998).

<sup>585</sup> N.568.

consumers were outside the U.S.); the primary objective of antitrust laws is to preserve competition, and thus ultimately protect the interests of American consumers;<sup>586</sup> the public are the ‘purchasers or consumers’ whom the combination will deprive ‘of the advantages which they derive from free competition’;<sup>587</sup> in addition to the protection of American consumers’ and creditors’ interests, the U.S. has a substantial interest in regulating the conduct of businesses within the U.S.;<sup>588</sup> foreign governments have civil suits in federal courts,<sup>589</sup> whether a foreign nation is entitled to sue for treble depends on whether it is a ‘person’;<sup>590</sup> a foreign corporation is entitled to sue<sup>591</sup> on the same basis as a U.S. corporation or individual,<sup>592</sup> and to the same extent as any other person injured by antitrust violation;<sup>593</sup> the U.S. Congress’ foremost concern in passing the antitrust laws being the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations;<sup>594</sup> treble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.<sup>595</sup>

#### 4.2.2.6 The U.S. Exporter as a Subject of Protection

In the sections above it is presented that pre-*Empagran* courts gave protection to competition,<sup>596</sup> to competitors,<sup>597</sup> and to consumers<sup>598</sup> These objects and subjects of protection are categories that the U.S. antitrust laws protect also in

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<sup>586</sup> N.306.

<sup>587</sup> *U.S. v. Associated Press*, 52 F.Supp. 362,369 (S.D.N.Y.1943).

<sup>588</sup> N.306.

<sup>589</sup> *Pfizer, Inc. v. Government of India*, 550 F.2d 396,397 (8th Cir.1976); *Pfizer, Inc. v. Government of India*, 434 U.S. 308,318, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

<sup>590</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308,312, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

<sup>591</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308,313, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978); *In re Antibiotic Antitrust Actions*, 333 F.Supp. 315,316 (S.D.N.Y. 1971).

<sup>592</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308,318, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

<sup>593</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308,319, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

<sup>594</sup> *Pfizer, Inc. v. Government of India*, 434 U.S. 308,314, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

<sup>595</sup> Ibid.

<sup>596</sup> See subsection 4.2.2.3. of this chapter above.

<sup>597</sup> See subsection 4.2.2.4. of this chapter above.

<sup>598</sup> See subsection 4.2.2.5. of this chapter above.

those factual situations that are limited purely to the national territorial borders of the U.S.<sup>599</sup> Therefore, the question that arises is why the U.S. exporter is considered as a separate category of protected persons? Cannot the U.S. exporter be protected under the category of competitor or consumer? One of the arguments against this derives from the wording of the FTAIA that regulates the category of exporters separately.<sup>600</sup> This argument can be considered as purely technical and without real value. This thesis submits that in a situation where the U.S. courts would be required to assess the factual situation under adjudication in its integrity, i.e. to look at all the fact irrespective of the country where they are located or come from, then the situation of the U.S. exporter could be assessed only from the position of him being one of the competitors on the global market. Until this change in approach happens, the perception of the U.S. courts that U.S. exporters constitute a separate category of persons protected under U.S. antitrust law is nothing more than an expression of the U.S. to protect its own interests (nationals) within a wider international context.

The statements that can be found in pre-*Empagran* cases that classify the U.S. exporter as a separate person of protection are the following: in addressing the issue of export, aid is given to encourage U.S. manufacturers to extend U.S. foreign trade,<sup>601</sup> and to enable smaller producers and manufacturers in this country to form cooperative selling agencies in order to compete effectively with large foreign units abroad,<sup>602</sup> and not to extend exclusively the internal trade of a non-U.S. country;<sup>603</sup> the export of capital is not export trade,<sup>604</sup> the reasoning behind this being that a U.S. firm must be given power to form joint export associations in order to compete with foreign cartels, but in such a way should not injure substantially U.S. interests,<sup>605</sup> i.e. Americans should not be

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<sup>599</sup> See Chapter 2, n.46.

<sup>600</sup> See subsection 3.1. of this chapter above..

<sup>601</sup> *U.S. v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199,206, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968); *Daishowa Intern. v. North Coast Export Co.*, 1982 WL 1850,3 (N.D.Cal.); *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,963,964 (D.Mass.1950).

<sup>602</sup> *U.S. v. U.S. Alkali Export Ass'n.*, 86 F.Supp. 59,70 (S.D.N.Y.1949).

<sup>603</sup> *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,963,964 (D.Mass.1950).

<sup>604</sup> *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,963 (D.Mass.1950).

<sup>605</sup> N.472.

deprived of the main benefit of competition among U.S. firms;<sup>606</sup> export associations cannot engage in restraint of trade within the U.S. or in restraint of export trade of any U.S. competitor;<sup>607</sup> additional limitations should not be added to the export of companies forming export associations by, for example, limiting export to particular territories or particular firms to whom they are allowed to export,<sup>608</sup> or U.S. firms facing burdens in withdrawing from participating in export association;<sup>609</sup> there is a distinction between whether arrangements benefit exporters or do not affect export<sup>610</sup> – what is relevant is that export is not affected;<sup>611</sup> it is irrelevant that producers (exporters) thus offer benefits to non-U.S. countries;<sup>612</sup> it is irrelevant if non-U.S. countries are deprived of the benefits of competition among the U.S. firms who are allowed to form a U.S. export association;<sup>613</sup> it does not grant rights to U.S. firms to join other (non)-U.S. firms in establishing and financing production in non-U.S. countries<sup>614</sup>.

Some pre-*Empagran* courts, in formulating their decision on the issue on protection of U.S. export, applied their reasoning to the international perspective. By doing so, they stated the following: the entire emphasis was upon furthering competition between domestic and foreign concerns and not the elimination thereof;<sup>615</sup> no right is given to export associations to engage on a world-wide scale in practices antithetical to the American philosophy of free

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<sup>606</sup> N.112.

<sup>607</sup> *Daishowa Intern. v. North Coast Export Co.*, 1982 WL 1850,3 (N.D.Cal.); *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947 (D.Mass.1950); *U.S. v. U.S. Alkali Export Ass'n.*, 86 F.Supp. 59,67 (S.D.N.Y.1949).

<sup>608</sup> *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,965 (D.Mass.1950).

<sup>609</sup> *Ibid.*

<sup>610</sup> *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498,524 31 S.Ct. 279, 55 L.Ed. 310 (1911).

<sup>611</sup> *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498,527 31 S.Ct. 279, 55 L.Ed. 310 (1911); *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,959,963 (D.Mass.1950); *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215,242 (S.D.N.Y.1952).

<sup>612</sup> *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498,527 31 S.Ct. 279, 55 L.Ed. 310 (1911).

<sup>613</sup> N.472.

<sup>614</sup> *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,963 (D.Mass.1950) see also p.963 (“...even though there is an economic or political barrier which entirely precludes American exports to a foreign country a combination of dominant American manufacturers to establish joint factories for the sole purpose of serving the internal commerce of that country is a per se violation..”).

<sup>615</sup> *U.S. v. U.S. Alkali Export Ass'n.*, 86 F.Supp. 59,69 (S.D.N.Y.1949).

competition,<sup>616</sup> so members of a U.S. cartel taking part in the cartelisation of world, assigning international quotas and fixing prices in territories other than the U.S. cannot be protected under U.S. antitrust law;<sup>617</sup> U.S. businesses are not allowed to participate in international cartels.<sup>618</sup>

Some other pre-*Empagran* courts formulated their decision on the issue of the protection of U.S. export while adjudicating private antitrust litigation. In this litigation, the question was, who is allowed to rely on affected U.S. export trade. In delivering their decision on subject matter jurisdiction, pre-*Empagran* courts stated that: only U.S. exporters are entitled to rely on affected U.S. export<sup>619</sup> and only for export business in the U.S.;<sup>620</sup> actual injury to the plaintiff within the U.S. is required;<sup>621</sup> class of injured U.S. exporters;<sup>622</sup> a non-U.S. company cannot ‘piggy-back’ on injury to a U.S. exporter to demonstrate the requirement of injury within the U.S.<sup>623</sup>

#### 4.2.2.7 Flow of Commerce as Object of Protection

Some pre-*Empagran* courts gave protection to the flow of commerce itself, regardless of any connection to competition, competitors, or consumers. The examples are the following: affecting the flow of commerce into or out of the United States is within the scope of the Sherman Act;<sup>624</sup> with regard to the first part (i.e. goods into the U.S.), it is important that the issue under adjudication was the competition between two U.S. importers to obtain a source of supply in

<sup>616</sup> *Daishowa Intern. v. North Coast Export Co.*, 1982 WL 1850 (N.D.Cal.); *U.S. v. U.S. Alkali Export Ass’n.*, 86 F.Supp. 59,70 (S.D.N.Y.1949).

<sup>617</sup> *U.S. v. U.S. Alkali Export Ass’n.*, 86 F.Supp. 59,66,70 (S.D.N.Y.1949); *U.S. v. Imperial Chemical Industries*, 105 F.Supp. 215,242 (S.D.N.Y.1952).

<sup>618</sup> *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593,599, 71 S.Ct. 971, 95 L.Ed. 1199 (1951).

<sup>619</sup> *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,833 (E.D.Pa.2001); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1019 (N.D.Ill.2001).

<sup>620</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1019 (N.D.Ill.2001); *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,884 (W.D.Wis.2000).

<sup>621</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1019 (N.D.Ill.2001); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,426 (5th Cir.2001).

<sup>622</sup> *The ‘In’ Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494,499,n.5,500 (M.D.N.C.1987).

<sup>623</sup> *United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F.Supp.2d 1003,1019 (N.D.Ill.2001); *The ‘In’ Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494,500 (M.D.N.C.1987).

<sup>624</sup> N.150.



non-U.S. territory affecting the foreign commerce of the U.S.<sup>625</sup> (the same question was not raised in a case where the question only addressed importation and sale of products within the U.S.<sup>626</sup>), but with regard to the second part (i.e. goods leave the U.S.) it is same as follows, i.e. that affected flow of commerce of products out of the U.S.<sup>627</sup>

From a private antitrust law enforcement perspective, such an approach is considered problematic, as foreigners who could not obtain the same goods from a particular seller but only from another may bring a case before the U.S. courts irrespective of competition being affected outside the U.S. and irrespective of the possibility that there is nothing wrong in the U.S.

#### 4.2.2.8 Nation as Object of Protection

In private antitrust litigation where the factual situation is such that every element is limited to the national territorial borders of the U.S., it is difficult to imagine that the reasoning of the adjudicating court would be guided by the protection of the U.S. as a country (i.e. nation). However, the analysis of pre-*Empagran* cases shows that the U.S. adjudicating courts considered the interests of the U.S., or U.S. policies, as objects of protection on their own.

The statements in pre-*Empagran* cases that support this finding are the following: a strong U.S. industry is vital for national security and for the peacetime welfare of the general public;<sup>628</sup> antitrust laws do not protect foreign markets from anticompetitive effects,<sup>629</sup> and do not regulate the competitive conditions of other nations' economies;<sup>630</sup> there is protection of the U.S. trade;<sup>631</sup> if a U.S. company denies another U.S. company services at the international level, this affects the general benefit of the U.S. industry,<sup>632</sup> i.e. the economy of

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<sup>625</sup> Ibid.

<sup>626</sup> N.445.

<sup>627</sup> N.121.

<sup>628</sup> *U.S. v. Aluminum Co. of America*, 91 F.Supp. 333,416 (S.D.N.Y.1950).

<sup>629</sup> N.573.

<sup>630</sup> *Turicentro, S.A. v. American Airlines, Inc.*, 152 F.Supp.2d 829,831,834 (E.D.Pa.2001).

<sup>631</sup> *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,,517,n.20 (S.D.N.Y.1985).

<sup>632</sup> N.564.

the U.S.,<sup>633</sup> or public interests in protecting the trade aspirations of U.S. citizens,<sup>634</sup> or U.S. foreign policy;<sup>635</sup> protection of the U.S. interests,<sup>636</sup> that are sometimes explained as protection of U.S. consumers, U.S. export and investment opportunities,<sup>637</sup> or protection of the U.S. consumers, creditors' interests, the interest of regulating the conduct of businesses in the U.S.,<sup>638</sup> or it is left unexplained what the protected general interests are;<sup>639</sup> but U.S. finance is not give protection if arrangements between the U.S. (and non-U.S.) firms restrict U.S. commerce;<sup>640</sup> encouraging U.S. capital to be invested in non-U.S. countries;<sup>641</sup> it is not accepted that free foreign commerce must be scarified in order to foster the export of American dollars for investment in foreign factories which sell abroad;<sup>642</sup> the protection of the selfish national interests of the U.S.,<sup>643</sup> protection of interests of the U.S. public,<sup>644</sup> or public interests;<sup>645</sup> the protection of U.S. economic interests;<sup>646</sup> the protection of the U.S. commerce;<sup>647</sup> the protection of U.S. economic welfare;<sup>648</sup> the protection of U.S. firms that due to political and economic barriers cannot export from the U.S. to particular non-U.S. market,<sup>649</sup> or cannot do so due to legal, financial and governmental

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<sup>633</sup> N.543.

<sup>634</sup> Ibid.

<sup>635</sup> *International Ass'n of Machinists and Aerospace Workers, (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354 (9th Cir.1981).

<sup>636</sup> *U.S. v. Associated Press*, 52 F.Supp. 362,347 (S.D.N.Y.1943).

<sup>637</sup> N.581.

<sup>638</sup> N.306.

<sup>639</sup> N.310.

<sup>640</sup> *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,962 (D.Mass.1950).

<sup>641</sup> *U.S. v. General Elec. Co.*, 115 F.Supp. 835,875 (D.N.J.1953).

<sup>642</sup> N.618.

<sup>643</sup> N.294.

<sup>644</sup> *U.S. v. General Elec. Co.*, 82 F.Supp. 753,847 (D.N.J.1949); *Hunt v. Mobil Oil Corp.*, 444 F.Supp. 68,71 (S.D.N.Y.1977) case, this was stated along with the U.S. antitrust law protection of the interest of parties before the U.S. court.

<sup>645</sup> N.551.

<sup>646</sup> N.291.

<sup>647</sup> *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498,3 (N.D.Cal.), but it is important to explain that this purpose of U.S. antitrust law was stated alongside the purpose of consumers benefitting price competition and the purpose of protecting the economic freedom of participants in the relevant market.

<sup>648</sup> *U.S. v. Timken Roller Bearing Co.*, 83 F.Supp. 284,318 (N.D.Ohio 1949).

<sup>649</sup> *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,958 (D.Mass.1950).

policies,<sup>650</sup> tariffs, trade barriers, empire or domestic preferences, and various forms of parochialism.<sup>651</sup>

### 4.2.3 Antitrust Injury

In the section<sup>652</sup> above it was presented that antitrust injury did not have any relevance to determining the subject matter jurisdiction of the U.S. courts in pre-*Empagran* cases. This is despite the fact that in some of the pre-*Empagran* cases the plaintiffs were private parties who suffered antitrust injury.<sup>653</sup>

Therefore, it is interesting to analyze whether pre-*Empagran* courts took into consideration that the compensation of private antitrust injury in purely domestic context might have a different nature and meaning than compensating foreign antitrust injury.

The statements in pre-*Empagran* cases on the issue of antitrust injury are the following: the violation of the Sherman Act does not depend on the existence of an injury to a private plaintiff;<sup>654</sup> a private party is protected if is adversely affected by the anticompetitive aspect of the defendant's conduct,<sup>655</sup> meaning that it is not enough for a private plaintiff to show injury causally linked to an illegal presence in the market,<sup>656</sup> but the private plaintiff must prove the existence of antitrust injury, i.e. injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful;<sup>657</sup> the injury must result from the type of harm the antitrust laws were intended to prevent;<sup>658</sup> an injury, although causally related to an antitrust violation, does not qualify as "antitrust injury" unless it is attributable to an

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<sup>650</sup> *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593,604,605,606,607, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) (dissenting opinion).

<sup>651</sup> *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593,607 71 S.Ct. 971, 95 L.Ed. 1199 (1951) (dissenting opinion).

<sup>652</sup> See subsection 3.2.1. of this chapter above.

<sup>653</sup> See section 2 of this chapter above.

<sup>654</sup> N.245.

<sup>655</sup> *Lantec, Inc. v. Novell, Inc.*, 146 F.Supp.2d 1140,1153 (D.Utah 2001).

<sup>656</sup> *Ibid.*

<sup>657</sup> *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864,867 (10th Cir.1981).

<sup>658</sup> *Ibid.*

anti-competitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition;<sup>659</sup> for injury to be compensable it has to be of the type the antitrust laws were intended to prevent; i.e. has to flow from that which makes defendants' acts unlawful; the injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation;<sup>660</sup> courts need to assess whether the injury flows from that which makes defendants' acts unlawful;<sup>661</sup> an allegation of mere monetary injury is not enough to state a Sherman Act claim: a Sherman Act plaintiff must show injury to a market or to competition in general, not merely injury to individuals;<sup>662</sup> the plaintiff must establish antitrust injury, i.e. that the conduct at issue actually caused injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged;<sup>663</sup> the plaintiff cannot maintain action for the compensation of antitrust injury on behalf of the general public or the average American consumer,<sup>664</sup> as it is necessary that the action should be brought and maintained by a specific plaintiff, with the result that proximate cause must be established to connect the alleged prohibited conduct of the defendants to the specific injury allegedly suffered by the plaintiff.<sup>665</sup>

All these statements listed above raise two types of concerns if analyzed from the perspective of the transborder standard. The first concern is related to the connection between antitrust injury and competition. This is because in the international context, competition may have wider implications on the U.S. market.<sup>666</sup> The second concern is related to the fact that antitrust injury can be suffered by a private party outside the U.S., irrespective of whether they ever conducted business within the U.S. Pre-*Empagran* cases do not provide any answers to these two concerns.

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<sup>659</sup> N.655.

<sup>660</sup> *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,888 (5th Cir.1982).

<sup>661</sup> *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,889 (5th Cir.1982).

<sup>662</sup> *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071,1078 (S.D.N.Y.1988).

<sup>663</sup> N.144.

<sup>664</sup> *International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553,574 (C.D.Cal.1979).

<sup>665</sup> Ibid.

<sup>666</sup> See subsection 4.2.2.3. of this chapter above.

## 4.2.4 Antitrust Standing and Directness

Antitrust standing was introduced into private antitrust law enforcement and its substance determined exclusively by the U.S. courts.<sup>667</sup> The analysis of standing reveals that the U.S. courts apply standing inconsistently.<sup>668</sup> Consequently, one of the major criticisms of antitrust standing is that the U.S. courts introduced the requirement of antitrust standing into the system of private antitrust law enforcement in a way that restricts the kinds of private parties who can claim protection and obtain compensation for their suffered private antitrust injuries<sup>669</sup>.

The reason why this section addressed the antitrust standing requirement is the Supreme Court's adjudication of antitrust standing in the *Empagran* decision. In its *Empagran* decision, the Supreme Court adjudicated that a private plaintiff who suffers antitrust injury outside the U.S. does have standing despite the fact that the same anticompetitive conduct causes antitrust injury also to a private plaintiff within the U.S.<sup>670</sup>

Therefore, it is important to analyze what was the position of pre-*Empagran* courts on the element of antitrust standing. The statements in pre-*Empagran* cases are the following: for standing, a party has to show elements in addition to the one that is sufficient for deciding subject matter jurisdiction, so if a party cannot establish jurisdiction, it cannot establish standing either;<sup>671</sup> without subject matter jurisdiction, courts are without power to entertain the plaintiffs' claim as they lack standing;<sup>672</sup> it focuses on the party seeking to get his complaint before a federal court and not on the issue the party wishes to have

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<sup>667</sup> See Chapter 2, n.113.

<sup>668</sup> Ibid.

<sup>669</sup> See William H. Page, "The Scope of Liability for Antitrust Violations," *Stanford Law Review* 37 (1985); Joseph Bauer, "The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing," *University of Pittsburg Law Review* 62 (2001); Elizabeth T. Lear, "Federalism, Forum Shopping, and the Foreign Injury Paradox," *William and Mary Law Review* 51, no. 1 (2009); Charles A. Sullivan, "Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action," *Seton Hall Law Review* 14 (1983).

<sup>670</sup> See Chapter 2, subsection 3.1.4.

<sup>671</sup> See *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,888 (W.D.Wis.2000).

<sup>672</sup> *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,431 (5th Cir.2001).

adjudicated;<sup>673</sup> Section 4 of the Clayton Act does not list the requirements of standing,<sup>674</sup> so standing imposes limitations on suing for antitrust injuries, and the Supreme Court left it to the lower courts to formulate those limitations;<sup>675</sup> standing is a judicially created doctrine designed to foreclose recovery to some plaintiffs who, although within the literal terms of section 4 of the Clayton Act, have suffered injuries;<sup>676</sup> the factors determining standing are such that some of them favour the plaintiff but others do not;<sup>677</sup> the line between plaintiffs with standing and those who lack it may not be perfectly clear in every case;<sup>678</sup> the elaboration of standing is not always consistent;<sup>679</sup> a court's refusal to adopt a bright line rule requires that the standing determination be made on a case-by-case basis,<sup>680</sup> so no single factor is dispositive in the determination of standing; it was not the U.S. Congress' intent to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages, so courts introduced considerations that may limit the availability of remedies to private plaintiff;<sup>681</sup> the defendants did not argue that the plaintiff lacks standing, so the court does not need to address the question;<sup>682</sup> the question of standing cannot be ignored even if the defendants do not raise it;<sup>683</sup> competitors or consumers in the relevant market have standing,<sup>684</sup> or those who do business or are in competition with defendants;<sup>685</sup> to qualify for standing, a competitor or consumer has to be in the U.S. market;<sup>686</sup> the application of existing standing tests<sup>687</sup>; existing standing tests, including proximate causation,

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<sup>673</sup> *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229,1234 (6th Cir.1981).

<sup>674</sup> *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,885 (5th Cir.1982).

<sup>675</sup> N.657.

<sup>676</sup> N.674.

<sup>677</sup> *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702,771 (D.Md.2001).

<sup>678</sup> *Long Island Lighting Co. v. Standard Oil Co. of California*, 521 F.2d 1269,1274 (2d Cir.1975).

<sup>679</sup> *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,886,n.9 (5th Cir.1982).

<sup>680</sup> *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,514,516,n.19 (S.D.N.Y.1985).

<sup>681</sup> *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,514 (S.D.N.Y.1985).

<sup>682</sup> N.234.

<sup>683</sup> N.671.

<sup>684</sup> *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62,76 (3d Cir.2000).

<sup>685</sup> *Sulmeyer v. Seven-Up Co.*, 411 F.Supp. 635,639,n.6 (S.D.N.Y.1976).

<sup>686</sup> N.200.

<sup>687</sup> See e.g. *Long Island Lighting Co. v. Standard Oil Co. of California*, 390 F.Supp. 1172,1176,1177 (S.D.N.Y.1975); *Long Island Lighting Co. v. Standard Oil Co. of California*, 521 F.2d 1269,1273,1274 (2d Cir.1975); *Lantec, Inc. v. Novell, Inc.*, 146 F.Supp.2d 1140,1153

are too limiting for plaintiffs at their pleading stage;<sup>688</sup> instead, it compels the court to focus on the type of injury pleaded and its relationship to the alleged anticompetitive conduct;<sup>689</sup> the pleading of antitrust injury is an essential component of standing;<sup>690</sup> antitrust injury and standing are related but analytically distinct aspects of the problem of determining when a person is sufficiently injured;<sup>691</sup> in a situation where the injury to the plaintiff is distinct, different, or where there are different levels of harmed individuals, there is no risk of double recovery, so there is no limitation to standing within this context;<sup>692</sup> as there is no risk of duplicate recovery in the case at bar, it remains to be seen if the injury is too remote,<sup>693</sup> and remoteness is analyzed in the same way as proximate cause.<sup>694</sup>

In contrast to the other issues analyzed in the subsections above, pre-*Empagran* courts did consider the application of antitrust standing in the international context. The statements that can be found in pre-*Empagran* cases in this regard are the following: whether the plaintiff has standing depends on whether the U.S. Congress, in enacting the Sherman Act, intended to protect the kind of interest asserted by the plaintiff;<sup>695</sup> foreign corporations, as plaintiffs, are ‘persons’ within the meaning of the statute, and thus are entitled to sue for antitrust injury;<sup>696</sup> only persons or corporations injured while trading within U.S. foreign or domestic commerce have the standing necessary to bring such claims;<sup>697</sup> the issue was whether the foreign plaintiff can have standing, as he

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(D.Utah 2001); *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n.*, 574 F.Supp. 1453,1467,1468,1469 (N.D.Cal.1983); *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342,1362 (5th Cir.1980); *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,823,824 (E.D.N.Y.1980); *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10,22 (S.D.N.Y.1975).

<sup>688</sup> *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229,1233,1235 (6th Cir.1981).

<sup>689</sup> N.506.

<sup>690</sup> *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229,1234 (6th Cir.1981); *Lantec, Inc. v. Novell, Inc.*, 146 F.Supp.2d 1140,1153 (D.Utah 2001); *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875,888 (W.D.Wis.2000); *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836,842 (7th Cir.2003).

<sup>691</sup> See *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229,1234,n.1 (6th Cir.1981).

<sup>692</sup> N.661.

<sup>693</sup> *Ibid.*

<sup>694</sup> *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,515,n.15,17,18 (S.D.N.Y.1985).

<sup>695</sup> N.515.

<sup>696</sup> *Ibid.*

<sup>697</sup> *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 738 F.Supp. 1472,1476 (S.D.N.Y.1990).

was trading on a market that was not wholly international, but was also the U.S. market and in this factual situation anticompetitive effects had an impact on U.S. commerce, so the private plaintiff has standing;<sup>698</sup> for the purposes of standing, the relevant market must be the U.S. market, as antitrust laws do not extend to protecting foreign markets from anticompetitive effects;<sup>699</sup> the plaintiff must be injured in the U.S. market by concluding purchasing transactions in the U.S market,<sup>700</sup> or being an importer of goods into the U.S.;<sup>701</sup> in a situation where the plaintiff concluded transactions outside the U.S., the adjudication court used the same standing analysis as was designed for transactions concluded within the U.S., including the elements of causation, directness, and antitrust injury,<sup>702</sup> but in another case the court listed different factors to be considered as relevant;<sup>703</sup> the requirement that the alleged injury must be related to anticompetitive behaviour requires that the injured party be a participant (i.e. competitor or consumer) in the same market as the alleged malefactors (i.e. in the U.S. market), because the U.S. Congress did not intend to grant recovery under antitrust laws to an individual who traded and was injured entirely outside of United States commerce;<sup>704</sup> the plaintiffs were customers, concluding transactions with the defendants, so there is no danger that the defendants would be exposed to multiple recoveries;<sup>705</sup> if a non-purchaser can demonstrate a regular course of dealing with the conspirators, the injury may not be inherently speculative;<sup>706</sup> non-purchasers should be denied standing to sue, at least when they lack a past course of dealing with the conspirators;<sup>707</sup> the mere fact that plaintiffs have not yet begun operation is not dispositive, as long as they can demonstrate their intention to enter the field

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<sup>698</sup> *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 738 F.Supp. 1472,1475,1476 (S.D.N.Y.1990).

<sup>699</sup> N.200.

<sup>700</sup> N.251.

<sup>701</sup> *Raubal v. Engelhard Minerals & Chemicals Corp.*, 364 F.Supp. 1352,1357 (S.D.N.Y.1973).

<sup>702</sup> See n.63.

<sup>703</sup> N.515.

<sup>704</sup> N.200.

<sup>705</sup> *In re Vitamins Antitrust Litigation*, 2001 WL 755852,3 (D.D.C.).

<sup>706</sup> *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864,868 (10th Cir.1981).

<sup>707</sup> *Ibid.*



and their preparedness to do so<sup>708</sup> - it would be anomalous to hold otherwise, since any monopoly that succeeded in erecting an absolute barrier to competition would then be immune to private antitrust suits, since its potential competitors would be barred from seeking relief.<sup>709</sup>

The assessment of pre-*Empagran* case law on antitrust standing shows that it is inconsistent. Some pre-*Empagran* courts allowed standing to private parties who suffered foreign private antitrust injury, whereas other pre-*Empagran* courts granted standing only to those private parties who suffered domestic private antitrust injury. The assessment of antitrust standing through a transborder standard would require that merely the fact that private antitrust injury is suffered outside the U.S. should not be dispositive on its own not to grant standing to the private party who suffers foreign antitrust injury. It is not reasonable to first grant subject matter jurisdiction to foreign private antitrust injury and then deny standing to it. In fact, suffering foreign antitrust injury in a market that is of transborder nature means that the part of the market that is outside the territorial borders of the U.S. is not an independent foreign market, but connected with the U.S. market.

There is some confusion<sup>710</sup> about whether the directness of the purchaser is an element of standing or a separate requirement that a private plaintiff has to satisfy to get his claim adjudicated before the U.S. courts. Therefore, prudence requires considering the element of directness of purchaser as a separate element. The statements in pre-*Empagran* cases on the element of directness of purchaser are the following: the issue of (in)direct purchaser is a separate issue from standing,<sup>711</sup> but there are opposing positions too;<sup>712</sup> it is not required that a private party should pay money directly to the antitrust violator,<sup>713</sup> e.g. a private

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<sup>708</sup> *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680,691 (S.D.N.Y.1979).

<sup>709</sup> *Ibid.*

<sup>710</sup> See Chapter 5, n.75.

<sup>711</sup> *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702,708,709 (D.Md.2001).

<sup>712</sup> E.g. *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,885 (5th Cir.1982); *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,823,824 (E.D.N.Y.1980) see also standing description and cases cited there.

<sup>713</sup> *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702,710 (D.Md.2001).

party may be forced to assume the status of indirect purchaser,<sup>714</sup> or ownership or control exception to direct purchaser rule,<sup>715</sup> or there may be a pre-existing cost-plus contract between a direct and an indirect purchaser;<sup>716</sup> it is not an exception if direct purchasers choose not to institute antitrust actions of their own;<sup>717</sup> the only concerns about directness are the prevention multiple recoveries and the difficulty of apportioning damages,<sup>718</sup> and practical problems in delineating costs actually incurred and passed on through the distribution chain.<sup>719</sup>

The analysis of pre-*Empagran* case law on the element of directness of purchaser reveals that pre-*Empagran* judges did not consider its suitability for the international context. It is possible that different countries regulate directness (and standing) differently compared to how these elements are regulated by U.S. antitrust law. The question that consequently arises is how systems of private antitrust law enforcement that have different requirements of standing (and directness) can be accommodated to operate simultaneously if applied to the same private litigants who litigate out of the same antitrust conspiracy. Elaborating the answer to this question would be beyond the scope of the present analysis of pre-*Empagran* cases.

#### 4.2.5 Causation

This thesis is extremely critical of decision reached by the Second Court of Appeals in the *Empagran* litigation<sup>720</sup> and of post-*Empagran* cases<sup>721</sup> because of how they formulated the required type of relationship between the litigated (foreign) private antitrust injury and anticompetitive effect (antitrust injury) within the U.S. This thesis does not support the determination of this

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<sup>714</sup> Ibid.

<sup>715</sup> *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702,713 (D.Md.2001); *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,818 (E.D.N.Y.1980).

<sup>716</sup> *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,818,819,820 (E.D.N.Y.1980).

<sup>717</sup> *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702,713,n.7 (D.Md.2001).

<sup>718</sup> N.713.

<sup>719</sup> N.170.

<sup>720</sup> See Chapter 2, subsection 3.1.7.4.

<sup>721</sup> See Chapter 3, subsection 6.2.

relationship in terms of causation between anticompetitive effects and antitrust injury. This thesis submits that this relationship must be established in terms of a ‘dependency connection’ and not in terms of ‘causation’. This thesis uses the Supreme Court’s *Empagran* decision<sup>722</sup> as grounds for this submission.

In addition to this legal basis that the thesis used in support of its submission, the thesis also relies on common sense and on pre-*Empagran* case law on the element of causation. This thesis submits that antitrust injury can be caused only by anticompetitive conduct and not by anticompetitive effects. Anticompetitive conduct is the source that produces consequences. These consequences can be of two types: a.) Anticompetitive effects only; b.) Anticompetitive effects and antitrust injury. This means that antitrust injury cannot exist without the existence of anticompetitive effects. This means that antitrust injury is one aspect of anticompetitive effects.

Some statement in pre-*Empagran* cases show that pre-*Empagran* courts always interpreted causation only as a relationship between anticompetitive conduct (antitrust violation) and anticompetitive effect, and never between anticompetitive effects and antitrust injury. These statements are the following: there is a relationship between the type of pleaded injury and alleged anticompetitive conduct;<sup>723</sup> there is a necessary causal relation between defendants’ conduct and claimed damage;<sup>724</sup> there has to be present, in addition to standing, a casual connection between the violation alleged and the injuries allegedly suffered;<sup>725</sup> civil antitrust action is allowed only to those who have suffered some diminution of their ability to compete, and they have to allege and prove that illegal restraint injured their competitive position in the business in which they are or were engaged;<sup>726</sup> the plaintiff must prove that its business injury was caused by the defendants’ violation of antitrust laws in order to recover damages;<sup>727</sup> the plaintiff must allege that their business or property was

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<sup>722</sup> See Chapter 2, subsection 3.1.7.3.

<sup>723</sup> N.506.

<sup>724</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100,125, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

<sup>725</sup> N.120.

<sup>726</sup> N.557.

<sup>727</sup> *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 738 F.Supp. 1472,1485 (S.D.N.Y.1990); *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,823 (E.D.N.Y.1980);

injured as a direct result of the antitrust violation,<sup>728</sup> by the acts of the defendants;<sup>729</sup> there has to be a connection between the injury and the aims of antitrust laws<sup>730</sup>.

On the type of causation that has to be present, pre-*Empagran* courts delivered the following statements: there is no element of proximate causation in standing injury;<sup>731</sup> causation is part of standing analysis;<sup>732</sup> causation analysis is based on the same principles as remoteness of injury;<sup>733</sup> proximate causation has to be shown,<sup>734</sup> here considered as a but-for type of causation<sup>735</sup> - it is enough for the illegality to be shown to be a material cause of the injury - the plaintiff does not need to exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury;<sup>736</sup> requisite causal connection (proximate cause<sup>737</sup>) between the alleged injury and the alleged anticompetitive conduct;<sup>738</sup> proximately caused by the acts of the defendants in violation of the antitrust laws of the United States;<sup>739</sup> the plaintiff has to show that the defendants' wrongful acts had caused damage to the plaintiff and this damage should not be

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*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,697, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68,80 (2d Cir.1977), (dissenting opinion); *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,888 (5th Cir.1982).

<sup>728</sup> *Hunt v. Mobil Oil Corp.*, 550 F.2d 68,77 (2d Cir.1977).

<sup>729</sup> *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420,431 (5th Cir.2001) (dissenting opinion); *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10,24 (S.D.N.Y.1975).

<sup>730</sup> N.506.

<sup>731</sup> *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229,1235 (6th Cir.1981); confusing statement is in *Raubal v. Engelhard Minerals & Chemicals Corp.*, 364 F.Supp. 1352,1357 (S.D.N.Y.1973) where courts stated that to have standing, plaintiffs have to be injured in their business or property by acts of the defendants.

<sup>732</sup> *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,824 (E.D.N.Y.1980); *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10,22 (S.D.N.Y.1975); *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,888,889 (5th Cir.1982).

<sup>733</sup> *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,515 (S.D.N.Y.1985); *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,823 (E.D.N.Y.1980).

<sup>734</sup> *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012,8 (Del.Super.).

<sup>735</sup> N.728.

<sup>736</sup> *Hunt v. Mobil Oil Corp.*, 550 F.2d 68,80,n.2 (2d Cir.1977) (dissenting opinion).

<sup>737</sup> *International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553,572,573,574 (C.D.Cal.1979); *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa)*, 518 F.Supp. 270,279 (W.D.Pa.1981).

<sup>738</sup> *Ibid.*

<sup>739</sup> *Raubal v. Engelhard Minerals & Chemicals Corp.*, 364 F.Supp. 1352,1357,n.6 (S.D.N.Y.1973).

attributable to other causes;<sup>740</sup> the loss suffered by plaintiff has to be attributed to a change in the competitive conditions on the market<sup>741</sup> - other market variables could have intervened to affect those pricing decisions (on a market outside the U.S.), e.g. numerous complex transactions - additional factor evaluated to determine how markets interact;<sup>742</sup> the consideration of political and economic conditions, import restrictions, currency restrictions on non-U.S. markets, and preferential treatment of goods made by non-U.S. companies in non-U.S. markets.<sup>743</sup>

#### **4.2.6 Liability and Remedies**

One of the reasons that require particular consideration in developing the transborder standard is the possibility of the simultaneous existence of multiple private antitrust litigations between the same private litigants before the national courts of different countries in relation to the same antitrust conspiracy. Consequently, there exists the possibility that private plaintiffs can be adjudicated compensation multiple times and the possibility that defendants will be required to pay compensation multiple times. Therefore, the transborder standard proposes a correction element that national courts are expected to apply before delivering their final judgment.<sup>744</sup>

Bearing this possibility in mind, the analysis of pre-*Empagran* cases cannot skip the question whether pre-*Empagran* courts provided any guidance on how liability and remedies should be applied in the international context. The only statements that can be found in pre-*Empagran* cases in this regard are the following: there should not be any interference with the policies of foreign nations if relief was limited to treble damages, and the public interest in enforcing antitrust laws, as well as the private interest of private plaintiff in

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<sup>740</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100,123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,697, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

<sup>741</sup> See n.506.

<sup>742</sup> *de Atucha v. Commodity Exchange, Inc.*, 608 F.Supp. 510,516 (S.D.N.Y.1985).

<sup>743</sup> *U.S. v. Minnesota Min. & Mfg. Co.*, 92 F.Supp. 947,960,961 (D.Mass.1950).

<sup>744</sup> See Chapter 5, subsection 2.5.

obtaining a remedy, may be satisfied in large measure through such an award;<sup>745</sup> the fact that other nations do not provide treble damages for antitrust violations is not appropriate grounds for restricting an antitrust claim to a U.S. forum,<sup>746</sup> but if the remedy in a foreign forum is clearly inadequate or unsatisfactory, then there is no alternative forum;<sup>747</sup> merely seeking a remedy not available in the domestic forum may be proper;<sup>748</sup> the court cannot shape a decree to preclude doing business anywhere in the world.<sup>749</sup>

In relation to the facts to take into consideration in formulating the nature of the remedy, the statements in pre-*Empagran* cases are the following: the circumstances of each case control the breath of the order,<sup>750</sup> i.e the remedies in the light of the facts of a particular case;<sup>751</sup> judging from the point of view of the public interest as well as that of the private interests involved;<sup>752</sup> the remedy is flexible and capable of nice adjustment and reconciliation of the public interest and private needs as well as competing private claims;<sup>753</sup> availability should be conditioned by the necessities of the public interest which the U.S. Congress has sought to protect;<sup>754</sup> the judgment should speak from the time of its entry;<sup>755</sup> it is important to forbid acts of antitrust violation in the future, and to deprive defendants of the fruits of their wrongdoing;<sup>756</sup> remedial action is justified where a relationship exists between the defendant and any

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<sup>745</sup> N.126.

<sup>746</sup> *CSR Ltd. v. Cigna Corp.*, 2005 WL 3132188,496 (D.N.J.) (here the issue under litigation was the permissibility of forum non convenience analysis in antitrust cases).

<sup>747</sup> *Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811,817 (D.C.1983).

<sup>748</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,932,n.73 (D.C.Cir.1984).

<sup>749</sup> *George W. Luft Co. v. Zande Cosmetic Co.*, 142 F.2d 536,540 (2d Cir.1944).

<sup>750</sup> *U.S. v. Bausch & Lomb Optical Co.*, 321 U.S. 707,727, 64 S.Ct. 805, 816, 88 L.Ed. 1024 (1944); *U.S. v. Aluminum Co. of America*, 91 F.Supp. 333,344 (S.D.N.Y.1950).

<sup>751</sup> *U.S. v. National Lead Co.*, 332 U.S. 319,335, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947).

<sup>752</sup> *U.S. v. National Lead Co.*, 332 U.S. 319,359, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947).

<sup>753</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100,131, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

<sup>754</sup> *Ibid.*

<sup>755</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416,446 (2d Cir.1945), because as court states situation that from time of evidence until the time of judgment the reality in industry may change.

<sup>756</sup> *U.S. v. Aluminum Co. of America*, 91 F.Supp. 333,343,344 (S.D.N.Y.1950) – that is why voluntary cessation of alleged illegal conduct does not moot a case (*U.S. v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968) cases); same *U.S. v. Aluminum Co. of America*, 148 F.2d 416,447 (2d Cir.1945) cases where statement that mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption.

one or more of its competitors which materially inhibits free competition;<sup>757</sup> the remedy shall be as effective and fair as possible,<sup>758</sup> and prevent continued or future violations;<sup>759</sup> showing antitrust violation is not sufficient to recover damages in the absence of proof that the plaintiff was injured;<sup>760</sup> proof of damage must not be based on mere speculation or guesswork,<sup>761</sup> and potential expert's assumptions are to be supported by the evidence introduced at the trial;<sup>762</sup> the doctrine of *in pari delicto* is not a recognised defence of antitrust action;<sup>763</sup> the U.S. Congress had no intention, while enacting remedies, to interfere with ordinary commercial practices;<sup>764</sup> it is not for courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate antitrust laws.<sup>765</sup>

The statements in pre-*Empagran* cases that determine the issue of liability and remedies in relation to private antitrust law enforcement are the following: the possible recovery of triple the loss actually suffered by the plaintiff is very properly praised as a supplementary deterrent;<sup>766</sup> the purpose of treble damages is to compensate the victims of antitrust violations for their injuries and to deprive violators of the fruits of their illegality;<sup>767</sup> the dominant influences that must guide courts' decisions on remedies are: 1) the duty of giving complete and efficacious effect to the prohibitions of the statute, 2) accomplishing this result with as little injury as possible to the interests of the general public, 3) proper regard for the vast interests of private property which may have become vested in many persons without any guilty knowledge or intent in any way to become actors or participants in the wrongs;<sup>768</sup> was designed primarily as a remedy,<sup>769</sup>

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<sup>757</sup> *U.S. v. Aluminum Co. of America*, 91 F.Supp. 333,347 (S.D.N.Y.1950).

<sup>758</sup> N.751.

<sup>759</sup> *U.S. v. National Lead Co.*, 332 U.S. 319,335, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 358 F.Supp. 1065,1102 (D.Nev.1973).

<sup>760</sup> N.640.

<sup>761</sup> *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342,1362 (5th Cir.1980).

<sup>762</sup> *Ibid.*

<sup>763</sup> *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10,17,n.12 (S.D.N.Y.1975).

<sup>764</sup> *U.S. v. Bausch & Lomb Optical Co.*, 321 U.S. 707,728, 64 S.Ct. 805, 816, 88 L.Ed. 1024 (1944).

<sup>765</sup> *U.S. v. National Lead Co.*, 332 U.S. 319,353, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947).

<sup>766</sup> *Pfizer, Inc. v. Lord*, 522 F.2d 612,620 (8th Cir.1975).

<sup>767</sup> N.657.

<sup>768</sup> *American Tobacco Co. v. U.S.*, 328 U.S. 781,815, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

but also designed at least in part to penalize wrongdoers and deter wrongdoing;<sup>770</sup> the purpose of giving private parties treble-damage and injunctive remedies is not merely to provide private relief, but to also serve the high purpose of enforcing antitrust laws.<sup>771</sup>

Pre-*Empagran* cases provide, in addition to the above statements on damages, statements in relation to injunction remedies. These statements are the following: the moving party must show that relief is needed;<sup>772</sup> plaintiffs do not need to suffer antitrust injury;<sup>773</sup> dangerous probability that injury will happen;<sup>774</sup> plaintiff's reasonable likelihood to succeed;<sup>775</sup> significant threat of injury;<sup>776</sup> threatened loss or damage by violation of antitrust laws;<sup>777</sup> threatened injury to plaintiff outweighs threatened harm;<sup>778</sup> necessary determination that there exists some cognizable danger of recurrent violation, something more than the mere possibility;<sup>779</sup> no injunction is granted when antitrust violation allegedly ceased,<sup>780</sup> but discontinuance in itself does not justify the denial of injunctive relief, especially if there is no guarantee that it will be permanent;<sup>781</sup> can be utilized even without showing of past wrongs;<sup>782</sup> the plaintiff must demonstrate the intent of the defendant to restrain;<sup>783</sup> damage must be proximately caused

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<sup>769</sup> *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876,891 (5th Cir.1982).

<sup>770</sup> *Ibid.*

<sup>771</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100,130, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

<sup>772</sup> *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 358 F.Supp. 1065,1102 (D.Nev.1973).

<sup>773</sup> *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n. of North America*, 274 U.S. 37,54, 47 S.Ct. 522, 71 L.Ed. 916, 54 L.Ed. 791 (1927); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100,130, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

<sup>774</sup> N.535.

<sup>775</sup> *In re Uranium Antitrust Litigation*, 617 F.2d 1248,1281 (7th Cir.1980).

<sup>776</sup> N.771.

<sup>777</sup> *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n. of North America*, 274 U.S. 37,54, 47 S.Ct. 522, 71 L.Ed. 916, 54 L.Ed. 791 (1927); *International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553,573 (C.D.Cal.1979).

<sup>778</sup> *In re Uranium Antitrust Litigation*, 617 F.2d 1248,1261 (7th Cir.1980).

<sup>779</sup> N.772.

<sup>780</sup> *Lefrak v. Arabian American Oil Co.*, 487 F.Supp. 808,824,n.24 (E.D.N.Y.1980).

<sup>781</sup> N.772.

<sup>782</sup> *Ibid.*

<sup>783</sup> N.535.



by the alleged anticompetitive actions of the defendants;<sup>784</sup> the injunctive issue is purely discretionary with a court and should not be resolved until the issue of infringement has been solved;<sup>785</sup> granting injunction does not disserve public interest.<sup>786</sup>

The analysis of pre-*Empagran* case law on injunction relief shows that pre-*Empagran* courts did provide some adjudication on how injunction relief should be applied in the international context. These statements are the following: entering injunctions serves strong national interests in effective and meaningful enforcement of American anti-trust laws;<sup>787</sup> injunction does not transgress principles of international comity or nationality-based prescriptive jurisdiction,<sup>788</sup> i.e. avoiding the impedance of the foreign jurisdiction is the reason cautioning against exercising power to issue injunction restraining litigants from proceeding in forums of other countries<sup>789</sup> and power to control the conduct of persons subject to their jurisdiction;<sup>790</sup> injunctions are most often necessary to protect the jurisdiction of the enjoining court<sup>791</sup> and to prevent the litigants' evasion of the important public policies of the forum;<sup>792</sup> comity teaches that injunction should be no broader than necessary to avoid the harm on which the injunction is predicated, so no injunction should be issued at all when less intrusive measures would redress the injury caused by the evasion of public policies.<sup>793</sup>

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<sup>784</sup> *International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553,573 (C.D.Cal.1979).

<sup>785</sup> N.772.

<sup>786</sup> N.778.

<sup>787</sup> Ibid.

<sup>788</sup> N.374.

<sup>789</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,927 (D.C.Cir.1984).

<sup>790</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,926 (D.C.Cir.1984); injunctions are occasionally limited to restraining only residents of the forum state from pursuing foreign litigation - on occasion even permitted restraints on actions by foreign parties in other forums, see *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,933 (D.C.Cir.1984) cases; Foreign corporations doing business in the enjoining forum are expected to abide by the forum's laws, see *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,933 (D.C.Cir.1984).

<sup>791</sup> N.789.

<sup>792</sup> Ibid.

<sup>793</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909,933,n.81 (D.C.Cir.1984).

The analysis of pre-*Empagran* case law on remedies shows that pre-*Empagran* courts did consider the question of the application of U.S. antitrust remedies in the international context and in relation to private antitrust law enforcement. The analysis shows that this consideration by pre-*Empagran* courts did not extend beyond: a.) preserving the goals of private antitrust law enforcement to be applied also in adjudicating a factual situation that has international elements, and b.) enforcing U.S. antitrust law to adjudicate remedies as intended by U.S. antitrust law despite the fact that the litigated factual situation had international elements.

### **4.3 Impact of the Transborder Standard on Private Antitrust Law Enforcement**

This thesis aims to provide analysis, explains arguments and delivered outcomes and proposes solutions in a simple and transparent way. Therefore, it aims to present the contribution of the transborder standard to the existing law and an understanding along the analysis of every single issue under scrutiny. This is to avoid repetitions.

This explanation is required to stress that a critique of pre-*Empagran* case law from the perspective of a transborder standard was presented in each of the subsections above. This means that such critiques do not need to be repeated in this subsection.

Nevertheless, it is worth mentioning that the rulings in pre-*Empagran* cases in relation to elements of private antitrust law enforcement are of a highly questionable nature and as such can be used to provide inconsistent guidance on how private antitrust law enforcement is supposed to function in a transborder type of factual situation. The application of a transborder standard requires the U.S. courts to commonly agree on the aims of antitrust law enforcement and on the goals of U.S. antitrust law (i.e. what and who are protected). This should be done by taking into consideration the fact that the relevant market on which competition is to be assessed is wider than the national territory of the U.S., and that no discrimination based on nationality is allowed in terms of whether the litigants are of U.S. nationality or whether they suffer private antitrust injury

within the U.S. The elements from pre-*Empagran* cases that preserve their validity if analyzed under the transborder standard are the goals attributed to the system of private antitrust law enforcement and the determination of the U.S. courts to adjudicate remedies that are in conformity with U.S. antitrust law irrespective of the opinion that courts from non-U.S. countries have in this regard.

The functioning of the system of private antitrust law enforcement means more than merely providing adjudication on the issues analyzed in this section of the chapter.

The issues on which pre-*Empagran* cases do not provide any explanation are the following: the relationship between the functioning of public and private antitrust law enforcement in the international context; the efficiency of private antitrust law enforcement as antitrust law enforcing mechanism in the international context; the relationship between private antitrust law enforcement and antitrust law enforcement mechanisms in other countries; the impact that private antitrust law enforcement has on private parties (both victims and perpetrators) in the international context.

## 5 Conclusion

It is important to recall that the analysis and conclusions in this chapter must be considered in conjunction with the analysis and the conclusions reached in Chapters 5 and 7. Only in this way it is possible to understand the full extent of the proposed transborder standard.

This thesis submits that where private parties litigate their (foreign) antitrust injury before the U.S. courts, the adoption of a transborder standard requires the subject matter jurisdiction of U.S. courts to be determined according to the goals of private antitrust law enforcement and the aim of U.S. antitrust laws. The aims of U.S. antitrust law must be interpreted taking into account the particularities that commercial arrangements have in a transborder factual situation. In addition, there are particularities of private antitrust law enforcement system that have not been raised or addressed in pre-*Empagran*

cases, and these particularities also have to be aligned to be properly operational in an international context.

That is why this chapter examined pre-*Empagran* cases both on the subject matter jurisdiction of U.S. antitrust law and on private antitrust law enforcement where some international elements were present in the facts.

The analysis shows that in these pre-*Empagran* cases the subject matter jurisdiction of the U.S. courts in antitrust law was adjudicated with the result that no element of private antitrust law enforcement ever had any impact on the decision to grant or refuse subject matter jurisdiction. A similar conclusion has been reached in the opposite direction, i.e. the particularities of the international context of the facts never led pre-*Empagran* courts to consider whether the case law on private antitrust law enforcement that was developed for factual situations purely within the U.S. was suitable for application to a transborder (or international in general) situation. At most, pre-*Empagran* courts automatically applied (i.e. preserved the same) case law on private antitrust law enforcement to the international context.

Surprisingly, this analysis of pre-*Empagran* cases revealed three groups of reasoning that can be used in support of the application of a transborder standard. Firstly, the analysis of pre-*Empagran* cases showed that comity was not designed with the intention of applying it to private antitrust litigation. Secondly, the assessment of the legality of a commercial arrangement between perpetrators has to encompass not just a formality of interactions between them, but wider aspects of their participation in the economic reality. Thirdly, the U.S. companies, when engaged as exporters and participants in commercial arrangements with other (non) U.S. companies outside the U.S., are not allowed to violate U.S. antitrust law.

Apart from these examples just cited, pre-*Empagran* cases are not of much use to assist in building a framework for the application of a transborder standard. The main problem with the pre-*Empagran* judgments analyzed in this chapter is their inconsistency. In addition, it is submitted that pre-*Empagran* cases' approach to the determination of subject matter jurisdiction in antitrust law

cases is completely different from the one the Supreme Court in *Empagran* proposed for consideration by the Court of Appeals.

None of the pre-*Empagran* cases (apart from the two that triggered the *Empagran* litigation in first place) ever considered the conditions under which a (foreign) antitrust injury can be litigated before the U.S. courts by the granting of subject matter jurisdiction. Antitrust injury was never an element in the adjudicating process in pre-*Empagran* cases when the courts were asked to rule on whether U.S. courts had subject matter jurisdiction.

Therefore, this chapter analyzed factual situations and reasoning in pre-*Empagran* cases to understand fully the types of antitrust injuries that were granted the subject matter jurisdiction of the U.S. courts before *Empagran*, even where they were not considered relevant to adjudicating subject matter jurisdiction. This analysis reveals that in pre-*Empagran* cases, subject matter jurisdiction was granted for the following type of antitrust injury: private party injured in the U.S.; private party prevented from importing goods into the U.S.; private parties prevented from performing activities in non-U.S. countries; private party injured out of transactions with a U.S. company.

From comparing the type of antitrust injuries that were granted jurisdiction in pre-*Empagran* cases with the type of antitrust injury litigated in the *Empagran* litigation, it seems that the Supreme Court in *Empagran* is the first U.S. court to extend the type of injury that may potentially be litigated before the U.S. The Supreme Court explicitly decided not to grant subject matter jurisdiction only to foreign private antitrust injury that is independent from anticompetitive effects in the U.S. Therefore, it is submitted in this thesis that foreign private antitrust injury that is not independent from anticompetitive effects in the U.S. may potentially be granted subject matter jurisdiction despite arising out of transaction between non-U.S. private parties, being suffered outside the U.S., and being suffered in relation to goods that never intended to enter the U.S. This is why this thesis submits that the Supreme Court in *Empagran* opened the door to every type of antitrust injury being litigated before the U.S. courts, as no restriction was determined on the type/nature of antitrust injury, private parties who can be litigants, and the location where antitrust injury is suffered,

except the requirement that this antitrust injury must not be independent from anticompetitive effects (antitrust injury) in the U.S.