

**Comments in Response to  
Antitrust Modernization Commission  
Request for Public Comment  
Regarding International Topics  
Submitted by the Section of International Law  
of the American Bar Association**

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The Section of International Law of the American Bar Association ("ABA International") 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 regarding specific questions relating to topic IX ("International") selected for Commission study.<sup>1</sup> The views expressed herein are being presented on behalf of ABA International.\* 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.

The membership of ABA International includes over 13,000 lawyers and law students, most of whom are based in the United States. The members of ABA International focus on all aspects of law in the international context, including antitrust law. Many ABA

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\* The members of the Section working group who developed these comments are as follows: James Bailey, Yee Wah Chin, Charles Critchlow, Russell Damtoft, Thomas J. Dillickrath, Niclas Ericsson, Howard Fogt Jr., David Gelfand, Kathleen Harris, Mark Katz, Elisa Kearney, Ann Neir and Robert Thorpe.

<sup>1</sup> 70 Fed. Reg. 28902-28907 (May 19, 2005).

International members practice U.S. antitrust law and/or foreign competition law and are experienced in the interplay of U.S. law in the antitrust area with those of other jurisdictions. Thus, the comments are grounded in ABA International members' experience in antitrust law and practice in the international context. ABA International hopes and intends that these comments, which begin with a short executive summary of the respective issues discussed in further detail herein, will assist the Commission in fulfilling its mandate.

### **Executive Summary**

The comments which follow are made in the context of ABA International's suggestion, in its comments of September 30, 2004 regarding issues for study, that "the Commission may wish to apply, in identifying its issues for study, the following two criteria: (1) whether an issue raises specific concerns; and (2) whether such concerns are appropriate for legislative or administrative resolution."

With respect to the first question under topic IX, whether the FTAIA should be amended, ABA International believes that both of these criteria are satisfied; there is a real need to clarify the circumstances in which the Sherman Act applies to non-U.S. transactions, and legislative action would be appropriate and helpful in providing such clarification. However, there is no consensus within ABA International on how the statute should be amended, that is whether the FTAIA should be amended to make clear that the Sherman Act does not apply to foreign commerce even when there is a link between an anti-competitive effect in the United States and the injury suffered by the foreign plaintiff or whether the FTAIA should be amended to extend jurisdiction in such circumstances. Arguments in support of both views are presented in the appendices hereto.

With respect to the second question under topic IX, whether there are technical amendments to the IAEAA that could enhance coordination between the United States and foreign antitrust enforcement authorities, ABA International believes that Section 12(2)(E)(ii) of the IAEAA, as presently written, may impede the adoption of antitrust cooperation agreements with other jurisdictions because it can be interpreted to require that the United States be granted the right to use information it has obtained pursuant to these agreements for non-antitrust law enforcement purposes. Such an impediment, if confirmed to exist, would present a need that would be appropriate to alleviate by legislative action. ABA International recommends that the IAEAA be amended to clarify that section 12(2)(E)(ii) is not a mandatory provision, and would allow the U.S. authorities to enter into IAEAA agreements even if the information obtained could only be used for antitrust enforcement purposes.

With respect to the third and last question under topic IX, whether there are technical changes to the budget authority granted to the U.S. antitrust agencies that could further facilitate the provision of international antitrust technical assistance, ABA International believes that neither of the two proposed criteria is met. ABA International is not convinced that making technical changes to the budget authorization is the correct approach. ABA International suggests that the Commission consider instead whether

coordination between the antitrust agencies and USAID could be further improved and institutionalized without legislative action.

**Issue:**

***Should the Foreign Trade Antitrust Improvements Act ("FTAIA")<sup>2</sup> be amended to clarify the circumstances in which the Sherman Act and FTC Act apply to extraterritorial anticompetitive conduct?***

**Comment**

ABA International believes that there is a real need to clarify the circumstances in which the Sherman Act applies to non-U.S. transactions, and legislative action is needed for such a clarification, so that the two criteria for appropriate issues for Commission study that the Section proposed in its September 30, 2004 comments are satisfied.<sup>3</sup>

It is becoming increasingly common for plaintiffs in antitrust cases, especially class actions, to seek to recover treble damages for injuries that occur both in the United States and abroad arising out of conduct that is alleged to have a global impact. This attempt for expanded use of the U.S. antitrust laws most commonly occurs in cases where the defendants are alleged to have fixed prices on an international scale, as in the vitamins case that gave rise to the various *Empagran* decisions. In such cases, plaintiffs who purchased the goods at issue in domestic U.S. commerce or in U.S. import commerce are clearly entitled to the remedies available under the U.S. antitrust laws. The difficult question that has divided the courts – both before and after the Supreme Court's decision in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*<sup>4</sup> – is whether and under what circumstances foreign plaintiffs may also recover under the U.S. antitrust laws where their injuries arose out of foreign transactions with sellers also based outside the United States. For example, can a German buyer who bought goods in Germany from a German seller sue for treble damages under the U.S. antitrust laws where the buyer can show that the defendant's conduct also had an impact on prices in the United States?

As explained below, the language of the FTAIA is ambiguous on this point. The Supreme Court in *Empagran* resolved one important issue of interpretation under the FTAIA, holding that there is no jurisdiction over transactions occurring abroad where there is no connection between an anti-competitive effect in the United States and the injury alleged to have been suffered by the foreign plaintiff, **but** it left open the question of whether the FTAIA allows for the application of the U.S. antitrust laws to such wholly foreign transactions where it can be shown that there is some relationship between the alleged foreign injury and the domestic effects of the allegedly anticompetitive conduct.

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<sup>2</sup> 15 U.S.C. §6a.

<sup>3</sup> ABA International expresses no view about the need for such clarification with respect to the FTC Act. By its terms, the FTAIA applies only to Sections 1 to 7 of Title 15 of the United States Code.

<sup>4</sup> 124 S. Ct. 2359 (2004) ("*Empagran*").

The Court left that issue to be resolved by the lower federal courts, which have reached divergent conclusions on the question.

ABA International believes that it would be desirable for Congress to amend the FTAIA to clarify the appropriate legal standard under which the Sherman Act might apply to such foreign transactions. Because this issue arises out of ambiguous statutory language in the FTAIA, it is appropriate for Congress to amend the law to clarify its intent on the issue. By doing so, Congress would obviate any possibility that the courts may apply U.S. antitrust laws to reach transactions among foreign nationals occurring outside the United States if such application is in derogation of Congressional intent. If Congress does indeed wish the antitrust laws to extend to any such situation, amending the FTAIA will provide clear direction to the courts as to where U.S. antitrust law may apply.

While ABA International believes that it would be appropriate and desirable for Congress to amend the FTAIA to clarify this issue, there is a divergence of opinion within ABA International about how the ultimate issue of extraterritorial application of the U.S. antitrust laws should be resolved. Some members of ABA International's working group on the issue believe that Congress should amend the FTAIA to extend jurisdiction to such foreign transactions in some circumstances, while other members believe that the FTAIA should be amended to make clear that the U.S. antitrust laws do not apply to wholly foreign transactions even where there is some link with an anti-competitive effect in the United States. To assist the Commission in considering these different points of view, we attach as Appendix A and Appendix B summaries of the arguments in support of each position.

## **Background**

Congress enacted the FTAIA in 1982 to clarify (and, perhaps, limit) the scope of foreign conduct that might be deemed to violate Section 1 (and other provisions) of the Sherman Act.<sup>5</sup> The FTAIA provides that the antitrust laws do not apply to commerce with foreign nations (other than import commerce) unless, *inter alia*, (i) the "conduct" has a direct, substantial and reasonably foreseeable effect on domestic U.S. commerce, and (ii) "such effect" gives rise to "a claim" under Section 1 of the Sherman Act. The first element (domestic anti-competitive effect) is usually satisfied if the conduct results in higher

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<sup>5</sup> The FTAIA provides in relevant part (emphasis added):

Sections 1 to 7 of [Title 15] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) *such conduct has a direct, substantial, and 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, or 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.*

prices in the United States (the effect). The second element (that effect giving rise to a claim) is where the ambiguity of the statute had, prior to *Empagran*, led to divergent interpretations. Specifically, the issue was whether the direct, substantial and reasonably foreseeable effect of the conduct on domestic commerce has to give rise to the claim made by the foreign plaintiff before the court or whether it was sufficient if the effect gave rise to a claim on behalf of other individuals who were not before the court.<sup>6</sup>

### **The FTAIA and the Supreme Court's Decision in *Empagran***

The Supreme Court in *Empagran* rejected the broadest reading of the FTAIA that would have permitted claims that were based purely on the fact that there had been a domestic violation of the law even though the plaintiff's claim did not arise from any effect on domestic commerce. Invoking considerations of comity, the Supreme Court noted that the D.C. Circuit's decision holding that the U.S. antitrust laws extended to foreign plaintiffs merely because other purchasers had been injured in the United States created a "serious risk of interference" with foreign nations' ability to regulate their own affairs.<sup>7</sup> The Court also pointed out that Congress had 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," and found it significant that the case law predating the FTAIA did not support broad recovery of treble damages by foreign purchasers, although it expressly distinguished prior case law where foreign injury was "inextricably bound up... with domestic restraints of trade."<sup>8</sup> The Supreme Court concluded that it "makes linguistic sense to read the words 'a claim' as if they refer to the 'plaintiff's claim' or 'the claim at issue'.<sup>9</sup>

The Supreme Court did not, however, expressly adopt the broad view that damages arising out of higher prices in wholly foreign commerce are always excluded from the scope of the U.S. antitrust laws. Instead, the Court staked out a possible middle ground, stating that it "assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help bring about that foreign injury." The Court remanded to the Court of Appeals to consider whether the plaintiffs' claim could survive in view of the allegation that defendants needed to fix prices in the

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<sup>6</sup> Compare, *Den Norske Stats Oljeselskap AS v. Heeremac VOF*, 241 F.3d 420, 427 (5th Cir. 2001) (holding "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."), with *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (2d Cir. 2002) (finding "gives rise to a claim" statutory language as requiring only "that the domestic effect violate the substantive provisions of the Sherman Act," rather than "that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action.") The difficulties in interpreting the FTAIA are exemplified by the reliance on the plain language of the text in the rationale propounded by both courts in reaching these opposite conclusions.

<sup>7</sup> *Empagran supra* note 3 at 2366-67.

<sup>8</sup> *Id.* at 2369-70 (distinguishing *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng.*, 1977 U.S. Dist. LEXIS 17851 (S.D.N.Y. Jan. 18, 1977)).

<sup>9</sup> *Id.* at 2372.

United States in order to sustain higher prices abroad. On remand, the D.C. Circuit adopted a “proximate cause” test and found that it did not have subject matter jurisdiction. The Court of Appeals viewed the plaintiffs’ allegation as “but-for” causation, which it concluded was not sufficient to bring the plaintiffs’ claim within the FTAIA exception.<sup>10</sup>

### **The FTAIA Post-*Empagran***

Other lower courts now must decide whether to draw a distinction between independent foreign injury (for which a claim will not lie in the US courts under *Empagran*) and foreign injury that is linked to domestic effects of a cartel (for which the Court left open the question of whether jurisdiction is appropriate). On the one hand, the same comity and policy considerations relied upon by the Supreme Court arguably weigh against allowing recovery by foreign purchasers even where such a link exists. There remains a substantial risk of interference with foreign nations' antitrust enforcement regimes and there is no evidence that Congress contemplated the possibility of whole classes of foreign purchasers obtaining treble damages in U.S. courts under any circumstances. On the other hand, the existence of a causal relationship arguably means that the domestic effect "gives rise" to the foreign injury, as that term is used in subsection 2 of the FTAIA, and therefore satisfies the requirements of the FTAIA's exception even under a narrow interpretation of the statute.

The development of the caselaw post-*Empagran* confirms the danger of potentially years of application of inconsistent standards until the Supreme Court addresses the issue left open in *Empagran*. Some lower federal courts find it sufficient to avoid a motion to dismiss if the foreign plaintiff simply alleges that without the anticompetitive prices in the United States the global conspiracy could not have succeeded. *See, e.g., MM Global Services, Inc. v. Dow Chemical Co.*, (district court denied a motion to dismiss where the plaintiffs, distributors claiming to have been coerced by defendants into participating in a resale price maintenance conspiracy in India, alleged that, as a result of that alleged conspiracy, "competition in the sale and resale of Union Carbide products *in and from the United States* [was] improperly diminished and restrained, and as the result of such effect on competition, [the] [p]laintiffs were injured by being precluded from effectively and fully competing and maximizing their sales....." (emphasis added)).<sup>11</sup>

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<sup>10</sup> *Empagran S.A. v. F. Hoffmann-La Roche Ltd*, 2005 U.S. App. LEXIS 12743., (D.C. Cir. June 28, 2005), at \*9.

<sup>11</sup> 329 F. Supp. 2d 337, 342 (D. Conn. 2004). *See also In re Monosodium Glutamate Antitrust Litigation*, 2005 U.S. Dist. LEXIS 8424 (D. Minn., May 2, 2005), at 14 (denying motion to dismiss where foreign plaintiffs alleged that effects of defendants' alleged anticompetitive scheme in the United States prevented them from purchasing competitively priced MSG in the U.S., in addition to the direct effects of foreign conspiracy, leading to antitrust injury and noting "far more direct causal relationship between the domestic effect and the plaintiffs' injury" in this case than those cases where foreign injury was independent of domestic harm).

In contrast, the D.C. Circuit on remand in *Empagran* found that an allegation that the U.S. effects were necessary to bring about the foreign injury was not enough.<sup>12</sup> The D.C. Circuit addressed its decision to the legal question of the nature of the link sufficient to trigger the application of the FTAIA's domestic injury exception.<sup>13</sup> The court concluded that "[t]he statutory language [in the FTAIA] – 'gives rise to' – indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for 'nexus' the [plaintiffs] advanced in their brief."<sup>14</sup>

Thus, the lower courts are reaching divergent interpretations of the FTAIA in the wake of the Supreme Court's decision.

### **The Need for Legislative Amendment**

ABA International believes that the FTAIA needs to be amended in order to clarify the jurisdictional authority of U.S. courts in applying the antitrust laws. Congress intended the FTAIA to provide guidance on the reach of the Sherman Act over international commerce. But the ambiguous language of the FTAIA leaves open the question of whether restraints on foreign commerce can be subject to the reach of the U.S. antitrust laws if "dependent" on domestic effect. The *Empagran* decision did not provide a clear answer and courts will have to continue to struggle with this issue.

It bears noting that unlike the Sherman Act, the FTAIA is not the sort of statute that should be general in its language in order to allow for development in the case law as courts gained experience with different business practices and as economic theory evolves. The statute addresses a fundamental question of the jurisdictional reach of U.S. antitrust law, which should be clearly defined by Congress. Because the language Congress employed in the FTAIA is ambiguous and confusing as applied to wholly foreign commerce, it is important for Congress to clarify it.

There is no consensus within ABA International on how to resolve the issue. Attached as Appendix A and Appendix B to these comments are summaries of arguments in favor of

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<sup>12</sup> The Second Circuit in *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004), vacated its previous decision and declined "to infer from the general allegations in [plaintiff's] amended complaint that the 'domestic component' of the alleged 'worldwide conspiracy' was 'necessary . . . for the conspiracy's overall success.'" The court did not reach the question of whether, if the plaintiff had alleged "but for the European conspiracy's effect on United States commerce, he would not have been injured in Europe," those allegations could have been sufficient to invoke jurisdiction under the FTAIA. *Id.*

<sup>13</sup> Compare *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 388 F.3d 337, 344-345 (D.C. Cir. 2004) (refusing to remand to the district court and ordering full briefing on the legal question of the sufficiency of the link) with *In re Graphite Electrodes Antitrust Litig.*, 106 Fed. Appx. 138, 143 (3d Cir. 2004) ("Because the District Court, and the parties, did not have the benefit of *Empagran*, we will remand the case to the District Court for its reconsideration. The District Court . . . may give the parties the opportunity to present evidence as to whether the alleged anticompetitive conduct's domestic effects were linked to the alleged foreign harm.").

<sup>14</sup> *Empagran S.A. v. Hoffmann-La Roche Ltd.* at \*9.

allowing jurisdiction in circumstances where there is a link between the domestic effect and the plaintiff's claim and in favor of limiting jurisdiction so it does not extend to foreign commerce even where there is such a link. ABA International hopes that these will assist the Commission in considering the potential options.

**Issue**

***Are there technical amendments to the International Antitrust Enforcement Assistance Act ("IAEAA")<sup>15</sup> that could enhance coordination between the United States and foreign antitrust enforcement authorities?***

**Comment**

ABA International has been advised that foreign antitrust enforcement authorities may have been inhibited from entering into Antitrust Mutual Assistance Agreements ("AMAAs") with the United States because of the perception that section 12(2)(E)(ii)<sup>16</sup> of the IAEAA sets forth a mandatory provision for AMAAs requiring foreign antitrust enforcement authorities to grant their U.S. counterparts the authority to use information provided under an AMAA for law enforcement purposes other than under the antitrust law. If that is so, ABA International believes that the IAEAA should be amended to clarify that there is no such requirement.

Section 12(2) of the IAEAA provides that the United States may enter into AMAAs with foreign jurisdictions "for the purpose of...providing antitrust evidence, on a reciprocal basis". This Section provides further that such AMAAs will include "terms and conditions that specifically require using, disclosing, or permitting the use or disclosure of, antitrust evidence received under such agreement or such memorandum only --

- (i) for the purpose of administering or enforcing the foreign antitrust laws involved, or
- (ii) with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission, as the case may be, gives...."

ABA International understands that the United States is willing to enter into arrangements which allow the use of AMAA-obtained evidence by foreign authorities for non-antitrust purposes, but the reciprocity requirement under the statute may mean that the foreign authority in question must be equally willing for an AMAA to be permissible. To the extent that other jurisdictions' laws prohibit the disclosure or use of data obtained in an antitrust investigation for non-antitrust purposes, or where foreign countries are willing to cooperate in the antitrust area but not more broadly, then Section 12(2)(E)(ii)

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<sup>15</sup> 15 U.S.C. §6201 *et seq.*

<sup>16</sup> *Id.* at §6211(2)(E)(ii).



of the IAEEA would impede the adoption of AMAAs if it is treated as a mandatory provision.

For example, Canada's *Competition Act* requires that a foreign state receiving data from the Competition Bureau provide an undertaking that the data will be used "only for the purpose for which it was requested", which presumably in that context is for antitrust purposes.<sup>17</sup> Section 12(2)(E)(ii) may therefore prevent Canada from entering into an AMAA with the United States. The Section is advised that provisions such as this are an important reason why few AMAA arrangements have been made with other nations since the IAEEA has been in effect.

The Commission should inquire of the federal antitrust enforcement agencies whether Section 12(2)(E)(ii) of the IAEEA is impeding the adoption of AMAAs. If so, the Commission should recommend that the IAEEA be amended to clarify that section 12(2)(E)(ii) is not a mandatory provision. Clarifying that downstream disclosure of antitrust evidence for non-antitrust purposes is not a mandatory requirement would preserve the ability of a foreign jurisdiction to grant this right to the United States if it is prepared to do so (as Australia has done)<sup>18</sup> while still allowing the United States to conclude AMAAs with those authorities that are not prepared to allow their evidence to be disclosed for these purposes.

### **Issue**

***Are there technical changes to the budget authority granted to U.S. antitrust agencies that could further facilitate the provision of international antitrust technical assistance to foreign antitrust authorities?***

### **Comment**

ABA International believes that while there are concerns about providing antitrust technical legal assistance in the places that need it the most, those concerns do not require legislative action. While ABA International understands that the U.S. antitrust agencies are in a position to provide valuable international antitrust technical assistance and would like to be able to direct the resources devoted to the places where they will do the most good,<sup>19</sup> ABA International does not believe that technical changes to the budget authority granted to the U.S. antitrust agencies are necessary to facilitate this goal. ABA International believes that the effectiveness of antitrust technical assistance can be more

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<sup>17</sup> R.S.C. 1985, c. C-34, section 30.01(d)(ii).

<sup>18</sup> Article VII, B *Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance*, April 27, 1999.

<sup>19</sup> U.S. Federal Trade Commission & U.S. Department of Justice, Antitrust Division, *The United States Experience In Competition Law Technical Assistance: A Ten Year Perspective*, OECD Document CCNM/GF/COMP/WD(2002)20, February, 2002.

readily improved by enhancing coordination between the antitrust agencies and the funding arm for technical legal assistance.

Most technical assistance to foreign antitrust enforcement authorities by the United States is funded by the United States Agency for International Development ("USAID"). Predictably, funding for these projects is guided by USAID's priorities and resource constraints, most of which are set at the level of the local USAID mission operating in developing countries around the world.

To enhance the effectiveness of USAID's technical assistance, ABA International believes that USAID should be required to engage in prior consultation with the antitrust agencies before it provides funds to foreign antitrust enforcement authorities. In this way, USAID will have the benefit of the views of the U.S. antitrust agencies as to where technical assistance is most needed and would be most beneficial.

August 22, 2005

## APPENDIX A

### **The Foreign Trade Antitrust Improvements Act Should Be Amended to Provide for Jurisdiction Where Foreign Injury Is Inextricably Linked to Domestic Anti-Competitive Activity**

In *Empagran*, the Supreme Court left open the question of whether there were situations where a foreign plaintiff's injury might be inextricably linked to the domestic effect so as to support jurisdiction. Simply amending the FTAIA to provide expressly for jurisdiction in this scenario would confirm the presence of jurisdiction that would serve the interests of the United States through increased deterrence of international cartels.

In *Empagran*, the court drew a distinction between dependent and independent effects; that is, where the defendant's conduct affects both domestic and foreign commerce, the line is drawn between situations in which the plaintiff's injury is "dependent" on the domestic effect, where there is jurisdiction, as opposed to those in which the plaintiff's injury arises solely from that portion of the conduct effecting only foreign injury, so that the effect is "independent" of domestic U.S. effect, where no jurisdiction arises.<sup>20</sup>

It is incumbent upon Congress to clarify whether considerations of cartel deterrence and recompense of plaintiffs injured by violations of U.S. antitrust laws call for bringing within the ambit of the U.S. antitrust laws cases involving "direct, substantial, and reasonably foreseeable effects" on domestic commerce, regardless of where the injury took place. If Congress determines that such recompense should be provided under U.S. antitrust law, it should amend the FTAIA to so state, to prevent conflicts among the lower courts. Indeed, one significant clarification Congress should incorporate into the FTAIA would be to reiterate that there must be a direct, substantial and reasonably foreseeable *domestic* effect in order to provide jurisdiction, even where there has been a significant indirect effect on foreign plaintiffs. Such an amendment to the FTAIA would permit recovery in situations where warranted, but prevent *de minimis* domestic effects from providing a forum for foreign plaintiffs.

Notably, the fears of a case-by-case analysis leading to widely disparate findings propounded by opponents of jurisdiction will be minimized by codification of this test, since the test proposed between dependent and independent effects is the type of fact-based determination federal district courts are regularly called upon to make. At the same time, it is an appropriate exercise of Congressional power to articulate the legal parameters of antitrust jurisdiction, rather than leaving that standard to be developed by

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<sup>20</sup> As a practical matter, cases where the effect is independent are few, and increasingly less common, particularly in the context of the cartel behavior typified by the vitamins conspiracy alleged in *Empagran*. Given the globalization of industry today, many products are subject to some form of arbitration. Commerce is more frequently inextricably linked between nations in the global economy, and only the minority of cases would be otherwise. One commentator has suggested that a regional allocation agreement of the type seen in *Den Norske* (*supra* note 5) may be an exemplar of independent harm. See, Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. Chi. L. Rev. 265, 276 (2005).

the courts after years of conflicting circuit and district court decisions imposing divergent jurisdictional standards.

Indeed, the test announced by the D.C. Circuit on remand in *Empagran* was premised on the court's reading of the FTAIA as requiring the more stringent "proximate cause" standard as opposed to a less onerous "but-for" causation test. It is up to Congress to clarify which standard is appropriately applied. Opponents of amendment to the FTAIA frequently call for a body of judicial decisions to resolve debate over the jurisdictional reach of the FTAIA. Were Congress, at a minimum, to clearly enunciate a standard for judicial resolution of these issues, a body of comparably decided law might actually appear. Absent such clarification, the waters will continue to be muddy.

Opponents of an amendment clarifying the jurisdictional reach of U.S. antitrust laws where there is a direct linkage between domestic effect and foreign commerce also rely upon the rubric from *Empagran* stating that Congress intended to "clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce."<sup>21</sup> However, that reliance is ill-conceived since the amendment would merely clarify that which is already there and codify that which is already arguably extant.

Moreover, an amendment to the FTAIA specifically authorizing jurisdiction in "dependent" situations, and clearly stating the appropriate standard for review, would serve to deter global cartel behavior, for example, in cases where the cartel may be willing to forego its domestic gains "in the expectation that the illegal profits they could extort [abroad] would offset any liabilities at home."<sup>22</sup> Thus, the goal of true deterrence of international cartels adversely affecting domestic commerce suggests that foreign plaintiffs injured by domestic effects linked to their injury be permitted access to U.S. courts for enforcement of the antitrust laws.

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<sup>21</sup> *Empagran supra* note 3 at 2369.

<sup>22</sup> *Pfizer v. Government of India*, 434 U.S. 308, 315 (1978).

## APPENDIX B

### **The Foreign Trade Antitrust Improvements Act Should Be Amended to Provide That the U.S. Antitrust Laws Do Not Extend to Wholly Foreign Transactions Even When Inexorably Linked to an Effect on Domestic Commerce**

Applying U.S. antitrust law to wholly foreign transactions – even where the defendants' conduct has had a direct, substantial and reasonably foreseeable effect on U.S. commerce - raises serious concerns about comity and interference with the internal laws of other countries. The same principle underlies the Supreme Court's decision in *Empagran* construing the FTAIA "to avoid unreasonable interference with the sovereign authority of other nations."<sup>23</sup> It is not the role of the U.S. courts to provide a remedy to foreign purchasers who buy products or services from foreign sellers in transactions that occur abroad. In this regard, the antitrust laws should not be different from other substantive bodies of law. U.S. tax dollars and scarce judicial resources should not be expended to provide a remedy to foreign plaintiffs who are injured in foreign commerce.

Proponents of allowing U.S. antitrust law to extend to foreign transactions point to increased deterrence as the justification for doing so. But the U.S. antitrust laws already serve as a significant deterrent against international antitrust violations because substantial compensatory and punitive remedies are available to the extent defendants' conduct has caused injury to domestic U.S. commerce. Among other things, U.S. law provides criminal sanctions that have recently been strengthened significantly,<sup>24</sup> treble-damage liability and the recovery of attorneys' fees by prevailing plaintiffs, joint and several liability with no corresponding right of contribution, prohibition against a pass-through defense, the prospect of duplicative recovery by direct purchasers under federal law and indirect purchasers under state law, and class actions that allow recovery by whole classes of purchasers. Allowing recovery in the U.S. courts by plaintiffs who purchased products in foreign countries is unnecessary and goes beyond the legitimate interest of U.S. law in protecting parties engaged in United States commerce (or commerce between the United States and foreign nations).

Moreover, enforcement of the antitrust laws involves more than imposing ever increasing penalties on companies that violate the law. It also requires detection and proof of the violation. The very enforcement agencies that are responsible for antitrust enforcement both in the United States and abroad made clear in their amicus briefs to the Supreme Court in *Empagran* that extending the reach of the U.S. antitrust laws to foreign transactions will deter companies from reporting violations and cooperating with

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<sup>23</sup> *Empagran supra* note 3 at 2366.

<sup>24</sup> See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §215, 118 Stat. 668, 666-667 (2004); *see also* Thomas O. Barnett, Antitrust Enforcement Priorities: A Year in Review, Speech at the Fall Forum of the Antitrust Law Section of the American Bar Association (Nov. 19, 2004) ("During fiscal year 2004, ... we obtained more than \$350 million in criminal fines from 17 different corporations and 15 individuals, making 2004 the second-highest year the Division has ever had."), available at [www.usdoj.gov/atr/public/speeches/206455.htm](http://www.usdoj.gov/atr/public/speeches/206455.htm).

competition regulators under applicable leniency programs.<sup>25</sup> These programs are critical to the success of enforcement efforts by U.S. and foreign antitrust agencies, and diminishing their value could well reduce detection and therefore deterrence of violations.

It was this very concern that caused Congress recently to amend the U.S. antitrust laws to eliminate treble damages and joint and several liability for companies that enter the U.S. amnesty program.<sup>26</sup> It would be anomalous to relieve U.S. amnesty applicants, who have caused direct damage to U.S. consumers, of treble-damage liability while imposing such liability on foreign companies that sold their products to foreign buyers outside the United States and that might wish to enter leniency programs administered by foreign antitrust agencies.

It is also unworkable in practice to extend U.S. antitrust liability to foreign commerce, especially in the class action context. For example, how should the courts administer a class action on behalf of foreign purchasers throughout the world, many of whom may not even be subject to the jurisdiction of the U.S. courts? Can a purchaser of goods in Germany that has never been to the United States be bound by a U.S. class action settlement or judgment? If not, should these potential defendants be required to pay treble damages for a purchase in Germany without any assurance that the purchaser will not also sue in the German courts? Moreover, why should a dispute between a German plaintiff and a German defendant over transactions that occurred in Germany be governed by U.S. law or resolved in a U.S. court? Basic comity and choice of law principles dictate that such a dispute should be governed by German law.<sup>27</sup> These are the sorts of issues that will arise if Congress opens the doors of the U.S. courts to purchasers throughout the world.

Finally, it is far from clear how Congress could articulate an appropriate standard for allowing recovery of damages arising out of foreign transactions. What is the necessary link between the foreign transactions and U.S. domestic effects of an alleged antitrust violation? Many markets are global in nature and it is often easy to allege a relationship between sales in the United States and sales abroad.<sup>28</sup> If this is all that is required, then

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<sup>25</sup> Briefs of *Amici Curiae* United States, Canada, and the Federal Republic of Germany; *see also*, *Empagran supra* note 3 at 2368.

<sup>26</sup> See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213, 118 Stat. 665, 666-667 (2004).

<sup>27</sup> The Supreme Court in *Empagran* assumed "that legislators take into account the legitimate sovereign interests of other nations when they write American laws." *Empagran supra* note 3 at 2366.

<sup>28</sup> In *Den Norske (supra* note 5 at 427), the plaintiffs alleged that the defendants conspired to allocate bids both in the Gulf of Mexico (U.S. commerce) and in the North Sea (foreign commerce). The Fifth Circuit acknowledged that "there may be a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea." In *Kruman (supra* note 5 at 401), the plaintiffs alleged "the domestic price-fixing agreement could only have succeeded with the foreign price-fixing agreement." Presumably the reverse was true as well. And in *Empagran*, of course, the plaintiffs' allegation that higher prices in the U.S.

the U.S. courts will be open to foreign plaintiffs in numerous cases. Drawing a narrower test, on the other hand, raises difficult questions about which sorts of cases arguably require additional deterrence and which ones do not.

When Congress enacted the Sherman Act, it limited the scope of the law to commerce within the United States and commerce between the United States and foreign nations. When Congress enacted the FTAIA, it intended to "clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce."<sup>29</sup> The fact that the economies of the world have grown closer together and more goods and services are now traded in global markets should not alter fundamental limits on the jurisdictional reach of the U.S. antitrust laws. Congress should not extend those laws to disputes involving foreign transactions just as foreign countries should not attempt to impose their laws on transactions that occur wholly within the United States. The FTAIA should be amended to make clear that in order to be entitled to recover under U.S. law, plaintiffs must show that the transactions in which they were allegedly damaged occurred in U.S. commerce (or in commerce between the United States and foreign nations).

How to amend the FTAIA to provide the needed clarification requires careful study and input from the antitrust bar to avoid creating new ambiguities and confusion. It appears, however, that the necessary clarification could be provided by adding a sentence to the end of the FTAIA. The statute already has a provision making clear that where the U.S. antitrust laws apply to conduct only because such conduct is covered by section (1)(B) of the FTAIA (i.e., it has a direct, substantial and reasonably foreseeable effect on export commerce), the law applies only to injury to export business in the United States.<sup>30</sup> A similar provision could be added to address conduct that is covered by section (1)(A) of the FTAIA. Such a provision could read as follows: *"If sections 1 to 7 of this title apply to such conduct because of the operation of paragraph (1)(A), then sections 1 to 7 of this title shall apply to such conduct only for injury that occurs in U.S. domestic trade or commerce or in U.S. import trade or commerce."*

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contributed to higher prices abroad is the reason the case has been remanded to the D.C. Circuit. Thus, a test that allows recovery for foreign injury where it can be shown that the goods or services in question trade in a global market would appear to extend to each of these fact patterns.

<sup>29</sup> *Empagran supra* note 3 at 2369.

<sup>30</sup> *See* 15 U.S.A. §6a: "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."