

EXTRATERRITORIALITY OF ANTITRUST LAW IN THE US AND ABROAD: A HOT ISSUE

WASHINGTON, DC, SEPTEMBER 28, 2015

3rd Annual Joint Conference - GW Competition Law Center & Concurrences Review



Concurrences Review and The Competition Law Center of the GW Law organized, on September 28, 2015, the 3rd annual conference on «Extraterritoriality of Antitrust Law in the US and Abroad: A Hot Issue.» The event was sponsored by Axinn, Veltrop & Harkrider, O’Melveny & Myers LLP, and Paul Hastings. Chief Judge Diane P. Wood addressed the keynote speech.

KEYNOTE SPEECH

WHAT’S THE ROLE OF COMITY IN THE INTERNATIONAL ANTITRUST ENFORCEMENT?

Chief Justice Diane P. WOOD

Bill KOVACIC (Director of the George Washington Competition Law Center) welcomed the audience and opened the conference by remarking the importance of extraterritoriality in antitrust enforcement. Kovacic highlighted the increase in number of existing competition plus authorities (currently approximately 130) and the fact that some of them are becoming very powerful in practice. Kovacic discussed how the USA ‘monopoly’ relating to antitrust enforcement became a US-EU duopoly when the EC adopted its first merger regulations. These days, an oligopoly is being developed, particularly with China, South Africa, India, and Brazil.

Consequently, international transactions as well as monopoly cases are being structured differently. Kovacic anticipated that soon eight to ten gatekeepers will be key to the structuring of business transactions. Against this background, Kovacic concluded that there is disappointment as to comity not having had a stronger role.

Diane P. WOOD (Chief Judge, US Court of Appeals for the Seventh Circuit, Chicago) delivered the opening keynote speech on the role of comity in the international antitrust enforcement scenario.

Speaking from her experience, Chief Judge understands that the USA has changed in

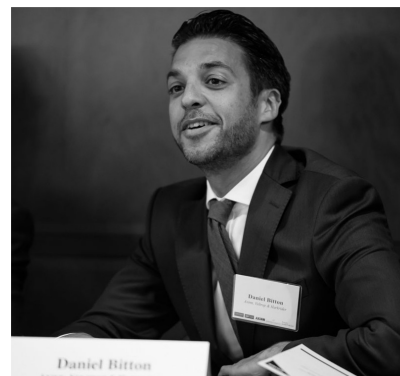
the way it sees the application of its antitrust laws. In the views of chief Judge, in the early days, the US imposed self-restrictions to questions such as the effect on US markets, the compatibility or lack thereof with other regimes, as well as the role that comity should play. As a matter of example, the 9th circuit came up with the *timberlane* decision suggesting a multifactor test on comity.

Chief Justice noted that the current thinking is different. Since 2002, the Supreme Court has been tightening up the vocabulary relating to the concept of jurisdiction in many areas of law. Furthermore, chief justice raised the point that there is a need to draw a line between a true jurisdictional rule and other type of rules. The practical difference of making such distinction relies on the fact that subject matter jurisdictions can be raised any time, whereas the matter of the statute reach will be raised under a motion to dismiss. Chief justice determined that the FTAIA is not a question of subject matter jurisdiction and therefore falls under the latter category, *i.e.*, motion to dismiss. Then, upon discussing the split interpretations of the FTAIA by the ninth and second circuits, Wood predicted that eventually the Supreme Court will decide on the matter.

In line with Kovacic’s opening remarks, chief justice commented on the increasing number

of competition laws worldwide and its positive effects for consumer as long as such laws do not slide over businesses practices. In this international context, the allocation of responsibility for the regulation of anticompetitive activities is not solvable by a simple formula. As such, the resurgence of attention to comity is not surprising. Wood offered her positive opinion over cooperation as a strategy to enforce competition laws despite the fact that it is difficult to find another system like the US that relies on private enforcement. In this regard, chief justice Wood argued that if there is an 80% agreement it would be advisable to cooperate in such percentage and agree respectfully to the disagreement on the remainder of the 20%.

Finally, chief justice Wood concluded by arguing in favor of comity to be administered by the executive and even by other social actors. Chief justice understands that it is extremely difficult to ask a court to administer comity as the courts hands are tight. In her view, *timberlane* was a good effort, but the seven factors included in such decision without weighting what goes to each factor is not optimal. Further, she reminded the audience that the Supreme Court has moved away from these types of balancing tests. Eventually, she expressed her concerns relating to judicial comity becoming a reality. ■



PANEL 1

CHALLENGES TO INTERNATIONAL COMITY?

John BRIGGS (Managing Partner, Axinn, Veltrop & Harkrider, Washington DC) opened the first panel by pointing to the importance of understanding the different approaches taken by the EU and USA relating to comity. Then, he gave the floor to the panelist to discuss such different approaches and to comment on convergence thereof.

Frédéric JENNY (Chairman, OECD Competition Committee, Paris) began his remarks by clarifying that it is challenging to define convergence as the number of jurisdiction increases. Mr. Jenny explained that there is a territorial dimension to article 101 and 102 of the TFUE, as they need to affect intra EU commerce. As such, within the EU there is no need for an FTAIA type of legislation as antitrust laws are not applicable in the EU if there is not such intra EU commerce effect. Mr. Jenny continued to comment on the need to make a distinction between the merger and rest of anticompetitive practices when discussing international comity. In the EU, the evolution of antitrust enforcement towards and effects based diagnosis has led to the EC to consider different elements when dealing with foreign anticompetitive practices, *i.e.*, the formation of the agreement and the implementation of the agreement, as well as whether it has an effect on direct sales in the EU. Further, Mr. Jenny discussed the fact that the

former implementation test cannot be used for mergers since the merger has not taken place. Mr. Jenny concluded that international comity is difficult when it comes to anticompetitive conducts if there is no interference in commerce and if proportionality is not taken into consideration.

Joseph HARRINGTON (Patrick Harker Professor, The Wharton School, University of Pennsylvania) opened his remarks by noting that the primary rationale for comity is reciprocity; it is a *quid pro quo* that both countries will limit their intervention on certain matters. In determining whether the exercise of comity is warranted, he argued that one should assess whether the implicit reciprocal behavior is actually desirable. In the case of antitrust, the guiding principle is the protection of consumers which led him to conclude that comity should be assessed in terms of its impact on consumer welfare. He warned against consumer harm being the collateral damage associated with comity and to instead translate the benefits and costs of comity into the common currency of consumer welfare.

James RILL (Senior Counsel, Baker Botts, Washington DC) focused his remarks on his extended experience. He stressed how much the antitrust enforcement landscape had changed and how other jurisdictions' decisions

could impact American businesses. Mr. Rill broadly agreed with the rest of the panelists and concluded that international comity would be desirable albeit difficult to implement.

Daniel BITTON (Partner, Axinn, Veltrop & Harkrider, New York) expressed his personal views as an American and European trained attorney dealing with multijurisdictional investigations, litigation and transactions. Mr. Bitton pointed to another aspect of the reciprocity inherent in the concept of international comity: whether the US is ready to see other jurisdictions follow its lead in aggressive antitrust enforcement. He took the US v. Apple case as an example. In that case, the US government alleged a per se horizontal cartel, yet pursued a civil instead of criminal case against Apple as a cartel facilitator. He posed the following questions: What if antitrust regulators in China adopt criminal antitrust enforcement like the US and prosecute a US corporation and its executives criminally in a case like that? Would the US permit that to happen, as it so often expects other countries to do when DOJ criminally prosecutes their corporations and citizens for cartel violations? If not, then should the US perhaps be more restrained in its criminal prosecution of foreign corporations and nationals? ■



PANEL 2

NEW MEANINGS FOR DIRECT EFFECT AND CAUSATION

Jeremy EVANS (Partner, Paul Hastings, Washington DC) opened the second panel by providing an overview of the FTAIA and asking the panelists a series of questions designed to explore their views on the scope of the extraterritorial reach of the Sherman Act and future trends. The questions elicited a range of perspectives from the panelists based on their different roles as counsel for the government, the defense bar and US and European in-house role. Mr. Evans also offered hypotheticals to the panelists designed to discuss the legal standards and explore what conduct satisfies the “direct effects” test set out in the FTAIA.

James FREDRICKS (Assistant Chief, Department of Justice, Antitrust Appellate Section, Washington DC) explained that the DOJ’s approach to extraterritoriality is very important for two main reasons. First, DOJ takes into consideration international comity when bringing an enforcement action. Second, the connection to the US commerce needs to be established, since US antitrust law does not provide redress for every injury in the world. Mr. Fredricks also responded to the moderator’s questions by clearly arguing in favor of the ‘proximate cause’ interpretation of the FTAIA. Mr. Fredricks concluded by stating that the proximate cause test is a flexible concept well-suited to addressing concerns about remoteness and courts have a great deal of experiencing applying it in many legal contexts including in antitrust.

Camilla HOLTSE (Chief Legal Counsel, Maersk, Copenhagen) argued in favor of legal certainties as a way to set precise boundaries in the application of competition laws. Then, Ms. Holtse expressed her views from a European perspective, and recalled the discussion of the first panel on the different tests applied in the EU when dealing with an anticompeti-

tive conduct, calculation of a fine, or a merger. She remarked that according to well-established EU case law foreign conduct must have effect in the EU, whether it applies to anticompetitive agreements or mergers. With respects to mergers, she highlighted that it has nevertheless been the practice of the EU Commission to require EU merger notification of non-EEA joint ventures where the joint ventures parents’ turnover meet the thresholds in the EU Merger Regulation, but where the joint venture has no effects on EEA. Recently, the EU Commission has however proposed to change this practice and propose to exclude such non-EEA joint ventures from EU merger control. This would provide more legal certainty for companies and the proposal is therefore welcomed. Upon providing the audience with very illustrative examples on how the company Ms. Holtse represents is affected by the multiplicity of existing competition laws and requirements, she urged for the need for clarity and certainty. She concluded by expressing her concerns relating to the lack of legal certainty that can lead to bad results on competition enforcement. Finally, she stated that jurisdiction boundaries are necessary especially for corporations such as Maersk that operate globally on globally interlinked markets.

David RODI (Senior Antitrust Legal Counsel, Shell Oil Company, Houston) in line with the previous panelist, claimed that legal clarity would be welcome. He expressed his concerns relating to the lack of current understanding on where the boundaries of national competition laws are. Mr. Rodi observed, however, that for global multinational companies, where compliance is a priority, the question of precisely where the jurisdictional line falls makes little difference in practice. As an example, Mr. Rodi noted that price fixing that is illegal in most jurisdictions,

and that because the jurisdictional lines are blurry, any company that launches its products into the stream of global commerce should assume that it could be subject to a price-fixing charge somewhere. On the other hand, vague jurisdictional dividing lines may cause international companies to avoid conduct in that would be legal where it occurred based on the possibility of extraterritorial claims. Mr. Rodi emphasized the lack of practical difference between the two competing US standards—‘immediate consequence’ versus and ‘proximate cause.’ He observed that the distinction between these two standards are so legalistic, and difficult for business-people to understand, that in-house counselors rarely rely on this difference in advising clients. Finally, Mr. Rodi criticized the ‘proximate cause’ standard as being so amorphous that a company often will not know whether its conduct is subject to US jurisdiction until it is in court litigating the issue.

Michael SPAFFORD (Partner, Paul Hastings, Washington DC) opened his remarks by explaining that since it is not clear where the US law ends it has to be assumed that it applies everywhere. In reference to the interpretation of the FTAIA, Mr. Spafford opined that if legislators would have wanted to way proximate cause they would have, but instead they said direct to mean direct effect on the US markets. Then he commented on the existing tension between flexibility and certainty in view of the increase in foreign enforcement program reaching out to every corner particularly relating to cartels. He argued that on the one hand proximate cause grants flexibility and leverage, but that, on the other hand, certainty promoted compliance and made counseling easier. Mr. Spafford concluded by stating that there is not enough guidance yet to resolve this tension, making legal counseling a challenge. ■



PANEL 3

GOOD vs. BAD EXTRATERRITORIALLY: WHAT IS THE DESIRABLE LEVEL OF GOVERNMENT ENFORCEMENT?

Ian SIMMONS (Partner & Co-Chairman of Antitrust Practice Group, O'Melveny & Myers LLP, Washington DC) opened the third panel by reviewing with the audience the literal text of the FTAIA provisions. He expressed his view that the FTAIA provided for a broad exclusion to the Sherman Act unless the two cumulative conditions in the statute were met. The first, the "import" provision, brings conduct involving foreign trade *back into* the reach of the Sherman Act if the conduct involves import trade or commerce. Simmons pointed out that there are a host of unsettled questions concerning the "import" provision: for example, in a case alleging a conspiracy as to "components" (for example, price fixing of compressors), is the import clause triggered if refrigerators are imported which contain the compressors? In other words, is the import provision only triggered when the product that was subjected to the conduct is imported? The second, the "domestic effects" provision, makes clear that the "claim" must arise from the domestic effects of the conduct, not from the conduct itself. Does that therefore mean plaintiffs must allege and prove their injury flows not from the price fixing (the conduct) but from the US effects of the conspiracy? Simmons, referencing his recent ABA Antitrust Section article, also raised the issue as to whether a criminal prosecution can be based solely on the domestic effects provision, because an indictment is not a "claim."

Douglas H. GINSBURG (Judge, US Court of Appeals for the District of Columbia Circuit; Professor of Law, George Mason University School of Law) in response to the moderator's opening remarks, anticipated further cases that will determine what constitutes a direct effect that gives rise to a claim. In this respect,

he explained to the audience that when advancing a novel theory the Government first brings a civil action to establish the legitimacy of its interpretation, *i.e.*, a precedent; as an example, he pointed to the civil case against American Airlines first establishing that soliciting an agreement to fix prices is unlawful. Only after the precedent has been established is the conduct prosecuted criminally. He concluded by highlighting the uncertainties and interpretative difficulties posed by the wording of the FTAIA.

Michael HAUSFELD (Chairman, Hausfeld, Washington DC) initiated his remarks by pointing to the fact that the decline in US antitrust enforcement is no longer at the core of the competition law determinant factors. Differently, the rise of antitrust enforcement in other jurisdictions is relevant. Mr. Hausfeld opined that with respect to extraterritoriality and public enforcement, the US felt isolated as other antitrust regimes covering offenses sanctioned by the US appeared. In his view, the US had a restrictive approach towards territoriality not to make other nations feel that it was imposing the American views and thus invading sovereignty. Mr. Hausfeld underlined that the views on extraterritoriality differ when discussing collusion, mergers or abuse of power and monopolies. Whereas in collusion cases interests are aligned, the same is not the case in mergers or monopolization cases. Mr. Hausfeld concluded by highlighting that in the new world with numerous competition systems, international comity and extraterritoriality will have a more significant meaning than ever.

Mark POPOFSKY (Partner, Ropes & Gray, Washington DC; Adjunct Professor, George-

town Law Center) stressed the importance of clarifying when the FATA applies to conduct that involves both domestic and foreign elements, an issue few courts have addressed. This could prove important in future criminal prosecutions, when the government declines to rely on import commerce. In practice, Mr. Popofsky explained, the government tends to invoke import commerce and count indirect US sales differently in negotiating criminal fines; but if a defendant elects to go to trial, cases such as *AUO* show that juries will decide whether the conduct is sufficiently within the Sherman Act's territorial scope. Mr. Popofsky also explained the reasons why State antitrust laws ought not be construed to have a broader territorial scope than Federal antitrust laws, a recurring issue in indirect purchaser litigation.

John TERZAKEN (Partner, Allen & Overy, Washington DC) explained that, in his personal experience working for the DOJ, extraterritoriality and positive comity play an important role. He stressed the fact that the DOJ is amongst major international cartel enforcers and that, as such, he anticipated that it will continue to rely on extraterritoriality principles to fight against cartels. That said, Mr. Terzaken expressed his concerns on the limits of criminal enforcement and concluded that such limits are at the crossroads of the future of extraterritoriality and comity. ■

Editor: Marianela López-Galdos, Principal Researcher at George Washington Competition Law Center

This synthesis has been prepared by Concurrences Review. Views expressed cannot be regarded as stating an official position of any of the institutional speakers.

VIDEOS

During the Conference some of the speakers summarized some of their ideas in short videos. These can be watched at Concurrences.com website (Events > September 28, 2015 > Washington, DC).



Daniel BITTON



John BRIGGS



Jeremy EVANS



Michael HAUSFELD



Frédéric JENNY



Bill KOVACIC



Michael SPAFFORD

PRESS REPORTS

REPORT BY LAW360©

DOJ official defends foreign antitrust enforcement

By Jimmy Hoover Law360, Washington

A top official in the US Department of Justice's Antitrust Division fought back at criticism of its loose enforcement of US competition laws abroad, saying Monday that the agency needs the flexibility to assess each case's circumstances.

Congress curtailed the federal government's ability to prosecute antitrust violations occurring outside the US when it passed the Foreign Trade Antitrust Improvements Act of 1982. However, it also provided exceptions for conduct that has a direct effect on domestic markets.

Under that exception to the FTAIA, the Antitrust Division has now stretched its foreign reach to conduct that proximately causes domestic effects—a new standard that helps the agency weigh multiple aspects of a case,

James Fredricks, a top official in the division's appellate section, said Wednesday at an event at George Washington University Law School.

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According to panelist Michael Spafford, a partner at Paul Hastings LLP, the new standard reaches beyond the original text of the FTAIA, which explicitly called for a "direct" cause.

"If they meant proximate cause, they would have put it in the statute," Spafford said.

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During the panel, Fredricks suggested that clarity was unrealistic given the variety of conduct prohibited by the antitrust laws.

"There could be all kinds of different conduct from price-fixing to exclusionary conduct to

joint ventures," Fredricks said. "There's no way Congress could have provided a mechanical role."

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Speaking to the GWU audience Monday via teleconference, US Circuit Judge Diane P. Wood, who authored the opinion adopting the proximate cause standard for the Seventh Circuit, said the court did not think the Ninth Circuit's immediate consequence standard "would not be a good definition" for "direct" under the statute given additional requirements by the FTAIA.

On the possibility of the Supreme Court resolving that disagreement some time in the future, Judge Wood said, "That of course would be fine." ■

[Read the full article on Law360.](#)

REPORT BY MLEX©

Courts aren't the right place for international comity arguments, appeals court judge says

By Leah Nylén

Courts aren't the right venue to weigh international comity considerations raised by companies or other defendants, the chief judge of a US appeals court and leading antitrust expert said Monday.

Defendants would do better to argue to the US Congress that it should change the law or to the executive branch that it should exercise prosecutorial discretion, such as by not pursuing antitrust cases related to foreign conduct if it is also being punished by a foreign regulator, said Chief Judge Diane Wood of the US Court of Appeals for the Seventh Circuit.

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Speaking on a different panel at the same conference, James Fredricks, assistant chief of the DOJ's Antitrust Appellate Section, emphasized that the agency is cognizant of comity issues. "International comity is at the forefront of our thinking in these cases," he said.

In her remarks, Wood also addressed a November 2014 decision by her court that prohibited Motorola Mobility from pursuing antitrust damages for purchases made by its foreign subsidiaries. In that case, several foreign

governments, including Japan, South Korea and Belgium, submitted briefs urging the court against an expansive view of when plaintiffs can seek damages because of comity concerns.

....

"The ability to get to foreign commerce exists for the government," she said. "To the extent this reveals a wedge between private enforcement and government enforcement, which it does, it seems to me it's Illinois Brick that creates the wedge and not the FTAIA – and certainly not the Seventh Circuit." ■

[Read the full article on MLex.](#)

DOJ lawyer defends Agency's reading of FTAIA

By Pallavi Guniganti

The “proximate cause” interpretation of the Foreign Trade Antitrust Improvements Act advocated by the Department of Justice is a flexible yet familiar standard for courts to apply, the assistant chief of the appellate section in the DOJ’s antitrust division said yesterday.

James Fredricks, who argued for the government in the Motorola Mobility litigation and has co-authored amicus briefs in other cases dealing with the FTAIA, spoke on a panel discussing “new meanings for direct effect and causation” at a conference on the extra-territoriality of antitrust law.

The division cares about how the Act is interpreted by courts because when the DOJ brings actions, it carefully considers the implications for the US’s relations with foreign nations, Fredricks said.

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The antitrust division is “not always advocating for a maximalist reach” of the antitrust laws, he said, and “oftentimes we are helping to describe the limits, and sometimes we

are placing them where private plaintiffs aren’t happy.”

Paul Hastings partner Michael Spafford, however, took issue with the DOJ’s desire for flexibility, which he said is in tension with businesses’ ability to be certain about what the law is. Such certainty promotes compliance and enables lawyers to explain to clients where the lines between legal and illegal conduct lie, he said.

The “proximate cause” standard of the FTAIA, under which foreign conduct is deemed to have a “direct” effect on the US and thus come within the antitrust laws, is an example of such flexibility, Spafford said.

...

Fredricks agreed that in some ways, the proximate cause test gives flexibility, but said it is not a new concept invented by the DOJ.

“Proximate cause should be familiar to everyone who went to a US law school,” he said. It is a prominent part of torts liability and other

areas of law taught to first-year law students.

The FTAIA has the difficult job of limiting the reach of the Sherman Act, even though the Sherman Act itself is broadly written and covers a variety of conduct, Fredricks said.

...

“We brought our LCD cases in the Ninth Circuit, which applies the stricter ‘immediate consequences’ standard, and we were comfortable doing that,” he said. “We never thought ‘immediate consequences,’ properly understood, meant immediacy in a temporal sense.”

...

Fredricks and Spafford were joined on the panel by Camilla Holtse, chief legal counsel for shipping company Maersk, and David Rodi, Shell Oil senior legal antitrust counsel. The discussion was moderated by Paul Hastings partner Jeremy Evans and was part of a conference hosted by George Washington University law school and Concurrences. The event ended yesterday. ■

Courts are wrong audience for comity arguments, says Judge Wood

By Pallavi Guniganti

Judge Diane Wood, formerly an attorney at the Department of State and a deputy assistant attorney general in the Department of Justice’s antitrust division, gave the keynote to a conference on the extraterritoriality of antitrust law in the US and abroad.

Calling the Foreign Trade Antitrust Improvements Act “a miracle of bad drafting,” she discussed how the courts had interpreted its requirement that foreign commerce have a direct, substantial and foreseeable effect in the US to be caught by the US antitrust laws.

...

She said non-judicial actors can urge Congress to change laws, and the executive branch and Federal Trade Commission to exercise prosecutorial discretion due to foreign relations, and keep litigation from occurring in the first place.

But once a case shows up in federal court, she said, judicial comity is “a very difficult thing to give reality to.”

The decision to prosecute a foreign corporation represents the executive branch’s decision that such prosecution will further US interests, Judge Wood said, and it is not for the court to consult with interested entities about whether the case should have been brought despite other governments’ opposition.

“I’m not fond of the word ‘never’, but it is extremely difficult to ask a court to be the institution that administers comity,” she said.

...

The Illinois Brick Supreme Court precedent prohibiting such lawsuits is well established, but it does not apply to government litigation, which is why the DOJ could prosecute AU Optronics criminally for price fixing.

If this difference puts a wedge between government and private enforcement, Judge Wood said, it was Illinois Brick and not the FTAIA that created the wedge.

“If you look at 130 antitrust laws, it’s hard to find one that relies the way US does on private enforcement,” she said of the many jurisdictions that have developed competition regimes. “There has never been a time the international dimensions have been more interesting.”

Judge Wood acknowledged that recent Supreme Court decisions may have increased the difficulty of private enforcement, such as the Twombly ruling that required antitrust plaintiffs to make a “plausible” factual claim in their complaints. She said Justice David Souter’s choice of that word was “unfortunate” because the court is not supposed to determine litigants’ credibility on a motion to dismiss.

...

Judge Wood spoke at a conference held at George Washington University law school, which was co-sponsored by Concurrences, Axinn Veltrop & Harkrider, O’Melveny & Myers and Paul Hastings. The event ended yesterday. ■

INTERVIEWS



INTERVIEW WITH JAMES RILL > BY JOHN DEQ. BRIGGS

THE ANTITRUST ENFORCEMENT ACTIONS OF ONE JURISDICTION VERY OFTEN AFFECT CONDUCT WELL BEYOND ITS BORDERS. THIS SITUATION IS PARTICULARLY RELEVANT TO THE INTERSECTION OF COMPETITION LAW ENFORCEMENT AND INTELLECTUAL PROPERTY. ”

> *Concurrences Review*, August 26, 2015

John DeQ. Briggs – Axinn, Veltrop & Harkrider – has interviewed James Rill – Baker Botts. They both participated on the panel "Challenges to International Comity?".

John Briggs: What international and other developments have elevated concerns with the application of comity principles to competition enforcement?

James Rill: Comity principles have certainly attracted increasing attention and, indeed, significance over the past few years. Part of the reason is, of course, important court decisions. A more overarching reason, however, in my opinion, is the dramatic expansion of not only competition regimes around the world, but the increased enforcement activity, particularly in Asian and Latin American jurisdictions. Relatively recent entrants into the antitrust field, many of these jurisdictions reach out for both substantial and procedural experience of more mature antitrust institutions. Their support and dissemination of experience is, or could be, substantially enhanced by the global adoption of the sound principles of traditional comity. Challenges remain in advancing this goal, however.

John Briggs: What efforts, if any, have the United States enforcement agencies made to address concern with global application of comity principles?

James Rill: The United States enforcement agencies have made significant efforts to promote international acceptance of comity principles. First, bilateral cooperation agreements between the enforcement agencies and their counterpart agencies have incorporated detailed elements of traditional comity. For example the US-EU antitrust cooperation agreement of 1991 contains a precise listing. Second, the International Competition Network provides a forum for the cross-fertilization of views respecting not only substance but process and an opportunity, not yet fully realized, for the mutual respect of sister agencies' interests in the spirit of comity. A third opportunity sometimes, but not so frequently exercised might be the agencies' direct communication with their foreign counterparts in

matters affecting the extent of US antitrust policy and US commercial interests.

John Briggs: Does comity play, or should it play, a different role in antitrust cases than in other cases?

James Rill: I would not say that different comity principles should apply to competitive matters. The fact is, however, that cross-border issues are very often particularly implicated in competition matters. World trade issues regularly involve elements of antitrust law and policy. The antitrust enforcement actions of one jurisdiction very often affect conduct well beyond its borders. This situation is particularly relevant to the intersection of competition law enforcement and intellectual property. Accordingly, through different basic principles might not apply, the need for strong adherence to comity policy is essential to sound competition enforcement. ■

...IT IS UNCLEAR WHETHER THE GOVERNMENT MAY SECURE A CRIMINAL CONVICTION AGAINST A FOREIGN DEFENDANT ON THE THEORY THAT ITS CONDUCT OVERSEAS CAUSED A DIRECT, SUBSTANTIAL, AND REASONABLY FORESEEABLE EFFECT ON DOMESTIC COMMERCE. ”

> *Concurrences Review*, September 1, 2015

Ian Simmons – O’Melveny & Myers LLP – has interviewed Judge Douglas Ginsburg – US Court of Appeals for the District of Columbia Circuit. They participated on the panel “Good vs. Bad Extraterritoriality: What is the Desirable Level of Government Enforcement?”.



Ian Simmons: The courts have divided over how to interpret several provisions of the FTAIA. What are some of the most important issues confronted by the courts in applying the Act and why has it been so difficult to reach a consensus?

Douglas Ginsburg: The FTAIA begins with a straightforward rule: the Sherman Act does not apply to “conduct involving trade or commerce ... with foreign nations.” 15 U.S.C. § 6a. The Act then creates three exceptions, one of which applies the Sherman Act to foreign conduct that has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce if that effect “gives rise to a claim” under the Sherman Act. Id.

The courts have understandably struggled with how to interpret each of these ambiguous phrases, beginning with whether conduct has a “direct” effect on domestic commerce. Consider, for example, the recent case of the LCD panel cartel: Manufacturers in Korea and Taiwan fixed the price of LCD panels they sold to companies in China and elsewhere, which then installed the panels in computers and smartphones they sold in markets around the world, including the United States. How does a court determine whether the cartel’s conduct had a “direct” effect on the American market? The Ninth Circuit Court held an effect is “direct” only if it “follows as an immediate consequence of the defendant’s activity.” Other circuits have made it easier for a plaintiff to sue a foreign cartel in the US, holding the statute requires only “a reasonably proximate causal nexus” between the unlawful conduct and the effect on the American market.

The courts also divided over what it means for the effect of unlawful conduct to “give rise to a claim” under the Sherman Act. Consider, for example, a foreign purchaser that bought a product at a price inflated by a foreign cartel. May it file suit in a US court and avail itself of the American antitrust laws, which are more attractive to private plaintiffs than are those of most other countries? Some courts allowed a foreign plaintiff to sue in the United States under these circumstances because the statute requires only that the effect of the unlawful conduct give rise to “a claim” under the Sherman Act, not that it give rise to “the claim” filed by the plaintiff. Because an American purchaser would have “a claim” against the foreign cartel, the courts held the foreign plaintiff, too, may file its claim in a US court. The Supreme Court disagreed, however, holding that a foreign plaintiff may not sue in the United States to recover for harm that is “independent” of the harm inflicted upon the American market.

A recent decision by the Seventh Circuit involving the LCD panel cartel illustrates the importance of the requirement that the effect of the defendant’s conduct “gives rise to a claim” under the Sherman Act. Motorola, an American company, purchased from its Chinese subsidiaries smartphones that included LCD panels the subsidiaries had bought from members of the cartel. The court concluded Motorola could not recover from the foreign cartel members because it was an indirect purchaser of the LCD panels. US antitrust law prohibits an indirect purchaser from recovering under these circumstances, and the effect of the defendants’ conduct therefore did not “give] rise to a claim” under the Sherman Act. It is up to the subsidiaries of Motorola to seek relief under the laws of the countries in which they are located or do business.

The court’s reasoning is in tension with the recent decision of the European Court of Justice upholding a fine assessed against a member of the same cartel. *InnoLux*, Case C-231/14P (July 9, 2015). The court held the European Commission may impose a fine that accounts for the harm inflicted upon European purchasers of televisions and other finished products that included the LCD panels if the finished product was sold by a member of the same corporate group, such as a subsidiary, that manufactured the panel.

Finally, it is unclear whether the Government may secure a criminal conviction against a foreign defendant on the theory that its conduct overseas caused a direct, substantial, and reasonably foreseeable effect on domestic commerce. Liability attaches only if the effect of the conduct “gives rise to a claim” under the Sherman Act, and the word “claim” is ordinarily used to denote a civil action for damages rather than a criminal prosecution. The Ninth Circuit nevertheless affirmed the conviction of a corporation and its executives for their role in the LCD panel cartel.

Ian Simmons: Several courts have recently held the FTAIA does not limit the subject matter jurisdiction of the federal courts, but rather sets forth substantive elements that must be satisfied in cases subject to the Act. How can results vary depending upon whether the statute affects the court’s subject matter jurisdiction?

Douglas Ginsburg: Into the early 2000s the courts believed the FTAIA deprived them of jurisdiction to hear cases not subject to one of its exceptions. Starting in 2006 the Supreme Court set out to clarify the distinction between a statute that deprives the courts of jurisdiction and one that defines the claim. E.g., *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511-12 (2006). As a result of these decisions, several courts have reversed course and held the requirements in the FTAIA are elements of a claim under the Sherman Act rather than jurisdictional prerequisites. The plaintiff will not prevail unless it can show its claim is not barred by the FTAIA, but it has a greater opportunity to do so than if the statute is interpreted as a jurisdictional requirement. The court must accept as true the factual allegations in a plaintiff’s complaint, which will survive a motion to dismiss if its claim for relief is merely “plausible.” If the plaintiff’s claim is not implausible on its face, then in order to bolster its factual allegations, the plaintiff may engage in discovery—which is notoriously expensive for defendants in antitrust cases. Therefore, in a court that views the FTAIA as a substantive rather than as a jurisdictional limitation, a defendant may be more likely to settle than to endure the prospect of protracted litigation. ■

TESTIMONIALS



“ This conference brought together many of the practitioners and present and former government lawyers who have been most involved in the leading cases raising issues under the FTAIA. I learned a great deal from them.”

JUDGE DOUGLAS GINSBURG, Judge, US Court of Appeals for the District of Columbia Circuit; Professor, George Mason University School of Law.



“ Speaking as an academic economist, it was a highly stimulating examination of the practical implications of extraterritoriality with a broader view on the design of appropriate judicial standards. I left feeling both invigorated and challenged by these increasingly important antitrust issues.”

JOSEPH HARRINGTON, Professor, The Wharton School, University of Pennsylvania.



“ As one of the former heads of DG Comp stated, when “faced with global problems we...design truly global solutions.” This is precisely the situation in an ever-changing and dynamic area of competition infringements. Public authorities throughout the world are actively engaged in price-fixing, mergers and acquisitions and abuse of dominant power investigations. Private enforcement is an integral part of individual victims’ rights for full enforcement for many of these unlawful activities. As the public bar grows, so will the private bar, and there will need to be rules and processes to address effective access to justice in this field. The Concurrences + GWU Law Extraterritoriality of Antitrust Law Conference was a perfect forum in which this emerging field was explored.”

MICHAEL HAUSFELD, Chairman, Hausfeld.



“ Concurrences has gained a well deserved reputation for organizing on both sides of the Atlantic and in Asia lively conferences and debates on the most important cutting edge antitrust topics among highly knowledgeable specialists. This contribution to the elaboration and the dissemination of new ideas in antitrust is invaluable. The very successful conference organized by Concurrences with George Washington University Law school on Extraterritoriality of Antitrust law in the US and Abroad at a time when high profile public and private enforcement cases in Europe and in the United States raise complex issues regarding the boundaries of national jurisdictions, the application of the principle of comity and the prospects for international cooperation is an excellent example of the ability of Concurrences to stimulate antitrust thinking.”

FRÉDÉRIC JENNY, Chairman, OECD Competition Commission.



“ Fantastic conference, as always.”

MARK S. POPOFSKY, Partner, Ropes & Gray.



“ The Program was stimulating and especially timely Judge Diane Wood’s keynote remarks set a perfect stage. It was a privilege to be on the comity and convergence panel with such icons of international antitrust as Fred Jenny. The topic has immediate currency as more nations undertake competition enforcement and grapple with the elements of procedural fairness. Congratulations on an outstanding program.”

JAMES RILL, Senior Counsel, Baker Botts.



“ This was one of the best antitrust seminars I’ve attended: over a few hours a star-studded group of panellists crisply gave nuanced presentations in a challenging area of antitrust law. Who could ask for more than this?”

DAVID R. WINGFIELD, former Head of the Competition law section of the Canadian Department of Justice and Barrister at Fountain Court Chambers, London.



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