



MEMORANDUM

From: AMC Staff

To: All Commissioners

Date: July 21, 2006

Re: Supplemental International Antitrust Discussion Memorandum—FTAIA Issue

On June 7, 2006, the Commission deferred completion of its deliberations on the Federal Trade Antitrust Improvement Act (“FTAIA”) to consider possible statutory amendments to the statute. In particular, the Commissioners asked staff to research and advise the Commission regarding statutory language proposed to the Commission by AMC witness Professor Eleanor M. Fox.¹ The Commission wanted to understand the extent to which Professor Fox’s proposed language, or possible alternative language, would clearly express both Congressional intent behind the FTAIA and the results of recent FTAIA court decisions, particularly those in *Empagran*.² In addition, the Commission requested more information on the reasoning and holdings in post-*Empagran* case law.

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² *F. Hoffman-La Roche Ltd. v. Empagran*, 542 U.S. 155 (2004) (“*Empagran*”); *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267, 1270-71 (D.C. Cir. 2005) (“*Empagran Remand*”).

I. Background

Currently, the FTAIA provides that:

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

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
 - (A) on trade or commerce which is not trade or commerce with foreign nations, 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.³

In *F. Hoffman-LaRoche Ltd. v. Empagran S.A.* (“Empagran”), the Supreme Court held:

The FTAIA seeks 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 (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets It does so by removing from the Sherman Act’s reach (1) export activities and (2) other commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.⁴

³ 15 U.S.C. § 6a (2006).

⁴ 542 U.S. 155, 161 (2004) (emphasis in original).

A. FTAIA Legislative History

1. Confusion About Jurisdictional Reach of the Sherman Act

The FTAIA has been “widely criticized by courts, practitioners, and academics as being poorly drafted and confusing.”⁵ Some have characterized it “as a drafting disaster, the worst nightmare of every legislation professor.”⁶

Although many have criticized the FTAIA for its lack of clarity, the confusion surrounding the jurisdictional scope of the Sherman Act predates the FTAIA. Prior to enactment of the FTAIA, courts “differ[ed] in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists”⁷ and “over the extraterritorial reach of the antitrust laws.”⁸ These differences and disagreements “generated a body of case law that is both confusing and unsettled.”⁹

U.S. exporters were particularly troubled by this uncertainty.¹⁰ Non-U.S. entities, including foreign sovereigns, tried to hold U.S. exporters liable under the Sherman Act for conduct occurring in, and affecting, only foreign markets.¹¹ Because of the lack of consistency

⁵ ABA Section of Antitrust Law, Comments Regarding the Foreign Trade Antitrust Improvements Act, at 4 (Feb. 8, 2006) (“ABA FTAIA Comments”); Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. Rev. 2151, 2157 (Fall 2003) (“Cavanagh, FTAIA”).

⁶ Cavanagh, *FTAIA*, at 2157; *id.* (stating that FTAIA has also been described as “cumbersome and inelegant,” and “very difficult to read”). (internal quotations and citations omitted).

⁷ H.R. Rep. No. 97-686, at 6.

⁸ Cavanagh, *FTAIA*, at 2152.

⁹ *Id.*

¹⁰ H.R. Rep. No. 97-686, at 6 (stating that “the Business Roundtable believes that judicial decisions are rife with inconsistencies regarding the types of effects on the domestic economy”); Cavanagh, *FTAIA*, at 2152.

¹¹ 127 Cong. Rec. 3538-39 (1981).

among the U.S. courts, American exporters could not know with any certainty whether these claims would be allowed.¹² They urged Congress to clarify, and limit the law so that they could better structure their business affairs abroad.¹³

Congress enacted the FTAIA to address these precise issues. First, it wanted to clarify ambiguities in the law by introducing what was intended to be a “simple and straightforward” legal test.¹⁴ Second, it wanted to remove the possibility that a foreign sovereign could hold a U.S. export business accountable under U.S. law for an antitrust violation overseas.¹⁵ Third, it wanted to introduce a “domestic effect” requirement into the Sherman Act to ensure that only conduct affecting U.S. commerce could be actionable under U.S. antitrust laws.¹⁶

¹² H.R. Rep. No. 97-686, at 7 (“This legislation will send to the export business community the clear signal that it appears to need in order for it to compete with greater confidence and freedom of action in the international marketplace.”); 127 Cong. Rec. 3538-39 (1981).

¹³ 127 Cong. Rec. 3538-39 (1981); H.R. Rep. No. 97-686, at 2; *see also* Eleanor M. Fox, *Extraterritoriality in the Age of Globalization; Conflict and Comity in the Age of Empagran*, at 5 (2005) (stating that the FTAIA intervened “to answer the complaints of American business that U.S. antitrust law should not follow them into foreign markets, for it was handicapping them”) (“Fox, *Extraterritoriality*”).

¹⁴ H.R. Rep. No. 97-686, at 2 (1982) (“The ‘direct, substantial, and reasonably foreseeable effect’ test will serve as a simple and straightforward clarification of existing American law.”).

¹⁵ 127 Cong. Rec. 3538 (stating that the FTAIA was designed to eliminate the possibility that “[f]oreign entities, including sovereigns, may currently sue American firms that restrain trade abroad even if the activity has no domestic impact”); *see* H.R. Rep. No. 97-686, at 9 (“The ultimate purposes of this legislation is to promote certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions.”); *see also* Fox, *Extraterritoriality*, at 6 (stating that the FTAIA stood for the proposition that “[w]hen in Rome, or when selling into Rome, it was fine to do what the Romans did (to Romans). It was not necessary to follow, also, the U.S. law”).

¹⁶ H.R. Rep. No. 97-686, at 9-10 (“A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. . . . When [U.S. businesses’] activities lack the requisite domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign owned competitors.”).

2. U.S. Exporters Carve-Out

Notwithstanding the introduction of the domestic effect test, Congress still preserved a right of action for U.S. exporters injured by conduct occurring outside of the United States. U.S. exporters who are denied entry into foreign markets due to the anticompetitive conduct of other U.S. exporters in the foreign markets have a right of action under the Sherman Act.¹⁷ Congress preserved the U.S. exporters' right to sue for such conduct because it viewed the U.S. export business as constituting part of U.S. commerce. In other words, Congress believed that injury to a U.S. exporter's business through the conduct of U.S. firms, even though such conduct took place on foreign soil, injured U.S. commerce.¹⁸

3. FTAIA and Standing

Although Congress carved out a specific right of action for U.S. exporters, it made no other distinctions as to who could sue under the Act. The legislative history indicates that Congress did not intend the FTAIA to alter the issue of plaintiffs' standing.¹⁹

Specifically, Congress did not distinguish between domestic and foreign plaintiffs. In fact, it expressly stated that the FTAIA was not intended to preclude suits based on the

¹⁷ 15 U.S.C. § 6a(1)(B) (stating that the Sherman Act will apply to foreign conduct that “has a direct, substantial, and reasonably foreseeable effect . . . on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States”); *see also* H.R. Rep. 97-686, at 10-11 (“If such solely export-oriented conduct affects export commerce of another person doing business in the United States, both the Sherman and FTC Act amendments preserve jurisdiction insofar as there is injury to that person. Thus, a domestic exporter is assured a remedy under our antitrust laws for injury caused by conduct of a competing United States exporter.”).

¹⁸ *See* H.R. Rep. No. 97-686, at 11 (“[The FTAIA] limits recovery for conduct that has no requisite domestic effects, other than the effects on the export commerce of another person doing business in the United States.”).

¹⁹ *Id.* (“The Committee does not intend to alter existing concepts of antitrust injury or antitrust standing This Bill only establishes the standards necessary for assertion of United

nationality of the plaintiff.²⁰ Rather, according to the House Report, Congress believed that “foreign purchasers should enjoy the protection of [U.S.] antitrust laws in the domestic marketplace, just as U.S. citizens do.”²¹ Denying foreign purchasers this protection “could violate the Friendship, Commerce and Navigation treaties this country has entered into with a number of nations.”²²

B. The Court Decisions in *Empagran*

In *Empagran*, the Supreme Court considered how best to understand the FTAIA’s scope with respect to three concepts:

- a) Foreign conduct;
- b) U.S. harm; and
- c) Foreign plaintiff’s injury.

For the sake of clarity, this memorandum uses “harm” to refer to the harm to U.S. commerce and “injury” to refer to the plaintiff’s claimed injury.

States antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiffs’ claim would remain unchanged.”).

²⁰ *Id.* at 10 (stating that the FTAIA “does not exclude all persons injured abroad from recovering under the antitrust laws of the United States”).

²¹ *Id.*

²² *Id.*; *see, e.g.*, Treaty of Friendship, Commerce and Navigation Between Argentina and the United States, art. VIII (July 27, 1853) (“The citizens of the two contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries respectively, for the prosecution and defense of their just rights, and they shall be at liberty to employ in all cases such advocates, attorneys or agents as they may think proper; and they shall enjoy, in this respect, the same rights and privileges therein as native citizens.”); *see also* Diane Wood, *Antitrust at the Global Level*, 72 U. Chi. L. Rev. 309, 314 (2005) (stating that one principle of international law is “the national treatment commitment,” which “obliges members to treat persons from fellow members just as well as they treat their own nationals”).

The Supreme Court methodically engaged in a three-prong analysis. First, it asked whether the foreign conduct “fall[s] within the FTAIA’s general rule excluding the Sherman Act application [to foreign conduct].”²³ The Court concluded that it did.²⁴

Next the Court asked whether this excluded foreign conduct “[fell] within a domestic-injury exception to the general rule, an exception that applies (and makes the Sherman Act nonetheless applicable) where the [foreign] conduct (1) has a ‘direct, substantial, and reasonably foreseeable effect’ on domestic commerce.”²⁵ The Court concluded that it did.

Finally, the Court asked the third question: from what harm to commerce does plaintiffs’ injury arise? The Court concluded that “where the plaintiff’s claim rests solely on the independent foreign harm,” the FTAIA does not grant jurisdiction.²⁶

Before *Empagran*, courts differed in their analysis of the third prong—that is, when can a foreign plaintiff sue under the Sherman Act? The Second Circuit’s *Kruman* decision allowed a foreign plaintiff to sue even when the domestic effects (prong 2) did not give rise to its particular injury, so long as the conduct involved gave rise to “a” Sherman Act claim.²⁷ The Fifth Circuit decision in *Statoil*, on the other hand, permitted a foreign plaintiff to sue only when the domestic

²³ *Empagran*, 542 U.S. at 158.

²⁴ *Id.*

²⁵ *Id.* at 159.

²⁶ *Id.*; see also *id.* at 162 (“[The FTAIA] lays down a general rule placing *all* (non-import activity involving foreign commerce outside the Sherman Act’s reach. It then brings such conduct back within the Sherman Act’s reach *provided that* the conduct *both* (1) sufficiently affects American commerce, i.e., it has a ‘direct, substantial, and reasonably foreseeable effect’ on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, i.e., the ‘effect’ must ‘give rise to a Sherman Act claim.’”) (emphasis in original) (internal quotations omitted).

²⁷ *Kruman v. Christie’s Int’l PLC* (“*Kruman*”) 284 F.3d 384, 399-400 (2d Cir. 2002) (holding that the defendant’s conduct only had to give rise to *a* claim under the Sherman Act, and not necessarily the plaintiff’s claim).

effects (prong 2) gave rise to his or her injury.²⁸ Some view the question of whether plaintiff's injury results from harm to U.S. commerce as a standing issue that the FTAIA was not intended to resolve.²⁹

The Supreme Court settled this question by agreeing with the Fifth Circuit's reasoning. The Court held that wholly foreign harm (*i.e.* plaintiff's foreign injury—prong 3) that is independent from any U.S. effects (prong 2) is not actionable under the FTAIA.³⁰ On remand, the D.C. Circuit confirmed that the plaintiff had to establish that “the U.S. effects of the appellees' conduct—*i.e.*, increased prices in the United States—*proximately caused* the foreign appellants' injuries (emphasis added)” to be actionable under the FTAIA.³¹

II. Two Alternate Approaches

The Commission considered two alternative approaches to possible recommendations regarding the FTAIA: (1) Recommend continued development of the case law in the courts pursuant to general or guiding principles identified by the AMC; or (2) Recommend that

²⁸ *Den Norske Stats Oljeselskap AS v. Heeremac VOF* (“Statoil”), 241 F.3d 420, 427 (5th Cir. 2001) (holding that the domestic effect had to give rise to *the* claim being asserted).

²⁹ Trans. at 19 (Fox) (“The FTAIA was never meant to indulge in standing questions. It was a misconception of the Supreme Court in constraining the FTAIA to parse the issue as to what plaintiff is suing.”). Unless otherwise noted, all references to “Trans.” are to the transcript of the hearing on February 15, 2006.

³⁰ *Empagran*, 542 U.S. at 173-74 (holding that the Sherman Act had no jurisdiction over foreign harm that was independent of domestic anticompetitive effects); *Empagran Remand*, 417 F.3d at 1270-71 (holding that the FTAIA demanded there be a proximate cause between the foreign harm and the domestic effects, and that “but for” causation was not enough). Other courts have followed the D.C. Circuit's holding. *See, e.g., In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 2810682, **1, 3 (D. Minn. Oct. 26, 2005) (reversing itself in light of the D.C. Circuit's *Empagran* decision on remand, finding instead that the plaintiffs had failed to allege a sufficient causal connection between the domestic effects and their foreign injury); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005); *accord CSR Ltd. v. CIGNA Corp.*, 405 F. Supp. 2d 526, 549 (D.N.J. 2005).

Congress amend the Act pursuant to AMC-endorsed language. This memorandum first addresses the case law development, because a review of the case law lends clarity to the likely effectiveness of possible legislative amendments.

A. Court Development and Possible Guiding Principles

In general, federal courts faced with FTAIA cases are closely following the principles articulated by the Supreme Court and the D.C. Circuit Court in their decisions in *Empagran*. Below is a discussion of all of the relevant post-*Empagran* case law.

In *Sniado*,³² the plaintiff was a New York resident who regularly traveled to Europe.³³ He claimed that while he was in Europe, he purchased price-fixed currency exchange services from conspiring European banks.³⁴ He filed suit under the Sherman Act, alleging that the European conspiracy affected U.S. commerce and thus gave rise to “a” claim, although he conceded that the claim was not *his* claim.³⁵

The Second Circuit dismissed his initial claim under the FTAIA based on the Supreme Court’s reasoning in *Empagran*.³⁶ After the dismissal of his initial claim, Sniado advanced an alternate theory. He argued that his injury abroad was not independent of the U.S. competitive effect, but that it was “causally connected” to the U.S. harm.³⁷ The court rejected this argument, stating that Sniado’s Complaint was devoid of any such connection, and that he had not even

³¹ *Empagran Remand*, 417 F.3d at 1271; *see also id.* (“The statutory language [of the FTAIA] ‘gives rise to’ indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for ‘nexus.’”).

³² *Sniado v. Bank of Austria AG*, 378 F.3d 210 (2d Cir. 2004).

³³ *Sniado v. Bank of Austria AG*, 352 F.3d 73, 75 (2d Cir. 2003) (opinion vacated and remanded for reconsideration in light of *Empagran*).

³⁴ *Sniado*, 378 F.3d at 212.

³⁵ *Id.*

³⁶ *Id.*

pleaded a “but for” relationship between the European conspiracy’s effects in the U.S. and his foreign injury.³⁸ It is worth noting that the Second Circuit decided *Sniado* before the D.C. Circuit’s decision on remand in *Empagran*, so the D.C. Circuit’s precise language of “proximate causation” was not used in *Sniado*. Nevertheless, the Second Circuit still arrived at the same conclusion—namely, that there had to be a sufficient causal connection between the plaintiff’s foreign injury and the U.S. effects before a plaintiff injured abroad could sue under U.S. antitrust laws.

Like *Sniado*, *MM Global Services* was decided after the Supreme Court’s ruling in *Empagran*, but before the D.C. Circuit’s decision on remand.³⁹ Unlike the court in *Sniado*, however, the court in *MM Global Services* held that the foreign plaintiffs had alleged facts sufficient to meet the jurisdictional requirements of the FTAIA. In *MM Global Services*, the defendants were two U.S.-based companies selling goods through the foreign distributor plaintiffs.⁴⁰ The foreign plaintiffs purchased the defendants’ products in the United States and resold them to end-users in India.⁴¹ Plaintiffs claimed that the defendants refused to accept orders or cancelled orders if the plaintiffs’ resale prices to end-users were too low.⁴² Plaintiffs asserted an arbitrage theory of harm to U.S. commerce;⁴³ they claimed that the defendants

³⁷ *Id.* at 213.

³⁸ *Id.*

³⁹ *MM Global Servs. Inc. v. The Dow Chemical Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004).

⁴⁰ *Id.* at 339.

⁴¹ *Id.*

⁴² *Id.* at 340.

⁴³ The plaintiffs in *Empagran* asserted an arbitrage theory to connect their foreign injury and the U.S. effects.

wanted to keep the Indian prices high so as to avoid the erosion of the prices defendants charged end-users in the United States.⁴⁴

Plaintiffs claimed that this foreign conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce, thus providing a U.S. court with subject matter jurisdiction.⁴⁵ After the Supreme Court's *Empagran* decision, the defendants claimed that the plaintiffs had "failed to allege, as required by [*Empagran*] . . . that the defendants' misconduct gave rise to antitrust effects in the United States *that injured the plaintiffs*."⁴⁶ Defendants claimed that all the plaintiffs have shown is that "Indian resale price maintenance led to higher prices in the United States, and not the other way around."⁴⁷

The court disagreed, focusing on the language in the complaint alleging:

As a direct and proximate result of the defendants' fixing of minimum resale prices and other terms of sale, competition in the sale and resale of products in and from the United States was improperly diminished and restrained, and *as the result of such effect on competition, the plaintiffs were injured* by being precluded from effectively and fully competing and maximizing their sales of products.⁴⁸

The court stated that this language was sufficient to claim "the defendants' conduct had an effect on competition in and from the United States and the plaintiffs were injured *as a result* of that effect (emphasis added)."⁴⁹ Thus, unlike the D.C. Circuit in its later decision in *Empagran*, the district court in *MM Global Services* did not require that the plaintiffs' foreign

⁴⁴ *MM Global Servs.*, 329 F. Supp. 2d at 340.

⁴⁵ *Id.*

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.* at 342 (internal quotations omitted).

⁴⁸ *Id.* (emphasis in original).

⁴⁹ *Id.*

injury was “proximately caused” by the harm to U.S. commerce; rather, it was sufficient that the plaintiffs’ foreign injury allegedly was “a result” of the harm to U.S. commerce.

In *eMag Solutions LLC v. Toda Kogyo Corp.*,⁵⁰ a district court in northern California followed the reasoning of *Empagran* and also addressed a new issue. There, two different groups of foreign plaintiffs sued on the same alleged price-fixing conduct, but with different theories. Both groups alleged that the defendants conspired to fix prices for magnetic iron dioxide (“MIO”) worldwide, thus affecting markets in both the United States and abroad. One group of foreign plaintiffs conceded that their purchases took place abroad, but claimed a “but for” connection to the U.S. harm through a lack of arbitrage due to the conspiracy. The court dismissed this claim based on the Supreme Court’s decision in *Empagran*.

The other group of foreign plaintiffs advanced a new theory. These plaintiffs were Mexican corporations that had ordered products containing the allegedly price-fixed MIO. These products were to be resold in Mexico. The products were sent from abroad, but were received by the Mexican corporations in Texas and California. They claimed that this transaction was enough to make them “U.S. importers,” thus qualifying them for the FTAIA exception that allows U.S. imports to be within the jurisdictional reach of the Sherman Act. Their so-called U.S. importing activities, they asserted, provided them with a sufficient nexus to U.S. commerce to support a Sherman Act claim.⁵¹

The court rejected these arguments. The court stated that the mere receipt of foreign goods by foreign purchasers in U.S. territory does not rise to the level of “import commerce that produced some substantial effect in the United States.”⁵² The court held that “transient receipt of

⁵⁰ 2005 WL 1712084 (N.D. Cal. July 20, 2005).

⁵¹ *eMag Solutions*, 2005 WL 1712084, at *9.

⁵² *Id.*

product in the U.S. for ultimate delivery and use outside the U.S.” did not constitute domestic commerce.⁵³

In *In re Monosodium Glutamate*,⁵⁴ the plaintiffs were foreign corporations that purchased allegedly price-fixed monosodium glutamate (“MSG”) abroad. Like the *Empagran* plaintiffs, these plaintiffs used an arbitrage theory of harm to advance a “but for” connection between their foreign injuries and U.S. commerce. The district court relied on the D.C. Circuit’s decision in *Empagran* in dismissing this claim. The court found that a direct and proximate relationship between the plaintiffs’ foreign injuries and the domestic effects was required and “but for” causation was not enough.⁵⁵

The courts in both *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*⁵⁶ and *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*⁵⁷ found that the plaintiffs’ facts were analogous to the facts in *Empagran*—namely, the foreign plaintiffs alleged a global price-fixing conspiracy that affected both U.S. and foreign markets, but the plaintiffs made their purchases of the allegedly price-fixed goods abroad.⁵⁸ In both cases, the plaintiffs advanced a “but for” theory of harm, but were rejected by the courts.

These cases yield little new information on how the “proximate cause” requirement articulated by the D.C. Circuit in *Empagran* will be construed, because the facts in these cases were often analogous to those in *Empagran*. The cases do, however, offer some synonyms for proximate cause. In *Latino Quimica*, the court found that “[n]othing in [the plaintiffs’]

⁵³ *Id.* at *10.

⁵⁴ 2005 WL 2810682 (D. Minn. Oct. 26, 2005).

⁵⁵ *MSG*, 2005 WL 2810682, at *1.

⁵⁶ 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005).

⁵⁷ 2006 WL 515629 (N.D. Cal. Mar. 1, 2006).

⁵⁸ *Latino Quimica*, 2005 WL 2207017, at *1; *DRAM*, 2006 WL 515629, at *2.

allegations even suggest[ed] that Plaintiffs’ injuries were *directly or proximately caused* by the domestic effect of Defendants’ alleged conspiracy.”⁵⁹ The court used the terms “direct” and “proximate” almost interchangeably.⁶⁰ In *MGM*, the court found that “a unanimous panel of the District Columbia Court of Appeals held 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.”⁶¹

In summary, most post-*Empagran* cases have followed the *Empagran* reasoning of both the Supreme Court and the D.C. Circuit. The cases have not provided sufficiently different fact patterns to allow much development of the D.C. Circuit’s “proximate cause” language, however.

B. Statutory Amendment

Some Commissioners wanted to explore the possibility of recommending substitute statutory language for the FTAIA. Prof. Fox, an AMC witness, offered two proposals. These two proposals are set forth below in italicized language, followed by four other proposals (also in italicized language): (i) Commissioner Warden’s proposal offered at the June 7, 2006, deliberation meeting; (ii) Commissioner Delrahim’s proposal for a simple statutory amendment that would change “gives rise to ‘a’ claim” to “gives rise to ‘the’ claim”; (iii) Commissioner Delrahim’s recommendation at the June 7, 2006 deliberation meeting to develop language that

⁵⁹ *Latino Quimica*, 2005 WL 2207017, at *9 (emphasis added).

⁶⁰ *Id.*

⁶¹ 2005 WL 2810682, at *2 (emphasis added); see *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (stating that “direct” under the FTAIA means an “immediate consequence”). In *DRAM*, because some of the defendants had already pleaded guilty to the conspiracy in the U.S., the court found that there had been a direct, substantial, and foreseeable effect on U.S. commerce. *DRAM*, 2006 WL 515629, at *3. The court held that the foreign plaintiffs’ injury was not proximately caused by this U.S. effect, however, and dismissed the claim based on D.C. Circuit’s *Empagran* decision on remand. *Id.* at *4.

addresses standing; and (iv) a general rule of law for courts to follow offered by James Atwood at the AMC February 15, 2006, hearing.

Fox Proposal 1:

1. “*The Sherman and FTC Acts shall not apply to harm not within the United States and not on U.S. territory.*”⁶²

If Prof. Fox’s proposal is interpreted to mean that the Sherman Act will not apply where there is no *domestic harm*, then it would only address the second prong of the test—namely, whether the foreign conduct harms U.S. commerce, thus bringing the foreign conduct that otherwise would be excluded back within the reach of U.S. antitrust laws. The proposal would not address future *Empagran*-type claims, however.

In *Empagran*, domestic harm was conceded. In fact, some of the defendants had already pleaded guilty to price-fixing in the U.S. The issue to be decided in *Empagran*-type cases was whether a foreign plaintiff can vindicate harm in the U.S. Thus, new statutory language directed to whether there is U.S. harm in the first instance would not address the *Empagran* standing issues.⁶³

If Prof. Fox’s proposal is interpreted to mean that the Sherman Act will not apply where the *plaintiff’s injury* does not occur within the United States or its territories, it answers only the third question. It does not provide an inquiry by which to determine whether, in the first

⁶² Testimony of Eleanor M. Fox Before the Antitrust Modernization Commission, as Revised March 2, 2006, at 9 (Feb. 15, 2006) (“Fox Statement”) (Prof. Fox notes that such a revision would make the Webb-Pomerene Act and Export Trading Company Act surplusage); *see also* Trans. at 55-57 (Fox).

⁶³ Prof. Fox’s proposal also does not attempt to preserve the U.S. exporter carve-out, because she does not believe that it should be preserved. *See* Fox, *Extraterritoriality*, at 14 (recognizing that Congress intended “to preserve the possibility that American firms excluded from foreign markets by U.S. export associations’ restraints abroad could sue,” but that “[n]o such foreclosure cause of action is now recognized by U.S. law . . . [and as such] [t]his possibility should not be preserved”).

instance, the foreign conduct at issue had a sufficient connection to U.S. commerce. Under the current statute, foreign conduct will be actionable only when it has a “direct, substantial, or reasonably foreseeable” effect on U.S. commerce. Until this question is answered, there is no need to determine which plaintiff’s injury can be vindicated under U.S. antitrust law.

Fox Proposal 2:

2. “Plaintiffs must show that their harm has been proximately caused by the illegal acts that harm the U.S. market and is inextricably bound up with the affected U.S. commerce.”⁶⁴

Prof. Fox’s second proposal addresses all three prongs—(1) foreign conduct, (2) causing harm to U.S. markets, and (3) which plaintiff can sue. It does not, however, fully comport with the *Empagran* holding that the plaintiff’s injury must derive from the U.S. harm.

- a. Conduct that harms U.S. commerce (prongs 1 & 2)

The proposal implicitly addresses foreign conduct, by asking the question whether the “illegal acts” (presumably, the foreign conduct) “harm the U.S. market.” An affirmative answer to this question brings back with the Sherman Act’s reach conduct that otherwise would have been excluded from U.S. antitrust laws.

- b. Who can sue? (prong 3)

With respect to which plaintiff can sue, the proposal does not require that the plaintiff’s foreign harm be directly or proximately caused by the domestic effect. It requires instead that the plaintiff’s foreign harm be proximately caused by the defendant’s *illegal acts*. Prof. Fox’s deviation from *Empagran* standards likely reflects her disagreement with the Supreme Court’s

⁶⁴ Fox Statement, at 1.

holding that the plaintiff’s injury had to derive from the domestic anticompetitive effects.⁶⁵ She considered this holding to be a “strange and strained construction of the FTAIA.” According to Fox,

[p]laintiffs who are directly, substantially, and foreseeably hurt by anticompetitive conduct centered in the United States should not have to show that their harm derived from the U.S. *effect*. Rather, they should be required to show that their harm derived from the illegal *conduct*, and proximately so, and perhaps that their purchases were sufficiently linked to the United States.⁶⁶

Thus, Professor Fox would require only that the foreign harm be “linked” to the domestic conduct at issue and not necessarily to the domestic anticompetitive effect produced by that conduct.⁶⁷ Some would say, however, that linking the plaintiff’s harm to a domestic competitive effect is precisely the inquiry required to show “antitrust injury.”⁶⁸

⁶⁵ *Id.* at 9; *id.* (rejecting the Supreme Court’s finding in *Empagran* that “plaintiffs who buy abroad have no cause of action unless the challenged conduct’s *domestic effect* ‘gives rise’ to their claim”) (emphasis in original).

⁶⁶ *Id.* (emphasis in original).

⁶⁷ Trans. at 101 (Fox) (“I think that anyone who suffers with antitrust injury—directly, substantially, foreseeably—from conduct within the U.S. jurisdiction that proximately causes the harm should have a right to sue as long as that person is sufficiently related to the United States. This is not the way the cases are running. The cases are saying that plaintiffs who buy abroad must be injured by the U.S. effect as if that U.S. effect could directly injure them. I think that is wrong.”).

⁶⁸ Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 Antitrust L.J. 273, 273 (1998) (stating that *Brunswick*’s antitrust injury meant that “[n]o longer was the issue whether the plaintiff had been harmed by the defendant’s conduct; the issue became whether the plaintiff’s injury sufficiently reflected the adverse effect of the defendant’s conduct on competition and consumers”); *see id.* at 280 (stating that (“[A]ntitrust plaintiffs should be required to demonstrate harm from an actual adverse effect on competition”) (citing to Phillip E. Areeda, *Antitrust Violations Without Damages Recovery*, 89 Harv. L. Rev. 1127 (1976)); Cavanagh, *FTAIA*, at 2181 (reaffirming that in *Brunswick*, “[t]he Supreme Court held that a plaintiff in a treble damage action must establish more than a violation of an antitrust statute and injury flowing from that violation; a plaintiff must prove “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. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation”); *see id.* (“Nowhere in the legislative history is there any suggestion that the FTAIA

Commissioner Warden proposal:

3. “There is no private right of action under the U.S. antitrust laws for injury not occurring within the United States or U.S. territory.”

Commissioner Warden offered this proposal at the June 7, 2006, AMC deliberation meeting. The proposal would modify only the third prong of the test—namely, which plaintiff can sue under U.S. antitrust laws. (It does not provide a mechanism for determining when foreign conduct that otherwise would be excluded from U.S. antitrust laws can be brought back within the reach of U.S. antitrust laws.)

The proposal requires that the plaintiff’s injury occur within the geographical boundaries of the United States or its territories. Currently, the D.C. Circuit’s *Empagran* decision requires only that the plaintiff’s injury be derived from or proximate to the U.S. effects. In this respect, Commissioner Warden’s proposal could be read as being more restrictive than current case law.

Also, Commissioner Warden’s proposal might be read to permit a foreign plaintiff that briefly receives and holds foreign price-fixed goods within U.S. territory, but sells only abroad, to sue under U.S. antitrust laws because the “injury” occurred within the geographical boundaries of the United States. There is case law to suggest that such an outcome would not

was intended to modify the antitrust injury doctrine It is inconceivable that Congress, in enacting the FTAIA with the view of limiting jurisdiction over foreign claims, intended to create a broad exception to [the] rule in *Brunswick*”); H.R. Rep. No. 97-686, at 11 (“The Committee does not intend to alter existing concepts of antitrust injury or antitrust standing.”); ABA FTAIA Comments, at 2-3 (identifying *Kruman*’s approach to antitrust jurisdiction as being “expansive,” and that “[t]his expansive reading, which the D.C. Circuit adopted in its first *Empagran* opinion . . . permitted jurisdiction over foreign claims that did not arise out of the challenged conduct’s domestic effects”). *But see* Trans. at 53 (Fox) (stating that the “[antitrust] plaintiff’s claim never derives proximately from the U.S. . . . effect. It derives from the conduct that was within the U.S. subject matter jurisdiction”).

occur in today's courts.⁶⁹ In this respect, the proposal might be more expansive than current case law.

Commissioner Delrahim Proposal 1:

4. “Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless ... (2) such effect gives rise to ~~a~~ the claim of the plaintiff under the provisions of sections 1 to 7 of this title, other than this section.”

The Supreme Court resolved a circuit court split regarding whether to read the FTAIA's “gives rise to ‘a’ claim” as “gives rise to ‘the’ claim.”⁷⁰ The Supreme Court held that the statutory provision should be read as “gives rise to ‘the’ claim.”⁷¹ A statutory change reflecting this outcome would codify the U.S. Supreme Court's holding in *Empagran* and would limit plaintiffs, foreign or otherwise, to vindicating their own injuries. This change would not answer the question of how proximate a plaintiff's injuries must be to U.S. harm to be actionable.

Commissioner Delrahim Proposal 2:

5. “Injured parties that are neither competitors nor consumers in the U.S. marketplace are precluded from suing under U.S. antitrust laws.”

This language is taken from pre-*Empagran* cases that analyzed a foreign plaintiff's claim under both subject matter jurisdiction and standing.⁷² The selected language addresses only the

⁶⁹ See *eMag Solutions*, 2005 WL 1712084, at **9-10 (where the Mexican plaintiffs received allegedly price-fixed products sent from abroad to be resold in Mexico within U.S. territory (Texas and California) were found not to have suffered a cognizable injury under U.S. antitrust laws because mere presence in the country was not enough).

⁷⁰ *Empagran*, 542 U.S. at 160 (stating that “[w]e granted certiorari to resolve the split among the Courts of Appeal.”); compare *Statoil*, 241 F.3d at 427 (holding that the domestic effect had to give rise to *the* claim being asserted) with *Kruman*, 284 F.3d at 399-400 (holding that the defendant's conduct only had to give rise to *a* claim under the Sherman Act, and not necessarily the plaintiff's claim).

⁷¹ *Empagran*, 542 U.S. at 173-75.

⁷² *Galavan Supplements, LTD. v. Archer Daniels Midland Co.*, 1997 WL 732498, **1, 4 (N.D. Cal. Nov. 19, 1997) (analyzing the issues separately and ultimately dismissing on standing grounds, finding that the plaintiff was “neither a competitor nor a consumer in the United States

third prong—namely, which plaintiff can sue under U.S. antitrust laws. It does not incorporate a mechanism to bring foreign conduct that otherwise would be excluded back within the reach of the U.S. antitrust laws. Also, it does not expressly link plaintiff’s injury to the domestic harm or domestic effect caused by the foreign conduct.⁷³

Atwood Proposal:

6. “*The United States laws do not apply in the absence of an adverse effect in the United States’ territory.*”⁷⁴

During the February 15, 2006, AMC hearing, another witness, James Atwood, offered this proposal as a possible rule of law to guide courts moving forward. Although the language is simple and thus likely preferably to the current language of the FTAIA, it suffers from the same defect as Prof. Fox’s first proposal in that it addresses only U.S. harm and does not attempt to address which plaintiff can sue under U.S. antitrust laws to vindicate that harm.

domestic market,” and that for standing purposes, “the injured party [must] be a participant in the same market as the alleged malefactors.”); *In re Microsoft Corp. Antitrust Litigation*, 127 F. Supp. 2d 702, 716 (D. Md. 2001) (stating that “the critical question is not the nationality of the plaintiff but the location of the marketplace in which he participated”).

⁷³ Presumably, the standard antitrust injury doctrine that already links the plaintiff’s injury to the anticompetitive effects. would still apply.

⁷⁴ Trans. at 50-51 (Atwood).