ABA SECTION OF ANTITRUST LAW

"STATE INTERACTION WITH FOREIGN ENTITIES"

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Outline of Presentation

I. Language of the Sherman Act §1 – "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, **or with foreign nations**, is declared to be illegal."

A. Sherman Act §2 – also states "among the several States, **or with foreign nations** . . ."

B. Consistent with language of the Commerce Clause, Art. I, § 8, cl. 3 – "To regulate Commerce **with foreign Nations**, and among the Several States, and with the Indian Tribes"

C. Contrast, e.g., Clayton Act

1. Clayton Act §7 – "any section of the country"

2. Clayton Act §2 and §3 – "within the United States or any Territory thereof or the District of Columbia or any insular possession or any other place under the jurisdiction of the United States . . ."

II. Representative Cases Addressing Application of Antitrust Laws to Foreign Entities/Conduct

A. *American Banana v. United Fruit Co.*, 213 U.S. 347, 356 (1909)

1. "The general and almost universal rule is that the character of an act must be determined wholly by the law of the country in which the act is done."

B. *United States v. American Tobacco Co.*, 221 U.S. 106 (1911)

1. Focused on conduct within the United States

C. *United States v. Aluminum Co.* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945) (heard by Second Circuit in the absence of a quorum of the United States Supreme Court pursuant to 15 U.S.C. § 29, recodified at 28 U.S.C. § 2109)

1. Rejection of *American Banana*

2. Coverage depends on <u>effects</u> felt within the United States

3. Two-part test

a. Plaintiff had to show that the conduct was intended to affect American commerce, 148 F.2d at 444.

b. Once intent shown, burden of proof shifted to defendant to show that the challenged conduct did not "materially affect" that commerce, *Id*.

D. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993)

1. "The Sherman Act applies to foreign conduct that was meant to produce some substantial effect and did in fact produce some substantial effect in the United States."

2. Effects test met by an alleged agreement involving foreign reinsurers to reduce or eliminate the quality or amount of insurance coverage on certain American casualty risks, i.e., by forcing a switch from occurrence to claims made coverage

E. *F. Hoffman-La Roche, Ltd*. v. *Empagran S.A.*, 542 U.S. 155, 165 (2004)

1. "[A]pplication of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."

III. Foreign Trade Antitrust Improvements Act ("FTAIA") (1982)

A. 15 U.S.C. § 6a and 15 U.S.C. § 45(a)(3)

1. § 6a. Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title 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.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

B. What does this gibberish mean?

1. "Price fixing confined to exports with no domestic spillover would thus fall outside the Sherman Act, as would price fixing abroad that did not significantly affect imports into the United States." Areeda & Hovenkamp, ANTITRUST LAW, ¶ 272 at 302 (4th Ed.)

2. Because *Hartford Fire*, 509 U.S. at 796 n.23, involved import commerce and alleged agreements between domestic insurers and foreign reinsurers to restrict certain insurance **within the United States**, FTAIA's application did not need to be addressed directly. *Id.* at 307.

C. Is FTAIA jurisdictional?

1. *See, e.g., Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) ("[T]he FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.")

2. *See also Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, 2014 WL 2487188, *1 (2d Cir. 2014) (not jurisdictional, citing *Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006), overruling *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998))

D. *F. Hoffman-La Roche, Ltd*. v. *Empagran S.A.*, 542 U.S. 155 (2004)

1. Foreign purchasers, i.e., vitamin distributors, located in the Ukraine, Australia, Ecuador and Panama bought vitamins from manufacturers for delivery outside the United States

2. Court of Appeals, 315 F.3d 338 (D.C. Cir. 2003), held that the Sherman Act applied because the cartel had a direct, substantial and reasonably foreseeable effect on domestic trade or commerce, i.e., higher domestic prices, and the effect gave rise to a claim, i.e., an injured domestic customer could have brought a Sherman Act suit. The Court assumed that the foreign effect, higher prices in foreign countries, was independent of the domestic effect, i.e., higher domestic prices.

3. Supreme Court granted cert to address split in the Circuits -- *Kruman*, 284 F.3d 384 (2d Cir. 2002), and *Den Norske*, 241 F.3d 420 (5th Cir. 2001) -- does FTAIA permit Sherman Act claims even when foreign injury is independent of the domestic harm?

4. The Supreme Court in *Empagran* held that the FTAIA exception does not apply when the adverse foreign effect is independent of any domestic effect.

5. It is not reasonable, per the Court, for foreign harm alone to give rise to the plaintiff's claim because, in

part, of a "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. . . . We recognize that the principles of comity provide Congress greater leeway when it seeks to control through legislation the action of *American* companies, and some of the anticompetitive price-fixing conduct alleged here took place in *America*. But the higher foreign prices of which the foreign plaintiffs here complain are not the consequence of any domestic anticompetitive conduct *that Congress sought to forbid*. . . . Rather Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm." 542 U.S. at 165-66.

6. Court noted that permitting private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty, citing amicus briefs of several foreign governments. 542 U.S. at 168.

7. Prescriptive comity counsels against permitting the FTAIA exception to apply. To do so, would be inconsistent with the Court's view that Congress intended FTAIA to <u>limit</u> the reach of the Sherman Act

8. Court concluded that "no pre-1982 case provided significant authority for application of the Sherman Act in the circumstances we here assume." 542 U.S. at 173.

9. Under subsection (2) of FTAIA, "a claim" is thus the <u>plaintiff's</u> claim, not another person's claim, even if the language can be read linguistically to permit same

IV. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)

A. Twenty-one states

1. Alleged boycotting activity by domestic insurers and reinsurers and foreign reinsurers to reduce or eliminate the quality or amount of insurance coverage on certain American casualty risks, i.e., by forcing a switch from occurrence to claims made coverage

B. Established several important legal principles

1. Domestic insurers did not lose their McCarran-Ferguson Act immunity from federal regulation because they agreed or acted with foreign reinsurers allegedly not regulated by state law; unlike the facts in, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co*., 440 U.S. 205 (1979) (non-exempt parties in *Royal Drug* were retail pharmacists, rather than members of the insurance industry)

2. Foreign reinsurers subject to United States antitrust laws; principle of international comity no bar since British law did not require them to act in some fashion that is prohibited by Unites States law or claim that compliance with the laws of both countries is otherwise impossible

3. Boycott sufficiently alleged to survive motion to dismiss under boycott exception to McCarran

4. "Boycott" under McCarran distinguished from, and more limited than, concerted refusal to deal under Section 1 of the Sherman Act in that it is not a boycott where parties refuse to engage in a particular transaction until the terms of that transaction are

agreeable. The refusal must be with respect to an unrelated transaction.