EXTRATERRITORIAL APPLICATION OF US ANTITRUST RULES: AMBIGUITIES OLD AND NEW

ABD Rekabet Hukukunun Ülke-Dışı Uygulanması: Eski ve Yeni Belirsizlikler

Assistant Professor Hüseyin Çağrı ÇORLU*

Research Article

Abstract

The US was the first state that reacted the cross-border implications of foreign anticompetitive practices. In order to extend their jurisdiction over these practices, US courts introduced 'effects doctrine' which was envisaged to establish judicial jurisdiction on the basis of effects created in US trade and commerce. The extraterritorial application of US antitrust rules has been gradually developed and as of to date, it has been 75 years since the effect doctrine was first adopted by the US courts. Nevertheless, the case law on extraterritoriality of US antitrust rules is far from being complete. This is particularly evident in recent conflicting rulings on component cartels that were concluded and implemented outside the US. Given the advent of new supply chains in global economy, US courts encounter new challenges to ensure competitiveness of domestic markets. In so doing, the Supreme Court must both shed light upon the ambiguities that have been ongoing since the adoption of the effects doctrine and recalibrate its approaches to extraterritoriality to address legal and regulatory challenges ahead.

Keywords: Antitrust, Component Cartels, Sherman Act, Extraterritoriality, Comity, Effects Doctrine

Özet

Amerika Birleşik Devletleri yabancı rekabete aykırı eylemlerin sınır-ötesi etkileri ile ilgili olarak harekete geçen ilk devlet olarak karşımıza çıkmaktadır. Amerikan Mahkemeleri bu tür eylemlere yönelik hukuki yetkilerini kurabilmek için ABD ticaretine olan etkiler üzerinden etki doktrinini geliştirmişlerdir. Doktrinin ortaya atılmasından itibaren 75 yıl geçmiştir ve bu süreç dahilinde ABD rekabet hukukunun ülke-dışı uygulanması sürekli bir gelişmeye tabi tutulmuştur. Buna rağmen, içtihat hukuku hala önemli boşluklar ve sorunlarla doludur. Bu boşluk ve sorunlar, özellikle yakın zamanda verilen ve birbiriyle çelişen mahkeme kararlarında açıkça görünmektedir. Global ekonomide gelişen yeni tedarik zincirleri, ABD mahkemelerine yerel piyasaların rekabetçiliğinin sağlanması adına karşılaşacakları yeni zorluklar sunmaktadır. Bu zorlukların üstesinden gelebilmek için ABD Yüksek Mahkemesinin, hem süregelen hukuki belirsizlikleri ortadan kaldırması hem de daha önce benimsediği bazı hukuki yaklaşımları yeniden gözden geçirmesi gerekmektedir.

Anahtar Kelimeler: Rekabet Hukuku, Birleşen Kartelleri, Sherman Kanunu, Ülke-dışılık, Etki Doktrini

* Assistant Professor, Necmettin Erbakan University, Law School, e-mail: hccorlu@erbakan.edu.tr, ORCID ID: 0000-0002-8205-9596.

Submitted:8.12.2020 / Revision Requested: 16.02.2020
Last Version Received: 27.02.2021 / Accepted:11.06.2021

INTRODUCTION

In an increasingly globalized world, in which the effects of a particular conduct produce cross-border victims, states have become more reluctant in limiting their legal authority to the peripheries of their territory. Illustrations can be reflected in many areas of law such as humanitarian law[1], environmental law[2], human rights violations[3], etc.. Antitrust laws are of no difference. Transactions and business practices among corporations have been involving more of a characteristic of international nature. The integration of multiple markets by multinational companies results in a situation, in which any conduct taken by a legal entity in one market has cross-border effects in other markets. The concurrent exercise of multiple legal authorities in such circumstances results in overlapping jurisdictions, creating further tensions between sovereign States. The situation gets even more complicated due to the conflict of interests, that is, while home countries are lacking of necessary incentive to apply their antitrust rules to conducts of their nationals that distort markets in other jurisdictions, the targeted states, frustrated by these effects, seek to expand their legal jurisdiction in a way reaching the jurisdiction of other sovereign states[4].

US case law provides a great insight into challenges that national authorities encounter in ensuring the competitiveness of domestic markets against the adverse effects posed by extraterritorial conduct. Nevertheless, the approach adopted by the US courts to the extraterritorial application of US antitrust rules is far from complete. This is particularly evident in recent rulings by the Seventh and Ninth Circuits, which turned out to be conflicting each other, despite similar facts. These cases also reflect new challenges in the regulation of foreign conducts, arising due to the advent of new supply chains. This paper seeks to uncover these challenges with an in-depth legal analysis on these two conflicting rulings and thus provide a taxonomy of cases where the extraterritoriality of domestic competition rules is relevant.

In this regard, this paper, first, explores the evolution of US case law on extraterritorial application of the Sherman Act. In the first section, the paper

---

1 "In modern times, the class of crimes over which States can exercise universal jurisdiction has been extended to include war crimes and acts identified after the Second World War as 'crimes against humanity'" *United States v. Yousef,* 327 F.3d 56 (2d Cir. 2003). See also: *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005); *Regina v. Bartle, Bow Street Stipendiary Magistrate & Commissioner of Police, Ex Parte Pinochet* 2 W.L.R. 827, 38 I.L.M 581 (1999).

2 See; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 1998).

3 See: *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

4 Eleanor M. Fox, 'National Law Global Markets and Hartford: Eyes Wide Shut' (2000) 68/1 Antitrust Law Journal 73, p. 82.

presents the gradual development of the existing legal framework, along with the regulatory instruments adopted to alleviate concerns raised by other national jurisdictions. In the second section, the paper examines legal ambiguities remaining in US jurisprudence on the extraterritorial application of the Sherman Act. This sections reveals that despite 100 years old experience of US case law on the regulation of foreign conduct with anticompetitive effects on US trade and commerce, uncertainties as to the extraterritoriality of US antitrust rules remain. Finally the paper concludes.

I. Evolution of US Case Law on the Extraterritorial Application of US Antitrust Rules

A. The Introduction of Extraterritoriality

The United States, the first state that has adopted rules to ensure the competitiveness of its domestic markets through specific set of rules, also happened to be the first State frustrated by the effects of foreign conducts. 1897 Sherman Act included two sections which specifically dealt with anti-competitive market behavior. While Section 1 of the Sherman Act specifically declared that *"*(e)very contract, combination …, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"[5] was illegal, Section 2 made it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations …"[6]. Even though the formulation of the Act, especially the phrase "with foreign nations", indicated an extraterritorial dimension, for almost 50 years since its adoption, the Act was applied to conducts committed within the US, on the basis of territoriality principle[7]

This practice was abandoned in *Alcoa,* in which Judge Learned Hand, a prominent judicial philosopher of US law, provided that US antitrust rules were applicable to foreign conduct, once it was established that inevitable effects on the US commerce was intended by culprits[8]. Later identified as "intended effects doctrine", Judge Hand's reasoning set out that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that [had] consequences within its borders which the State reprehends…"[9].

---

5 15 U.S.C. § 1.

6 15 U.S.C. § 2.

7 The first case, the US courts evaluated the extraterritorial application of the Sherman Act was *American Banana* in which the court rejected this notion and ruled on the basis of territoriality principle. *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909).

8 *United States v. Aluminum Co of America*, 148 F.2d 416 (2d Cir. 1945), 424.

9 *Ibid*., 443.

Aware of concerns that his decision would give rise to, Judge Hand stressed that extraterritorial application of national jurisdictions on the basis of domestic effects was not without its limits. Regard should be vested on "limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the Conflicts of Laws"[10]. Furthermore, his reasoning should not lead to a proposition that all foreign conduct could be subject to US jurisdiction, as long as such conduct had effects on domestic commerce. This reading would result in an overarching application of US law as an encroachment of sovereignty rights, bestowed upon other States under public international law. Foreign conduct would be considered within US jurisdiction, only if its perpetrators intended its effects on US commerce.

Judge Hand's reasoning was, in fact, a reflection of Permanent Court of International Justice's (PCIJ) decision in *Lotus,* in which the court noted that "(f)ar from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it [left] them in this respect a wide measure of discretion which [was] only limited in certain cases by prohibitive rules…"[11]. States could exercise their jurisdiction to persons or conducts abroad, unless there was an international rule that forbade them specifically from doing so. The question in *Lotus* was whether there was such an international rule, and the Court's answer was negative. In this sense, Judge Hand found no obstacle[12] to adopt an effects-based approach to the regulation of extraterritorial conduct. His concern was political repercussions the US would encounter in its relations with other sovereigns which would happen to be real.

Reasoning of Alcoa was endorsed by other federal courts, even to an extent that the majority of concerns Judge Hand had raised as to the application of his doctrine were ignored[13]. This brought about an international clamor in other jurisdictions[14]. Concerns on the extraterritorial application of national

---

10 *Ibid*.

11 S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, para. 46.

12 Except for Supreme Court's ruling in *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909), which would be overcome by citing another ruling of the Court, *Strassheim v. Daily,* 221 U.S. 280 (1911), as Judge Hand did in *Alcoa. United States v. Aluminum Co of America*, 148 F.2d 416 (2d Cir. 1945), 443.

13 See: *United States v. Imperial Chemicals Industries Ltd.* 100 F. Supp. 504 (S.D.N.Y. 1951); *United States v. Watchmakers of Switzerland Info. Center, Inc.* 168 F. Supp. 904 (S.D.N.Y. 1958); *Sabre Shipping Corp. v. American President Lines Ltd.* 285 F. Supp. 949 (S.D.N.Y. 1968).

14 Canada, the United Kingdom, Australia, France, South Africa, Italy, the Netherlands, introduced blocking legislations to enjoin their national authorities from complying with

antitrust rules were also addressed in International Court of Justice's decision in Barcelona Traction. Judge Sir Gerald Maurice, in his separate opinion, confirmed that international law on jurisdictions was not mature, pointing out that "under present conditions international law [did] not impose hard and fast rules on States delimiting spheres of national jurisdiction in (…) anti-trust legislation (…) but leaves to State a wide discretion in the matter"[15]. Nevertheless this would not lead to a conclusion of States having an absolute authority to designate the limits of national jurisdictions. Judge Fitzmaurice continued its argument by stressing that international law imposed on "every state an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State"[16].

B. Attempts to Alleviate Concerns on Extraterritoriality and The FTAIA

Strong political and legal criticism across the world prompted US courts to recalibrate the intended effects doctrine with the introduction of international comity and a jurisdictional rule of reason analysis. In Timberlane[17] the 9th Circuit set forth a tripartite test for determining its jurisdiction. Accordingly, the court asked whether;

- the conduct has an intended or actual effects on US commerce,
- the effects are sufficiently large to constitute a cognizable injury to the plaintiffs
- the interests that the US has in exercising its jurisdiction are stronger in comparison with the interests of other nations[18].

Final element of this tripartite test necessitated balancing of interests between the US and other conflicting jurisdictions. Factors to be evaluated in

US proceedings under the extraterritorial application of antitrust rules Roger P. Alford, 'Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches' (1992) 33/1 Virginia Journal of International Law 1, p. 10. The United Kingdom adopted a claw-back legislation enabling the UK nationals to reimburse two thirds of treble damages they were fined by US courts. Donald E. Knebel, 'Extraterritorial Application of US Antitrust Laws: Principles and Responses' (2017) 8/2 Jindal Global Law Review 181, p. 192.

15 Case Concerning Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) ICJ. 1970, p. 105, See also; Roger P. Alford, Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches (1992) 33/1 Virginia Journal of International Law 1, p. 6

16 *Ibid*.

17 *Timberlane Lumber Co. v Bank of America,* 549 F2d 597 (9th Cir 1976).

18 *Ibid.,* p. 613.

this analysis were later elaborated in Mannington Mills[19] in which the Third Circuit identified ten factors to be considered in its balancing process:

"1) Degree of conflict with foreign law or policy;

2) Nationality of the parties;

3) Relative importance of the alleged violation of conduct here compared to that abroad;

4) Availability of a remedy abroad and the pendency of litigation there;

5) Existence of intent to harm or affect American commerce and its foreseeability;

6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

8) Whether the court can make its order effective;

9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

10) Whether a treaty with the affected nations has addressed the issue"[20].

Even though the Third Circuit's balancing criteria were welcomed by the majority of academics and other federal courts, strong criticism was directed to the court's alleged lack of competences in determining such a test[21]. This division was deepened with D.C. Circuit's conspicuous denial of applying the balancing test on the ground of its lack of prerogative[22]. Citing some scholarly critics of balancing test, the Court asserted that no mandatory rule was found in international and domestic law that required a comity obligation[23].

Foreign jurisdictions were not the only ones frustrated by the intended effects doctrine. US exporters which would engage in anti-competitive practices

---

19 *Mannington Mills, Inc. v. Congloeum Corp*., 595 F.2d 1287 (3rd Cir. 1979).

20 *Ibid*., p. 1297.

21 Roger P. Alford, Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches (1992) 33/1 Virginia Journal of International Law 1, p. 12.

22 "This court is ill-equipped to "balance the vital national interests of the United States and the [United Kingdom] to determine which interests predominate. When one state exercises its jurisdiction and another, in protection of its own interests, attempts to quash the first exercise of jurisdiction it is simply impossible to judicially `balance' these totally contradictory and mutually negating actions". *Laker Airways v. Sabena, Belgian Wd. Airlines*, 731 F.2d 909, 950 (D.C. Cir. 1984).

23 *Ibid*., 950-951.

abroad were also subjected to US antitrust rules. In Pfizer Inc. v. Government of India[24], in which foreign plaintiffs brought claims in US courts for damages they incurred, as a result of price fixing and market division practices carried out by US exporters abroad, the Supreme Court rejected the argument that the Sherman Act intended to protect only US consumers[25]. The Court provided that "(w)hen a foreign nation [entered] our commercial markets as a purchaser of goods or services, it [could] be victimized by anticompetitive practices just as surely as a private person or a domestic State, which (…) was held to be a person within the meaning of the antitrust laws; and there [was] no reason why Congress would have wanted to deprive a foreign nation of the treble-damages remedy available to others who suffered through violations of the antitrust laws"[26].

It was this type of decisions that caused the Congress to react and demarcate the extraterritorial application of the Sherman Act. In 1982, the Congress passed Foreign Trade Antitrust Improvements Act[27] (FTAIA), which introduced further limitations to the scope of the Sherman Act. The wording of the Act provided:

"(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 (the Sherman Act), other than this section.

If (the Sherman Act) apply to such conduct only because of the operation of paragraph (1)(B), then (the Sherman Act) shall apply to such conduct only for injury to export business in the United States".

The reading of the FTAIA, though murky, has had substantial implications for the application of the Sherman Act to foreign conduct. First, it promulgated that the Sherman Act would not be applied to any conduct that had repercussions upon US markets or consumers. The Sherman Act could be applicable to foreign conduct, only if its effects were direct, substantial

24 *Pfizer Inc., et al., Petitioners, v. Government of India et al.* 424 U.S. 308 (1978).
25 *Ibid*., p. 313-314.
26 *Ibid*., p. 308.
27 15 U.S. Code § 6a.

and reasonably foreseeable. The FTAIA did not provide further guidance on what constituted direct, substantial and reasonably foreseeable effects, leaving this task to US courts who would evaluate them on a case-by-case basis[28]. Nevertheless, this test indicated that a strong nexus between conduct and its effects on competition in the US was required in order for an extraterritorial application of the Sherman Act.

The FTAIA has introduced a taxonomy of foreign conducts that would be considered within the scope of the Sherman Act. Practices that constituted imports to the US would not be considered as extraterritorial conduct within the meaning of the FTAIA and thus would be governed directly by the Sherman Act. The FTAIA was adopted to address anti-competitive effects inflicted upon US markets by US exports and wholly-foreign conducts. Aware of concerns raised by US exporters as to the application of the Sherman Act to their practices abroad, as illustrated in *Pfizer Inc. v. Government of India,* the Congress has made the FTAIA applicable to export practices, if they had direct, substantial, and reasonably foreseeable effects on US trade or commerce and loses incurred in US markets would be the subject of treble-damages claims. Plaintiffs, US citizen or not, would not bring claims of their losses, they incurred in foreign markets, before the US courts. As to the wholly-foreign conduct, the FTAIA has again required direct, substantial and reasonably foreseeable effects on the US trade and commerce and made losses incurred in the US recoverable under treble-damages claims.

The wording of the FTAIA has not provided any indication on the availability of international comity as a part of extraterritoriality analysis. This resulted in a confusion among scholars and the courts as to whether the direct, substantial and reasonable foreseeable effects test superseded the precedent on international comity or the FTAIA left the implementation of the principle on Courts's discretion[29]. The latter was proved to be true, as US courts continued to refer international comity in subsequent case law[30].

---

28 For a detailed analysis on the FTAIA's direct, substantial and reasonably foreseeable effects test, see: Richard W. Beckler & Matthew H. Kirtland, Extraterritorial Application of US Antitrust Law: What is Direct, Substantial and Reasonably Foreseeable Effect under the Foreign Trade Antitrust İmprovements Act, (2003) 38/1 Texas International Law Journal 11.

29 Roger P. Alford, 'Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches' (1992) 33/1 Virginia Journal of International Law 1, 18.

30 See *O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 451- 54 (2d Cir. 1987), cert. denied, 488 U.S. 923 (1988); *Transnor (Bermuda) Ltd. v. BP North American Petroleum*, 738 F. Supp. 1472, 1477-78 (S.D.N.Y. 1990). See: Roger P. Alford, Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches (1992) *Virginia Journal of International Law,* 33/1, 1, 18, footnote 94.

C. *Hartford Fire* and 'True Conflict'

In Hartford Fire[31], in which claims of a global cartel involving domestic and foreign insurers and reinsurers with the cartel agreement concluded in London, the United Kingdom, were brought before US courts, the Supreme Court ruled that unless there was a 'true conflict' with the foreign law, the Sherman Act was applicable to the conduct, which had direct, substantial, and reasonably foreseeable effect on US commerce or US exports. The court regarded that a true conflict would arise, when the targeted company could not conform to the laws of both jurisdictions without violating one of them[32]. In other words, once it was established that the laws in the home country obliged the targeted companies to act in a certain manner, which accounted for a violation of the Sherman Act, the US courts would consider refraining from holding the relevant companies liable for antitrust law violation.

The reasoning in Hartford Fire accounted for a recalibration in the implementation of international comity by US courts. The Supreme Court noted that "the fact that conduct was lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state had a strong policy to permit or encourage such conduct"[33]. The Court would not find the existence of a true conflict, unless defendants would prove that they would not be able to comply with US antitrust rules without violating laws of other jurisdictions. The demonstration of such a true conflict would be very difficult, yet even if defendants demonstrated the existence of a true conflict, this would not result in a direct and immediate abstention of US courts from exerting their jurisdictions. In other words, the existence of a true conflict between US law and other jurisdiction was one, but not, the only requirement, according to which the Supreme Court would forbear from asserting its judicial authority over extraterritorial conduct. Whether the Court would exercise its jurisdiction was to be determined on the basis of international comity, once a true conflict between domestic and foreign laws had been established.

The Supreme Court's "true conflict" formulation for extraterritorial conducts has not been widely accepted by other courts. Some courts concluded that the existence of a true conflict between US law and laws of other jurisdictions might not always be regarded as a prerequisite for a determination of comity analysis. In Mujica v. Airscan Inc.[34] citing several post-Hartford Fire cases the ninth circuit provided that proof of true conflict was not a prerequisite to

31 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1998)
32 *Ibid*. p. 799.
33 *Ibid*.
34 *Mujica v. Airscan Inc.*, 771 F.3d 580 (9th Cir. 2014).

comity[35]. Interestingly, the Supreme Court itself, in its later decisions, have seemed to abandon the rigid requirement of true conflict as introduced in Hartford Fire. In Empagran[36] the Supreme Court addressed comity concerns with respect to the application of US antitrust rules by referring Justice Scalia's dissenting opinion in Hartford Fire[37]. The Court concluded that the principle of international comity would counsel against applying its jurisdictions to foreign conducts when foreign effects of such conducts were independent from the effects felt in the US[38]. Any action, in contrast to this conclusion, the Court continued, would be regarded as "an act of legal imperialism through legislative fiat"[39].

A thorough reading of the reasoning of the Supreme Court in Empagran revealed a distinction as to the analysis of extraterritoriality of US antitrust rules. Confirming that the principle of international comity was still an important element in this analysis, the court referred to this principle in relation with remedies originating from foreign injury. Accordingly, international comity barred the Court from granting requests of remedy on private claimants, if such requests were based on injuries incurred by claimants outside the US[40]. An argumentum in contrario of this finding would indicate that the Court would not consider comity concerns in granting remedies for foreign conduct, if private plaintiffs, seeking these remedies before the US courts could establish that their injuries were incurred in US markets.

II. Ambiguities Remain

A. Legal Implications of the Indirect Purchaser Doctrine

The reasoning in Empagran have not addressed the implications of international comity in proceedings brought by competent US agencies, such as Department of Justice or Federal Trade Commission rather than private plaintiffs. Questions such as whether the Court, in such cases, would include the principle of international comity in its extraterritoriality analysis, and if so, would it be evaluated only after a finding of 'true conflict' between US and foreign law was established have remained to be answered. Further ambiguities

35 *Ibid*., p. 602.
36 *F. Hoffmann-La Roche Ltd. v Empagran,* 542 U.S. 155 (2004).
37 *Ibid*., p. 161.
38 *Ibid*., p. 166.
39 *Ibid*., p. 167.
40 This approach was in conformity with the Supreme Court's previous decisions subsequent to the adoption of the FTAIA. "Respondents cannot recover antitrust damages based solely on an alleged caramelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations's economies." *Matsushita v. Zenith Radio Corp.,* 475 U.S. 574 582 (1986).

as to the extraterritoriality of US antitrust rules have arisen especially after the emergence and increasing prevalence of new links in global supply chains of especially technology-intensive industries[41]. US Federal Courts have concluded conflicting findings with respect to the application of the Sherman Act to foreign component cartels which were cartels fixing prices of components of final products which were incorporated abroad and then imported into the US.

In an early case, Illinois Brick Co. v. Illinois[42], the Supreme Court rejecting the pass-on theories asserted by the complainants, promulgated that the only direct purchasers could sue for the damages accruing from cartel practices[43]. The case involved petitioners alleging that Illinois Brick Company sold its brick blocks at high prices to masonry contractors. There was no direct contractual relationship between the petitioners and Illinois Brick Company. Petitioners supplied their bricks from general contractors which themselves supplied these bricks from the masonry contractors. Accordingly the petitioners sought remedies for the losses they incurred as a result of Illinois Brick Company's overcharging of bricks in its agreements with masonry contractors. The Court noted that allowing direct and indirect purchasers to sue for the same conduct would result in a multiplier effect on the remedies recovered from defendants[44]. Identified as "the Indirect Purchaser Doctrine", the Court's reasoning indicated that the final buyer of a product could not bring claims against the first seller, if there were multiple sale agreements regarding to the same product and they were not parties directly to the same agreement.

---

41 See: Dick K. Nanto, 'Globalized Supply Chains and U.S. Policy', (2010), *America in the 21st Century: Political and Economic Issues Series: Globalized Supply Chains and Policy* (ed. Solomon Mensah) 19-70. For the implications of new business models to the application of antitrust rules see also: Leon B. Greefield, et al., 'Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach (2015) 29 Antitrust 18; Ellen Meriwether, Motorola Mobility and the FTAIA: If Not Here, Then Where? (2015) 28 Antitrust, 8; Kenneth W. Dam, 'Extraterritoriality in an Age of Globalization: The Hartford Fire Case' (1993) The Supreme Court Review 289; Jae Hyung Ryu, 'Deterring Foreign Component Cartels in the Age of Globalized Supply Chains' (2016) 17/1 Wake Forest Journal of Business and Intellectual Property Law 81; Megan Masingill, 'Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in RJR Nabisco to Foreign Component Cartels' (2019) 68 American University Law Review 621.

42 *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977).

43 "If a pass-on theory may not be used defensively by an antitrust violator (defendant) against a direct purchaser (plaintiff), that theory may not be used offensively by an indirect purchaser (plaintiff) against an alleged violator (defendant)" *Ibid.,* p. 726.

44 "(A)llowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants, since even though an indirect purchaser had already recovered for all or part of an overcharge passed on to him, the direct purchaser would still automatically recover the full amount of the overcharge that the indirect purchaser had shown to be passed on, and, similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount." *Ibid.,* p. 730.

There are two important aspects in the Supreme Court's decision in *Illinois Brick Co. v. Illinois* that need to be clarified. First, the Supreme Court's indirect purchaser doctrine did not connote the contested conduct having indirect effects on the losses allegedly incurred by the claimants. The indirect purchaser doctrine merely regulated the relationship between the claimants and the perpetrators, rather than that between the contested conduct and the alleged losses. The doctrine required that in order for a claimant to seek any remedy from a violation of the Sherman Act, this claimant had to directly contract with the perpetrator of that violation. The fact that the claimant did not directly contract with the perpetrator would not mean that the anti-competitive effects inflicted by the alleged conduct upon the alleged losses were indirect.

Second, despite strong criticism from both its members and other scholars[45], the court focused on the limits to claims, brought before by private parties, with respect to a violation of the Sherman Act. The indirect purchaser doctrine would not constitute a defense against proceedings launched by public agencies. The DoJ and the FTC could bring claims before the courts under the FTAIA against foreign component cartels, provided that they had direct, substantial and reasonably foreseeable effects on US trade and commerce.

B. Clash of Seventh and Ninth Circuits.

In 2015, two conflicting rulings arose in the Seventh[46] and Ninth[47] Circuits which dealt with the same conspiracy of a foreign component cartel, fixing the price of liquid-crystal-display (LCD) panels which were incorporated into final products abroad, and then sold to retailers in the US. While the Seventh Circuit dealt with a private claim by a US retailer, the Ninth Circuit focused on criminal proceedings by the DoJ against the foreign perpetrators of LCD cartel. The Seventh Circuit relying on the Supreme Court's reasoning in Illinois Brick Co. v. Illinois concluded that indirect purchaser doctrine prevented the US retailer from bringing claims against cartel members, since the direct victim of price fixing practices was the foreign company which directly bought price-fixed LCD panels from cartel members and incorporated them into its final products[48].

---

45 Justice Brennan, dissenting to the reasoning in Illinois Brick Co. v. Illinois, pointed out that the Court's decision "outs Congress's purpose and severely undermines the effectiveness of the private treble damages action as an instrument of antitrust enforcement". Illinois Brick Co. v. Illinois, 431 U.S. 720 749 (1977). See also: Ellen Meriwether, 'Motorola Mobility and the FTAIA: If Not Here, Then Where' (2015)29/2 Antitrust 8; Randy M. Stutz, 'The FTAIA in Flux: Foreign Component -Goods Cases Have Tripped, but Have They Fallen?' (2015) CPI Antitrust Chronicle 2.

46 *Motorola Mobility LLC v. AU Optronics Corp.* 775 D.3d 816 (7th Cir. 2015).

47 *United States v. Hui Hsiung* 778 F.3d 738 (9th Cir. 2015).

48 "A related flaw in Motorola's case is its collusion with the indirect-purchaser doctrine of

The court's reasoning was not affected by the fact that foreign direct purchaser of LCD panels was a subsidiary of the US retailer[49]. The Court did not lift the corporate veil between the parent company and its subsidiary, treating them as separate legal entities. Referring to the Supreme Court's reasoning in Empagran, the Seventh circuit found that the US retailer and the parent company could not bring claims against the cartel under the indirect purchaser doctrine, and its subsidiary would not sue the perpetrators before US courts under the FTAIA, as its injury due to price fixing practices were incurred in foreign markets[50]. Any decision otherwise, the Court continued, would "enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and resentment at the apparent effort of the United States to act as the world's competition police officer, a primary concern motivating the Foreign Antitrust Improvements Act"[51].

The Seventh Circuit's decision was in conformity with both the indirect purchaser doctrine and the taxonomy adopted within the FTAIA. The Court correctly identified that the contested practice was an extraterritorial conduct within the meaning of the FTAIA and that the complainant as an indirect buyer of LCD panels cannot file suits for damages under the indirect purchaser doctrine. Nevertheless, this reasoning revealed a substantial flaw within the reach of the Sherman Act over foreign conducts. As mentioned above, cross-border effects of anticompetitive practices have become more likely due to the advent of new supply chains in the global economy. *Motorola Mobility LLC v. AU Optronics Corp.* clearly illustrated that a strict adherence to the indirect purchaser doctrine would leave certain practices outside the scope of the Sherman Act, even though such practices had foreseeable, substantial and direct effects on US trade and commerce under the FTAIA.

It would be reasonable to expect that the Ninth Circuit would not be concerned indirect purchaser doctrine, as the claims of the Sherman Act violation were brought before its hearing by the DoJ, under criminal proceedings against the cartel members. Nevertheless, the Court took an unexpected approach to the implementation of the FTAIA. It considered the relevant practices of the LCD cartel as imports to the US and applied the Sherman Act directly to the

Illinois Brick Co. v. Illinois, (…), which forbids a customer of the purchaser who paid a cartel price to sue the cartels even if his seller — the direct purchaser from the cartels — passed on to him some or even all of the cartel's elevated price." *Motorola Mobility LLC v. AU Optronics Corp.* 775 D.3d 816 821 (7th Cir. 2015).

49 "Motorola wants us to treat it and all of it and all of its foreign subsidiaries as a single integrated enterprise, as if its subsidies were divisions rather than foreign corporations. But American Law does not collapse parents and subsidiaries (or sister corporations) in that way." *Ibid*., p. 820.

50 *Ibid*.

51 *Ibid*., p. 825.

perpetrators. As noted above, the FTAIA provided an exception for imports to the US, and rendered them directly in-scope of the Sherman Act. However, the FTAIA did not further delve into clarifying what practices would constitute 'imports' within the meaning of its reading. The Court found that the arrival of price-fixed LCD panels should be considered as imports, as they were directed at the US import market[52].

This decision was in contrast with the reasoning of the Supreme Court in *Illinois Brick Co. v. Illinois,* in which the Court refused to consider multiple agreements together, even though the subjects of these agreements were the same products. In *Hui Hsiung*, the Ninth Circuit reached the opposite conclusion, treating agreements regarding the sales of LCDs to producers of final products, and that of final products to the buyers in the US, as one single conduct, and considering it as an import, within the meaning of the FTAIA. Striking point was that the Supreme Court, in *Illinois Brick Co. v. Illinois,* treated multiple transactions as different conducts, even though the products that were traded in these agreements were the same. The Ninth Circuit, in *Hui Hsiung,* on the other hand, treated multiple transactions as one conduct, even though the products that were traded in these agreements were different.

The reasoning in Hui Hsiung would indicate that the Ninth Circuit sought to prevent the escape of cartel members from the jurisdiction of the Sherman Act, while their effects on US trade and commerce were substantial[53]. However, in so doing, the Court did not need to stretch the concept of importation in a way that would blur the distinction drawn by the taxonomy endorsed under the FTAIA. The FTAIA and the Supreme Court judgement in Empagran, had already provided ammunition to US public agencies, necessary for the reach of the Sherman Act to these types of foreign practices, under criminal proceedings. In fact, the Ninth Circuit itself, in later part of its decision, confirmed that the FTAIA would still reach the price fixing practices of the defendants, were they considered to be non-import foreign conducts[54].

---

52 *United States v. Hui Hsiung* 778 F.3d 738 755 (9th Cir. 2015). See also: Megan Masingill, 'Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in RJR Nabisco to Foreign Component Cartels' (2018) 68 American University Law Review 621, 643.

53 "The defendants's efforts to place their conduct beyond the reach of United States law and to escape culpability under the rubric of extraterritoriality are unavailing" *United States v. Hui Hsiung* 778 F.3d 738 743 (9th Cir. 2015).

54 In *Hui Hsiung,* the DoJ sought to establish its jurisdiction under the FTAIA's direct, substantial and reasonably foreseeable test. The Ninth Circuit rejected the Agency's formulation yet still confirmed that price fixing practices of the defendants had direct, substantial and reasonably foreseeable effects on US trade and commerce. Ibid., pp. 757-759.

In that regard, the Ninth Circuit's reasoning in *Hui Hsiung* acknowledged that given the advent of new supply chains, the Supreme Court's indirect purchaser doctrine should be recalibrated in a way that foreign anticompetitive practices which seriously affected the competitiveness of domestic trade and commerce should not be allowed to escape the confines of the Sherman Act. What was problematic in the Ninth Circuit's decision was the approach adopted by the Court to prevent that from happening. The Court's designation of the contested practice as an import blurred the distinction between the territorial and extraterritorial application of the Sherman Act and thus was not in compliance with the taxonomy established under the FTAIA.

CONCLUSION

US case law clearly illustrated that the effects doctrine has been an instrument crafted specifically for dealing with foreign conduct which had repercussions in national markets. Despite several reforms that recalibrated its scope and extent, the doctrine has been effective in reaching out extraterritorial anti-competitive practices, since its first introduction in *Alcoa.* The aggressive implementation of the doctrine by US courts has caused clamor in international community which criticized US courts' assertion of judicial jurisdiction as violations of sovereign rights enjoyed by other states in international law. Nevertheless, these criticisms were more of a political nature than a legal one, as the PICJ ruled in *Lotus,* public international law lacked any rule forbidding states from exercising their jurisdiction over persons, property and acts outside their territory.

Even though, public international law provided a wide measure of discretion to States, this discretion would not be construed as a right to exercise national jurisdiction in an arbitrary manner. As Judge Fitzmaurice argued in *Barcelona Traction*, this wide discretion was a result of sovereign rights which were accompanied with reciprocal obligations, that is, states exercising jurisdiction over persons, property and acts outside their territory must avoid doing so, if the jurisdiction of another sovereign is found to be more appropriate. The determination of appropriateness must be carried out with criteria balancing the interests of overlapping jurisdictions, such as nationality of perpetrators, availability of remedies, objective of practices, relative importance of alleged violations. As noted above, US case law has introduced several criteria in dealing with balance of interests between overlapping jurisdictions.

Despite 100 years old jurisprudence on extraterritoriality of antitrust rules, the regulation of foreign conducts under the Sherman Act has been far from being well-established. The case law shows that the implementation of the effects doctrine follows the integration of domestic sectors with international markets. Greater the globalization has become, more aggressively the extraterritoriality

has been applied by US courts. Nevertheless, even in *Hartford Fire*, in which the Supreme Court adopted a very aggressive approach to the extraterritorial application of US antitrust rules, the principle of international comity and balancing tests have always been an important part of the extraterritoriality analysis. Discontent for being described as the protagonist of 'legal imperialism' or 'the world's competition police officer' can be seen throughout the rulings of the Supreme Court and other federal courts. Courts have insisted on being cautious in applying the Sherman Act to foreign conducts which had no or very limited nexus with the territory of the US.

This caution resulted in the Seventh Circuit's decision in *Motorola Mobility LLC v. AU Optronics Corp.,* in which the Court refrained from exercising its jurisdiction over the conduct despite the foreseeable, direct and substantial effects the contested practices inflicted upon domestic trade and commerce. Nevertheless, the necessity of new approaches to deal with domestic anticompetitive effects of extraterritorial practices has proved to be evident due to new business models as a result of the introduction of new supply chains in the global economy. The Ninth Circuit, in *Hui Hsiung* sought to exert its authority over such practices even though the Supreme Court's indirect purchaser doctrine in *Illinois Brick Co. v. Illinois* stipulated otherwise.

This paper endorsed the taxonomy established by the FTAIA as to the extent of extraterritorial practices within the scope of the Sherman Act. However, the effectiveness of the FTAIA has been hindered by the Supreme Court's indirect purchaser doctrine. In this respect, the paper proposes the Supreme Court's reconsideration of this doctrine a way that it would not constitute barrier to the prosecution of foreign anticompetitive practices which have foreseeable, direct and substantial effects on US commerce and trade. While the paper does not suggest that the indirect purchaser doctrine should be discarded completely from US case law on the extraterritorial application of the Sherman Act, it provides that the Supreme Court must, at least, clarify that the perpetrators cannot rely on the doctrine as a defense against proceedings by public agencies. Otherwise, case law developed on the Seventh Circuit's reasoning in *Motorola Mobility LLC v. AU Optronics Corp.* would result in an unwarranted limitation in the scope of the Sherman Act.

BIBLIOGRAPHY

Primary Sources

The Sherman Act of 1890 15 U.S. Code §§ 1-7.

Foreign Trade Antitrust Improvements Act of 1982, 15 U.S. Code § 6a.

Case Law

American Banana Co. v. United Fruit Co. 213 U.S. 347 (1909)

Strassheim v. Daily, 221 U.S. 280 (1911)

S.S. "*Lotus"* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10

United States v. Aluminum Co of America, 148 F.2d 416 (2d Cir. 1945)

United States v. Imperial Chemicals Industries Ltd. 100 F. Supp. 504 (S.D.N.Y. 1951)

United States v. Watchmakers of Switzerland Info. Center, Inc. 168 F. Supp. 904 (S.D.N.Y. 1958)

Sabre Shipping Corp. v. American President Lines Ltd. 285 F. Supp. 949 (S.D.N.Y. 1968)

Case Concerning Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) ICJ. 1970

Timberlane Lumber Co. v Bank of America, 549 F2d 597 (9th Cir 1976)

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)

Pfizer Inc., et al., Petitioners, v. Government of India et al. 424 U.S. 308 (1978)

Mannington Mills, Inc. v. Congloeum Corp., 595 F.2d 1287 (3rd Cir. 1979)

Filártiga v. Peña-Irala 630 F.2d 876 (2d Cir. 1980)

Laker Airways v. Sabena, Belgian Wd. Airlines, 731 F.2d 909, 950 (D.C. Cir. 1984)

Matsushita v. Zenith Radio Corp., 475 U.S. 574 582 (1986)

O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 451- 54 (2d Cir. 1987), cert. denied, 488 U.S. 923 (1988)

Transnor (Bermuda) Ltd. v. BP North American Petroleum, 738 F. Supp. 1472, 1477-78 (S.D.N.Y. 1990)

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

Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 1998)

Regina v. Bartle, Bow Street Stipendiary Magistrate & Commissioner of Police, Ex Parte Pinochet 2 W.L.R. 827, 38 I.L.M 581 (1999)

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003)

F. Hoffmann-La Roche Ltd. v Empagran, 542 U.S. 155 (2004)

Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005)

Mujica v. Airscan Inc., 771 F.3d 580 (9th Cir. 2014)

Motorola Mobility LLC v. AU Optronics Corp. 775 D.3d 816 (7th Cir. 2015)

United States v. Hui Hsiung 778 F.3d 738 (9th Cir. 2015)

Secondary Sources

Alford, Roger P. 'Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches' (1992) 33/1 Virginia Journal of International Law 1.

Beckler, Richard W. & Kirtland, Matthew H. 'Extraterritorial Application of US Antitrust Law: What is Direct, Substantial and Reasonably Foreseeable Effect under the Foreign Trade Antitrust Improvements Act', (2003) 38/1 Texas International Law Journal 11.

Dam, Kenneth W., 'Extraterritoriality in an Age of Globalization: The Hartford Fire Case' (1993) The Supreme Court Review 289.

Donald E. Knebel, 'Extraterritorial Application of US Antitrust Laws: Principles and Responses' (2017) 8/2 Jindal Global Law Review 181.

Greefield, Leon B., et al., 'Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach' (2015) 29 Antitrust 18.

Fox, Eleanor M. 'National Law Global Markets and Hartford: Eyes Wide Shut' (2000) 68/1 Antitrust Law Journal 73.

Masingill, M. 'Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in RJR Nabisco to Foreign Component Cartels' (2018) 68 American University Law Review 621.

Meriwether Ellen, 'Motorola Mobility and the FTAIA: If Not Here, Then Where' (2015) 29/2 Antitrust 8

Nanto, Dick K. 'Globalized Supply Chains and U.S. Policy', (2010), *America in the 21st Century: Political and Economic Issues Series: Globalized Supply Chains and Policy* (ed. Solomon Mensah) 19-70

Stutz, Randy M. 'The FTAIA in Flux: Foreign Component -Goods Cases Have Tripped, but Have They Fallen?' (2015) CPI Antitrust Chronicle 2