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

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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. ■

INTERVIEW WITH JUDGE DOUGLAS GINSBURG > BY IAN SIMMONS

...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 cartelist 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 "gives 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. ■