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Sherman Act Jurisdiction: FTAIA

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FTAIA Overview

- FTAIA limits the extraterritorial reach of Sherman Act in both civil and criminal antitrust cases.

- Three recent Court of Appeals cases addressing this issue:
  - Second Circuit: Lotes Co. v. Hon Hai Precision Industry (June 4, 2014).
  - Seventh Circuit: Motorola Mobility v. AU Optronics (March 27, 2014; vacated July 1, 2014).
  - Ninth Circuit: United States v. AU Optronics (July 10, 2014).

FTAIA Overview

15 U.S.C. § 6a

- [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—
  - **(A)** on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
  - **(B)** on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- **(2)** such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

FTAIA: *Lotes Co. v. Hon Hai Precision Industry*

The June 4, 2014 Decision:

- The requirements of FTAIA are substantive and not jurisdictional.
- Foreign anti-competitive conduct can meet the FTAIA's "direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import commerce "even if the effect does not follows as an immediate consequence of the defendant's conduct, so long as there is a reasonably proximate causal nexus between the conduct and the effect."

  > *"There is nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harm or renders any and all domestic effects impermissibly remote and indirect."*

- However, under the facts of this case, the Court held that the "domestic effect caused by the defendants' foreign anticompetitive conduct did not 'give rise to'" the claims.

  > *"Lotes alleges that the defendants' patent hold-up has excluded Lotes from the market, which reduces competition and raises prices, which are then passed on to U.S. consumers. Lotes's injury thus precedes any domestic effect in the causal chain."*

FTAIA: *Motorola Mobility v. AU Optronics*

- The March 27, 2014 Decision (now vacated):
  - Motorola purchased only 1% of the LCD panels in the U.S.; the remainder of the purchases were made by Motorola's foreign subsidiaries.
  - Motorola could not show a "direct" effect on US commerce as a result of its foreign subsidiaries' purchases.
  - The higher prices for mobile phones Motorola sold in the US did not "give rise to" its foreign subsidiaries' antitrust claims. In doing so, the panel emphasized the availability of remedies under foreign law:

    "If Motorola's foreign subsidiaries have been injured by violations of the antitrust laws in the countries in which they do business, they have remedies; if the remedies are inadequate or if the countries don't have or don't enforce antitrust laws, these were risks that the subsidiaries . . . assumed by deciding to do business in those countries."

  - The panel cautioned against "expansive interpretation" of FTAIA urged by Motorola that could "creat[e] friction with many foreign countries[.]"
- The panel will rehear this case; briefing to be completed by October 14, 2014.

United States v. AU Optronics Corporation

The July 10, 2014 Decision:

- The requirements of FTAIA are substantive and not jurisdictional.
- Import trade, as the government alleged and proved here, is excluded from the reach of the FTAIA.
- If the government proceeds under a "domestic effects" theory, it must prove that the defendants' conduct had a "direct, substantial and reasonably foreseeable effect" on United States commerce.
- The district court properly applied a *per se*, rather than rule of reason, analysis to the horizontal price-fixing scheme.
- The Ninth Circuit affirmed the $500 million fine imposed on AU Optronics under the Alternative Fine Statute, finding that the statute permits a "gross gains" calculation based on the gain attributable to the entire conspiracy.

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Extraterritorial Reach: Securities Exchange Act

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Morrison v. National Australia Bank (Supreme Court, June 2010)

- Considered “foreign cubed” cases: whether foreign plaintiffs may sue foreign companies in connection with transactions on foreign exchanges.
- Found “that legislation of congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”
- Section10(b) of the Securities Exchange Act contains “no affirmative indication” that it applies extraterritorially; it reaches only fraud in connection with the “purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”

Dodd-Frank Act (August 2010)

- Widely viewed as a response to the Supreme Court's decision in *Morrison.*
- Section 929P(b): provides courts with jurisdiction to hear proceedings brought by the SEC or the Justice Department involving:
  - Conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
  - Conduct occurring outside the United States that has a foreseeable substantial effect within the United States.
- Section 929Y: directs SEC to solicit public comments to determine whether private rights of action should be extended to cover certain extraterritorial conduct or effects.

Trend: Restricting Extraterritorial Enforcement

- *United States v. Vilar* (2d Cir. 2013): Extends *Morrison* to criminal, as well as civil, laws.

- *City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG* (2d Cir. 2014): The ban on extraterritorial application of U.S. securities laws applies not just to foreign securities listed on foreign exchanges, but also when foreign securities are cross-listed on U.S. exchanges

- *ParkCentral Global Hub Limited v. Porsche Automobile Holdings SE* (2d Cir. 2014): The presumption against extraterritorial application applies even to claims involving "domestic" securities-based swap transactions if the claims are "so predominantly foreign as to be impermissibly extraterritorial." The Second Circuit declined to "proffer a test that will reliably determine when a particular invocation . . . will be deemed appropriately domestic or impermissibly extraterritorial" and instead held that courts must consider the facts and circumstances of each case.