INTERNATIONAL TRADE AND ANTITRUST

Clarity Put on Hold as FTAIA Conflict/Confusion Continues

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Foley & Lardner Antitrust Practice Group Webinar

Presented by

Melinda Levitt and Howard Fogt
Partners in Foley & Lardner's
Washington and Brussels Offices

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Overview of Presentation

- During 1970s, Antitrust Uncertainty Perceived as Inhibiting U.S. Export Trade
- The Response: Foreign Trade Antitrust Improvements Act of 1982 – 15 USC §6a
- Despite Good Intentions, Confusion and Conflict Continue
- Present Issues Posing Problems
- 6/15/15 SCOTUS denial of cert. in 7th Cir. (*Motorola*) and the 9th Cir. (*Hui Hsiung*) Prolongs Conflict/Confusion
- Where do We Go From Here?

Antitrust Uncertainty Inhibiting U.S. Export Trade

- During the late 1970s, United States export trade perceived as withering in face of challenge from Asian and European competitors: An economic crisis?
- Courts had developed differing tests on the types of conduct in international trade that would violate the Sherman Act. See, *e.g., Nat'l Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2nd Cir. 1981); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d. 597 (9th Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979).
- Critics of antitrust law sought to solve this problem by clarifying antitrust law applicable to export trade and by limiting antitrust law's exterritorial reach

The Perceived Problem: Antitrust Laws as Inhibiting U.S. Exports

- Congress was told that there was no consensus how far the U.S. antitrust laws could reach into export trade activities
- This lack of certainty allegedly inhibited U.S. export trade.
- Proponents of change sought to limit application of U.S. antitrust laws to restraints occurring abroad that had a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce
- Proponents sought to reduce the ability of foreign purchasers to access U.S. courts forcing them to rely on local law and to explicitly approve coordinated U.S. export trade.
- Seeking to reinforce further the notion that there were outer limits to U.S. antitrust jurisdiction, proponents sought export trade legislation that would explicitly exempt and approve coordinated U.S. export trade as had been possible under the Export Trade Act of 1918 (so-called "Webb Pomerene Act")

Foreign Trade Antitrust Improvements Act ("FTAIA") : What Congress Wanted and Wrote

- The FTAIA and related legislation enacted in 1982 sought to achieve clarity and limit territorial reach of conduct proscribed by U.S. antitrust laws and, thus, promote greater legal certainty for U.S. export commerce.
- FTAIA, focusing on international trade, says that the Sherman Act (15 USC §1-7) applies to competitive restrictions affecting U.S. import trade but does not apply to competitive restrictions affecting trade or commerce with foreign nations (non-import trade) *unless* –
- Such non-import conduct has a direct, substantial and reasonable effect "on trade which is not trade with foreign nations (domestic trade), import trade with foreign nations or export trade with foreign nations by a person engaged in the U.S. in such export trade; *and*
- Such restrictive effect gives rise to a claim under other provisions of 15 USC §1-7.
- Tortured language creates series of exceptions within exceptions and has proved difficult to interpret and apply. The companion Export Trading Company Act confirms explicit exemption for joint export.

Empagran: The Seeming Calm Before the Storm

- FTAIA was supposed to provide a clear benchmark on the application of U.S. antitrust laws for both domestic and foreign companies.
- In 2004, the Supreme Court construed FTAIA in *Empagran* ruling that FTAIA limited not increased antitrust jurisdiction of U.S. courts – no global power over antitrust claims
- The Court also said that U.S. courts needed to discourage forum-shopping, avoid unnecessary interference with the sovereign interests of other countries to regulate their economies and enforce laws to protect their consumers.
- However, presaging coming difficulties, the Court held that a global price-fixing cartel which directly, significantly and reasonably foreseeably affected both customers in and outside the United States but where the adverse foreign effects were independent of domestic effects, left plaintiffs relying on the foreign effects with no claim under U.S. antitrust laws. Very difficult to know how to draw the line
- Seeds of confusion/conflict had been planted and the FTAIA has been dogged by conflicting judicial decisions ever since

As Confusion on FTAIA Grew, Need for Clarification Became Ever More Important

- Since 2004, antitrust has become a global phenomena. Antitrust regimes enacted in more that 150 countries focusing on cartels as a priority
- Antitrust investigations, prosecutions and increased regulatory cooperation have raised the stakes for business and individuals
- Fines and damage claims literally have involved billions, if not trillions of dollars. Many, many of the challenged activities have a global or at least an international nexus.
- Not surprising that since the U.S. courts are the only principal forum in which both treble damages and attorneys fees can be awarded, demand for access to pursue claims under U.S. law grew. However, that demand collided with FTAIA (and its purpose to limit reach of U.S. antitrust laws).
- The results have become increasingly contentious.

Current FTAIA Issues of Contention/Conflict

- Is FTAIA an issue of substantive liability or is it an initial question of subject matter jurisdiction? Why does it matter?
- What is the scope of the "Import Commerce" Exclusion? If the import commerce is indirect, can there be an "effect on import commerce?"
- If an effect to be actionable has to be "direct" as well as substantial and reasonably foreseeable what is required to satisfy this "directness" criteria?
- How to interpret requirement that a domestic effect "give rise to the claim" being asserted?

Recent Appellate Cases Raising FTAIA Issues

- *Lotes v. Hon Hai Indus.,* 753 F.3d 395 (2nd Cir. 2014). In *Lotes*, a Taiwanese plaintiff sued local Taiwanese competitors which allegedly had adopted an essential product standard that prevented Lotes from selling its USBs in the United States. Lotes contended that its absence from market forced up the prices that U.S. consumers paid for USBs. Held: Plaintiff denied relief - "domestic effect did not give rise to its claim."
- *United States v. Hui Hsiung (AU Optronics)*, 2015 U.S. App. Lexis 1590 (9th Cir. 2015). Criminal price-fixing international cartel involving liquid crystal displays (LCD). Most LCD panels are sold to foreign third parties and incorporated into electronic products then imported to the United States – thus an indirect import into U.S. commerce. Held: criminal LCD price-fixing conviction valid relying, in part, on a prior interpretation of the "direct" criterion in the FTAIA in *United States v LSL Biotechnologies,* 379 F.3d 672 (9th Cir. 2004), which required that the domestic effect be the "immediate consequence" of the trade restraint.

Current Appellate Cases Raising FTAIA Issues

- *Motorola v. AU Optronics,* 775 F.3d 816 (7th Cir 2014). Civil treble damages case involving the same LCD conspiracy as in *Hui Hsiung*. Motorola asserted a claim arising out of LCDs bought by its foreign subs, incorporated into phones, and imported into the United States by Motorola. Held: damage claim denied [?because effect not sufficiently "direct"?] despite the prior Seventh Circuit FTAIA "directness" interpretation in *Minn-Chem v. Agrium,* 683 F.3d 845 (7th Cir. 2012), which had interpreted "direct" as meaning a reasonably proximate cause of the claimed injury.
- *Animal Sci. Prod. v. China Min.*, 654 F.3d 462 (3rd Cir. 2011). Claim brought by U.S. purchaser of allegedly price-fixed Chinese products sold in U.S. market by third-party importers. Held: Motion to dismiss vacated as FTAIA raises substantive merits issues and not initial jurisdictional question. On remand district court required to consider allegations sufficiently indicated within meaning of FTAIA whether foreign conduct directed at U.S. import market.

FTAIA: Substantive Liability or Subject Matter Jurisdiction

- If FTAIA is question of subject matter jurisdiction, it is a preliminary question of power to hear/decide dispute – subject to motion to dismiss without discovery
- If the FTAIA is a matter of substantive liability, court has power to decide the dispute – resolution through motion for summary judgment after expensive discovery or trial. Expense and shifting burdens of proof greatly increases settlement pressure.
- Emerging majority view is that FTAIA is question of substantive merits and not a fundamental question of subject matter jurisdiction. Implication: FTAIA cases will proceed at least through discovery and await summary judgment or trial for resolution.

FTAIA: Substantive Liability or Subject Matter Jurisdiction

- The 3rd Circuit in *Animal Science*, 2nd Circuit in *Lotes* and 9th Circuit in *Hui Hsiung* interpreted the FTAIA as a question of substantive liability (not subject matter jurisdiction) consistent with the non-FTAIA U.S. Supreme Court decision in *Arbaugh v. Y&H Corporation*, 546 U.S. 500 (2006), thereby placing the burden of proof on plaintiffs' shoulders.
- As *Minn-Chem* demonstrates, if FTAIA is a question of substantive liability, significant pressure put on defendants to settle rather than incur costs of discovery and motion practice. In *Minn-Chem*, the defendants independently imported potash to the United States from Canada. The plaintiffs complained that defendants had conspired with Russian potash producers to fix the price of potash sold in Brazil and Asia. There was little or no evidence that the price-fixed potash sold in foreign markets had affected U.S. prices or that the defendants' potash imports from Canada were tainted by the alleged price-fixing conspiracy in foreign markets. After 7th Circuit decision affirming denial of defendants' summary judgment, defendants settled for +/-$100 million.

Scope of the "Import Commerce" Exclusion

- Does conduct "affect" import commerce? Limits?
- Easy case where the defendants make and sell goods abroad and sell them directly to U.S. purchaser plaintiffs
- What if defendant is not the importer? Was anticompetitive conduct "directed at" an import into U.S. commerce? Relation to "direct" effect issue
- Conflict between appellate courts in 3rd , 9th , 7th and 2nd circuits – See *Animal Sci.*, *Hui Hsiung* , *Motorola* and *Lotes*

For an effect to be "direct," what's required?

- Issue of "directness" has sparked most of the controversy and conflict
- 9th circuit – effect must be "immediate consequence" (temporal context) of defendant's anticompetitive behavior
- 7th and 2nd circuits – effect must have "reasonably proximate causal nexus" – effect is not direct, if effect "filters through many layers and finally causes a few ripples in the United States," according to 7th circuit
- See *Motorola*, *LSL* and *Lotes*

Requirement that Domestic Effect "Give Rise to the Claim" Being Asserted

- The claim asserted has to result from a domestic effect
- In *Lotes*, foreign USB manufacturer's claim was not same as U.S. consumers for increased prices
- In *Motorola*, parent cannot sue for inflated prices paid by its foreign subs for products incorporated abroad into final product that is imported into the U.S. market (also relevant is *Illinois Brick* indirect purchaser rule)
- Can an indirect purchaser ever satisfy this criteria of the FTAIA? Why should *Lotes* lose?
- What does this mean for state antitrust law indirect purchaser rights of action?

Concluding Thoughts: What Lies Ahead for the FTAIA?

- As the foregoing reflects, there is continuing confusion and conflict about the application of the FTAIA to trade restraints in foreign commerce. Some of the confusion and conflict is obvious when, as is reflected in the several recent decisions, the question is focused on the criterion of "directness" of the "effect" to be actionable.
- Even here, there may be difference in answer depending on who is posing the question. Is it USDOJ pursuing criminal prosecution? If so, public policy might counsel deference to the government regulator. Or is it a private plaintiff (whether U.S. or foreign) and if so, should that plaintiff be accorded less deference? Should there be deference given to a foreign government's antitrust regime?

Concluding Thoughts: What Lies Ahead for the FTAIA?

- The domestic effect "giving rise to a claim" also reduces potential claims. It might be useful to think through again the denial of relief in *Lotes*, *Animal Sci.* and *Motorola*. Each was denied relief but they may raise different policy questions (even accepting the role of *Illinois Brick* in *Motorola*).
- Ongoing uncertainty about question whether FTAIA involves subject matter jurisdiction or substantive liability weighs heavily on realities of litigating treble damage actions in this area.
- For now, one must wait and hope for another opportunity to resolve these issues and bring the clarity to the role of antitrust in international trade that the FTAIA was supposed to have played when it was enacted in 1982.
- Maybe, the ball is back in Congress' court?

Questions?

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