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The Year So Far in FTAIA

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Congress enacted the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA"), in 1982 with the stated goal of clarifying the extent to which United States antitrust laws apply to foreign or international transactions. FTAIA provides, in part, that 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 . . . [on United States domestic commerce] . . . and 2) such effect gives rise to a claim" under the Sherman Act. FTAIA has been described as "inelegantly phrased" and using "rather convoluted language." *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 300 (3d Cir. 2002); *see also Minn-Chem, Inc. v. Agrium, Inc.*, No. 10-1712, 2011 U.S. App. LEXIS 19433, at *17 (7th Cir. Sept. 23, 2011) (FTAIA "awkwardly phrased"). In sum and substance, however, FTAIA articulates a general rule that U.S. antitrust laws do not apply to trade or commerce with foreign nations. The statute then creates two exceptions to this general rule, when the conduct at issue either: (1) involves import trade or commerce, or (2) has sufficient effects in the United States to give rise to a Sherman Act claim.

During the first nine-plus months of 2011, several courts—including two federal Courts of Appeal—have grappled with FTAIA in the context of antitrust claims involving foreign and international commerce. This article provides a brief survey of the FTAIA landscape so far this year.

Animal Sci. Prods., Inc. v. China Minmetals Corp.

In the first federal appellate decision of 2011, the Third Circuit, in *Animal Science*, No. 10-2288, 2011 U.S. App. LEXIS 17046 (3d Cir. Aug. 17, 2011), addressed whether FTAIA imposes a "substantive merits" limitation or a "jurisdictional" bar to Sherman Act claims. *Animal Science* involved claims on behalf of domestic purchasers of magnesite alleging that Chinese producers and exporters engaged in a conspiracy to fix prices for product exported to and sold in the United States. The district court *sua sponte* dismissed the plaintiffs' claims on the basis that the court lacked subject matter jurisdiction under FTAIA, but granted the plaintiffs leave to amend their complaint to provide "evidentiary proof allowing the [District] Court to conduct a *factual determination* . . . and to conclusively satisfy itself as to the presence or lack of subject matter jurisdiction over this action." 596 F. Supp. 2d 842, 881 (D.N.J. 2008) (emphasis in original). After an amended complaint was filed, the district court—engaging in what the Third Circuit characterized as "extensive fact-finding"—concluded that the plaintiffs had failed to demonstrate that either FTAIA exception applied, and again dismissed the claims.

The distinction between a substantive limitation versus a jurisdictional bar can have practical significance. If FTAIA imposes a substantive limitation, a motion to dismiss would be decided under the procedural framework applicable to Rule 12(b)(6), in which the defendant carries the burden and a court generally must accept all alleged facts as true. In contrast, if FTAIA imposes a jurisdictional bar, a motion to dismiss would be decided under the framework applicable to Rule 12(b)(1), in which case the plaintiff has the burden of establishing the existence of subject matter jurisdiction and the court may examine evidence and resolve factual disputes.

In *Turicentro* and *Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62 (3d Cir. 2000), the Third Circuit concluded that FTAIA constituted a jurisdictional bar. However, following *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006)—in which the U.S. Supreme Court held that a threshold limitation is jurisdictional only if the legislature "clearly states" as much—the Third Circuit overturned that aspect of its prior decisions and concluded that FTAIA instead imposes a substantive limitation. In so ruling, the Third Circuit disagreed with the Seventh Circuit's pre-*Arbaugh en banc* decision in *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003).

The Third Circuit remanded the *Animal Science* matter to the district court "with two brief instructions" if the FTAIA question were again addressed. First, with respect to the "import trade or commerce" exception, the Court of Appeals noted that, while the exception "must be given a relatively strict construction," it does not require that the defendants function as the physical importer of goods. Rather, it is enough that the conduct target import goods or services.

Second, with respect to the "effects" exception, the Court of Appeals observed that the "reasonably foreseeable" language does not impose a "subjective intent" requirement. Instead, it imposes an "objective" standard under which "the requisite 'direct' and 'substantial' effect must have been 'foreseeable' to an objectively reasonable person."

Minn-Chem, Inc. v. Agrium, Inc.

The Seventh Circuit also addressed FTAIA in *Minn-Chem*, a putative class action by U.S. purchasers of potash against seven of the world's largest potash producers. While the defendants' operations are located primarily in Belarus, Canada and Russia, the plaintiffs alleged that collusive conduct—including anticompetitive conduct aimed at the potash markets in Brazil, China and India—resulted in significant price increases in the U.S. market. Among other allegations, the plaintiffs asserted that agreements by the defendants with buyers in those counties "directly influence prices in other major markets," including the U.S. When the defendants moved to dismiss the plaintiffs' claims, arguing that subject matter jurisdiction was lacking under FTAIA, the district court denied the motion but certified its order for immediate appellate review.

On appeal, the Seventh Circuit called into question its prior ruling in *United Phosphorus* that FTAIA's requirements are jurisdictional—a view rejected by the Third Circuit. Nevertheless, the Court of Appeals did not resolve that issue because, in its view, the defendants were entitled to dismissal regardless of how the motion was framed.

The Seventh Circuit held that the district court had erred by essentially conflating the "import commerce" and "direct effects" exceptions in its analysis of FTAIA. Citing the Third Circuit's recent ruling in *Animal Science*, the Court of Appeals noted that the relevant inquiry under the "import commerce" exception is "whether the defendants' alleged anticompetitive behavior 'was directed at an import market.'" The plaintiffs' specific factual allegations, however, described anticompetitive conduct aimed at the potash markets in other countries, not the U.S. import market. While the complaint also generally alleged that the defendants conspired with respect to prices at which potash would be sold in the U.S., the Seventh Circuit held that such a conclusory statement was insufficient under *Twombly* and *Iqbal*.

With respect to the "direct effects" exception, the court held that an effect is "direct" if "it follows as an immediate consequence of the defendant's activity." Applying this standard, it concluded that the "generalized allegations" of a "benchmark" effect on prices in the U.S. by prices in Brazil, China and India were insufficient. Instead, "[t]o satisfy the requirements of *Twombly* and the FTAIA, the plaintiffs needed to provide enough factual content—that is, they needed to provide some factual description of the way in which prices in China, Brazil and India serve as a 'benchmark' for American prices—to permit a plausible inference that the defendants' anticompetitive conduct in these foreign markets has a direct, substantial, and reasonably foreseeable effect on potash prices in the United States."

Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.

In addition to the Third and Seventh Circuits, various federal district courts have also addressed FTAIA in 2011. *Precision Associates*, No. 08-CV-42 (JG)(VVP), 2011 U.S. Dist. LEXIS 51330 (E.D.N.Y. Jan. 4, 2011) is a putative class action concerning an alleged price fixing conspiracy in the international commercial freight forwarding industry. The plaintiffs sued 65 domestic and foreign freight forwarders and two trade associations. The defendants moved to dismiss the claims relating to alleged conduct that took place outside the United States.

Relevant to the discussion above concerning *Animal Science*, the defendants argued that FTAIA deprived the court of subject matter jurisdiction over the plaintiffs' claims. The district court observed—as did the Third Circuit—that the party asserting jurisdiction has the burden of establishing jurisdiction. The district court, however, treated the defendants' motion to dismiss as asserting a "facial" (as opposed to an "in fact") attack on jurisdiction and therefore reviewed whether the plaintiffs' complaint alleged facts, accepted as true, that would be sufficient to invoke jurisdiction over their claims.

The focus of the FTAIA analysis in *Precision Associates* concerned whether the alleged conduct of the foreign freight forwarder defendants involved "import trade or commerce." The foreign defendants asserted that they were merely local intermediaries between their cargo-shipping customers and the air carriers that actually transported the goods into the United States, thereby placing the locus of their conduct entirely within other countries.

Citing the Third Circuit's decisions in *Carpet Group* and *Turicentro*, the district court observed that the term "import" generally denotes a product, or perhaps a service, that has been brought into the U.S. from abroad, and furthermore that under FTAIA, the Sherman Act not only reaches import commerce itself but also "conduct *involving* import commerce." Examining the plaintiffs' allegations, the district court disagreed with the defendants' characterization of their conduct as the mere charging of fixed prices at locations abroad, but instead involved "the illegal agreement to fix prices for the freight forwarders' services on various routes entering the United States." The district court found that the claims directly implicated import commerce given that the alleged unlawful surcharges were imposed on shipments between foreign locations and the United States.

Alternatively, the court found that the alleged conduct had a "direct, substantial, and foreseeable effect" on import trade or commerce, which gave rise to jurisdiction. A key allegation that appears to have differentiated the plaintiffs' claims in *Precision Associates* from cases that "involve[d] wholly foreign conduct with minimal connection to United States markets," was that "each surcharge was connected to freight forwarding services for the transport of goods between the United States and other countries."

In re TFT-LCD (Flat Panel) Antitrust Litig.

The *TFT-LCD Antitrust* MDL, No. 1827, 2011 U.S. Dist. LEXIS 33364 (N.D. Cal. Mar. 16, 2011) involves allegations that producers of flat panel LCD displays engaged in a global price-fixing conspiracy. In an individual action, Dell —a manufacturer of desktop and laptop computers—alleged that it paid artificially inflated prices to the defendants as a result of the conspiracy. The complaint encompassed not only transactions that took place in the United States, but also between the defendants and certain of Dell's foreign affiliates. The defendants asserted, in a motion to dismiss, that the court lacked subject matter jurisdiction over those latter transactions.

Dell alleged that it had entered into master purchase agreements with the defendants, which set forth the terms and conditions by which Dell "and all of Dell's subsidiaries and corporate affiliates" made their purchases. Those agreements provided that the price for flat panel displays would be negotiated with Dell's procurement team in Austin, Texas.

The district court concluded that Dell had sufficiently shown that the domestic effects of the foreign conduct proximately caused Dell's alleged foreign injuries. After examining the leading cases on the question, including *Empagran* from the D.C. Circuit, and *Centerprise (DRAM)* from the Ninth Circuit, the court noted that Dell's allegations differed significantly from the circumstances in those cases, in which no proximate causation was found. First, unlike the plaintiff in *Empagran*, Dell is a U.S. company, not a foreign company alleging injury based solely on foreign transactions. Second, the negotiation of global prices from Dell's U.S. headquarters established a "concrete link between defendants' conduct, its domestic effect and Dell's foreign injury that is far stronger than the tenuous arbitrage theory rejected in [*Empagran* and *Centerprise*]."

The district court reached a similar conclusion in a subsequent FTAIA ruling involving Motorola's claims against the flat panel manufacturers. *In re TFT-LCD (Flat Panel) Antitrust Litig*., MDL No. 1827, 2011 U.S.

Dist. LEXIS 42692 (N.D. Cal. Mar. 28, 2011). Like Dell, Motorola alleged that its procurement teams in the U.S. negotiated all of Motorola's purchases worldwide. In arriving at its conclusion that Motorola sufficiently alleged proximate causation, the district court explicitly disagreed with a ruling from the Northern District of California in the *DRAM* MDL. In that decision, involving claims asserted by Sun Microsystems against DRAM manufacturers, the district court had ruled that while the negotiation of an inflated global price might constitute a "domestic effect," such an effect cannot be the proximate cause of higher prices paid abroad.

In another FTAIA ruling, the district court rejected an argument by the targets of a criminal indictment that the government had failed to allege sufficient facts to satisfy FTAIA and bring the defendants' foreign conduct within the reach of the Sherman Act. *In re TFT-LCD (Flat Panel) Antitrust Litig*., MDL No. 1827, 2011 U.S. Dist. LEXIS 42345 (N.D. Cal. Apr. 18, 2011). The court observed the lack of authority regarding whether FTAIA applies to criminal cases brought under the Sherman Act. Nevertheless, the court concluded that FTAIA did not bar criminal prosecution of an alleged conspiracy that "involve[d] conduct in furtherance of the conspiracy both inside and outside of the United States."

Most recently, the district court denied a FTAIA motion by the defendants to dismiss claims brought by an indirect purchaser class "based on foreign sales." *In re TFT-LCD (Flat Panel) Antitrust Litig*., MDL No. 1827, 2011 U.S. Dist. LEXIS 115212 (N.D. Cal. Oct. 5, 2011). Unlike the Dell or Motorola lawsuits, the claims at issue in this motion involved "indirect" purchases of flat panel displays that had been integrated into other products, such as laptops or televisions. According to the defendants, the majority of the purchases in question involved panels that had been manufactured overseas and then sold to a foreign company that assembled the panels into a final product before being sold to a U.S. company and imported into this country. The defendants argued that such conduct is entirely foreign in nature and that any effects in the U.S. were "indirect." The plaintiffs, in contrast, pointed to evidence that, inter alia, the conspiracy was deliberately aimed at the U.S. market, that the defendants used their U.S. employees in furtherance of the conspiracy, and that the supracompetitive prices of the LCDs were "passed through" to class members, regardless of how the panels made their way into the U.S.

As an initial matter, the district court looked to the recent *Animal Science* and *Minn-Chem* decisions discussed above and concluded that FTAIA does not implicate subject matter jurisdiction, and therefore treated the defendants' motion as one for summary judgment. On the merits, the court agreed with the plaintiffs that the conduct at issue satisfied the "direct effects" exception to FTAIA. In rejecting the defendants' position, the court observed that looking only at the financial effects of the "first sale" would "exclude from the Sherman Act's reach a significant amount of anticompetitive conduct that has real consequences for American consumers." And while the district court recognized that the "direct effect" requirement places "concrete limits on the ability of a plaintiff to invoke the federal antitrust laws," it concluded that "[w]here, as here, the nature of the effect does not change in any substantial way before it reaches the United States consumer, the effect is an 'immediate consequence' of the defendant's anticompetitive behavior."

In re Transpacific Passenger Air Transp. Antitrust Litig.

The *Transpacific Passenger Air* MDL, No. C 07-05634 CRB, 2011 U.S. Dist. LEXIS 49853 (N.D. Cal. May 9, 2011) involves allegations that 26 airlines conspired to fix prices for transpacific air passenger travel. The defendants moved to dismiss the plaintiffs' claims with respect to alleged overcharges on flights originating in Asia, arguing that FTAIA deprived the court of subject matter jurisdiction over claims of foreign injury. The district court agreed and granted the defendants' motion to dismiss on FTAIA grounds.

The court concluded that the "import commerce" exception did not apply, remarking that "[i]t is too great a leap to equate air passenger travel with the importing of people. . . ." In addition, the court held that the "domestic effects" exception did not apply. While the plaintiffs sufficiently alleged a direct effect on U.S. commerce—in the form of U.S. residents and citizens paying more for air passenger transportation—the court concluded that the plaintiffs could not demonstrate whether the domestic effects of the foreign conduct directly caused the foreign injury. Citing *Centerprise* and *Empagran*, the court concluded that the foreign effect was not proximately caused by the domestic effect, but merely was of the same overall

conspiracy that also caused the domestic effect. In so concluding, the court noted its disagreement with another FTAIA ruling from the same district in the *SRAM Antitrust Litig.*, No. 07-md-01819 CW, 2010 U.S. Dist. LEXIS 141968 (N.D. Cal. Dec. 31, 2010), in which the district court had determined that the domestic effects exception was satisfied in the context of an alleged global price-fixing conspiracy.

Fond du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.

Fond du Lac Bumper Exchange, No. 09C0852, 2011 U.S. Dist. LEXIS 72198 (E.D. Wis. July 6, 2011) is a putative class action involving allegations that Taiwanese manufacturers of sheet metal aftermarket auto parts, and their U.S. subsidiaries, conspired to fix prices and engaged in other unlawful, coordinated conduct. On a request for reconsideration of the court's denial of their motion to dismiss under Rules 12(b)(1) and 12(b)(6), the defendants argued that the alleged conduct involved solely foreign commerce, not import or domestic commerce, because the defendants sold the parts in question to the plaintiffs in Taiwan.

The district court reaffirmed its prior conclusion that the alleged conduct involves import conduct, and is therefore subject to the Sherman Act. According to the court, the evidence suggested that the alleged conspiracy focused on setting the price of parts manufactured for sale in the United States and that the defendants negotiated the sales to importers at prices established by the conspiracy. The court concluded that, even if the defendants did not themselves ship the parts into the U.S., but transferred title overseas, in light of the agreement aimed at the U.S. and the other steps taken, the conduct involved import commerce. To hold otherwise, the court noted, "would have the perverse effect of encouraging companies to engage in off-shore anti-competitive activity designed to harm American consumers and importers."

Global Reinsurance Corp. – U.S. Branch v. Equitas, Ltd.

In addition to the federal decisions discussed above, the Appellate Division (First Dept.) of the Supreme Court of New York in *Global Reinsurance Corp.*, 921 N.Y.S.2d 1 (N.Y. App. Div. 2011) addressed FTAIA in the context of claims brought under New York's Donnelly Act. The plaintiff alleged that the defendants were at the hub of a conspiracy in a worldwide market for non-life retrocessional reinsurance coverage, with a geographic submarket consisting of "the Lloyd's marketplace," a collection of hundreds of syndicates in London. The plaintiff alleged that the individual underwriting members, facing financial ruin in 1996 from unexpectedly large claims on certain business lines, engaged in concerted action to reduce claims payments on pre-1993 business while continuing to compete on new business.

The Supreme Court of New York County granted the motion to dismiss on various grounds. On appeal, the defendants argued that New York courts lacked subject matter jurisdiction over the plaintiff's claims under FTAIA. The Appellate Division, "[a]ssuming the applicability of FTAIA," concluded that the plaintiff's allegations of injury satisfied the requirement that the challenged conduct had a "direct, substantial and reasonably foreseeable effect." The court further noted that the plaintiff alleged that the defendant engaged in anticompetitive claims handling in New York.

The dissent, in contrast, concluded that the plaintiff's allegations did not involve domestic commerce: "Where alleged anticompetitive effects in the U.S. are based on a theory that the globally interconnected nature of the marketplace enabled foreign conduct to affect the U.S. market, that effect is not considered 'direct' within the meaning of the federal statute."

Conclusion

Courts have continued so far this year to grapple with the extent to which the Sherman Act reaches transnational economic activity. As illustrated by the cases discussed above, whether particular foreign transactions constitute import commerce or activity, or otherwise satisfy the effects test, turns on the specific factual circumstances involved. Indeed, at the margins, district courts do not necessarily agree from case to case whether similar circumstances are sufficient to bring foreign conduct within the reach of

the U.S. antitrust laws. Perhaps the most interesting development to watch is whether, in light of the Third Circuit's ruling in *Animal Science*, more complaints survive motions to dismiss on FTAIA grounds. As the Seventh Circuit's decision in *Minn-Chem* cautions, however, even if considered under Rule 12(b)(6), allegations that would bring foreign commerce under the exceptions set forth in FTAIA still must satisfy the pleading requirements set forth in *Twombly* and *Iqbal*. Whatever the ultimate outcome of that question, with the globalization of commerce, the reach of the Sherman Act over foreign commerce is an issue that will continue to confront the courts in the months and years ahead.

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