

Deborah A. Garza
Chair, Antitrust Modernization Commission
Attn: Public Comments
1001 Pennsylvania Avenue,
NW Suite 800-South
Washington, DC 20004-2505

January 27, 2006

Re: Comments Regarding International Issues

Dear Ms. Garza:

On behalf of the International Bar Association, Antitrust and Trade Law Section, we are pleased to submit the comments of one of our Working Groups, these comments being related to International Issues for purposes of responding to the AMC's request for public comments.

We hope that our views will provide a positive contribution to the Commission's work and we will certainly be pleased to answer any questions members might have.

Yours Sincerely,

A handwritten signature in black ink, appearing to read "M Reynolds", with a horizontal line drawn underneath.

Michael Reynolds
Chair of the Legal Practice Division of the International Bar Association

Cc:
Bruno Ciuffetelli, Chair, Antitrust Committee
John Briggs, Co-chair, Working Group on US Antitrust Modernization
Riccardo Celli, Co-chair, Working Group on US Antitrust Modernization
William J. Kolasky, Co-chair, Working Group on US Antitrust Modernization
Thomas McQuail, Co-chair, Working Group on US Antitrust Modernization



INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE

WORKING GROUP ON US ANTITRUST MODERNIZATION

INTERNATIONAL ISSUES

SUBMISSION TO THE US ANTITRUST MODERNIZATION COMMITTEE

1. INTRODUCTION

The IBA's Working Group on International Issues

- 1.1 This submission is made to the Antitrust Modernization Committee ("AMC") on behalf of a Working Group on International issues established by the International Bar Association's Antitrust Committee with the specific task of providing comments to the AMC on specific issues of antitrust law and policy. The Members of the Working Group are set forth in Annex A.
- 1.2 The Antitrust Committee of the International Bar Association ("IBA") brings together antitrust practitioners and experts among the IBA's 20,000 individual members from across the world, with a unique blend of jurisdictional backgrounds and professional experience.
- 1.3. The Antitrust Committee has established Working Groups to examine and provide input to the AMC on the topics on which comment was invited where it appeared that the international perspective that the IBA can offer would be particularly

relevant. This submission responds to the AMC's request for public comment on the following international issues:

A: Should the Foreign Trade Antitrust Improvements Act ("FTAIA") be amended to clarify the circumstances in which the Sherman Act applies to extraterritorial anticompetitive conduct?

B: Are there technical or procedural steps the United States could take to facilitate further coordination with foreign antitrust enforcement authorities?

- Are there technical amendments to the International Antitrust Enforcement Assistance Act of 1994 ("IAEAA") that could enhance coordination between the United States and foreign antitrust enforcement authorities?
- Are there technical changes to the budget authority granted US antitrust agencies that could further facilitate the provision of international antitrust technical assistance to foreign antitrust authorities?

C: Are there multilateral procedures that should be implemented or other actions taken, to enhance international antitrust comity? If so, what is the significance of the issue, what solutions might reduce that problem, and how could such solutions be implemented by the United States.

1.4 As explained in detail in this submission, the Working Group recommends the following actions:

- In response to Issue A, the Working Group recommends that Congress clarifies:

- a) The notion of “independent” effect under the Supreme Court decision in *Empagran*.
- b) The correct standard for determining the extraterritorial reach of U.S. antitrust law, and
- c) If the exclusion of a potential foreign competitor would satisfy the “direct, substantial and foreseeable effect” under the FTAIA.

- In response to Issue B, the Working Group recommends amending Section 12(2)(E) of the IAEAA to ensure that any information sharing is limited to the purpose of antitrust enforcement and not non-antitrust criminal enforcement. The Working Group also considers it advisable that Congress amend this provision to clarify that this provision to disclose antitrust evidence for non-antitrust purposes is not mandatory.
- In response to Issue C, the Working Group suggests that DOJ and FTC, as appropriate, intervene to develop guiding principles for the courts to use in the treatment of comity issues.

1.5 We hope that the AMC finds these comments helpful and we remain available to provide further elaboration as required by the AMC. We are grateful for this opportunity to participate in the work of the AMC and we hope to contribute constructively to the process.

A: EXTRATERRITORIAL ANTICOMPETITIVE CONDUCT UNDER THE FTAIA

1. General Principles

- 1.1 The FTAIA was enacted in 1982 to clarify the scope of foreign conduct that might be deemed to violate Section 1 of the Sherman Act. The FTAIA generally excludes extraterritorial application of the Sherman Act to anticompetitive conduct which causes foreign harm¹. However, the Act creates an exception to the general rule where that conduct also causes domestic harm, i.e. where a plaintiff can prove that (i) the foreign injuring conduct has a “direct, substantial, and reasonably foreseeable effect” on US commerce and (ii) such “effect gives rise to a claim” under Section 1 of the Sherman Act.
- 1.2 The phrasing of this provision has given rise to a significant amount of litigation in recent years over the interpretation of the extraterritorial reach of the Sherman Act. In particular, it was not clear whether the FTAIA requires plaintiffs to show that the foreign injuring conduct’s anticompetitive effects on US commerce must give rise to the *plaintiff’s* claim (i.e. the claim actually being advanced by the party seeking jurisdiction in the case pending before the court) or whether it is enough that it shows that these effects give rise to *someone’s* claim under the

¹ The FTAIA, which was enacted in 1982 (Pub. L. No. 97-290, § 402, 96 Stat. 1248) provides: “Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
(1) such conduct has a direct, substantial, and reasonably foreseeable effect—
(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.”

Sherman Act (i.e. a claim by some other third party victim of the cartel in the US)².

1.3. The Supreme Court Decision in *Empagran*

(a) Background

The Supreme Court ruled on the extraterritorial reach of the Sherman Act in *F. Hoffman-La Roche v. Empagran*³ (2004) (“*Empagran*”). The Supreme Court unanimously held that the FTAIA excludes from the scope of US antitrust law damage claims based on injuries suffered entirely outside the US and “independent” of any domestic effects (i.e. effects on US commerce), so that foreign purchasers cannot sue before the US courts simply by alleging that they were harmed by conduct that also injured consumers in the US. The Court, however, did not take the broad view that damages arising out of higher prices in wholly foreign commerce are always excluded from the scope of US antitrust law.

The case concerned a class action seeking treble damages under the Sherman Act on behalf of purchasers both in the US and overseas, following the United States’ successful investigation into the vitamins price-fixing cartel. In particular, non-US plaintiffs (i.e. five foreign vitamin distributors located in Ukraine, Australia, Ecuador and Panama), which had purchased vitamins outside the United States, had argued that their injuries were not independent of the cartel’s effect on US commerce. They argued that, because the market for bulk vitamins is global, the cartel members would not have been able to raise prices in foreign markets without also raising prices in the United States. While there was little debate that domestic purchasers were proper plaintiffs under US antitrust

² In *Den Norske Stats Oljeselskap As v. HeereMac VOF*, 241 F.3d 420 (5th Cir. 2001), the Fifth Circuit ruled that a plaintiff could pursue an antitrust claim in US courts only if the plaintiff’s own injury arose from the alleged wrongdoing’s effect on U.S. commerce. The Second Circuit, by contrast, held in *Kruman v. Christie’s International PLC*, 284 F.3d 384 (2d Cir. 2002), that a plaintiff could pursue a claim in U.S. courts even when the plaintiff’s injury does not arise from the domestic effect of the conspiracy, as long as someone (even if not the plaintiff) had a Sherman Act claim based on the anticompetitive effect on U.S. commerce. In *Empagran*, the D.C. Circuit largely sided with the Second Circuit and ruled that plaintiffs purchasing overseas could bring suit.

³ 542 U.S. 155, 124 S. Ct. 2359 (14 June 2004). *Empagran* provided the Supreme Court with the first opportunity after *Hartford Fire Ins Co v California* (509 US 764 (1993)) to address the application of the Sherman Act to conduct occurring outside the United States.

laws, the vitamin manufacturers argued that the US courts did not have jurisdiction over the antitrust claims of the purchasers who had bought vitamins outside the US.

The Supreme Court's decision follows several years of litigation over the vitamin case. After the District Court dismissed the applicants' claims in 2001, finding that none of the FTAIA exceptions were applicable to the vitamin case, the DC Circuit Court of Appeals reversed in 2003, ruling that the domestic-injury exception applied⁴. The DC Circuit Court considered that overseas purchasers were entitled to seek treble damages relief on the theory that foreign conduct by vitamin manufacturers was part of a global price-fixing conspiracy that had anti-competitive effects in the US, which gave rise to a claim by some other third parties under the Sherman Act.

(b) Key findings

In its opinion, the Supreme Court defined the issue narrowly as follows: does a US court have subject matter jurisdiction over a plaintiff's claim if the plaintiff's antitrust injury occurred outside US commerce and was "independent" of any harm to US commerce? The Court's answer to this narrow question was negative.

The Court concluded that the FTAIA exception does not apply where the anticompetitive conduct significantly and adversely affects both customers outside and within the United States but the plaintiff's claim rests solely on the independent foreign harm (i.e. where producers around the world agree to fix prices leading to higher prices in the United States and independently leading to higher prices in other countries). Following its interpretation of the FTAIA, the court concluded that, in this case, while a plaintiff who

⁴ The District of Columbia Circuit Court of Appeals ("DC Circuit Court") held, on 17 January 2003, that the Sherman Act allows US courts to hear non-US plaintiffs' claims in respect of damages suffered from transactions outside the US, even if independent of any adverse domestic effect, as long as an injured domestic customer could bring similar claims in the US under the Sherman Act in relation to the same cartel. The Court assumed that the foreign effect, i.e. higher prices in Ukraine, Panama, Australia and Ecuador, was independent of the domestic effect, i.e. the higher domestic prices. However, it concluded that, in light of the FTAIA's text, legislative history and the policy goal of deterring harmful price-fixing activity, this lack of connection was not relevant.

had purchased in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury from the anticompetitive conduct, a foreign purchaser who transacted entirely outside of the United States could not bring a Sherman Act claim based on foreign harm.

The Court importantly rejected the applicants' argument that the transaction fell outside the FTAIA because its general exclusionary rule would only apply to conduct involving exports⁵.

The Court ruled that the FTAIA exception does not apply where the plaintiff's claim rests solely on the independent foreign harm, for two main reasons:

- First, the Court ordinarily construes ambiguous statutes to avoid unreasonable interference with other nations' sovereign authority, to reflect customary international law principles. The Court noted that application of US antitrust law to foreign conduct is reasonable and consistent with prescriptive comity principles, even if it can interfere with a foreign nation's ability to regulate its own commercial affairs, where foreign anticompetitive conduct has caused a domestic antitrust injury that needs to be redressed. On the contrary, it would not be reasonable to apply US law to foreign conduct which causes independent foreign harm and this foreign harm alone gives rise to a plaintiff's claim. As the Court held:

⁵ The Court noted that the House Judiciary Committee changed the bill's original language from "export trade or export commerce" to "trade or commerce (other than import trade or import commerce)" deliberately to include commerce that did not involve American exports but was wholly foreign. H.R. 5235, 97th Cong., 1st Sess., § 1 (1981). The House Report stated that "[t]he Subcommittee's 'export' commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, i.e. transactions within, between, or among other nations. *Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions* – that is, there should be no American antitrust jurisdiction, absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor... *It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment*, but that import transactions are not" (House Report 9-10, emphases added).

“Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?”.

- Second, the FTAIA’s language and history suggest that Congress designed the Act to clarify, perhaps to limit, but not to expand, the Sherman Act’s scope as applied to foreign commerce⁶.

In reaching this answer, the Court recognized that US antitrust law needs to work on a global level. The Court cited the *amicus curiae* briefs filed by a number of foreign countries and the United States arguing that permitting independently injured foreign plaintiffs “to pursue private treble-damages remedies would undermine foreign nations’ own antitrust enforcement policies by diminishing foreign firms’ incentives to cooperate with antitrust authorities in return for prosecutorial amnesty”⁷.

⁶ The 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...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”. The Court also noted that in the vitamin case, the higher foreign prices were not the consequences of any domestic anticompetitive conduct sought to be forbidden by Congress, which rather wanted to release domestic (and foreign) anticompetitive conduct from Sherman Act’s constraint when that conduct causes foreign harm, with an exception where it also causes domestic harm. There is no significant indication that, at the time Congress drafted the FTAIA, courts would have thought the Sherman Act applicable in these circumstances.

⁷ See, e.g., Brief for the United States as *Amicus Curiae* to the Court of Appeals for the DC Circuit in *Empagran*, February 2004, 19-21, where the US argued that “an expansive interpretation of the FTAIA would greatly expand the potential liability for treble damages in US courts and would thereby deter members of international cartels from seeking amnesty from criminal prosecution by the US Government”. The US also noted that the interpretation adopted by the Court of Appeals “would weaken the DoJ’s criminal amnesty program, which has served as an effective means of cracking international cartels”. Also, such interpretation “would damage the cooperative law enforcement relationship that the United States has nurtured with foreign governments and would burden the federal courts with a wave of new international antitrust cases raising potentially complex satellite disputes that turn on hypothetical claims of persons not before the courts”. The US also considered that foreign plaintiffs whose claims arise from a conspiracy’s effects outside the US are not proper plaintiffs to invoke US antitrust law, as would lack antitrust standing under the Clayton Act. See also Brief for Germany et al. as *Amici Curiae* 2; Brief for Canada as *Amicus*

(c) *Issues left “open”*

The Supreme Court, however, left open the questions as to (a) the meaning of “independent”, and (b) whether a foreign plaintiff who suffered foreign injury can sue if the injury is not “independent” of the anticompetitive conduct’s effects in the US, remanding to lower courts to rule on whether such an “indirect” effect would be enough to establish jurisdiction and standing under US antitrust laws. By leaving this issue unresolved, the Court has left considerable uncertainty as to the scope of its decision.

The issue, following the Supreme Court’s decision in *Empagran*, was whether the US courts would define the term “independent” so as to give rise to US jurisdiction whenever a purchaser outside the US could allege that its injuries were in some way caused by the conspiracy’s effects in the US.

Shortly after *Empagran*, the US Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which provides for de-trebling of antitrust damages for defendants who have entered into an amnesty agreement with the Department of Justice (DOJ).

1.4 The lower Federal Courts’ decisions

The lower federal courts have reached divergent conclusions on the interpretation of the FTAIA provisions.

(a) *DC Circuit’s decision in Empagran*

On 28 June 2005, the US Court of Appeals for the District of Columbia considered, on remand from the Supreme Court in *Empagran*, whether a “but for” condition is sufficient

Curiae 14; Brief for Japan as *Amicus Curiae* 10; Brief for the United Kingdom, Ireland and the Netherlands.

to bring the price-fixing conduct within the scope of the FTAIA's exception. The applicants had argued 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 applicants would have not suffered their foreign injury.

The Court held that it lacked jurisdiction over the purchasers' claims under the FTAIA because the US effects of the manufacturers' conspiracy were not the "proximate cause" of the purchasers' alleged injuries, thus affirming the District Court's original dismissal of the action.

The Court noted that the direct cause of the purchasers' injuries was in fact the foreign effects of the global conspiracy, i.e. the artificially inflated prices of vitamins sold in foreign countries. The Court recognized that the fixing of vitamin prices in the US may have facilitated the manufacturers' fixing of vitamin prices in foreign countries but concluded that the higher US prices were only an indirect cause of the purchasers' injury abroad. There was no "direct tie" between the US effects and the alleged injuries.

The DC Circuit decision construes narrowly the circumstances under which plaintiffs can bring suit in US courts for injuries suffered outside the US. In accordance with the wording of the FTAIA, the decision interprets the term "independent" as to bar claims for injuries suffered in foreign commerce that are only indirectly tied to effects on US commerce. In short, an "indirect effect" is an insufficient basis upon which to found a suit under US antitrust law.

The Court held that to obtain relief, plaintiffs must show that their injuries bear a "direct causal relationship" to the US effects of the alleged anticompetitive conduct. In other words, the US effects must be the "proximate cause" of the plaintiffs' injury rather than simply a "but for" cause (i.e. where the plaintiff did not actually pay those high prices, on the theory that lower, competitively determined, US prices would have made it difficult to sustain the price fixing agreement if it had been limited to foreign territory).

The Court noted that this interpretation of the FTAIA provisions accords with the principles of “prescriptive” comity (i.e. “the respect sovereign nations afford each other by limiting the reach of their laws”), that the Supreme Court endorsed in its *Empagran* opinion.

The DC Circuit decision is in contrast with previous court cases where the “but for” cause had been accepted and the district courts had concluded that it was enough that the plaintiff alleged that without the anticompetitive prices in the US the global conspiracy would have not succeeded (see for example, *MM Global Service v. Dow Chemical*, 2004⁸).

The DC Circuit’s decision, along with the second Circuit’s decision in *Sniado v. Bank Austria AG*⁹ indicate that the US courts are taking very seriously the comity concerns and are reluctant to extend US jurisdiction over antitrust claims to transactions taking place strictly in foreign commerce.

However, the DC Circuit’s decision is not the last word in the debate concerning the interpretation of the FTAIA.

(b) The LSL Biotechnologies case

Another “open” issue concerning the FTAIA scope arose in *United States v. LSL Biotechnologies* (2004) (“LSL”), where the US Court of Appeals for the Ninth Circuit interpreted the notion of “direct effect” under the FTAIA requirement. The Court considered whether a settlement agreement between two potential competitors (i.e. LSL and a former joint venture partner, Hazera in Israel), restraining Hazera from selling as

⁸ No 3:02cv 1107 (AVC), 11 August 2004, District of Connecticut District Court. See also *Kruman v Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002), where the Court of Appeals found that the FTAIA exception applies even where foreign injury is independent from any adverse domestic effect.

⁹ 378 F. 3d 210 (2d Cir. 5 August 2004), where the Second Circuit reinstated the district court’s dismissal of the case, in the light of the Supreme Court’s opinion in *Empagran* and held that a “but for” cause is not sufficient for the application of the FTAIA.

yet undeveloped long-shelf-life tomato seeds in North America, in which LSL was active, had the required “direct, substantial, and reasonably foreseeable effect” on US commerce under the FTAIA.

The Court ruled that an effect is “direct” only “if it follows as an immediate consequence of the defendant’s activity”. Because it found that it was “sheer speculation” whether Hazera would ever be able to develop a long-shelf-life tomato seed that does not infringe LSL’s patents, the Court held that the effect of the LSL-Hazera agreement cannot be direct because it depends on uncertain intervening developments.

The interpretation of the FTAIA standard for such requirement and, in particular, when the exclusion of a potential foreign competitor would satisfy the “direct” requirement, is another area which remain “open” until the Supreme Court or Congress bring some clarification.

1.5 Working Group’s Recommendations

Based on this background, two possible alternative approaches are available for clarifying the interpretation of the FTAIA exception rules: (i) legislative action by amending the law and clarifying the correct standard for the extraterritorial reach of the Sherman Act or (ii) common law process through a case-by-case analysis including, where appropriate, the submission of *amicus* briefs by the US and other countries.

In the Working Group’s views, legislative action would be more effective for the purposes of this clarification process, based on the following considerations:

- 1) *Legal certainty.* As lower courts are following inconsistent approaches, there is a serious risk of uncertainty for many years with relative significant costs for businesses. Congressional action would help ensure legal certainty by giving clear directions to the courts. While the common law will continue to evolve and eventually provide greater certainty, this will take

significant time, involve costly litigation, and the ultimate outcome may not be optimal from a policy perspective. Consistent with the original legislative intent behind the FTAIA, further legislative amendment is appropriate to provide the required certainty on this issue.

2) *Policy implications.* Congress is in the best position to consider the delicate policy implications relating to the different interpretations which might result from the Supreme Court decision in *Empagran* and to assess the extent and circumstances in which US courts should open their doors to foreign purchasers. The following considerations appear, in particular, relevant:

- (i) The FTAIA enactment itself recognized that Congress was in a better position than courts to clarify the scope of extraterritorial reach of the Sherman Act. Government and industry had significant concerns at the time regarding the lack of judicial consensus as to the appropriate balance between considerations of jurisdiction and considerations of comity¹⁰.
- (ii) The weighing and balancing of sensitive international interests should arguably not be conducted by a body that relies on an exclusive legal analysis and in the context of the specific facts presented by individual cases. This framework would typically not give full and proper regard to the wider diplomatic, political and policy aspects.
- (iii) The FTAIA represented an important step towards some foreign government concerns over perceived excesses regarding the extraterritorial application/ramifications of US antitrust law during

¹⁰ See, e.g., Calvin Goldman et al., *Comity After Empagran and Intel*, 19 SUM Antitrust 6 (2005).

the 1970s and early 1980s (e.g., *Westinghouse* litigation). The more “aggressive” extraterritoriality over that period had generated significant political and jurisdictional frictions, leading to the enactment of “blocking” and “claw-back” legislation by a number of countries¹¹.

- 3) *Timing*. Legislative action is more effective in terms of timing than common law process, which would require many years of conflicting circuit courts’ and district courts’ decisions imposing divergent jurisdictional standards before a standard is developed.

1.6 Issues to be clarified

Based on the recent case law developments, the Working Group recommends that Congress clarifies at least the following issues:

- a) The notion of “independent” effect under the Supreme Court decision in *Empagran*.
- b) In particular, whether the requirement for a “non-independent” effect, and therefore the correct standard for determining the US antitrust law extraterritorial reach under the FTAIA, is (i) a “proximate cause” test and a “direct effect” (e.g. DC Circuit court in *Empagran*) or (ii) a “but for” cause and “indirect effect” (e.g. *MM Global Service*), as described above.
- c) When the exclusion of a potential foreign competitor would satisfy the “direct, substantial and foreseeable effect” under the FTAIA (e.g. *LSL* case).

¹¹ See, e.g., Protection of Trading Interests Act, 1980 [U.K.] ; Law Concerning the Communication of Commercial, Financial, or Technical Nature to Foreign, Natural or Juristic Persons, July 1980, French Law. No. 80-538, J.O. (July 17, 1980) [France]; The Foreign Extraterritorial Measures Act, 13 Can. Rev. Stat. 1984 c. 49 [Canada] ; Foreign Proceedings (Excess of Jurisdiction Act), 1984 No. 3 [Australia].

As concerns the interpretation of “non-independent” effect, the question arises as to the most appropriate amendments to the FTAIA (raising a policy question as to the appropriate scope of US antitrust extraterritoriality). In the submissions made to the AMC to date, there is a lack of consensus on this issue. The ABA, for example, has set out arguments for both an expansive and a restrictive approach in its submission.

The Working Group considers that a more restrictive approach, along the lines of the “direct causal relationship” approach of the DC Circuit Court in *Empagran* would reflect the Supreme Court’s considerations in *Empagran* and be more appropriate from a policy perspective for the following reasons:

- (i) *Deterrent effect and risk to undermine international antitrust cooperation.* Allowing recovery of treble damages by foreign plaintiffs outside the US would deter companies from reporting infringements and seeking amnesty in many jurisdictions if they know that they expose themselves to greater financial liability. This entails a risk to interfere with the enforcement systems in other jurisdictions and jeopardize cooperation among authorities, as leniency programs are critical in competition enforcement¹². Furthermore, having a broad approach could, combined with the Antitrust Criminal Penalty Enhancement and Reform Act, lead to the undesirable result that a company engaged in conduct in the US (but having obtained

¹² The Supreme Court accepted the arguments submitted by a number of governments in their *amicus curiae* briefs, see e.g. Brief for the United States as *Amicus Curiae* supporting petitioners on writ of certiorari to the US Court of Appeals for the District of Columbia Circuit, February 2004, where the United States noted that “an expansive reach of the antitrust laws is not justified by either the text or the history of the FTAIA and would have the perverse effect of undermining the government’s efforts to detect and deter international cartel activities and the effectiveness of the government’s amnesty program. Even those conspirators who come forward and receive amnesty from criminal prosecution still face exposure to private treble damage actions under 15 U.S.C. 15(a). Potential amnesty applicants therefore weigh their civil liability exposure when deciding whether to avail themselves of the government’s amnesty program. The court of appeals’ interpretation would tilt the scale for conspirators against seeking amnesty by expanding the scope of their potential civil liability. Faced with joint and several liability for conspirators’ illegal acts all over the world, a conspirator could not readily quantify its potential liability. The prospect of civil liability to all global victims would provide a significant disincentive to seek amnesty from the government... It follows that deterrence is best maximized, and United States consumers are best protected, not by maximizing the potential number of private lawsuits, but by encouraging conspirators to seek amnesty and thus expose cartels in the first place”.

amnesty from the DOJ) would be liable only for single damages, whereas the company which has not been engaged in any conduct in the US (and having obtained amnesty e.g. in Europe) would be liable for treble-damages. This is because, in most countries, participants in leniency programs receive no immunity from private damage actions.

- (ii) *Comity principles.* A restrictive approach would reduce the risk of infringing the territorial sovereignty of other nations. International jurisprudence requires that a claim of extraterritorial jurisdiction must be premised on a substantial and genuine connection between the subject matter of the claim of jurisdiction and the reasonable legitimate interests of the nation seeking to exercise jurisdiction. As international antitrust co-operation increases (particularly via the adoption of positive comity mechanisms), while foreign antitrust laws improve in effectiveness, the need for extraterritorial enforcement of US antitrust laws reduces and comity considerations become more important¹³. Also, since these countries have enacted the remedies that their governments consider appropriate, US law should not promote “forum shopping” that undermines those sovereign systems.
- (iii) *Existence of other antitrust regimes worldwide.* As the United States and the United Kingdom note in their *amici curiae* briefs to the Supreme Court in *Empagran*, an expansive interpretation of the FTAIA is not necessary, given the large number of antitrust laws around the world that deter and punish cartel activity. Many of these, including most of the major industrialized countries, allow private lawsuits to recover damages for

¹³ The Supreme Court concluded that “principles of prescriptive comity counsel against the Court of Appeals’ interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that American’s antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well”.

antitrust violations or provide for damages in conjunction with administrative proceedings.

- (iv) *Case manageability and risk for “forum shopping”*. If an “indirect” effect is enough to recover treble damages, foreign plaintiffs would be allowed to bring class actions in the US in virtually all global cartel cases. Treble damages are unique to the US in Antitrust law, which creates strong incentive for foreign plaintiffs to try to use US law and courts rather than their own. A broader approach would risk turning US courts into international tribunals for antitrust enforcement, which could have a significant impact on presumable scarce of US judicial system resources, while a narrower approach could help to limit the reach of US antitrust law to a more manageable range of situations¹⁴.

¹⁴ As the US noted in its *amicus curiae* brief in *Empagran*, “otherwise, the US courts would provide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign’s provisions for private antitrust enforcement... For example, a buyer in Nigeria could file suit in the United States against its own Nigerian supplier if that supplier was a member of an international cartel, simply by alleging that some unnamed third person who was injured by the same cartel in United States commerce would have a claim under the Sherman Act”. The United States also noted that “opening our courts to suits with no connection to United States commerce also would risk undermining the relationships with foreign governments that are important to the United States’ enforcement efforts and would impose on federal courts potentially burdensome and complex antitrust suits brought by plaintiffs around the globe based on transactions that took place overseas”.

**B: NEED FOR MEASURES FACILITATING COORDINATION BETWEEN
FOREIGN ANTITRUST ENFORCEMENT AUTHORITIES**

**1. Technical amendments to the IAEAA enhancing coordination between the
United States and foreign antitrust enforcement authorities**

1.1. Background

Section 12(2) of the International Antitrust Enforcement Assistance Act (“IAEAA”) provides that the United States may enter into Antitrust Mutual Assistance Agreements (“AMAAs”) or “second generation agreements” with foreign jurisdictions “for the purpose of conducting investigations..., applying for orders..., or providing antitrust evidence, on a reciprocal basis”.

Under Section 12(2)(E), the 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 after –”

One of the greatest impediments to the negotiation of more sophisticated international antitrust co-operation arrangements to date has been the extent to which nations are willing to share commercially sensitive information. Sharing of confidential information requires each nation to have a high degree of confidence in the integrity of the competition authorities of the other nation. In this regard, the IAEAA contemplated a

level of confidential information sharing that was very advanced for its time. As a *quid pro quo* for enabling such sharing, and in the face of concerns expressed by US industry, Congress incorporated into the IAEAA safeguards to protect US industry from disclosure of confidential information.

Australia is currently the only country that has concluded an AMAA with the United States. The successful negotiation of an AMAA between Australia and the United States reflects a number of different factors, including the following:

- The Australian IAEAA does not permit confidential information to be used for purposes other than antitrust enforcement without the prior written consent of the Australian authority. Requests for assistance can be refused if not in the public interest.
- Since Australian competition law enforcement is currently in the civil jurisdiction, rather than criminal jurisdiction, Mutual Legal Assistance in criminal matters Treaties (“MLAT’s”) are not as useful to Australian antitrust enforcement as with other nations.
- Australia viewed the conclusion of the IAEAA as a key means of enabling Australia to solicit assistance from US authorities and to access information in the United States that would assist Australian domestic enforcement activities.
- Australia has “blocking” and “claw-back” legislation in place that it could use to block any excessive US extraterritorial antitrust enforcement. The “blocking” legislation could be used to block, in whole or in part, the enforcement of a foreign judgment considered offensive to the national interest to restrict the extent to which US litigants could obtain evidence or compel production of commercial documents for use in foreign proceedings. The “claw back” legislation protects against the risk that US antitrust judgments could be enforced against the US assets of Australian firms by

enabling Australian firms that suffered losses in this manner to be able to recover their loss against the assets of a judgment creditor from the US located in Australia.

Some legal experts believe that a number of antitrust enforcement authorities, in particular in those countries where no criminal sanctions are imposed for antitrust violations, have been deterred from entering into AMAAs with the United States because they consider that Section 12(2)(E)(ii) sets forth a mandatory requirement to grant their US counterparts the authority to use information obtained under an AMAA for criminal enforcement¹⁵.

Section 12(2)(E)(ii) would be an obstacle to the adoption of AMAAs, if considered as a mandatory provision, to the extent that other enforcement systems (e.g. in the EU) prohibit the disclosure or use of confidential information 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.

As we understand it, reasons given by nations other than Australia for not entering into an AMAA are partly related to this issue and include:

- concerns that the US could use information obtained under an AMAA as a basis for US extraterritorial enforcement that has a strategic trade policy objective (Japan);
- insufficient authority for the domestic competition regulator to share domestic information with foreign authorities (EU);

¹⁵ See GERALYN TRUJILLO, *Mutual Assistance Under the International Antitrust Enforcement Assistance Act: Obstacles to a United States-Japanese Agreement*, 33 Tex. Int'l L.J. 613 (1998).

- the perceived effectiveness of the existing processes under the Mutual Legal Assistance Treaties, with the US in some cases encouraging the use MLATS in preference to an AMAA (Canada); and
- sensitivities around cross-border industrial espionage.

A number of submissions made to the AMC to date have highlighted that some of these issues would be addressed if section 12(2)(E)(ii) of the IAEAA were amended to ensure that any information sharing is limited to the purpose of antitrust enforcement and not non-antitrust criminal enforcement.

However, these submissions do not consider the position of those jurisdictions where, currently, there is no criminal enforcement of antitrust laws (such as the EU) and, therefore, are less willing to share confidential information which could be used even only for antitrust criminal enforcement

1.2. Working Group's Recommendations

The Working Group agrees with those commentators who consider that it would be advisable that Congress amend this provision and clarify that the requirement under Section 12(2)(E)(ii) to disclose antitrust evidence for non-antitrust purposes is not mandatory.

Furthermore, with regard to those jurisdictions that currently have no criminal antitrust enforcement, The Working Group considers that it would be advisable also to clarify that Section 12(2)(E)(ii) does not impose a mandatory requirement to share confidential information which the US authorities could automatically use for criminal antitrust enforcement but that prior express consent from such jurisdictions would be necessary.

These amendments would make AMAAs more appealing to other countries, preserving at the same time the ability of a foreign jurisdiction to grant this right to the US authorities, when it is ready to do so, such as Australia.

Although only one AMAA agreement has been concluded so far, the principles underpinning the IAEAA remain commendable. The IAEAA has a continued future role in catalysing the global co-ordination of antitrust enforcement and merger review. The effectiveness of that role would be enhanced by technical amendments that reduce the threshold for negotiating at IAEAA.

More specifically, the IAEAA encourages the negotiation of bilateral competition co-operation agreements that provide for positive comity, co-operation and enhanced information sharing. Positive comity provisions (discussed in Section C) reduce the need for extraterritorial application of competition law by enabling a nation to request another nation to take action against anti-competitive conduct that is affecting the first nation's important interests.

2. Technical changes to the budget authority granted US antitrust agencies that could further facilitate provision of international antitrust technical assistance to foreign antitrust authorities

2.1. Background

Commentators generally agree on the importance of technical assistance by US agencies to foreign enforcers, in particular to recently established antitrust authorities, which would benefit from the US agencies' significant experience and valuable knowledge (e.g. in the proper application of economics-based antitrust principles).

There is less of a consensus on how such technical assistance can be improved. Some recommend legislative action to eliminate the existing budgetary constraints, which limit

the US antitrust agencies' ability to assist foreign enforcers and to participate in international fora, such as the ICN.

Others, such as the ABA, consider that a legislative change is not needed and that technical assistance can be improved by enhancing coordination between the US antitrust agencies and the United States Agency for International Development ("USAID"), which funds most of the technical assistance to foreign antitrust agencies and normally follows its priorities and resource constraints in funding these projects.

These commentators believe that effectiveness of the US technical assistance can be enhanced by requiring USAID to engage in prior consultation with the US antitrust agencies before it provides funds to foreign enforcers, to have their view as to where technical assistance would be most beneficial.

2.2. Working Group's Recommendations

The Working Group agrees that, as the nation with one of the most advanced antitrust laws in the world and with a history of antitrust dating back to 1890, the United States has a key role to play in educating antitrust regulators in other nations, particularly in less developed economies. The accurate application and enforcement of antitrust laws depends heavily on the quality and competence of the underlying enforcement institutions. Technical assistance is therefore important in an antitrust context.

As concerns the means for improving such technical assistance, the Working Group considers that an efficient allocation of resources is fundamental, so that assistance is provided where is most needed, as recommended by ABA. In addition, if additional financial resources could be found, the Working Group has no doubt that they could be applied beneficially to enhance assistance to antitrust regulators in other countries.

C: NEED FOR MEASURES TO ENHANCE ANTITRUST COMITY

1. The significance of the comity issue

The importance of comity considerations

1.1 Concomitant with the trends toward trade globalization, the adoption of national antitrust regimes and inter-agency cooperation, the issue of comity in the context of antitrust enforcement has assumed an increasing significance. The reasons for this include the increased likelihood that, in any given situation, there will be more than one national authority who can legitimately claim jurisdiction, as well as the fact that the manner in which comity concerns are addressed, can either further or hamper ongoing multilateral cooperation and harmonization initiatives. Furthermore, businesses operating in multiple jurisdictions need consistent rules to govern their commercial activities. Accordingly, the issue of comity and how enforcement clashes are resolved is an important issue in the future of international antitrust enforcement.

1.2 The importance of the role that comity considerations play in international antitrust enforcement has long been recognized at both the multi and bilateral levels. For example, the 1995 Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, emphasises:

“the need...to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of cooperation on the field of anticompetitive practices¹⁶.”

¹⁶ C(95)130/FINAL, at 2-4 (July 27, 1995).

1.3 In this same vein, the 1991 US-EC comity agreement states that, to avoid enforcement conflicts:

*... each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate.*¹⁷

In light of this, article IV of the agreement between the US Government and the European Communities on the Application of Positive Comity Principles in the Enforcement of their competition laws states:

“Under this agreement a requesting party will normally defer or suspend enforcement activities in favor of positive comity where anticompetitive conduct occurs in a foreign country but does not directly harm the requesting country's consumers. In cases where the anticompetitive conduct does harm the requesting country's consumers, the requesting country will still defer or suspend enforcement activities when the conduct occurs principally in and is directed principally towards the other party's territory. This presumption assumes that the requested party will investigate and take appropriate remedial

¹⁷ See the *Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws*, O. J. L 095 47-52, available at [http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21995A0427\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21995A0427(01)&model=guichett) . The stated purpose of the agreement was to “promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.”

measures in conformity with its own laws. In conducting its investigation, the requested party would also report back to the requesting party on the status of the investigation, notify any changes in enforcement intentions, and comply with any reasonable suggestions of the requesting party. Notwithstanding the presumption, the agreement contemplates that the parties may pursue separate and parallel enforcement activities where anticompetitive conduct, such as international price fixing cartels, affects both territories and justifies the imposition of penalties within both jurisdictions.”¹⁸

Similarly, 1995 Canada-US cooperation agreement at article VI states that:

“Within the framework of its own laws and to the extent compatible with its important interests, each Party shall, having regard to the purpose of this Agreement as set out in Article 1, give careful consideration to the other Party’s important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding and the nature of the remedies or penalties sought in each case.”¹⁹

- 1.4 One of the most recent expressions of the importance of acknowledging comity considerations in international antitrust enforcement can be found in the ICN’s Recommended Practices for Merger Notification Procedures. This document clearly states that, enforcement authorities should “seek remedies tailored to cure domestic competitive concerns and endeavour to avoid inconsistency with

¹⁸ Agreement Between The Government of the United States of America and The European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, available at <http://www.ftc.gov/bc/us-ec-pc.htm>

¹⁹ Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, available at the Competition Bureau’s website, www.cb-bc.gc.ca.

remedies in other reviewing jurisdictions” and expressly acknowledges that, even where enforcers agree to coordinate their reviews, they “remain free to make their own independent decisions”.²⁰ The inclusion of this type of language clearly reflects the significance that comity considerations play in the ongoing efforts to enhance international cooperation and coordination in antitrust enforcement, as well as the need to take positive steps to minimize comity clashes.

1.5 The issue of comity in antitrust enforcement has recently been brought to the fore as the result of foreign purchaser class actions brought in the US in the context of international cartels, as well as in cases involving the compelled production of documents, both into²¹ and from²² the US. Highlighting the significance of antitrust comity issues raised in these cases was intervention and filing of *amicus curiae* briefs by numerous foreign governments, as well as by the US. The fact that governments would go to the considerable time and expense involved in making submissions to US courts in the context of private damages actions underscores the importance this issue and of taking steps towards enhancing international antitrust comity.

1.6 Based on the best practices enunciated by multinational organizations, the provisions of bilateral cooperation agreements, as well as the fact that several foreign countries have intervened in private US antitrust proceedings, it is clear

²⁰ (June 2005), available at <http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf>.

²¹ See for example, *Re: Vitamins Antitrust Litigation* No. 99-197 (TFH) MDL No. 1285 (D.C. Dist Ct. April 4, 2002) and *Re: Methionine Antitrust Litigation* No. C-99-3491 CRB (JCS) MDL No. 113 (N. Dist. Cal. June 17, 2002), *aff'd*, July 29, 2002, which dealt with the issue of the compulsory production of documents provided to foreign authorities by the defendants to civil plaintiffs.

²² See for example *Intel Corp. v. Advanced Micro Devices Inc.*, 124 S. Ct. 2466 (2004) and *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada*, 384 F. Supp. 2d (45 (D.D.C. 2005), which dealt with the issue of production of US documents for use in proceedings outside of the US in the context of Section 172(a) of the Judicial Code.

that comity considerations will have an increasingly important effect on future international cooperation initiatives. That *Empagran* and other US cases in which comity issues featured prominently have received so much international attention and generated considerable commentary again highlights the significance of the issue.

2. Comity Issues in Public Enforcement

2.1 From the work of organizations such as the OECD and ICN, it is clear that governments and enforcement agencies are sensitive to comity considerations and the need to respect comity when engaging in cross-border enforcement initiatives. This is evidenced by the widespread support for organizations such as the ICN and the recommended practices it has introduced. While virtually all multinational organizations and cooperation agreements address the need to respect comity, relatively little work has been done regarding how to deal with the inevitable comity clashes when they do occur.

2.2 In addition to the substantive comity issues that typically arise in the context of cross-border merger reviews, differences in the way enforcement agencies perceive the extent of their jurisdiction can also raise comity issues. For example there have been situations in the past where firms have paid significant fines in the US based on the value of transactions that were regarded as taking place in the US, regardless of where the customers were resident, only to find themselves facing additional fines in respect of the same transactions in another jurisdiction. This resulted from the fact that the US assumed jurisdiction based on the fact that the relevant transactions had occurred within its territory and the other

enforcement agency took the position that, as its citizens had sustained injury, using an effects-based test, it too had jurisdiction.

- 2.3 In addition to causing friction between national enforcement agencies, these types of scenarios create a very real possibility that firms may face “double jeopardy” and face multiple fines in respect of the same transactions. Often there is little sympathy for firms in these types of situations and they may end up paying for the enforcers’ failure to adequately address the relevant comity issues. In addition to being unfair, even if infrequent, these situations can undermine the legitimacy and effectiveness of antitrust enforcement generally.

3. Working Group’s Recommendations – Public Enforcement

(a) Develop Guiding Principles

- 3.1 Guiding principles for the identification and resolution of comity issues should be developed at the multinational level. Additionally, and possibly as an interim measure, it may be worthwhile for countries to consider this type of initiative with respect to major trading partners as increased levels of trade potentially increases the likelihood that antitrust enforcement comity issues may arise. Principles that may be worth considering include:

- (i) Jurisdiction – what constitutes a sufficient nexus for a country to assume antitrust jurisdiction (i.e., territoriality vs. effects-based);
- (ii) Forbearance – namely, whether in appropriate circumstances agencies should voluntarily decline to take enforcement action,

(for example where the conduct at issue has already been addressed in another jurisdiction); and

- (iii) Conflict resolution – principles for addressing comity clashes, possibly based on relative impact within competing jurisdictions and agreements to forbear where the enforcement action taken by one agency addresses concerns in multiple jurisdictions.

(b) *Encourage inter-agency dialogue*

3.2 Inter-agency dialogue is likely the best way to identify and resolve comity conflicts at an early stage and should be encouraged. Dialogue should take place at both the informal and formal levels. For example, the ICN could provide a suitable forum for formal discussions on the topic of comity. This type of forum would provide an opportunity for enforcement agencies to discuss comity issues among peers. These discussions could consider situations where comity issues resulted in enforcement conflicts to both raise awareness of the circumstances in which these issues can arise and how the issues were or could have been resolved.

3.3 Policy discussions, including any discussions relating to the development of guiding principles should, at some level, include the private bar. As both stakeholders who will be affected by any policies implemented and as a source of useful input, members of the private bar can make a valuable contribution to this type of initiative. Further, the involvement of the private bar potentially encourages acceptance of and legitimizes any principles that may be adopted in this area.

4. Comity Issues in Private Litigation

- 4.1 With the high degree of emphasis placed on the role of private litigation with respect to both the criminal and non-criminal provisions of its antitrust laws, the US enforcement environment creates unique comity challenges. The volume of US antitrust litigation and the fact of overlapping state and federal antitrust legislation, as well as the large number and several levels of state and district courts only serve to increase these challenges. Due to the high volume of complex private antitrust litigation in the US system, divisional splits on the treatment of comity considerations are not infrequent and have often created uncertainty that can only be resolved by further appellate and Supreme Court litigation.
- 4.2 While the *Empagran* decisions (discussed in Section A) have helped clarify circumstances in which foreign plaintiffs can bring a suit in the US under the FTAIA exemption,²³ it is virtually certain that comity issues will arise in future private litigation.
- 4.3 It should be noted that the recent decision of the English High Court in the *Provimi* case²⁴ clearly indicates that the comity issues associated with private litigation are not restricted to the US. Further, as the EC contemplates implementing measures to provide greater incentives to private antitrust litigation

²³ Examples of cases where the decisions of the Supreme Court and D.C. Circuit have been followed include *In re Monosodium Glutamate Antitrust Litigation*, Slip Copy, 2005 WL 2810682, D. Minn., (2005); *Latina Quimica-Amtex SA. v. Akzo Nobel Chemicals B.V.*, Slip Copy, 2005 WL 2207017, S.D.N.Y., (2005); and *CSR Ltd. v. CIGNA Corp.*, 2005 WL 3479908 D.N.J., (2005). It is worth noting that in the *CSR* case, while the Australian parent company's suit was found not to come within the FTAIA exemption, its American subsidiary's suit was allowed.

²⁴ *Provimi Ltd. v. Roche Prods. Ltd.*, [2003] EWHC (Comm.) 961.

in the EU²⁵, the potential for future comity clashes is only likely to increase. These developments clearly suggest the need for the subject of comity to be considered and proactively addressed on a multinational level if such conflicts are to be minimized.

4.4 In addition to the issues associated with jurisdiction over antitrust claims generally, another issue where comity has arisen as a contentious issue is with respect to the production of documents and other evidence, both into and from the US.

4.5 In several cases, US plaintiffs have sought production of documents provided by the defendants in the context of dealings with foreign antitrust authorities. Specifically, they have sought documents created either in furtherance of a leniency application or plea agreement or at the request of the agency in furtherance of its investigation. This issue was addressed in *In re Vitamins Antitrust Litigation (Vitamins)*²⁶ and *In re Methionine Antitrust Litigation (Methionine)*²⁷. In *Vitamins*, both the EC and Canada filed *amicus curiae* briefs opposing production of the documents in question. In particular, the Canadian brief raised issues of comity related to the fact that the documents were subject to Canadian “settlement privilege” and that requiring production would interfere with Canada’s enforcement of its antitrust laws²⁸. Despite the intervention of the EC and Canada and the Court’s acknowledgement that the Canadian documents

²⁵ Green Paper on Damages Actions for Breach of the EC Antitrust Rules, published on December 19th 2005. http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf

²⁶ No. 99-197 (TFH) MDL No. 1285 (April 4, 2002)

²⁷ No. C-99-3491 CRB (JCS) DL No. 1311

²⁸ For a more detailed discussion of these cases and comity issues in international antitrust enforcement generally, see Goldman, Hersh and Witterick, *Comity After Empagran and Intel*, ANTITRUST, Summer 2005, at 6 to 11.

were subject to privilege in Canada, it nonetheless ordered the production of the EC documents and many of the Canadian documents. In *Methionine*, while the EC did not formally intervene, the Court took judicial notice of the brief filed by the EC in *Vitamins* and denied the plaintiff's request for production, largely on the basis of comity considerations.

- 4.6 These cases clearly illustrate the inconsistent manner in which courts consider and weigh comity issues. The uncertainty surrounding this issue has had an impact on public enforcement as firms, wary of creating new documents that may have to be disclosed in US private litigation, may resist an agency's request to create helpful documents (i.e., timelines, etc.) and may want negotiations with enforcers to be "paperless". This is also likely to have a potential negative impact on the incentives of companies to apply for leniency, if there is a high risk that documents produced to foreign antitrust authorities in leniency applications can be produced in US Courts and expose them to greater financial liability.
- 4.7 Compounding the issues raised in *Vitamins* and *Methionine* is the fact that in *Vitamins*, Canadian class counsel had sought leave to obtain (i) observer status at US depositions and (ii) production of documents filed under seal, which would have included the Canadian privileged documents; documents they would have never been able to obtain in Canada.
- 4.8 It is increasingly becoming common practice for Canadian class counsel to seek these types of orders and it is likely that plaintiff's counsel from the United Kingdom and eventually the EC will do the same. Accordingly, to the extent possible, the comity issues related to the discovery process ought to be addressed

by enforcement agencies on a bilateral or multilateral basis to avoid these types of conflicts and their attendant effect on public enforcement initiatives.

4.9 With regard to the production of documents from the US to other jurisdictions, the *Intel* case²⁹ dealt with the application of Section 1782(a) of the Judicial Code, which authorizes federal district courts to provide assistance in obtaining evidence to be used in foreign and international tribunals. This case involved an attempt by AMD to compel Intel to produce documents filed under seal in private US litigation to the EC in the context an ongoing investigation (which had been instigated by AMD). In addition to specifically not requesting production of the documents in issue (despite having been advised of their existence by AMD), the EC intervened in the proceedings and, citing comity grounds among others, argued against compelling production³⁰.

4.10 Unlike its decision in *Empagran*, the Supreme Court did not appear to give significant weight to the comity arguments advanced by either the EC or *Intel* and interpreted the section as only exempting from production documents subject to “any legally applicable privilege”³¹. Inconsistent treatment by the courts of

²⁹ *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004).

³⁰ Brief of the Commission of the European Communities, Appearing as *Amicus Curiae*, In Opposition to Plaintiff’s Joint Motion to Compel Bioproducts to Produce its Governmental Submissions.

³¹ It is uncertain whether this extends to information that may be legally privileged in the foreign jurisdiction, as was the case with many of the documents at issue in *Vitamins* and *Methionine*. However, it is presumed that only information subject to privilege in the U.S. would be excluded from production. Regardless of the interpretation given to §1782(a) on this point, there appears to be a contradiction between the type of production that can be ordered produced to a foreign tribunal pursuant to §1782(a) and that which was ordered by the court in *Vitamins*, which included documents that were privileged in the jurisdiction in which they were created. The type of production ordered in *Vitamins* also potentially conflicts with the various initiatives that are currently being undertaken to further international information exchanges in cartel investigations while respecting applicable privileges.

comity issues such as this results in uncertainty that has negative implications for both public and private antitrust enforcement.

- 4.11 The *Empagran* and *Intel* cases do not give consistent views to how American courts should weight comity in antitrust cases. *Empagran* is a step forward to comity and *Intel* is a slight step back. Without any clear legislation or guidelines US courts will continue to address the comity issues inherent in cases involving international antitrust issues on an ad hoc basis.

5. Working Group's Recommendations – Private Litigation

Government intervention is necessary

- 5.1 For the reasons suggested in the discussion in the section addressing the future development of the FTAIA, allowing the US position (or that of any other country) on international antitrust comity to evolve through the development of its common law may not be the best approach from a policy perspective. In addition to being inefficient in terms of both time and money, cases involving comity issues arise infrequently and courts are limited to deciding individual cases on their specific facts.
- 5.2 Additionally, lower court decisions are often not appealed for a variety of reasons, for example, the *Kruman* case, which raised many of the same issues as those raised in *Empagran* was not argued before the US Supreme Court as the parties decided that it was in their best interests to reach a settlement. The effect of this was to create a period of major uncertainty until the release of the Supreme Court's decision in *Empagran* and the subsequent decision of the D.C. Circuit on the issue of causation. The uncertainty that exists during these interim periods

causes unmeritorious actions to be initiated and, at the same time, chills legitimate claims.

- 5.3 As the manner in which courts consider issues of comity in a particular case is highly fact specific, it is likely difficult to even attempt to legislate a standardized approach without unduly fettering the judiciary. For this reason, the DOJ and FTC, as appropriate, are likely to be in the best position to develop guiding principles that, while not binding on the judiciary, provide guidance regarding the treatment of comity issues. Any such principles should be consistent with those adopted in the context of similar bilateral or multilateral initiatives.
- 5.4 Recognizing the interrelationship between private litigation and public enforcement, the US government should continue to intervene in appropriate antitrust cases in both the US and abroad, including cases raising comity issues in the context of requests for documentary production.
- 5.5 Similarly, on an international level, the Working Group encourages the AMC to recognise the importance of US agencies, courts and congress giving full and sympathetic consideration to submissions from foreign sovereigns, particularly those who are actively enforcing their own competition laws in their own way.

ANNEX A

Lawyer	Firm	Location
Andrea Appella	Timewarner	London
John Briggs (co-chair)	Howrey LLP	Washington, D.C.
Riccardo Celli (co-chair)	O'Melveny & Myers LLP	Brussels
Bill Kolasky (co-chair)	Wilmer Cutler Pickering Hale and Dorr LLP	Washington, DC
Tom McQuail (co-chair)	Lovells	Brussels
Dany Assaf	Ogilvy Renault LLP	Toronto
Juan Cardinal	Richards, Cardinal et al	Buenos Aires
George Cary	Cleary Gottlieb Steen & Hamilton	Washington, D.C.
Neil Campbell	McMillan Binch Mendelsohn LLP	Toronto
Guido Cravetto	Tosetto, Weigmann e Associati	Torino, Italy
Kiran Desai	Mayer Brown	Brussels
Johannes Peter Gruber	Karasek Wietrzyk Rechtsanwaelte GmbH	Austria
Jacques Gunther	Freshfields	Paris
Chris Hersh	Cassels Brock & Blackwell LLP	Toronto
Anthony Idigbe (SAN)	Punuka Chambers	Nigeria
Crenguta Leaua	Cunescu, Balaciu & Asociatii	Romania
Ellen Maldonado	Arvesta Corporation	San Francisco
Andrew Matthews	Minter Ellison Rudd Watts	Auckland
Greg McCurdy	Microsoft	Redmond
Christian Alexander Meyer	Hürlimann & Uhlmann	Zurich

Bachir Nawar	Habib Al Mulla & Co.	Dubai
Amilcar Peredo	Basham, Ringe y Correa, S.C.	Mexico
Dave Poddar	Mallesons Stephen Jaques	Sidney
Rob Russell	Borden Ladner Gervais	Toronto
Alan Silberman	Sonnenschein Nath & Rosenthal, LLP	Chicago
Tefft Smith	Kirkland & Ellis, LLP	Washington, DC
Martyn Taylor	Mallesons Stephen Jacques	Sydney
Masatsugu Suzuki	Baker & McKenzie	Tokyo
Ryan Thomas	Jones Day	Washington, DC
Pieter Tubbergen	Lawton	Rotterdam
Louis Van Wyk	Spoor & Fisher	Pretoria
Ryan Thomas	Jones Day	Washington DC
Valentina Zoghbi	International Bar Association	London