The American
Antitrust Institute

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

WORKING GROUP ON INTERNATIONAL ISSUES

July 15, 2005

INTRODUCTION

These are the comments of a Working Group on International Issues established by the American Antitrust Institute for purposes of responding to the AMC's request for public comments. These comments reflect what appears to be a consensus of the Working Group, but it should not be assumed that all agree with every statement or position herein. The Working Group is chaired by Philip Nelson (Economists, Inc.) and the other members are John Connor (Purdue),[1] Beth Farmer (Penn State), Harry First (NYU), Albert Foer (AAI), Eleanor Fox (NYU), Douglas Rosenthal (Sonnenschein et al.), and Spencer Waller (Loyola).[2]

COMMENTS ON THE AMC'S SUGGESTED QUESTIONS

Issue #1: Should the FTAIA be amended to clarify the circumstances in which the Sherman Act and FTC Act apply to extraterritorial anticompetitive conduct?

The Foreign Trade Antitrust Improvements Act is widely regarded as a textbook example of poor drafting, a statute whose full meaning eludes even the most careful reader. Sporadically, albeit increasingly, litigated since its passage in 1982, it took more than twenty years before the Supreme Court decided to hear a case involving the statute. The Court's decision in that case, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*,[3] did not settle the interpretation of the statute, however. Rather, in a somewhat Delphic opinion, the Court set off a new round of litigation to interpret both the statutory language and the meaning of the Court's decision.

Despite the criticisms of the statute and a substantial concern about the direction in which court interpretation may be headed, we do not advocate any legislative change at this time, unless, perhaps, it would be to repeal the statute completely. We believe that the common law process, generally an effective one for antitrust interpretation, should be

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[1] In accordance with Purdue University Executive Memorandum B-4 (1972), John Connor wishes to inform readers that any views expressed in this message are his own and quite likely do not represent the views of his University.

[2] Spencer Waller did not participate in the drafting or review of the section discussing Issue #1.

[3] 542 U.S. 155, 124 S.Ct. 2359 (2004).

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given time to work out some of the statute's interpretive problems before Congressional intervention is considered.

Our conclusion is based on the following four points.

1. Post-*Empagran* cases: In *Empagran* the Court held that non-U.S. plaintiffs who purchased price-fixed vitamins outside the United States from a cartel of vitamin producers could not recover for overcharges they paid as a result of the price fixing if the foreign effect (higher prices outside the United States) was independent of the domestic U.S. effect (higher prices inside the United States caused by the cartel's operations). The Court remanded the case, however, for the lower courts to consider whether the foreign injury was dependent on the anticompetitive domestic effect, that is, whether the foreign and domestic effects were linked. The Court did not decide, however, whether factually there was a link or, if there were, whether such dependent effects would give rise to a claim under the statute.

On remand, the district court held that the "The statutory language—'gives rise to'—indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for 'nexus' the appellants advanced in their brief [which involved the argument that monopolistic prices in the U.S. were required to make the foreign collusion effective since otherwise there foreign purchasers would have purchased bulk vitamins at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States]."[4] We find the court's effort to make a distinction between "direct causal relationships" and the real economic relationship in the case between foreign effects and collusive U.S. prices to be strained, particularly because it ignores the fact that the mere threat of international arbitrage creates a very immediate and direct economic connection between U.S. prices and foreign prices. Nonetheless, given that this case might be appealed and that there will be other post-*Empagran* cases (some of which are already awaiting decisions), we believe it makes sense to allow the law to continue to evolve.[5] These cases will give the courts of appeals an opportunity to consider both the specific facts of each claim as well as arguments on the interpretation of the FTAIA. It is possible that a consensus interpretation of the Act will emerge from these decisions that more accurately reflects the direct ties between foreign markets and the U.S. market when arbitrage is a direct, and immediate threat that connects the markets.

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[4] Empagran S.A. et al. v. F. Hoffmann-Laroche, Ltd. et al., No. 00cv01686, slip op. at 7 (D.C. Cir. June 28, 2005). All three briefs submitted to the Supreme Court by economists agreed that, to be effective in raising prices, international cartels selling tradable products had to engage in conduct to prevent international geographic arbitrage. See, for example, Bernheim, Brief of Certain Professors of Economics as Amici Curiae in Support of Respondents, F. Hoffmann-LaRoche, et al., Petitioners v. Empagran et al., Respondents, et al., 2003 U.S. Briefs 724. (March 15, 2004).

[5] See e.g., BHP N.Z. Ltd. v. UCAR Int'l, Inc., 106 Fed. Appx. 138, 142-143 (3d Cir. 2004) (remanding for further proceedings).

2. Other recent FTAIA cases: FTAIA problems have arisen outside the price fixing area, in distribution cases,[6] in monopolization cases,[7] even in a Government case involving a joint venture agreement dividing markets.[8] Given the increasing globalization of the economy, it is likely that FTAIA cases will continue to arise in a variety of contexts. The diversity of the jurisdictional problems makes it debatable whether legislative tinkering with the Act's language will relieve its interpretative problems or make them worse, as Congress tries to foresee the numerous ways in which conduct outside the United States might give rise to liability under U.S. antitrust law.

3. The deterrence debate: A critical argument that relates to cases such as *Empagran* is the effect on deterrence of allowing recovery by persons injured outside the United States. Substantial scholarly support was presented to the Court for the proposition that increasing the total penalties for cartel activities would produce an increase in deterrence.[9] In contrast, the Justice Department (and others) argued that deterrence would suffer because cartelists would be less likely to seek amnesty if they knew they would expose themselves to greater financial liability. The Supreme Court could not say "on balance" which side of this "empirically based argument" was correct.[10]

Shortly after *Empagran* was decided by the Court, however, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which provides for detrebling of antitrust damages for defendants who have entered into an amnesty agreement with the Department of Justice. This statute is subject to a five year sunset provision.[11]

The interrelationship between the statutory detrebling and the ability of non-U.S. plaintiffs to collect damages from price-fixing cartels has yet to be assessed. It may be that the combination of the new statute and a denial of recovery to non-U.S. victims (if

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[6]See, e.g., MM Global Servs. v. Dow Chem. Co., 329 F. Supp. 2d 337 (D. Conn. 2004) (Indian distributor terminated for failure to sell at minimum resale prices in India, allegedly to maintain prices in U.S.) (suit permitted to go forward under FTAIA).

[7]See In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 716-17 (D. Md. 2001) (Greek citizen purchasing Windows program from Microsoft, using the Internet; court wonders whether this is a sale in the United States and therefore outside the FTAIA).

[8]See United States v. LSL Biotechnologies, 379 F.3d 672 (9th Cir. 2004) (no jurisdiction under FTAIA).

[9] Bush Brief Amicus Curiae in Support of Respondents, No. 03-742, F. Hoffmann LaRoche, Ltd. et al., Petitioners, v. Empagran S.A., et al., Respondents, 2003 U.S. Briefs 724.

[10]See Empagran, 124 S.Ct. at 2372.

[11]See Pub. L. 108-227, Title II, §§ 211-215, June 22, 2004, 118 Stat. 666.

such recoveries are denied) will be seen as a substantial weakening of deterrence, or it may be that experience will show otherwise. In either event, it seems wise to gain experience both with post-*Empagran* decisions and with the 2004 Act before deciding whether there is something that needs legislative fixing in the FTAIA.

4. Form of amendment: However tortured the current statutory language may be, it is not so easy to come up with amendments to the statute that would improve it. Nevertheless, the critical point is not so much how the statute should read, but what the goal of the statute (or any amendments to the statute) should be. On this point, it might be argued that the most elegant, and direct, solution to the FTAIA's language problems is to repeal the statute completely. After all, the FTAIA was originally enacted to give greater leeway to U.S. export cartels to operate abroad free of U.S. antitrust constraints and it substantially overlaps the policies of the Export Trading Company Act of 1982 (the FTAIA being Title IV of that Act). There never was a good reason to have two statutes; and there may not be a good reason to have even one. If we still want export cartels, however, we could leave that to the Export Trading Company Act. Without the FTAIA, courts would then be free to continue developing the meaning of the foreign commerce clause of the Sherman and FTC Acts, much as they have been doing since the Sherman Act was passed in 1890. Common law development could then focus directly on whether a particular restraint involved "trade or commerce . . . with foreign nations" within the meaning of the Sherman Act and on the separate question whether the particular plaintiff bringing suit had standing to sue for that violation. This would likely be a preferable outcome to any attempt to alter the language of the FTAIA to achieve some more specific goal.

Issue #2: Are there technical or procedural steps the United States could take to facilitate further coordination with foreign antitrust enforcement authorities?

Because of the AAI's interest in stimulating research and awareness of sound antitrust policy, it is particularly interested in the question of whether there are actions that could be taken to further "facilitate the provision of international antitrust technical assistance to foreign antitrust authorities." Recognizing the need to find better ways to train the officials of the hundred or so antitrust agencies now established around the world (many of which are relatively new), we urge the AMC to endorse the concept of a centralized, permanent faculty for this purpose, and to seek the budgetary authority for the United States to take a leading role in promoting the creation of such a facility. We suggest it might follow the lines proposed by the AAI in the attached document.

COMMENTS ON OMITTED INTERNATIONAL ISSUES

While the Commission is planning to address many important issues, few measures would make so dramatic a contribution to competition and consumer welfare as reform of the anti-dumping laws. The question "Should the antidumping laws be reevaluated?" appeared on the issues the AMC first recommended for study, by memorandum of December 21, 2004, and we infer from this reference that you, too, recognize the great importance of the issue. We want to urge that you return the issue to your agenda, and to try to get it on the table for legitimate debate.

There are at least three reasons why this issue should be given importance. First and obviously, the antidumping laws rob consumers by forcing them to pay prices that are substantially above world-market levels. Second, by putting costs on intermediate buyers (who are often manufacturers that compete in world markets), they make American businesses less competitive in the global economy. Third, antidumping laws notoriously facilitate cartels and/or other anticompetitive coordination.[12] Indeed, coordinated activity going beyond the dumping settlement has been justified on the grounds that the court could not infer an antitrust conspiracy because it made economic sense for each producer acting in its own interests to raise its prices to a supracompetitive and parallel level (e.g., Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., 203 F. 3d 1028,(8th Cir.), cert. denied, 531 U.S. 815 (2000)).

Despite the always highly charged political climate surrounding proposed reform of antidumping laws, discussion and modest recommendations are possible. An example is chapter 6 of the ABA Antitrust Section's NAFTA Report (1994), which we attach. Chapter 6 was written largely by Harvey Applebaum, an expert in both trade and antitrust, although the report was a group project. The report was presented to the American Bar Association by the Antitrust Section, which urged the ABA to adopt the eight framework principles (not the entire report, which was too highly detailed). The ABA adopted the eight principles, as the Antitrust Section urged. The principle relating to antidumping is stated as follows: "The Governments of the three NAFTA Parties should work together on the following tasks and towards the following goals: ... addressing the interrelationship between the trade laws and the antitrust laws . . . ."

That the NAFTA Report involves a free trade area is not important; the FTA simply provided the occasion to consider options in ratcheting back the antidumping laws. Those options should be equally important to your enterprise. You will note that the options and recommendations are modest; but they are a start.

We believe that the mere express recognition by you of the importance of the issue and the promise antidumping reform offers to competition, consumers, and antitrust would be progress.

Additional Submissions:

1. Proposal for International Academy of Competition Policy (attached)

2. ABA NAFTA Report (separate document)

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[12] In the global cartel for bulk vitamin C in the early 1990s, the European members of the cartel threatened to bring an EU dumping action against fringe Chinese manufacturers of vitamin C. See European Commission. *Commission Decision of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-1/37.512 – Vitamins).* Brussels (January 10, 2003).

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Proposal for International Academy
of
Competition Policy

Executive Summary:

Countries all over the world have now adopted antitrust laws, yet few of these countries have substantial experience enforcing them. The American Antitrust Institute proposes to address this and related problems through the establishment of an International Academy of Competition Policy. Students at the academy would be antitrust enforcement officials from all over the world, including many countries with developing or recently liberalized economies.

This proposal was drafted five years ago. It has been presented to the major logical funding sources without success. Everyone approached by the AAI has praised the idea. No one has come forth with the money that will make it possible. The Antitrust Modernization Commission could get behind the Academy idea by urging that the U.S. take the initiative in meeting with the European Union, the World Bank, the OECD, and others to agree on sharing the funding, with the U.S. putting up the first dollars. This project would complement the work of the International Competition Network (ICN) in its efforts to develop best practices, informal harmonization, and an effective capacity for building an international antitrust presence that can help market economies succeed.

Creating Better Competition-Policy Enforcement
By Creating Better-Trained Competition-Policy Enforcement Officials

In this era of market liberalization and globalization, interest in antitrust law is expanding dramatically. In the past decade, many national economies that were once highly regulated or state-run have moved to free-market models. And as they have done

so, their governments have quickly realized that free markets work best within a structure of institutions and ground rules—including fiscal and monetary policy and, as the United States discovered more than 110 years ago, antitrust law.

Often called "competition law" or "competition policy" outside the United States, antitrust is perhaps best described as a collection of rules against abusive behavior in the marketplace. The most infamous behavior that violates competition policy everywhere is price-fixing, that is, collusion among many or all of the producers in an industry to keep prices high, guaranteeing high profits for the colluders. Other examples include mergers to a high level of industry concentration, "predatory strategies" used by large companies to drive smaller rivals out of business, and the "tying" or "bundling" of a possibly inferior product with a different product that dominates its market—forcing consumers to buy both. Anticompetitive activity leads to higher prices and fewer choices for all consumers, with the largest impact likely to be on the poor.

Ultimately, competition policy helps align the private goals of market participants with the broader public good by insuring that businesses can succeed only by providing superior products and services or by finding ways to produce the same products at a lower price. Thus, competition policy helps create the link between the selfish aims of capitalism and the broader social aims that nations have for their citizens: more wealth, more leisure, and their combination, labor efficiency—that is, more wealth created per hour worked. Moreover, competition policy helps insure that all entrepreneurs are free to compete on an even playing field, and will not have their efforts squelched by powerful companies looking to sidestep competition.

National governments are rapidly committing to competition laws, but have not yet acquired the skills needed to enforce them effectively.

Recognizing the importance of competition policy, governments have raced to establish their own competition laws. As of 1989, only about 30 countries in the world had enacted such laws. But by early 1999 the figure was up to approximately 80, and about 20 more governments had draft laws on their way to adoption. Countries with

competition laws accounted for nearly 80 percent of world output and 86 percent of world trade. In the industrialized world, where competition laws have existed for many years, they are now being enforced with greater rigor.

Unfortunately, the recent upwelling of competition policy has outstripped the capacities of many countries to enforce it effectively. The American Antitrust Institute has learned this from its own formal group of advisors on the issue, as well as its informal information sources—a combined group that includes many of the world's leading experts in the international training of competition-policy enforcement officials. In interviews with these advisors, the AAI has discovered that most countries' competition laws are still enforced by officials who have little theoretical background in law, economics, or business strategies, and little experience in the techniques of gathering evidence, ferreting out, and prosecuting violations in competition cases. Many of these officials are career civil servants who have not been well trained for their current assignments. Indeed, some of them (especially in formerly communist countries) have basic misunderstandings about how competition works and what sorts of behavior are likely to threaten it.

Enforcing competition laws is considerably different from enforcing many other types of law. Although a few bright lines exist, most questions of competition law require careful and sophisticated analysis. To assess whether a competition law has been violated, investigators must often school themselves in the workings of an entire industry. Their activities often have as much in common with the work of an investigative journalist, or an academic teacher of marketing or microeconomics, as they do with the everyday work of a criminal prosecutor. Information sources routinely include informal interviews, articles in the popular and trade press, analysts' reports, and rough econometric calculations, in addition to more traditional sources such as deposition testimony, affidavits, "hot documents," and the like. Competition-law educators who have spent years working with less-experienced countries say that most of those countries' enforcement officials are under-equipped to carry out all these unfamiliar tasks.

Current international efforts to build better enforcement skills are inadequate and unfocused, considering the scope of the problem.

To help enforcement officials overcome some of these difficulties, several governments and international organizations offer "technical assistance" on competition law enforcement, including international conferences and internships with the more-experienced enforcement agencies. By all accounts the most useful kind of assistance consists of long-term visits to a less-experienced country by a more-experienced enforcement official. The main organizations providing such assistance have included the World Bank, the European Commission, the United States Agency for International Development, and the Organization for Economic Cooperation and Development. In an environment of increasingly global commerce, when one country fails to enforce (or erroneously enforces) its competition laws, the harm may be felt by the citizens of other countries as well as the local citizenry. For instance, if a company in Country A is allowed to stifle competition and ends up raising its prices, the consumers of all other countries that import Country A's products suffer as a result.

Competition policy enforcement, then, should really be an international concern—much like monetary policy, trade policy, and environmental policy. In all four areas, the "spillover effects" are large and growing. Unfortunately, experts in the area agree that the technical assistance directed toward competition-law enforcement has been grossly insufficient to deal with the enormous harms wrought by diminished competition. What's worse, the technical assistance that does exist has been inconsistent, uncoordinated, and ad-hoc. Indeed, the exact dollar amount spent on technical assistance is hard to compute, because the aid comes in many administrative guises representing several organizations. In late 1999, the American Antitrust Institute conducted a survey of competition-policy officials in 22 countries, most of whose competition laws are

relatively new.[13] Based on the responses, we believe there are many countries whose officials feel that they acutely need better training. In recent years, this sentiment has prompted some discussion within the World Bank and the OECD concerning the establishment of an international competition-policy *training center*, or some other program to address the problem in a more coordinated way. But as yet no one has undertaken such a project.

The American Antitrust Institute proposes a new, centralized academy for the training of enforcement officials from all countries

The AAI urges establishment of an International Academy of Competition Policy (IACP), where enforcement officials from many different nations could gather to learn—and to teach one another—investigative techniques suitable to competition law, and to study substantive topics that underlie that field of law, such as the basic legal doctrine, microeconomics and business strategy. The IACP would teach the basics of antitrust enforcement to officials from many countries at once, thus avoiding the duplication of effort that currently exists in country-by-country training programs. Students would attend the academy for an extended period of time, so that they could learn the kinds of investigative and prosecutorial skills that come only with long-term, hands-on training.

Based on the responses to the AAI survey of competition authorities, we suggest enrolling roughly 75 students per year in the academy: 25 students per term, for three terms each year. Before coming to the IACP, each cohort of students would spend roughly 16 weeks in their home countries taking distance-learning courses that cover the more theoretical parts of the curriculum: basic antitrust doctrine, micro-economics, and business strategy. All 25 students would then travel to the IACP, where they would attend courses full-time for roughly 6 weeks. These courses would likely emphasize case studies, group projects, and other skills-based exercises. The primary location of the

[13] Eighteen responding countries had transitioning or developing economies: Benin, Colombia, Croatia, Cyprus, Czech Republic, Estonia, Kenya, Lithuania, Malta, Mexico, Philippine Republic, Poland, Romania, Slovak Republic, Taiwan, Uzbekistan, Venezuela, and Zambia. Four represented advanced economies with well-established competition laws and institutions: Canada, Israel, New Zealand, and Switzerland.

IACP would likely be in Europe. The academy would be a not-for-profit educational institution, governed by an independent international board that includes representatives from students' home countries, funding sources, and international organizations with competition-law expertise. It would be truly international: students would learn as much from each other as from the instructors, and their home countries would have considerable influence on the curriculum.

At the IACP students would forge personal and professional relationships, helping to build a much-needed global competition-policy community. We hope that this might lead to the dissemination of "best practices" and the informal harmonization of competition policies among many market economies. The IACP would likely be affiliated with an existing institution of higher learning, and students would receive some sort of academic degree. As a condition for receipt of the degree, each student would have to (i) remain with his or her home country's competition authority for at least two years after graduating, (ii) run training sessions within that country's competition agency to teach the other officials some of what the student learned at the IACP, and (iii) contribute one publishable article to the IACP's journal of international competition policy. These degree requirements would, respectively, help to (i) solve the serious problem of staff turnover at competition policy agencies, (ii) disseminate the IACP's training to more than 75 people each year, and (iii) encourage scholarly dialog concerning international issues in competition policy. Of the countries that responded to the AAI survey, all but one said they would be interested in sending professional-level staff members to attend such an academy.

Before going ahead with the project, we need a more precise, expert-created curriculum, and a detailed accounting of the costs that it implies.

Although it appears that many countries would be willing to continue paying the salaries of enforcement officials while they were studying at the IACP, we believe that few countries will be able to cover the cost of transportation to the academy, let alone the

substantial costs for food, housing and tuition. For the moment, then, we are assuming that all IACP-related expenses will need to be underwritten.

The AAI prepared a draft business plan for the IACP, which includes a detailed itemization of costs and the description of a model curriculum. Five years ago, we estimated that costs will be roughly $1.5 million per year, when the IACP is running at its 75-student-per-year capacity. The cost would be higher today. The model plan has been very well-received by our expert advisors and others to whom we have presented it. Still, the model curriculum in the business plan is highly speculative and variations in the curriculum could affect the budget significantly.

To get the project off the ground, then, we feel that there should be a preliminary study of the IACP's curriculum, in day-by-day, lesson-by-lesson detail. In particular, it will be necessary to resolve a certain tension between a skills-based curriculum and a multi-national student body. To develop skills, the IACP will want to focus on mock cases and other hands-on exercises. But the more practical the exercises become, the greater the chances that they will stray from the legal rules of any given country. For instance, it may make little sense to teach students how to issue civil investigative demands (mandatory calls for evidence prior to the filing of a civil or criminal action), if half of those students come from countries where investigative tools similar to CIDs do not exist. We are confident that remaining curriculum questions can be pinpointed and resolved. A key question is whether the Academy should operate in one location with one language or whether multiple centers will be needed, each with its own language.

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Revised, May 25, 2005