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Extra-Territorial Reach of U.S. Antitrust Laws to Foreign Firms

This paper will examine the decision of the U.S. Supreme Court in *F. Hoffman-LaRoche Ltd. v. Empagran SA*,[1] which based its decision on the application of the Foreign Trade Antitrust Improvements Act of 1982[2] (the FTAIA) to "vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador." Id. at 159.

The origin of the Court's extension of the reach of U.S. antitrust laws will be examined in light of the following precedent: *American Banana Co. v. United Fruit Co.*, 213 US 347 (1909); *United States v. Aluminum, Co. of America*, 148 F2d 416 (2d Cir. 1945); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 US 572 (1986); *Hartford Fire Insurance Co. v. California*, 509 US 764 (1993); *U.S. v. Nippon Paper Indus. Co. Ltd.*, 109 F3d 1 (1st Cir. 1997); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F3d 420 (5th Cir. 2001); and *Kruman v. Christie's Int'l PLC*, 284 F3d 384 (2d Cir. 2002).

Discussion

'F. Hoffman-LaRoche Ltd. v. Empagran SA.' In interpreting the reach of the FTAIA, which was intended to limit the Sherman Act as applied to foreign commerce,[3] the Supreme Court concluded that, "a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm." *F. Hoffman-LaRoche* at 159.

The anticompetitive effects from business arrangements adversely impacting foreign markets was not the concern of the Sherman Act—as long as such arrangements had no domestic consequence. In citing to a U.S. House of Representatives Report, the Court observed that the FTAIA "remov[ed] 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 in the United States." Id. at 161.

The FTAIA sets forth the general rule of placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, i.e., it has a "direct, substantial and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (2) has an effect of a kind that the antitrust laws considers harmful, i.e., the "effect" must "giv[e] rise to a [Sherman Act] claim." Id. at 162 citing 15 USC §6a(1), (2).

The Supreme Court concluded that under the Foreign Trade Antitrust Improvements Act, a purchaser in the U.S. could bring a Sherman Act claim based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.

According to Professor Hovenkamp,[4] courts interpreting this poorly worded statute have generally required the plaintiff to show an injury, not merely to the plaintiff itself, but also to the trade or commerce of the United States. Read together, §§(1) and (2) mean that the requisite effect must be one of the following:

(1) an American domestic market;

(2) a market for importing goods into the United States; or

(3) a market for exporting goods from the United States but only if the injury occurs to the exporting business within the United States.

The plaintiffs brought a class action suit on behalf of foreign and domestic purchasers of vitamins claiming that the foreign and domestic vitamin manufacturers and distributors engaged in a price fixing conspiracy in violation of §1 of the Sherman Act and §§4 and 16 of the Clayton Act, which resulted in increased vitamin prices to customers in the United States and in foreign countries. The U.S. District Court for the District of Columbia dismissed plaintiffs' claims finding that none of the FTAIA exceptions applied.[5] *F. Hoffman-LaRoche* at 160. The U.S. Court of Appeals for the District of Columbia Circuit reversed, concluding that both the FTAIA's general exclusionary rule as well as the domestic-injury exception applied. Id. The court accepted certiorari based on a division among the circuits about the application of the domestic exception contained in the FTAIA. Id. This division was reflected in the U.S. Court of Appeals for the Fifth Circuit, *Den Norske Stats Oljeselskap As*; in the U.S. Court of Appeals for the Second Circuit, *Kruman*; and, in the D.C. Circuit., *Empagran*.

By finding that the adverse foreign effect of the price-fixing conduct was independent of any adverse domestic effect, the court held that the domestic exception of the FTAIA was not applicable and, hence the Sherman Act did not apply.[6] Id. at 164.

The court appeared to be perfectly content to extra-territorially apply U.S. antitrust laws where it was satisfied that it was necessary and reflective of a legislative effort "to redress domestic antitrust injury that foreign anticompetitive conduct has caused." Id. at 165.[7]

As a preface to this conclusion, the court observed that,

> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity…. Id.

The court is largely correct in noting the longstanding application of the antitrust laws to foreign anticompetitive conduct. In 1993, the Court applied the FTAIA to London reinsurers unlawfully conspiring to affect the U.S. insurance market, and in fact producing substantial effect. *Hartford Fire Ins. Co . v. California*, 509 US 764, 796 (1993).[8]

While not applying the FTAIA to the case at hand, the Court in 1986 in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 US 574, 582 n. 6 (1986), did acknowledge that, "The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."[9]

The conduct/effect dichotomy can be notably traced back to *United States v. Aluminum Co. of America*, 148 F2d 416, 443-444 (2d Cir. 1945), where the court concerned itself with the congressional intent to apply U.S. law to foreign conduct by noncitizens.

That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so:

> as a court of the United States, we cannot look beyond our own law…. We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. (citations omitted). On the other hand, it is settled law …that any state may impose liabilities, even upon persons not

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> within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends…. Id. at 443.

It seems readily apparent that this analysis utilized by Judge Learned Hand in reversing the district court's decision dismissing the government's claim that Aluminum Company of America, (Alcoa) violated §2 of the Sherman Act and should be dissolved was the intellectual basis for the FTAIA. While acknowledging the decision of *American Banana Co. v. United Fruit*, 213 US 347 (1909), where Justice Oliver Wendell Holmes recognized the limitations of U.S. law in affirming the circuit court's dismissal of the case, Judge Hand had to be particularly aware of the repercussions that his decision would have on foreign trade at a time when the country engaged in a war for four years and World War II was fortunately nearing an end. Perhaps there was never a time like the 1930s-1940s when foreign conduct had such a decisive effect on the United States.

Reflective certainly of another era, the Court in the 1909 decision, *American Banana Co.*, was duly deferential to the world order as it then existed. In interpreting the application of the Sherman Act to foreign conduct, the Court held that it was not inclined to render acts criminal in the United States which were performed in Panama or Costa Rica and were not criminal there. Justice Holmes observed,

> The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done…. The very meaning of sovereignty is that the decree of the sovereign makes law…. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law ." 213 US at 356-359.

While not exactly reflecting the conduct/effect division of the *Alcoa* case and its progeny, the Court in the *America Banana Co.* case demonstrated a deference to sovereign power regardless of its impact in the United States. And, perhaps more importantly, Justice Holmes was reflecting a time when the economic order, as it was, was one dominated by Europe and the role of the United States was one of largely an upstart. It hardly could be appropriate for the U.S. to be so boldly applying its laws abroad. Perhaps the British and the Germans might undertake such a task. After all, the Sherman Act had only been enacted for 19 years.

The 'Kruman' Case

On the other hand, in *Kruman v. Christie's International PLC*, the Second Circuit held that the FTAIA applied even where the foreign injury was independent of the domestic harm . This decision was reversed as a result of the *F. Hoffman-LaRoche* decision. The issue that was presented to the district court in *F. Hoffman-LaRoche* was whether a transnational price fixing conspiracy that affects commerce both in the United States and in other countries inevitably gives a person injured in transactions abroad and, otherwise unconnected with the U.S., a remedy under the U.S. antitrust laws. Both the district court and Supreme Court ruled that no such remedy was available under the FTAIA.

The 'HeereMac' Case

Similarly, in *Den Norske Stats Oljeselskap, As v . HeereMac Vof*, the Fifth Circuit dismissed the plaintiff's claim for lack of subject matter jurisdiction, holding that the plaintiff's injury did not arise from the required domestic anticompetitive effect. In this case, a Norwegian oil company which conducted business solely in the North Sea sought redress under the U.S. antitrust laws for an alleged anticompetitve conspiracy that inflated its operating costs in the North Sea leading it to raise oil prices in the U.S. According to the court, "[W]e doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act." *HeereMac* at 426.

While the court accepted the plaintiff's claim that the defendant's conduct had a direct, substantial and reasonably foreseeable effect on the U.S. economy (by its division of territory, rigging of bids and fixing prices), the plaintiff failed to show that this effect on the U.S. economy in any way gave rise to an antitrust claim. Id. at 426. In finding that the plaintiff's claim was too attenuated to succeed, the court stated that plaintiff's injury must stem from the effect of higher prices for heavy lift services in the other markets. Id. at 427. There was no evidence that this requirement was met. The domestic effect must give rise to the claim. As a result, the foreign injuries must be related to the injuries suffered in the U.S. Summing up its opposition to plaintiffs claim, the court stated, "Any reading of the FTAIA authorizing jurisdiction over [plaintiff's] claims would open the United States courts to global claims on a scale never intended by Congress." Id. at 431.

Issues remain: Namely, what is the nature of the conduct abroad that must be asserted? And, what kind of effect on U.S. commerce must be shown?

'Nippon Paper Industries'

While not explicitly relying on FTAIA in finding that a §1 violation of the Sherman Act existed for conspiracy to fix prices, the First Circuit reversed the district court's decision to dismiss the case and allowed a criminal prosecution to proceed to trial. The court reached its decision by relying on the principles set forth in *Hartford Fire Insurance Co.*, which references the FTAIA, where the Supreme Court deemed it "well established by now that the Sherman Act applies to foreign conduct meant to produce and [does] in fact produce some substantial effect in the U.S." *U.S. v. Nippon Paper Industries*, 109 F3d at 4.

Conclusion

The evolution of the domestic exception to the FTAIA appears to coincide with the historical trend in which the United States, generally and its economy's role in the global economy, specifically have increased and dominated over time. Nevertheless, it is important for foreign corporations to recognize that the U.S. antitrust laws could reach its activities when they export goods to the United States. Erring on the side of being overcautious and acting as if all of its commercial activities would be subject to U.S. antitrust scrutiny is always the more prudent course to follow. Consequently, establishing an antitrust audit followed with a compliance program is a more advisable course for foreign corporations conducting business in the United States.

While the *Hoffman-LaRoche* case represents the first time that the Supreme Court has attempted to untangle the rather complex meaning of the FTAIA, nevertheless the conduct/effect dichotomy still leaves much to be desired with regard to what factual cases will trigger its application.

Where the courts will take up the mantle and provide guidance to foreign corporations as to the meaning of the FTAIA on its business activities remains to be seen.

The Supreme Court's decision in *Hoffman-LaRoche* resolved some of the conflicts that were presented by the *Kruman, Den Norske* and the appellate decision of *Hoffman-LaRoche*.

Certainly, more issues remain to be resolved. Namely, what is the nature of the conduct abroad that must be asserted in order to satisfy this prong of the two-part test? And, what kind of effect on U.S. commerce must be shown to satisfy the second prong of this test? What is the nature of the market for which this test would be applied? Is there a threshold determination as to how large the market should be and what the litigants' share of that market might be? Will the Court provide any further guidance on the interconnection between the "domestic effect" requirement and the "giving rise to a Sherman Act Claim"?

Hopefully, the Supreme Court can divine Congress' intent from the FTAIA in subsequent cases without being accused of legislating from the bench.

1. *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), remanded to 417 F.3d 1267 (D.C. Cir. 2005) (holding that the domestic effects of maintaining high vitamin prices in the United States did not give rise to the claimed foreign injuries of high vitamin prices abroad), petition for cert. filed, 74 U.S.L.W. 3288 (Oct. 26, 2005) (No. 05-541), cert. denied 126 S. Ct. 1043 (Jan. 9, 2006).

2. 15 U.S.C. §6a.

3. The FTAIA provides that the Sherman Act shall not apply to conduct involving trade or commerce …with foreign nations. 15 USCA §6a.

4. Herbert Hovenkamp, Antitrust 324 (4th ed. 2004).

5. After the district court dismissed the plaintiff's claims, the domestic purchasers transferred their claims to another pending suit and did not take part in the subsequent appeal. Id. at 160.

6. In deciding this case, the Court assumed that the conduct's domestic effects did not cause the foreign injury. The respondents 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 respondents would not have suffered their foreign injury." Id. at 175. The Court remanded the case to determine whether anticompetitive conduct's domestic effects were linked to the foreign harm the "appellant's alternate for Sherman Act liability." The D.C. Circuit in *Empagran II* decided that the domestic and foreign harms were independent. In so holding, the Court concluded that, "Applying the proximate cause standard… , the domestic effects …did not give rise to their claimed injuries, so as to bring their Sherman Act claim within the FTAIA exception. While maintaining supercompetitive prices in the United States may have facilitated the appellees' scheme to charge comparable prices abroad, this fact demonstrates at most 'but-for' causation…(and) 'but-for' causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anticompetitive conduct within the FTAIA exception. 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'…." *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

7. In a recent decision, *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, No. C02-1486 PJH (Cal. N.D., March 1, 2006), the district court dismissed the complaint alleging that defendants engaged in a global conspiracy to fix prices for DRAM. The crux of the plaintiff's claim was that the defendants conducted an international conspiracy to deliberately fix DRAM prices in the United States, in order to extract cartel prices from plaintiff and other DRAM purchasers located outside the United States. The court granted the defendants' motion to dismiss for lack of subject matter jurisdiction and concluded that, "…the plaintiff could not sufficiently allege that its foreign injury was dependent upon, or somehow directly linked to, the domestic effect at issue…." *In re DRAM Antitrust Litigation* at 8.

8. "The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy… (citations omitted), and it is unclear how it might apply to the conduct alleged here… . Assuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements." Id. at 796, n. 23.

9. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 740 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.")