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William C. Holmes

Senior Counsel, Freeborn & Peters, Chicago, IL

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Jurisdiction and Standing in the International Arena

William C. Holmes*

Author's Note: After this article was written, the Second Circuit issued its decision in *Kruman v. Christie's International PLC*, No. 01-7309, 2002 WL 398290 (2d Cir. Mar. 13, 2002). The decision agrees with the author's logic that the FTAIA did not add a new "plaintiff's injury" requirement to the Sherman Act, and that the nature of the plaintiff's alleged injury is more properly part of a standing analysis under the Clayton Act and not part of the FTAIA jurisdictional inquiry. References to the case have been added to the footnotes.

I. Introduction

One of the more fascinating – and frustrating – aspects of U.S. antitrust law is its tendency to look for complex ways of answering simple questions. Like the best existential philosopher, we revel in crafting arcane solutions to even the most straight-forward of problems. This criticism seems particularly apropos of the strange manner in which a series of recent federal court decisions have approached the following issue: whether to allow a foreign plaintiff to sue in a U.S. court under the Sherman Act for purely extraterritorial conduct. Rather than address the issue as one of standing, the courts have articulated an exceedingly intricate jurisdictional analysis under the Foreign Trade Antitrust Improvements Act that few can hope to truly understand and that arguably does harm to both the statutory language of the Act and its legislative history.

* Senior Counsel, Freeborn & Peters.

II. The Stakes Are Higher Than You Might Think

At first blush, it might seem that most of us here in the United States have little, if anything, at stake in how the courts resolve issues of extraterritorial jurisdiction and standing over foreign parties involved in foreign transactions. While this may well be true over the short-term, the longer-term stakes are actually much higher for U.S. businesses and their legal advisors. The reason? Because international antitrust is not remaining static and is continuing to change in ways that could catch many by surprise. An especially powerful example can be seen in draft regulations issued by the European Commission ("Commission") on September 28, 2000,¹ calling for a major overhaul of the current system for enforcing Articles 81 and 82 of the Rome Treaty.² Among other significant changes, the regulations would replace the current system of administrative enforcement by the Competition Commission with a system of private judicial enforcement in the national courts. To this end, the regulations would extend to national competition authorities and courts the power to apply Community law in full. The intention is to enable the Commission to focus its limited resources on the most serious competitive restrictions and abuses, while leaving it to the national courts to protect the rights of individual parties by awarding damages and ruling on the enforceability of arguably anticompetitive contracts and other transactions.

Imagine a business world in which the proposed European regulations become final (a process currently in limbo, but still a distinct possibility).³ United States businesses have become accustomed to an environment in which their conduct abroad may face the risk of foreign governmental action, but they have not had to confront the high-stakes litigation poker we see here in our own country. While the private litigation contemplated in the draft European regulations would, presumably, not include the *in terrorem*

¹ *Proposal for a Council Regulation on the Implementation of the Rules of Competition Laid Down in Articles 81 and 82 of the Treaty*, 2000/0243 (CNS), available at <http://www.europa.eu.int/comm/competition> (last visited Mar. 1, 2002).

² Articles 81 and 82 are roughly the European counterparts of our own Sherman Act §§ 1 and 2. Copies of both provisions and of other key European antitrust guides and rules can be found in HOLMES, *ANTITRUST LAW SOURCEBOOK FOR THE UNITED STATES AND EUROPE* (2002).

³ See the accompanying paper by Jonathan Sinclair, 14 *LOY. CONSUMER L. REV.* 547 (2002).

rules of trebled damages and automatic attorney fees found in our system, it would still create a brave new world of private damages litigation abroad – a brave new world in which the treatment of standing and jurisdictional rules would take on a whole new meaning for U.S. businesses and those advising them. Given this exposure, those of us here in the United States do, most definitely, have a stake in how the courts resolve issues of extraterritorial jurisdiction and standing under our own Sherman Act,⁴ for as the saying goes, “sauce for the goose is sauce for the gander.”

III. *Den Norske*: A Case in Point

Taken literally, the antitrust laws of the United States extend the same sweeping coverage to the nation’s foreign commerce that applies to its domestic commerce. However, our courts have not taken a literal approach. Instead, they have long attempted to articulate standards for foreign commerce that stop short of the extremely far-reaching jurisdictional tests employed when dealing with domestic commerce.⁵ Congress weighed into the matter in 1982 with the enactment of the Foreign Trade Antitrust Improvements Act (the “FTAIA”).⁶ Statutory standards were enacted for asserting U.S. antitrust jurisdiction over conduct involving trade with foreign nations. These statutory prerequisites are now codified in Section 7a

⁴ European antitrust decisions not infrequently look to U.S. case law for guidance, due to the enormous body of antitrust jurisprudence that has evolved here over the past century.

⁵ See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444-45 (2d Cir. 1945) (asking whether the challenged foreign conduct was “intended” to affect American foreign commerce and, if so, actually had such an “effect”); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976) (employing a three-part balancing test that asked, first, whether the challenged foreign conduct affected or was intended to affect U.S. foreign commerce; second, whether the restraint was of sufficient magnitude to present a cognizable injury to American foreign commerce; and third, whether extraterritorial jurisdiction should be declined as a matter of international comity). See also *Kruman v. Christie’s Int’l PLC*, No. 01-7309, 2002 WL 398290, at *5-*6 (2d Cir. Mar. 13, 2002) (discussing *Alcoa* as modified in *Nat’l Bank of Can. v. Interbank Card Assoc.*, 666 F.2d 6 (2d Cir. 1981)).

⁶ Codified at 15 U.S.C. § 6a (Sherman Act) and 15 U.S.C. § 45(a)(3) (FTC Act). See also U.S. Dept. of Justice and Federal Trade Comm’n, *Antitrust Enforcement Guidelines for International Operations*, Sec. 3.14 (Apr. 1995) (“The Agencies would apply the same principles regarding their foreign commerce jurisdiction to Clayton Act Section 7 cases as they would apply in Sherman Act cases.”). See generally HOLMES, *ANTITRUST LAW HANDBOOK*, § 9:4 (2002).

of the Sherman Act and Section 45(a)(2) of the FTC Act. In the words of Section 6a:

[This 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 this Act, other than this section.

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

Like moths drawn to a flame, U.S. courts have looked to this extraordinarily convoluted language to answer the question of when a foreign plaintiff can sue for alleged violations of the Sherman Act occurring abroad. The result is some misplaced jurisprudence that might have been handled much more sensibly under accepted principles of antitrust standing. A case on point is the Fifth Circuit decision in *Den Norske Stats Oljeselskap AS v. Heeremac V.O.F.*⁸

Den Norske involved a Sherman Act challenge to an alleged international conspiracy to raise prices for heavy-lift oil platform services.⁹ The plaintiff, Statoil, was a Norwegian oil company that claimed it was injured when it had to pay an artificially high price for services purchased in the North Sea.¹⁰ According to the complaint, U.S. service purchasers were injured as well, in that they, too, paid

⁷ 15 U.S.C. § 6a (2001) (emphasis added).

⁸ 241 F.3d 420 (5th Cir. 2001).

⁹ *Id.* at 422.

¹⁰ *Id.*

artificially inflated prices for oil platform services purchased in U.S. domestic waters in the Gulf of Mexico.¹¹ Despite this allegation, the Fifth Circuit concluded that U.S. courts lacked jurisdiction over the plaintiff's claim.¹² In coming to this conclusion, the court focused on the language in Section 2 of the FTAIA in which it is specified that the "effect" that satisfies the "direct, substantial, and reasonably foreseeable" prong of Section 1 of the Act must be what "gives rise to a claim" under the Sherman Act (see highlighted language above). From this, the court reasoned:

Based on the language of Section 2 of the FTAIA, the effect on United States commerce—in this case, the higher prices paid by United States companies for heavy-lift services in the Gulf of Mexico—must give rise to the claim that Statoil asserts against the defendants. That is, Statoil's injury must stem from the effect of higher prices for heavy-lift services in the Gulf. We find no evidence that this requirement is met here.¹³

Rightly or wrongly, the court's reasoning is based on a logical leap that is by no means dictated by the quoted language in Section 2. The quoted language says simply that "such effect" – i.e., the "direct, substantial and reasonably foreseeable effect" on U.S. commerce needed to satisfy Section 1 of the FTAIA – must "give[] rise to a claim" under the Sherman Act. Purchasers of platform services in U.S. domestic waters would have had "a claim" under the Sherman Act, even if Statoil did not. Thus, the question effectively begged by the Court was whether the statutory reference to "a claim" really means *just the claim of the particular plaintiff*, or refers more generically to demonstrating an injury to a U.S. domestic or export interest sufficient for a U.S. court to have subject matter jurisdiction.

Once one court goes down a path, others tend to follow, and that is what seems to have happened to the arcane issue of FTAIA jurisdiction. A growing number of other cases have now come to the same conclusion that a foreign plaintiff alleging injury in a foreign market must show that its specific injury "arose out of" the same conduct used to satisfy the "direct, substantial and reasonably

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 427.

foreseeable effect” prong of FTAIA jurisdiction.¹⁴ Was this truly what Congress intended? Arguably not. As tellingly observed by the dissent in *Den Norske*, “[i]f the drafters of the FTAIA had wished to say ‘the claim’ instead of ‘a claim,’ they certainly would have.”¹⁵

Indeed, what limited legislative history there is suggests that the jurisdictional concern that Congress sought to address was not with the specific injury to the particular plaintiff (the *Den Norske* focus), but with the more general impact of the challenged conduct on U.S. domestic or export trade. Thus, the House Report that accompanied the Act gives the following example of something that would qualify as having the requisite “direct, substantial and reasonably foreseeable” effect for FTAIA jurisdiction:

[I]f a domestic export cartel were so strong as to have a “spillover” effect on commerce within this country—by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices—the cartel’s conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial, and foreseeable effect on domestic commerce.¹⁶

¹⁴ See, e.g., *Kruman v. Christie’s Int’l PLC*, 129 F. Supp. 2d 620, 625 (S.D. N.Y. 2001) (holding that “the FTAIA permits suit . . . only where the conduct complained of had ‘direct, substantial and reasonably foreseeable’ effects in the United States and the effects giving rise to jurisdiction are the basis for the alleged injury.”), *rev’d*, No. 01-7309, 2002 WL 398290 (2d Cir. Mar. 13, 2002) (As noted above, the district court was recently reversed by the Second Circuit in a ruling that – like the author – rejects the notion that the “effect” giving rise to Sherman Act jurisdiction under the FTAIA must also be the basis for the plaintiff’s specific injury. As expressed by the court: “The text of the FTAIA clearly reveals that its focus is not on the plaintiff’s injury but on the defendant’s conduct, which is regulated by the Sherman Act. The FTAIA does not regulate which plaintiffs can bring suit under the Clayton Act, and it would be inappropriate to import the element of injury from the Clayton Act and graft it onto the FTAIA.” *Id.* at *10.); *In re Microsoft Antitrust Litig.*, 127 F. Supp. 2d 702, 705 (D. Md. 2001) (holding that under the FTAIA, “foreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim.”); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 877 (W.D. Wis. 2000) (holding that “a private plaintiff cannot sue under the antitrust laws of the United States for injuries incurred as a result of international transactions that have an anticompetitive effect on a United States market if the domestic anticompetitive effect is not the same one that gives rise to the plaintiff’s injury.”).

¹⁵ 241 F.3d at 432 (Higginbotham, J., dissenting).

¹⁶ H.R. REP. NO. 97-686, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487,

Similarly, also in the House Report is the following statement as to the intended impact of the Act:

[The Act] does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—e.g., price fixing not limited to the export market—would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic. The conduct has the requisite effects in the United States, even if some purchasers take title abroad or suffer economic injury abroad.¹⁷

As suggested by these quotes, Congress seems to have been concerned with the broader policy issue of whether the government's interest in the challenged conduct is so "remote, minor, tangential or otherwise insignificant" that the government "presumably would not seek to control it."¹⁸ Through the FTAIA, Congress – albeit rather inartfully – set about articulating standardized, objective criteria for separating out situations in which the effects of foreign conduct are so removed from any legitimate U.S. domestic or foreign commerce interest that jurisdiction should be denied.

That this is what was intended finds further support in the fact that the House Report goes on to specifically approve of *Pfizer, Inc. v. Government of India*,¹⁹ a case in which a foreign government was held to have standing to sue an international cartel for allegedly raising the price of drugs sold in foreign and domestic markets.²⁰ In holding that foreign governments could sue for damages, the Supreme Court emphasized that "[t]reble damage suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers," where "an exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages."²¹ Since Congress felt compelled to mention *Pfizer*

2498.

¹⁷ 1982 U.S.C.C.A.N. at 2495.

¹⁸ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, ¶ 272f (2d ed. 2000).

¹⁹ *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 319-20 (1978).

²⁰ *See* 1982 U.S.C.C.A.N. at 2495.

²¹ *Pfizer*, 434 U.S. at 314-15. In *Kruman*, the Second Circuit similarly notes that the House Judiciary Committee Report "specifically and approvingly

specifically, it seems more logical – at least to this author – that the purpose of the FTAIA was not to block suits by injured foreign plaintiffs challenging conduct that injures American consumers. Rather, through the FTAIA, Congress sought to avoid situations in which the U.S. commercial stake in the challenged conduct is so tangential or non-existent that regulating it simply makes no sense.

IV. Standing: A More Logical Means to the Same End

The foregoing criticisms of *Den Norske* are not meant to suggest that the outcome was wrong, but simply that the wrong analytical tools were used to get there. Instead of looking to the convoluted language of the FTAIA for a solution, the court might have looked, instead, to well established principles of antitrust standing to still conclude that the nature of the plaintiff's claimed injury was such that it lacked standing to sue for either damages or injunctive relief. Such an approach would have resolved the issue before the court without having to arguably do violence to the language and legislative history of the FTAIA.

Specifically, even if a practice violates the U.S. antitrust laws, it does not follow that literally any party has the legal capacity to initiate an antitrust challenge to the practice. Rather, the courts have imposed significant standing limitations upon those persons and entities having the ability to sue for antitrust relief. One such limitation is that the injury incurred by the plaintiff must be “injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful.”²² In addition, although a showing of “antitrust injury” is necessary, it is “not always sufficient[] to establish standing, . . . because a party may have suffered antitrust injury but may not be a proper plaintiff. . . for other reasons.”²³ Other potentially relevant considerations bearing on a plaintiff's standing to sue for antitrust relief include the proximity (“remoteness”) of the causal connection between the defendant's antitrust violation and the plaintiff's harm, evidence of an actual intent to cause that harm, whether there are more direct victims, the speculativeness of the plaintiff's claimed injury, and the potential for

references” *National Bank of Canada* as still alive and well following enactment of the FTAIA. See *Kruman*, 2002 WL 398290, at *12.

²² *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 489 (1977). See also *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986) (extending the “antitrust injury” requirement of *Brunswick* to suits for injunctive relief).

²³ *Cargill*, 479 U.S. at 110 n.5.

duplicative recovery or overly complex apportionment of damages.²⁴ Applying these principles, courts have denied standing to plaintiffs whose injuries are incurred in markets unrelated to any legitimate U.S. commercial interest, or whose injuries are so removed from that which makes the defendant's conduct illegal under U.S. law as to make them inappropriate parties with standing to challenge the conduct.²⁵

It takes no great leap to extend the logic of these cases to a scenario such as that in *Den Norske*. When the plaintiff had to pay a higher price for oil platform services it purchased in the North Sea from foreign suppliers, did it incur injury "of [a] type the [United States] antitrust laws were intended to prevent"?²⁶ Doubtful, given the lack of any nexus between the situs of the plaintiff's injury and the territorial reach of U.S. law. Moreover, did this injury "flow[] from that which ma[de] the defendant's acts unlawful" under U.S. antitrust law?²⁷ Certainly not, unless the Sherman Act is viewed as an international law of conduct, which it is not. Finally, was the nature of the plaintiff's injury so removed from the conduct actually illegal under the Sherman Act as to make the plaintiff an inappropriate party

²⁴ *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538-44 (1983) [hereinafter *AGC*]; *Blue Shield of Va. v. McCready*, 457 U.S. 465, 478 (1982). See generally HOLMES, *supra* note 6, §§ 9:6 to 9:9.

²⁵ See, e.g., *Serv. Employees Int'l Union Health Fund v. Philip Morris, Inc.*, 249 F.3d 1068, 1072-73 (D.C. Cir. 2001) (costs incurred by union health plans and three foreign governments to treat smoking victims were too "remote, contingent, derivative, and indirect" to give them standing, even if the plaintiffs were correct that they were the "best" potential plaintiffs to challenge the defendant's allegedly anticompetitive behavior); *Ass'n of Wash. Public Hosp. Districts v. Philip Morris, Inc.*, 241 F.3d 696, 704-05 (9th Cir. 2001) (public hospital districts lacked both general and antitrust injury standing to sue tobacco companies for costs incurred in having to treat smoking victims. The derivative, indirect and speculative nature of their claimed injuries defeated standing under the *AGC* analysis, while their involvement in the "health care market" rather than the tobacco market in which the challenged conduct occurred, meant that they could not satisfy the Ninth Circuit's "market participant" test of *Brunswick* antitrust injury); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 437-38 (3d Cir. 2000) (private hospitals lacked standing to pursue antitrust claims against tobacco manufacturers, even though several of the *AGC* factors – intent, antitrust injury, and a causal connection – appeared to favor standing, where the favorable factors were "overwhelm[ed]" by the "remoteness" of the plaintiff's claimed injuries from the conduct by defendants that allegedly violated U.S. antitrust law).

²⁶ *Brunswick Corp.*, 429 U.S. at 489.

²⁷ *Id.*

with standing to challenge the conduct? Certainly yes, for the same reason persons who incur merely “derivative” injury not infrequently lack standing even when they are U.S. citizens. In short, a standing analysis would have been a far more logical, and equally effective, means of addressing the dilemma facing the court in *Den Norske*, without having to step into the murky waters of the FTAIA and do mischief to what Congress seems to have truly intended with that Act.²⁸

²⁸ See *Kruman*, 2002 WL 398290, at *9 (holding that allegations that the defendants had conspired to fix prices in foreign auction markets, as an essential part of a scheme to also fix domestic auction prices, satisfied the FTAIA test for subject matter jurisdiction, and that arguments involving the nature of the plaintiff’s specific injury “conflate[d] the FTAIA with the Clayton Act, which is the statute that determines whether a plaintiff may bring a private cause of action for a violation of the antitrust laws based on its actual or threatened injury.”); see also *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498, at *4 (N.D. Cal. Nov. 19, 1997) (holding that the claim of a foreign plaintiff satisfied the FTAIA test for subject matter jurisdiction, but that the plaintiff lacked standing under the *AGC* analysis), cited with approval in *In re Microsoft*, 127 F. Supp. 2d at 716 (“I am inclined to believe that the court in *Galavan* was correct in placing its holding on standing grounds.”). Cf. *Hartford Fire Ins. v. Cal.*, 509 U.S. 764, 796 (1993) (“[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”).