

**SUBMISSION TO THE  
ANTITRUST MODERNIZATION COMMISSION  
CONCERNING WHETHER CONGRESS SHOULD AMEND THE FTAIA TO  
CLARIFY THE CIRCUMSTANCES IN WHICH THE SHERMAN ACT APPLIES  
TO EXTRATERRITORIAL ANTICOMPETITIVE CONDUCT**

**January 2006**

The Section of Antitrust Law (“Antitrust Section” or “Section”) of the American Bar Association (“ABA”) is pleased to submit these comments to the Antitrust Modernization Commission (the “Commission”) in response to its request for public comment dated May 19, 2005. The specific questions presented relate to whether the Foreign Trade Antitrust Improvements Act (“FTAIA”), 15 U.S.C. §6a, should be amended to clarify the circumstances in which the Sherman Act applied to extraterritorial anticompetitive conduct selected for study by the Commission. The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

**I. Summary of Recommendations**

The Section believes that, given that post-*Empagran* jurisprudence is still nascent and guidance on the issues left open by *Empagran* is likely to emerge from the courts, the courts are best positioned to clarify the application of the FTAIA in a manner that reflects sound policy. Judicial clarification is particularly apt here because the standards at issue involve concepts of causation, which Congress has previously seen fit to leave to the courts to develop in the context of our domestic antitrust laws. Moreover, the Section sees the D.C. Circuit’s recent *Empagran* remand decision, *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 2005 U.S. App. LEXIS 12743, 2005-1 Trade Cas. (CCH) ¶ 74,844 (D.C. Cir. June 28, 2005), *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 2006 WL 37108 (Jan. 9, 2006), and the Second Circuit’s decision in *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004), as significant steps toward a sound interpretation of the FTAIA and the Supreme Court’s decision. Although the common law process can take time and risks lack of clarity at least in the short term, the process may be the most likely to yield sound results. Nonetheless, should the Commission choose to make recommendations to Congress, it should offer clear, bright-line standards that simplify the analysis and provide the courts and public with practical guidance.

The Section believes that the development of sound post-*Empagran* jurisprudence also could be encouraged by active participation of the U.S. antitrust enforcement agencies as *amicus* participants in pertinent litigation. We commend the government’s activity in this area to date, but believe the agencies could make even greater contributions by taking a more active role in lower and appellate court proceedings. Similarly, we believe that the antitrust agencies could play a potentially important role in influencing the courts and providing guidance to the public by issuing or supplementing guidelines expounding their views on the application of the FTAIA.

## **II. The Section's Interest in the Issue**

The Section has a strong interest in the development of sound antitrust jurisprudence. The Commission's decision to study potential amendments to the FTAIA is of particular importance to the Section in light of the recent upsurge in plaintiffs seeking treble damages in U.S. courts for alleged antitrust injuries suffered abroad and accompanying litigation over the scope of U.S. antitrust jurisdiction under the FTAIA. The issue has been brought into particular focus by the Supreme Court's recent decision in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 124 S.Ct. 2359 (2004), in which the Court addressed a split among the federal circuits concerning the question of whether the FTAIA permits certain plaintiffs who have suffered injury abroad, but not in the U.S., to recover for their foreign injuries in U.S. courts. Although the Court's decision clarified certain aspects of the FTAIA's scope and subsequent lower court decisions have begun to grapple with open issues, significant questions remain unsettled.

## **III. Background**

In light of the Commission's extensive familiarity with the FTAIA, its legislative history, and its related jurisprudence, we provide only a brief overview.

### **A. The Foreign Trade Antitrust Improvements Act**

The FTAIA was enacted in 1982 to "make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . . , however anticompetitive, as long as those arrangements adversely affect only foreign markets." See *Empagran*, 542 U.S. at \_\_\_\_, 124 S. Ct. 2359, 2364 (citations omitted). Its purpose was to put U.S. firms on an equal footing with their foreign counterparts when doing business abroad.

The FTAIA removes from the Sherman Act's jurisdictional reach all non-import activity involving foreign commerce (i.e., export activities and all other foreign commercial activities), but allows an injured plaintiff to bring the conduct back within the Sherman Act's purview if the plaintiff can show both that: (a) the foreign conduct had "a direct, substantial, and reasonably foreseeable effect" on domestic, import or export commerce; and (b) such domestic effect from the foreign conduct "give[s] rise to a claim" under the Sherman Act. 15 U.S.C. § 6a(1) & (2).

In the years following the FTAIA's enactment, a split among the federal circuit courts developed as to the meaning of the second prong of the statute's "give rise to a claim" language. Some courts held that a plaintiff was required to show that the domestic anticompetitive effects giving rise to jurisdiction also formed the basis of the claim. This restrictive reading limited antitrust jurisdiction to only those claims that arose from the domestic effect. See *Der Norske Stats Oljeselskap A.S. v. HeereMac v.o.f.*, 241 F.3d 420, 427 (5th Cir. 2001). Other courts held that a plaintiff could satisfy the second prong simply by showing that the domestic effect gave rise to a claim by some person under the Sherman Act, even if it was not the plaintiff's own claim. See *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (2d Cir. 2002). This expansive reading, which the D.C. Circuit adopted in its first *Empagran* opinion, 315 F.3d 338 (D.C. Cir. 2003), permitted jurisdiction over foreign claims that did not arise out of the challenged

conduct's domestic effects, as long as that conduct caused a domestic effect that gave rise to some person's claim.

## **B. The Supreme Court's Decision in *Empagan***

In *Empagan*, the Supreme Court adopted the more restrictive reading of the FTAIA, holding that to recover under the Sherman Act, a plaintiff asserting a claim based on foreign commerce must show that the domestic effect of the conduct at issue gave rise to its antitrust claim. 124 S. Ct. at 2372. Thus, where a foreign purchaser suffered harm that is independent of any effect on U.S. domestic commerce, the Sherman Act does not apply to the purchaser's claims. *Id.* at 2363.

Significantly, however, the Court assumed that the case before it involved a foreign injury that was independent of any domestic effect. The Court did not address plaintiffs' alternative argument that their injuries were intertwined with a domestic effect because the availability of international arbitration meant that foreign prices could not have been elevated without also elevating prices in the U.S. Accordingly, the Court did not address whether and under what circumstances the FTAIA extends antitrust jurisdiction to a case in which the anticompetitive conduct's domestic effects are connected in some way with the foreign harm, nor did the Court address how much of a connection is sufficient to confer jurisdiction over the foreign injuries. The Court remanded this question to the D.C. Circuit.

## **C. *Empagan's* Progeny**

Several courts have addressed the issues the Supreme Court left open in *Empagan*, but no clear consensus has yet emerged. In *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004), the Second Circuit relied on *Empagan* in finding that the plaintiff's allegations lacked the factual predicate to support his claims because the allegations failed to show that "his . . . injury in Europe, i.e., payment of excessive fees, was dependent on the conspiracy's effect on United States commerce." The District Court of Minnesota in *In re Monosodium Glutamate Antitrust Litigation*, 2005-1 Trade Cas. (CCH) ¶ 74781, 2005 WL 1080790 (D. Minn. May 2, 2005), however, denied a defendants' motion to dismiss because it found plaintiffs' allegation that keeping U.S. prices up was necessary to sustain the increased foreign prices sufficient to allege a causal nexus between the domestic competitive effects and the claimed foreign injury, and because plaintiffs had otherwise adequately alleged antitrust standing.

Most recently, the D.C. Circuit has ruled on the question the Supreme Court remanded, namely, whether the appellants' alternate theory of liability can be sustained under the FTAIA. *Empagan v. F. Hoffman-Laroche Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 2006 WL 37108 (Jan. 9, 2006). The appellants' argument was based on the assertion that "because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondent would not have suffered their antitrust injury." *Empagan*, 417 F.3d at 1269. Appellants argued that these facts established that their foreign injuries were sufficiently intertwined with the domestic anticompetitive effects to meet the FTAIA standard.

The D.C. Circuit rejected the appellants' argument, concluding that subject matter jurisdiction was lacking under the FTAIA. The Court explained that although the plaintiffs "paint[ed] 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," such causation "between the domestic effects and the foreign injury claim is simply not sufficient to bring anti-competitive conduct with the FTAIA exception." *Id.* at \*9. Rather, the Court held that 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' . . ." *Id.* at 1271. Finding that the appellants' allegations could not meet the proximate causation standard, the Court dismissed the claims. *Id.* .

#### **IV. Issues Identified by the Commission for Study**

The Commission has identified three issues in relation to whether the FTAIA should be amended to clarify the circumstances in which the Sherman Act applies to extraterritorial anticompetitive conduct. *See* Memorandum from the Commission International Working Group to All Commissioners re International Issues Recommended for Commission Study (Dec. 21, 2004). Two of the three questions grow out of issues left unanswered by the Supreme Court's decision in *Empagran*. The third issue relates to the FTAIA's "direct, substantial, and reasonably foreseeable effect" standard, which recently was the subject of litigation in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004). The questions the Commission identified are:

- Should Congress clarify the standard set forth in *Empagran* to determine whether effects are independent?
- More broadly, should Congress clarify whether the FTAIA exception permitting extraterritorial application of the Sherman Act applies if foreign effects are not independent of domestic effects?
- What is the standard for a "direct, substantial and reasonably foreseeable effect" on U.S. commerce -- and specifically when would the exclusion of a potential foreign competitor satisfy the "direct" requirement?

#### **V. Considerations and Concerns**

In formulating these comments and suggestions to the Commission, the Section took into account a variety of possible concerns that have been identified by the Commission, practitioners, commentators, and academics. These potential issues are summarized below.

##### **A. The FTAIA Is Poorly Drafted**

The FTAIA has been widely criticized by courts, practitioners, and academics as being poorly drafted and confusing. Critical issues of statutory interpretation have turned on ambiguous language and construction. Most notably, the FTAIA's requirement that the domestic effect "gives rise to a claim" under the antitrust laws engendered considerable debate (resolved only by the Supreme Court's ruling in *Empagran*) over the meaning and construction of the term "a claim." (see discussion at ¶ I.A.3, *supra*). Similarly, the terms "arising under" and "conduct"

pose significant issues of interpretation (e.g., does “arising under” connote but-for or proximate causation; does “conduct” connote the specific act injuring the plaintiff or the defendant’s illegal course of conduct). Although the courts have addressed these questions, some suggest that Congress could seek to clarify its intent further by redrafting the statute.

Others take the view that alternative language that is clear and provides sufficient guidance is elusive and that, like much of antitrust jurisprudence, judicial guidance rather than statutory prescriptions may provide the soundest results.

**B. *Empagran* Leaves Open a Potential Interpretation of the FTAIA That May Be Too Broad**

Some believe that the Supreme Court’s decision in *Empagran* opened a potential loophole in the FTAIA by leaving open the possibility of U.S. jurisdiction over foreign injuries if those injuries have some causal connection with an anticompetitive effect occurring in the U.S. They argue that Congress intended the FTAIA to limit the scope of Sherman Act jurisdiction and that foreign injuries generally should not be cognizable under U.S. antitrust laws.

**C. Continued Uncertainty**

The *Empagran* decision expressly leaves open significant questions as to whether and under what circumstances a causal connection between domestic effects and foreign injuries to plaintiffs in foreign markets support jurisdiction under the FTAIA. As a result, there will be continued uncertainty in the business community, potentially costly litigation to resolve these issues, pressures to settle potentially unmeritorious actions, and potentially disparate results that could take the courts years to resolve.

**D. Workability of the *Empagran* Standard**

Some argue that *Empagran* does not provide a workable basis or high enough standard for distinguishing foreign injuries that are sufficiently dependent on U.S. anticompetitive effects from those that are not. For example, if to satisfy the FTAIA a plaintiff can simply argue that keeping U.S. prices up was somehow necessary to sustain an increase in foreign prices, it would appear that virtually any global cartel case could be said to satisfy the *Empagran* exception. Given that, as discussed above, numerous courts have stated that the FTAIA is cumbersome and poorly worded, the current disputes regarding the scope of the FTAIA may not be the last.

**E. Interference with U.S. and Foreign Antitrust Enforcement**

U.S. and foreign antitrust enforcers will likely renew their arguments that permitting unduly broad U.S. jurisdiction to entertain damage recovery for injuries outside the U.S. would fail to respect principles of international comity and impede global antitrust enforcement efforts, including amnesty and leniency programs. Regardless of how the questions of jurisdiction are ultimately resolved, the intervening period of uncertainty may deter amnesty applications and adversely affect U.S. anti-cartel enforcement.

## **F. The “Direct, Substantial, and Reasonably Foreseeable” Standard Is Unclear**

The Ninth Circuit’s recent decision in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004), highlighted the application of FTAIA’s “direct, substantial, and reasonably foreseeable” standard. The Court held that the “directness” element required the conduct at issue to have “an immediate consequence” within the United States. Some have questioned whether the Ninth Circuit’s interpretation is too narrow.

In considering whether further Congressional action is appropriate, it is worth highlighting that whether the relevant standard hinges on the FTAIA or may be found in pre-existing case law remains unclear. As the Supreme Court recognized (but did not decide) in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 n. 23 (1993), it is not clear “whether the [FTAIA’s] ‘direct, substantial, and reasonably foreseeable effect’ standard amends existing law or merely codifies it.” Consequently, clarification of the standard may best be achieved through further judicial guidance.

## **VI. Potential Benefits and Drawback of Recommending Congressional Action**

The decision to recommend Congressional action to amend the FTAIA has a number of potential benefits and drawbacks, which the Section considered.

### **A. Possible Benefits Resulting from Congressional Action**

1. Reduced Uncertainty and Litigation Costs. Congressional clarification of the jurisdictional standard under the FTAIA could reduce the substantial costs of litigation likely to be incurred in clarifying this issue, avoid potentially disparate judicial interpretations of the FTAIA, and provide the business community greater certainty.
2. Reduced Damages Exposure. If Congressional clarification of the FTAIA resulted in narrowing the basis for jurisdiction over foreign antitrust injuries under the U.S. antitrust laws, it would reduce the potential exposure of firms that have caused foreign antitrust injuries. As demonstrated by many recent cartel cases, companies increasingly face substantial financial exposure from U.S. and foreign government enforcement and U.S. civil litigation. Some view the possibility of civil treble damages exposure in the U.S. for all global injuries caused by alleged cartel activity as unfair and excessively punitive, particularly when foreign jurisdictions may provide remedies for injuries incurred in their jurisdictions. Indeed, Congress recently enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 to detreble damages for amnesty applicants under certain circumstances, partly in recognition of the negative impact of potential treble damage exposure on applicant participation. Such Congressional action reflects sensitivity to the heavy burden of treble damages.
3. Non-Interference with Government Enforcement and the Operation of Foreign Competition Laws. If Congressional clarification of the FTAIA

narrowed the basis for jurisdiction for foreign antitrust injuries under the U.S. antitrust laws, the U.S. and certain foreign governments likely would argue that fewer companies would be deterred from reporting cartel activity for fear of the potentially debilitating exposure of treble damages for global injuries. Foreign governments similarly would argue that such changes would reduce interference with their domestic competition enforcement regimes, promoting international comity.

## **B. Possible Drawbacks Resulting from Congressional Action**

1. U.S. Markets Less Protected from Anticompetitive Conduct. Some would argue that narrowing the basis for jurisdiction over foreign antitrust injuries would decrease deterrence and punishment. They would contend that firms participating in cartels should be liable for the injuries they cause regardless of where they occurred, particularly if the foreign injuries are interrelated with or caused by anticompetitive effects occurring in the United States. The specter of increased damages may better protect U.S. markets from anticompetitive conduct.
2. Interference with the Development of Post-*Empagran* Jurisprudence. The post-*Empagran* jurisprudence interpreting the FTAIA is nascent. Congressional action would preempt or interfere with the development of legal principles and decisions that better deal with the real world circumstances of the problems presented by cases in this area.
3. Causation Standards May Best Be Developed in the Courts. Some argue that the potential legislative solutions are not clear. For example, a workable legislative standard for identifying injuries that are sufficiently intertwined with domestic anticompetitive effects may be difficult to craft. Indeed, in the domestic context, Congress enacted very general language in Section 4 of the Clayton Act (providing a private right of action to “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws”) and left to the courts the task of developing and elaborating the standing and causation standards implicit therein. Similarly, it is not clear what Congressional guidance could improve upon the FTAIA’s “direct, substantial and reasonably foreseeable effect” standard. Fleshing out these concepts may better be done through the common law judicial process in the context of actual cases.

## **VII. The Section’s Recommendations**

***Congressional Action to Amend the FTAIA Is Not Warranted.*** The Section believes that the courts are best suited to sort through the issues left open by *Empagran* and the broader jurisdictional standard (i.e., “direct, substantial, and reasonably foreseeable effect”). Congress has in the past been rightly wary of trying to legislate subtle changes in the antitrust laws. Here, there is no reason to believe that alternative statutory language is available that would be clear, provide sufficient guidance, and could be readily agreed upon.

Although continued uncertainty and litigation costs associated with the jurisdictional issues left open under the FTAIA create real concern, judicial resolution of the issues appears promising if judicial clarification comes in the relatively near term. The Section sees the D.C. Circuit's *Empagran* remand decision and the Second Circuit's *Sniado* decision as significant steps toward a sound interpretation of the FTAIA in accordance with the Supreme Court's guidance in *Empagran*. Although the common law process can take time and risks at least temporary lack of clarity, the process may be most likely to yield sound results, particularly given that elaboration of the kinds of causation standards at issue traditionally has been the province of the courts.

***The U.S. Antitrust Agencies Should Be Encouraged to Further Help Develop the Standard.*** Development of sound post-*Empagran* jurisprudence might be encouraged by further active participation of the U.S. antitrust enforcement agencies as *amicus* participants in pertinent litigation or by the agencies issuing guidelines concerning the application of the FTAIA. Some have commended the antitrust agencies for their *amicus* role in the *Empagran* litigation. The Antitrust Section suggests that the agencies increase their *amicus* involvement in lower and appellate court litigation to provide additional guidance to the courts. Earlier and more active involvement by the government might further encourage sound and consistent decisions. Similarly, the agencies could play a potentially important role in influencing the courts and providing guidance to the public by issuing or supplementing guidelines expounding its views on the proper application of the FTAIA.

***If Congressional Action Is Recommended, It Should Be Clear.*** If the Commission recommends revisions to the FTAIA, any suggested language should reflect clear, bright-line standards that simplify the analysis and provide the courts and public with practical guidance. The Section believes that clear, focused standards are essential if legislative change is considered.