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IN THIS ISSUE

The authors provide an update on recent developments in litigation involving the Sherman Act and the Foreign Trade Antitrust Improvement Act.

Can Foreign Companies Pursue Claims in American Courts for Anticompetitive Conduct by American Companies Occurring Abroad? An Update on Recent (and Evolving) Developments

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As the number of global cartel investigations continues to rise, an increasingly relevant question is whether foreign companies may sue American companies under the antitrust laws in United States courts, based upon alleged violations that occur in the foreign company's jurisdiction (i.e., outside the United States.) This newsletter updates developments on the evolving law in this area.

I. SHERMAN ACT & FOREIGN TRADE ANTITRUST IMPROVEMENT ACT

Section 1 of the Sherman Act prohibits unreasonable restraints of trade. Similarly, Section 2 of the Sherman Act precludes illegal monopolies, attempted monopolies, or conspiracies to monopolize any part of the trade or commerce of the several States, or with foreign nations. However, the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"),[1] limits the applicability of the Sherman Act to foreign commerce by excluding "from [its] reach much anti-competitive conduct that causes *only* foreign injury."[2] This limitation has come to be known as the "domestic injury" exception. In the controlling case on the domestic injury exception to the FTAIA, the Supreme Court reviewed the legislative history of the FTAIA and concluded that the FTAIA "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."[3] This is because American "antitrust laws concern the protection of 'American consumers and American exporters, not foreign consumers or producers.'"[4]

The FTAIA sets forth a "general rule placing *all* (non-import) activity involving foreign commerce outside the Sherman Act's reach."[5]

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[1] 15 U.S.C. § 6a. The FTAIA states:

> 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.

[2] *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 ("*Empagran I*") ("Congress sought to release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm."). *Empagran I* is the controlling precedent on the domestic injury exception to the FTAIA.

[3] *Id.* at 161.

[4] *In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008) (internal citations omitted) (analyzing whether foreign purchaser had claims under the FTAIA against sellers for conspiring to fix prices).

[5] The notion that under the FTAIA the Sherman Act is applicable to conduct involving import commerce is sometimes referred to as the "import commerce exception." *Animal Science Prod., Inc. v China Minmetals Corp.*, 654 F.3d 462, 466 (3rd Cir. 2011). The legislature included the import commerce exception so that there would be "no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law." H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494. Recently, the Court of Appeals for Third Circuit clarified that the import commerce exception must be narrowly construed. As such, the fact that defendants may be involved in the U.S. import market is not enough for conduct to fall within the exception. *Animal Science*, 654 F.3d at 470. Instead, "the import trade or commerce exception requires that the defendants' conduct *target* import goods or services." *Id.* (emphasis added). However, the Seventh Circuit stated that calling it an exception was not accurate and instead domestic and import trade is subject to the Sherman Act's general requirements, not

However, foreign conduct may be deemed within the Sherman Act's reach where the foreign conduct *both*

> (1) sufficiently affects American commerce, *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce; *and*
>
> (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the 'effect' must 'giv[e] rise to a [Sherman Act] claim.'[6]

II. DOMESTIC INJURY EXCEPTION TO THE FTAIA

A. Effect on Domestic Commerce

If a plaintiff does not allege that the foreign conduct had a substantial effect on United States domestic commerce, its claim will likely not proceed in American courts. For example, a federal district court could not exercise jurisdiction over buyers' claims that a seller participated in a global price fixing conspiracy of electronic carbon products purchased abroad, even though the buyers were American companies, and the seller sold product in the United States as part of the alleged conspiracy.[7] The court noted that the plaintiff did not allege that the foreign purchases directly affected domestic commerce, or American import or export commerce.[8] Similarly, foreign travel agents did not have claims under the FTAIA where they alleged that United States air carriers conspired to fix commissions paid to foreign travel agents, because even though the agents alleged that the defendant air carriers' conduct substantially reduced their businesses' values, they failed to show that economic consequences of the air carriers' anticompetitive acts were felt in United States commerce.[9] Recently, the Court of Appeals for the Seventh Circuit found that a "substantial effect" was demonstrated where 5.3 million tons of potash was imported into the United States alone in one year, mostly by the defendants in the case.[10]

B. "Gave Rise To" – Proximate Cause Standard

Courts have also held that the "gave rise to" language in the domestic injury exception to the FTAIA requires a proximate causal relationship between the United States domestic effect and the foreign injury, not merely a "but for" relationship.[11] Thus, for instance, the Circuit Court for the District of Columbia held that claims that defendants

any special requirements under the FTAIA. *Minn-Chem, Inc. v. Agrium Inc.*, --- F.3d ---, 2012 WL 2403531, *6 (7th Cir. June 27, 2012).

[6] *Empagran I*, 542 U.S. at 162 (internal citations omitted).

[7] *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437, 442-447 (D.N.J. 2007).

[8] *Id.* (noting that the fact that plaintiffs were American companies did not change the analysis as to the application of the FTAIA).

[9] *Turicentro, S.A. v. American Airlines Inc.*, 303 F.3d 293 (3rd Cir. 2002) ("federal antitrust laws do not extend to protect foreign markets from anticompetitive effects and 'do not regulate the competitive conditions of other nations' economies'. . . "[t]hat certain activities might have taken place in the United States is irrelevant if the economic consequences are not felt in the United States economy") (internal citations omitted).

[10] *Minn-Chem*, 2012 WL2403531, *8.

[11] *See Empagran v. F. Hoffmann-LaRoche Ltd.*, 417 F.3d 1267, 1270 (D.C. Cir. 2005) ("*Empagran II*"). In *Empagran I*, the Supreme Court remanded the case back to the D.C. Circuit Court in order to resolve the question about whether the foreign purchasers had preserved the argument that their foreign injury was not independent of the domestic effects. On remand, the *Empagran II* Court held that the "gave rise to" language in the FTAIA set forth a proximate cause standard, not a "but for" relationship. Since *Empagran II*, all courts evaluating the application of the domestic injury exception to the FTAIA have applied the proximate cause standard.

were able to sustain super-competitive prices abroad for a globally marketed product because defendants maintained super-competitive prices in the United States, merely established a "but for" relationship, and did not demonstrate that "United States effects of the defendants' conduct – i.e., increased prices in the United States – proximately caused the foreign [plaintiffs'] injuries."[12] Instead, "it was the foreign effects of price-fixing outside of the United States that directly caused, or 'gave rise to' the plaintiffs' losses outside of the United States when they purchased [the products] abroad at super-competitive prices."[13] This type of causal link – the "arbitrage theory" – between the domestic effect and foreign injury has been rejected by all courts analyzing it since the decision in *Empagran II*.[14]

[12] *Id.* (the plaintiffs' claimed that if the prices in the U.S. had not been super-competitive, "overseas purchasers would have purchased [the product] at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States").

[13] *Id.* at 1271.

[14] *See e.g., In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008) (concluding that the alleged domestic effects of a price fixing scheme did not "give rise to" plaintiff's injury where defendants' maintenance of "higher U.S. prices may have been necessary to sustain the higher prices globally," but plaintiff could not show "that the higher U.S. prices proximately caused its foreign injury of having to pay higher prices abroad"); *In re Monosodium Glutamate*, 477 F.3d at 539-40 (8th Cir. 2007) ("The domestic effects of the price fixing scheme (increased U.S. prices) were not the direct cause of the appellants' injuries. Rather, it was the foreign effects of the price fixing scheme (increased prices abroad."); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, No. 03 Civ. 10312 (HBDF), 2005 WL 2207017, *9, *11 (S.D.N.Y. Sept. 8, 2005) ("rejecting allegations that arbitrage from the United States would have defeated attempt to fix prices in other countries as an insufficient but-for causal allegation").

C. Comity

The heightened standard of the two part test of the FTAIA's domestic injury exception ensures that American antitrust laws, when applied to foreign conduct, do not interfere with a foreign nation's ability independently to regulate its own commercial affairs. In fact, the Supreme Court in *Empagran I* recognized that other foreign nations have antitrust laws that are similar to American antitrust laws. However, the court explained, while most nations would agree that, for example, price-fixing is illegal, all nations do not provide the same remedies.[15] For instance, American antitrust law provides for treble-damages and fees and costs for civil plaintiffs, while Canada does not. Thus, allowing "injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty."[16]

Moreover, the *Empagran I* Court noted that the domestic injury exception to the FTAIA was consistent with the principles of prescriptive comity. The court asked, "[w]hy 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?"[17] What is important to note about *Empagran I*, is that several foreign nations submitted briefs with the Supreme Court arguing that application of American remedies "would unjustifiably permit their citizens to bypass their own more specific

[15] *Empagran I*, 542 U.S. at 168-69.

[16] *Id.* at 168.

[17] *Id.* at 165.

remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody."[18]

III. RECENT AND EVOLVING DEVELOPMENTS

A. Circuit Split Regarding "Direct" Effect Definition Under the Domestic Injury Exception

In June 2012, a full panel of the influential Seventh Circuit held that an effect is "direct" under the FTAIA where there is "a reasonably proximate causal nexus."[19] The Seventh Circuit created a circuit split regarding the definition of "direct" by departing from the Ninth Circuit's definition, which held that an effect is "direct" if it "follows as an immediate consequence of the defendant's . . . activity.[20] The Seventh Circuit adopted the definition of "direct" proposed by the Department of Justice's Antitrust Division ("DOJ"), and thereby relaxed the standard which had been in place since 2004. Consequently, attorneys believe the DOJ will have more power in pursuing international cartel cases because the DOJ will be able to argue that the U.S. antitrust laws can reach across borders.[21] It remains to be seen whether the circuit split on this issue will reach the Supreme Court anytime soon. In the meantime, most courts outside the Ninth Circuit will likely follow the Seventh Circuit's definition, as that court has historically been a respected source of antitrust jurisprudence.

B. "Reasonably Foreseeable" Requirement Under the Domestic Injury Exception

In another recent development, the Court of Appeals for the Third Circuit ("Third Circuit") in *Animal Science*, held that the domestic injury exception, "does not contain a 'subjective intent' requirement."[22] Instead, "the FTAIA's 'reasonably foreseeable' language imposes an objective standard: the requisite 'direct' and 'substantial' effect must have been 'foreseeable' to an objectively reasonable person."[23]

C. The Third Circuit and the Seventh Circuit Rule Hold that the FTAIA Does Not Impose a Jurisdictional Bar

Perhaps the most significant development concerning FTAIA jurisprudence is the fact that the Seventh Circuit unanimously adopted the Third Circuit's holding that the FTAIA does not impose a jurisdictional limitation, but rather the FTAIA merely provides a substantive merits element.

1. Third Circuit & Seventh Circuit Decision

In *Animal Science*, the Third Circuit reversed its earlier precedent and held that the FTAIA does *not* impose a jurisdictional limitation, but rather it "imposes a substantive merits limitation.[24] The Third Circuit relied on the Supreme Court's 2006 ruling in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), which provided a bright line rule to determine whether a statute sets forth a "jurisdictional requirement or a substantive merits

[18] *Id.* at 167-68 (citing to briefs submitted on behalf of the governments of Germany, Canada and Japan).
[19] *Minn-Chem*, *9. The Seventh Circuit adopted the definition proposed by the Department of Justice.
[20] *Id.* (citing *U.S. v. LSL Biotechs.*, 379 F.3d 672 (9th Cir. 2004) (adopting the definition of direct proposed by the Supreme Court in interpreting the Foreign Sovereign Immunities Act)).
[21] Melissa Lipman, *7th Circ. Boosts DOJ's Leverage in Foreign Cartel Crackdowns*, July 6, 2012, at http://www.law360.com/articles/355180.
[22] *Animal Science*, 654 F.3d at 471.
[23] *Id.*
[24] *Id.* at 467-68.

element."[25] The Supreme Court declared a "clearly states" rule, where a statute must clearly articulate a jurisdictional limitation in order for it to be used to bar a district court from hearing a case.[26] After reviewing the language of the FTAIA, the Third Circuit overruled its pre-*Arbaugh* rulings, in finding that the FTAIA does not "clearly state" that its limitations are jurisdictional.[27] As such, according to the Third Circuit, the FTAIA merely explains what factors a plaintiff must demonstrate in order to bring a successful claim.[28] It is also important to note that the Third Circuit's decision followed on the heels of several district court decisions finding that the FTAIA was not jurisdictional.

In the Seventh Circuit's *Minn-Chem* decision in June 2012, the court agreed with the Third Circuit and overruled its *United Phosphorus* decision which stated that the FTAIA limitations were jurisdictional.[29] The Seventh Circuit held "that the FTAIA spells out an element of a claim" and does not relate to subject matter jurisdiction.[30] In so finding, the court recognized that that intervening decisions by the Supreme Court warranted their decision.[31]

2. Petition to the Supreme Court

On January 5, 2012, the defendants in *American Science*, a group of Chinese magnesite exporters, petitioned the Supreme Court to review the Third Circuit's decision finding that the FTAIA does not impose a jurisdictional limitation on a district court's ability to hear a case.[32] The petitioners assert that there is a "split of opinion among the Third Circuit on the one hand, and the Fifth, Seventh,[33] Ninth, and D.C. Circuits on the other, over whether the FTAIA's limitation on the extraterritorial application and adjudication of the Sherman Act is jurisdictional or elemental aspect of our antitrust jurisprudence."[34] The petitioners claim that the FTAIA imposes a jurisdictional bar and argue, among other things, that the Third Circuit misapplied *Arbaugh*, overlooked *Morrison*, and ignored the legislative history of the FTAIA which states that the limitations are jurisdictional.[35]

3. Impact of the Third Circuit and Seventh Circuit Rulings

The distinction as to whether the FTAIA imposes a jurisdictional bar or instead merely sets forth an element of a Sherman Act claim is important from a procedural aspect. If the FTAIA was deemed to be a jurisdictional limitation, claims involving the FTAIA would be reviewed under Federal Rule of Civil Procedure 12(b)(1) – a motion to dismiss for lack of subject matter jurisdiction. Under Rule 12(b)(1), the plaintiff has the burden of establishing the existence of subject matter jurisdiction, and the court may review

[25] *Id.* at 468 (citing *Arbaugh*, 546 U.S. at 515-16). *Arbaugh* considered whether "numerical qualification contained in Title VII's definition of 'employer' affects federal court subject matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief." 546 U.S. at 503.
[26] *Id.* (citing *Arbaugh*, 546 U.S. at 515-16).
[27] *Animal Science*, 654 F.3d at 468-69 (noting that "the statutory text is wholly silent in regard to the jurisdiction of the federal courts").
[28] *Id.*
[29] *Minn-Chem*, *5.
[30] *Minn-Chem*, *5.
[31] *Id.*
[32] Petitions for Certiorari filed Jan. 5, 2012, No. 11-846 and No. 11-847.
[33] The petition was filed before the Seventh Circuit's decision finding that the Third Circuit's interpretation was correct.
[34] *Pet. for a Writ of Certiorari of Sinosteel Corp., Sinosteel Trading Co., Ltd. And Liaoning Mayi Metals & Minerals Co., Ltd., Metals & Minerals Co., Ltd. v. Animal Science*, No. 11-847, Jan. 5, 2012, at 11-12 (citing cases from the Seventh Circuit, Fifth Circuit, D.C. Circuit, and Ninth Circuit which held that the FTAIA concerns subject matter jurisdiction).
[35] *Id.* at 13-22.

evidence and resolve factual disputes.[36] However, under the Third Circuit and Seventh Circuit decisions, a district court must examine the applicability of the FTAIA under Federal Rule of Civil Procedure 12(b)(6) – a motion to dismiss for failure to state a claim.[37] In contract to Rule 12(b)(1), under Rule 12(b)(6), the burden is on the defendant and the court must accept as true all facts alleged in the complaint, and is not allowed to make independent findings of fact.[38]

IV. CONCLUSION

As illustrated above, with respect to the situation where a foreign company is injured by the anticompetitive conduct of an American company, the location where this anticompetitive conduct takes place is significant – but not dispositive – in determining the application of American antitrust laws. The foreign company may be able to invoke the domestic injury exception to the FTAIA, if it can satisfy the two prongs of that exception. If the foreign company is unable to meet this test, it will have to pursue remedies in its home jurisdiction.

It is important to note, though, that the jurisprudence surrounding the FTAIA continues to evolve. Recent decisions in the Third Circuit and the Seventh Circuit will likely have a significant impact on how the district courts analyze and apply the FTAIA.

[36] *Animal Science*, 654 F.3d at 470, n.9.
[37] *Id.*
[38] *Id.*

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