May a Foreign Plaintiff Sue a Foreign Defendant for Conduct Outside the U.S. That Caused Antitrust Injury Outside the U.S.?

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by Antonio F. Perez

Foreign consumers argue that an extension of antitrust jurisdiction would deter foreign conspiracies from potentially harming U.S. consumers. Multinational vitamin sellers argue that an assertion of extraterritorial jurisdiction conflicts with the plain meaning of the FTAIA. The district court ruled in favor of the respondents, holding that the FTAIA does not extend the Sherman Act's extraterritorial jurisdiction to conduct that occurred outside the United States.

ISSUES
May the respondents, five foreign companies that purchased goods outside the United States from other foreign companies, pursue Sherman Act claims seeking recovery for overcharges paid in transactions occurring entirely outside U.S. commerce under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a?

Do such foreign plaintiffs lack standing under Section 4 of the Clayton Act, 15 U.S.C. § 15(a)?

FACTS
The respondents are five foreign companies located in Australia, Ecuador, Panama, and Ukraine. On behalf of foreign and domestic purchasers of vitamins, they brought a class action in July 2000 against the petitioners, a number of multinational companies, for allegedly conspiring to fix prices and allocate markets for vitamins on a global basis between January 1, 1988 and February 1999 in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The respondents sought treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4 and 26, including damages for injuries they allege were suffered by foreign persons because of purchases made outside the United States. The respondents also asserted claims arising under foreign and international law. This matter arose in light of a complex history of federal civil and criminal enforcement proceedings, as well as foreign and domestic private civil claims.

Initially, the vitamin companies moved to dismiss the suit as to the foreign plaintiffs under Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction under the FTAIA and for lack of standing under the Clayton Act. Because the district court ruled in favor of the respondents, holding that the FTAIA does not extend the Sherman Act's extraterritorial jurisdiction to conduct that occurred outside the United States.
court dismissed the foreign purchasers' claims for lack of subject matter jurisdiction, it did not reach the issue of standing. The district court also declined to exercise supplemental jurisdiction over respondents' foreign law claims, and, finding no international law norm prohibiting private conspiracies to fix prices and allocate markets, it dismissed their claims under customary international law for failure to state a claim. See Empagran S.A. v. F. Hoffman-LaRoche, Ltd., et al., 315 F.3d 338, 357 (D.C. Cir. 2003), cert. granted, 72 U.S.L.W. 3374.

On the subject-matter jurisdiction issue, the court of appeals reviewed the district court's interpretation of the FTAIA provisions that prohibit Sherman Act jurisdiction with respect to "conduct involving foreign trade or commerce" unless two requirements are met. Under FTAIA Section 1, the conduct must have "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and, under Section 2, such effect must "give rise to a claim under" the Sherman Act. The court found that the "a claim" language of the second requirement did not refer exclusively to the claim brought by the plaintiff with respect to the conduct at issue. Rather, the court of appeals read the FTAIA as also applying to extraterritorial conduct that gives rise to separate claims by U.S. purchasers and foreign purchasers. If, then, a U.S. person had "a claim" within the meaning of the Sherman Act, then the FTAIA would not deny a U.S. court jurisdiction to adjudicate the claim by a foreign person arising from the foreign effects of the conduct that gave rise to a separate claim in the United States. The court of appeals held that, because the foreign plaintiffs had, in fact, asserted the existence of such U.S. claims, their claim satisfied the conditions set forth in the FTAIA for the exercise of extraterritorial jurisdiction by U.S. courts over Sherman Act claims. See Empagran S.A., et al. v. F. Hoffman-LaRoche, Ltd. et al., 315 F.3d 338, 357 (D.C. Cir. 2003), cert. granted, 72 U.S.L.W. 3374.

In reaching this conclusion, the court of appeals found the language of the FTAIA insufficiently clear to support a plain-meaning interpretation. Specifically, it rejected the respondents' argument that interpreting the "gives rise to a claim" language as referring only to claims arising from effects in the United States would render superfluous the language in Section 6 of the FTAIA (which provides that, if the Sherman Act applies only because the conduct affects "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States," then it applies "to such conduct only for injury to export business in the United States"). In other words, the respondents argued that interpreting the "gives rise to a claim" language to refer only to claims for injury arising from effects in the United States would make unnecessary the final proviso's limitation of damages for injury to U.S. exports, because claims relating to U.S. exports would already be excluded by Section 2 if petitioners' interpretation were correct. The court of appeals was not persuaded, because it determined that Section 6 might also serve to preclude Sherman Act jurisdiction for damages with respect to operations outside the United States that would not themselves constitute "export" activities. On this basis, it rejected the suggestion that petitioners' narrow interpretation of Section 2 would make Section 6 surplusage. Thus, the court of appeals refused to accept respondents' argument that the plain meaning of Section 2 rules out petitioners' interpretation.

The court of appeals did, however, find other grounds to adopt respondents' proposed interpretation. It relied on legislative history, particularly the underlying policies of deterrence embedded in the FTAIA. The court of appeals cited Supreme Court precedent to describe Congress's purpose in enacting the FTAIA as "to exempt from the Sherman Act export transactions that did not injure the U.S. economy." See Empagran, 315 F.3d at 345 (quoting Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796-97 (1993)). But it relied on specific passages in the House Report to the FTAIA to find that Congress's intent was to address the question of extraterritorial jurisdiction by prohibiting jurisdiction over "conduct" lacking the requisite U.S. effects rather than by specifying the relationship between the claims that could be adjudicated and that conduct. Congress then denied jurisdiction only over "wholly foreign transactions" not having any "spillover effects" in the United States. Id. at 353-54. The court of appeals also relied on the Supreme Court's pre-FTAIA decision in Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), cited approvingly in the FTAIA's legislative history, as further evidence for its interpretation. See Empagran, at 315 F.3d at 354 (citing H.R. Rep. No. 97-686). In Pfizer, the Supreme Court determined that a foreign government had standing under the Clayton Act to assert a Sherman Act claim in order to ensure that foreign antitrust violators would perceive the full costs of their antitrust violations, thereby deterring more effectively global conspiracies that might harm U.S. consumers. The court of appeals concluded that this deterrence rationale would be served by its interpretation of the FTAIA. See Empagran, 315 F.3d at 355-57.
With respect to the standing issue, the court of appeals read the Clayton Act to be coterminous with the FTAIA. It described the foreign purchasers' injury as the type of injury contemplated by the antitrust laws, thereby satisfying the special "antitrust injury" requirement set forth by the Supreme Court. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 489 (1977). The court of appeals rejected respondents' argument that, because the antitrust laws do not forbid the fixing of prices in foreign markets, injury to foreign purchasers was not of "the type" the antitrust laws were designed to prevent. Indeed, the court said: "[T]he arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, [the] FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here." See Empagran, 315 F.3d at 358. In short, the court of appeals grounded its standing analysis on its interpretation of the FTAIA.

In sum, the court of appeals determined that respondents' FTAIA claims should survive a motion to dismiss; it then reversed the district court's decision on subject matter jurisdiction and vacated its judgment against respondents. Because of the new posture of the case, it also required the district court to reconsider whether to invoke its discretion to exercise supplemental jurisdiction to hear the respondents' foreign-law claims. See Empagran, 315 F.3d at 359.

On petition for rehearing en banc, the court of appeals invited the solicitor general to submit a brief expressing the views of the United States. In its submission on behalf of the Department of Justice's Antitrust Division and the Federal Trade Commission, the solicitor general urged en banc review to reverse the D.C. Circuit panel's reading of the FTAIA. The solicitor general suggested that the court of appeals' interpretation both accorded with the plain meaning of the statute and conflicted with federal antitrust enforcement policy by undermining the government's corporate leniency policy (which facilitates the acquisition of evidence in conspiracy cases in return for the exercise of prosecutorial discretion). The D.C. Circuit denied rehearing, and petitioners sought a writ of certiorari.

In granting certiorari, the Supreme Court now has an opportunity to resolve a recently emerged split in the circuits in the interpretation of the FTAIA. The central question is the meaning of the requirement that conduct having a "direct, substantial, and foreseeable effect" on U.S. commerce also gives rise to "a claim" under the Sherman Act. The Fifth Circuit has held that the "effect" in the U.S. must itself give rise to the very Sherman Act claim brought by the plaintiff. See Den Norske Stats Oljeselskap AS v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001), cert. denied sub nom. Statoil ASA v. HeereMac v.o.f., 534 U.S. 1127 (2002). The Second Circuit has held that, although foreign conduct must give rise to an effect in the United States, this effect need not give rise to any Sherman Act claim in the United States in order for a foreign plaintiff to sue a foreign defendant for a Sherman Act claim arising outside the United States. See Krumen v. Christie's International PLC v.o.f., 284 F.3d 384 (2nd Cir. 2002). The D.C. Circuit, apparently splitting the difference, has now held that in order for a foreign plaintiff to assert a Sherman Act claim with respect to extraterritorial conduct's foreign effects, the extraterritorial conduct must have an effect in the United States that gives rise to a separate claim under the Sherman Act claim for antitrust injury in the United States. See Empagran S.A., et al. v. F. Hoffman-LaRoche, Ltd. et al., Id. Having denied certiorari to consider the Fifth Circuit's narrow interpretation of the FTAIA in Empagran, the Supreme Court has now granted certiorari to review the D.C. Circuit's broader interpretation in Empagran as well as, presumably, the Second Circuit's still broader interpretation in Krumen.

**CASE ANALYSIS**

Petitioners now argue that the D.C. Circuit's interpretation conflicts with the plain language of the FTAIA, undermines federal enforcement policy in international antitrust cases, and arguably takes the statute beyond Congress's authority to regulate foreign commerce. First, they argue that the "most natural" reading of the FTAIA, which they note is endorsed by the Department of Justice, is that the requisite anticompetitive effect described by Section 1 itself gives rise to the claim described by Section 2, which in turn must be the claim brought by the plaintiff before the court. Pet. Br. at 7. Thus, petitioners argue that the court of appeals found statutory ambiguity where there was none. Petitioners note that the enactment of the FTAIA in 1982 reflected a congressional effort to pare back the extraterritorial exercise of jurisdiction by U.S. courts in antitrust cases, after a generation of antitrust jurisdictional conflicts leading to foreign retaliatory measures. They note that, as of the time the FTAIA was enacted, "no case had ever authorized claims arising from foreign transactions occurring wholly outside U.S. commerce, and virtually all academic commentary urged that the focus of U.S. antitrust law

Second, as to the broad deterrence rationale underlying the court of appeals’s interpretation, petitioners allude to the solicitor general’s argument that the court of appeals’s interpretation of the FTAIA, by undermining the government’s corporate leniency program, would actually reduce deterrence. Pet. Br. at 10. This argument was also made by the solicitor general’s amicus brief submitted to the D.C. Circuit in support of a rehearing en banc and reiterated in his amicus brief submitted to the Supreme Court. Petitioners’ statement of facts observes that “more than seventy-five federal civil antitrust cases, including class actions, were filed beginning in 1998 and consolidated in pretrial proceeding in the district court. Virtually all the claims in those cases have now settled for amounts exceeding $2 billion.” Pet. Br. at 4. They add: “Beginning in 1999, before any significant proceeding in the civil cases, several petitioners pleaded guilty to federal criminal antitrust violations for fixing prices of vitamins sold in the United States. ... Outside the United States, record civil penalties exceeding $1 billion were assessed against some petitioners by the European Union, Canada, Australia, and Korea. Private civil suits for damages have also been filed in Canada, the United Kingdom, Germany, Belgium, and the Netherlands, and class actions have been filed in Canada, Australia, and New Zealand.” Id. (citations omitted).

Third, petitioners maintain that the court of appeals’s reading of the FTAIA “might well” extend it beyond the scope of Congress’s power to regulate commerce “with foreign Nations, and among the several States.” See U.S. Const., Art. 1, sec. 8, cl. 3. They maintain that under the Foreign Commerce Clause, Congress lacks the constitutional power to create a private claim for purely foreign purchasers against purely foreign sellers for transactions consummated entirely within or between foreign countries when those transactions have no effect on U.S. commerce or U.S. foreign commerce. They also argue that, in view of established Fourteenth Amendment jurisprudence preventing the application of state law to persons and transactions unrelated to that state, the Fifth Amendment’s Due Process Clause should bar a federal court from applying federal law to transactions and persons that are unrelated to the United States. Petitioners therefore urge an interpretation of the FTAIA that avoids these constitutional doubts. Pet. Br. at 29-30.

Respondents ask the Supreme Court to sustain the court of appeals’s interpretation of the FTAIA but also argue in the alternative that their claim should go forward even under the narrower interpretation of the statute advanced by petitioners.

Respondents advance three main arguments in response to petitioners’ contentions. First, they argue that, even if petitioners are correct that Section 2 of the FTAIA requires that an effect in the United States “give rise to a claim” (that is to say, gives rise to “the” claim brought by respondents), that requirement would be satisfied in this case. They assert that it was because petitioners prevented respondents from buying vitamins in the United States directly or through intermediaries that respondents were forced to make those purchases outside the United States and suffered antitrust injuries there from the global vitamin cartel. Moreover, the effectiveness of the cartel in the United States is what made its success overseas possible; otherwise, “the cartel would have collapsed everywhere as a result of arbitrage.” Pet. Br. at 3. If accepted by the Supreme Court, these characterizations of the underlying economic facts of the case would dispose of petitioners’ Foreign Commerce Clause and Fifth Amendment Due Process arguments, at least as applied to the particular facts of this case. They would, at a minimum, warrant a remand, which might allow respondents another opportunity at the district court to establish the jurisdictional facts necessary to survive a motion to dismiss for lack of subject-matter jurisdiction.

Second, respondents also argue that, because the FTAIA applies only to export commerce, it simply does not apply to “cartels, which directly involve U.S. domestic and import commerce.” Third, they argue that this interpretation is plainly supported by legislative history, which they maintain reveals that Congress intended Section 2 “merely to provide that the Sherman Act does not apply to conduct that has a pro-competitive effect” in the United States. Respondents add that the Clayton Act’s standing and injury requirements do not immunize unlawful activity, such as the global cartel that harmed U.S. commerce as well as foreign purchasers in this case. Moreover, they describe the special antitrust standing and injury requirements as merely “prudential doctrines” and characterize respondents themselves as precisely the kind of “direct purchasers” whose claims would deter conduct directly harming U.S. consumers. Id. at 4.

In addition, respondents address arguments advanced principally by the amicus curiae in this case. The respondents contend that the United States’s argument that the

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U.S. corporate leniency policy would be undermined by granting jurisdiction in this case is unsustainable in the face of pending legislation that would limit the civil liability of leniency program participants. Respondents argue that the fact that the Congress is now considering such legislation suggests that the more appropriate inference is that no limits on civil liability currently flow from the exercise of federal prosecutorial discretion in international cartel cases.

Respondents also dismiss the argument advanced by the governments of the United Kingdom, Ireland, and the Netherlands as amici curiae that the court of appeals's interpretation of the FTAIA flies in the face of international law. These governments, as well as petitioners, quote Lord Denning's memorable phrase: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." Smith Kline & French Labs Ltd. v. Bloch, [1983] 1 W.L.R. 730 (C.A. 1982). Amici Curiae Br. at 14, and Pet. Br. at 26. These foreign governments suggest, therefore, that the interpretation of the FTAIA adopted by the court of appeals would encourage forum shopping, undermine their own antitrust enforcement policies (as well as that of the European Union), and undermine respect for national sovereignty in violation of international law. Accordingly, the governments maintain that the court of appeals's interpretation would be inconsistent with the established canon of statutory interpretation that, in the absence of express congressional intent to the contrary, statutes should not be interpreted to violate the law of nations. Amici Curiae Br. at 7 (citing John Marshall's famous dictum in Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

Respondents reply that this argument is inconsistent with the Supreme Court's view in Hartford Fire Ins., its most recent statement on conflicts of jurisdiction in antitrust, that the "mere overlap" of antitrust enforcement regimes is insufficient to establish that an exercise of jurisdiction is in violation of international law. Respondents add that there could be no conflict in this case since "cartels are universally condemned." That said, respondents nevertheless acknowledge a conflict in the sense that the "application of the Sherman Act remains necessary overseas because current enforcement overseas is too lax to protect U.S. interests" (italics in original). But that, they say, is a matter for Congress to resolve. Res. Br. at 5.

**SIGNIFICANCE**

The Supreme Court's treatment of the narrow question of statutory interpretation raised by this case may well be significant in at least two different ways. First, the renewed attention to the meaning of the FTAIA reflects the increasing internationalization of antitrust enforcement. The FTAIA, enacted in 1982 after several decades of U.S. antitrust extraterritoriality far in excess of what our major trading partners deemed permissible, reflects a more than twodecades-old congressional policy judgment as to the appropriate extent of extraterritoriality in U.S. antitrust enforcement.

Regardless of precisely how the Supreme Court resolves the current circuit split, its decision may well prompt Congress to revisit the issue of the appropriate extent of U.S. extraterritorial exercise of antitrust jurisdiction in an entirely different context. Much has changed in a generation. Major U.S. firms such as Microsoft now face the risk of foreign antitrust enforcement policies conflicting with U.S. antitrust law and policy. The executive branch and Congress have expended considerable resources in entering into a series of bilateral cooperation agreements with major U.S. trading partners facilitating international coordination in antitrust enforcement. Looking to the future, substantive antitrust harmonization is an issue on the agenda of the Doha Round at the World Trade Organization, although currently executive branch policy appears to be to block negotiations at that forum.

The role of U.S. courts in this complicated policy area has never been murkier. Some might argue that an aggressive assertion of extraterritorial jurisdiction by U.S. courts would provoke conflicts of jurisdiction, which would lead to international negotiations, which, in turn, would yield political resolution in the form of either agreed allocations of jurisdiction or substantive law harmonization. Others might argue that judicial restraint would better promote conciliation among the major domestic antitrust enforcement regimes that are competing for regulatory authority on the world stage. Still others might argue that an aggressive judicial assertion of jurisdiction would better ensure that U.S., rather than foreign, antitrust values prevail on the world stage as the Sherman Act competes with other nations' approaches to competition policy. The debate on these issues may well be framed by the Supreme Court's decision in this case.

Second, the general question of whether U.S. courts may serve as fora for the vindication of the rights of foreign plaintiffs' rights arises on a number of other fronts as well. A prominent example also before the Supreme Court this term is the
Alien Tort Claims Act (ATCA), a two-century-old statute giving U.S. courts jurisdiction to hear suits by alien plaintiffs against alien defendants for extraterritorial violations of the law of nations. See Sosa v. Alvarez-Machain, 331 F.3d 605 (9th Cir. 2003)(en banc), cert. granted, 72 U.S.L.W. 3192; see also 6 PREVIEW 363 (March 15, 2004). The petitioners' Foreign Commerce Clause and Fifth Amendment Due Process Clause arguments are clearly significant in this context, although the ATCA, unlike the Sherman Act, provides a more open-ended grant of jurisdiction to U.S. courts to identify and define international human rights—usually, but not necessarily, of a noneconomic character. Both the FTAIA (as read by the District of Columbia and Second Circuits) and the ATCA open the door for U.S. courts to vindicate the rights of foreign plaintiffs in suits against foreign defendants on claims based on the extraterritorial effects of extraterritorial conduct. In these cases, competing viewpoints on two sets of issues that regularly arise in the work of the Supreme Court are implicated. The first set concerns the relative importance of economic and noneconomic individual rights. The second involves the conflict between judicial activism in the vindication of natural rights and judicial restraint in the assertion of authority to adjudicate arguably political questions that have not clearly been delegated to the courts by Congress. It will be worth watching which combination of viewpoints yields a majority in these two related, albeit distinguishable, cases.

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